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January 1994
Volume 63
Number 1

United States
Department of Justice
Federal Bureau of
Investigation
Washington, DC 20535

Louis J. Freeh,
Director

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The Attorney General has determined that the publication of this periodical is necessary in the transaction of the public business required by law. Use of funds for printing this periodical has been approved by the Director of the Office of Management and Budget.

The *FBI Law Enforcement Bulletin* (ISSN-0014-5688) is published monthly by the Federal Bureau of Investigation, 10th and Pennsylvania Avenue, N.W., Washington, D.C. 20535. Second-Class postage paid at Washington, D.C., and additional mailing offices. Postmaster: Send address changes to *FBI Law Enforcement Bulletin*, Federal Bureau of Investigation, Washington, D.C. 20535.

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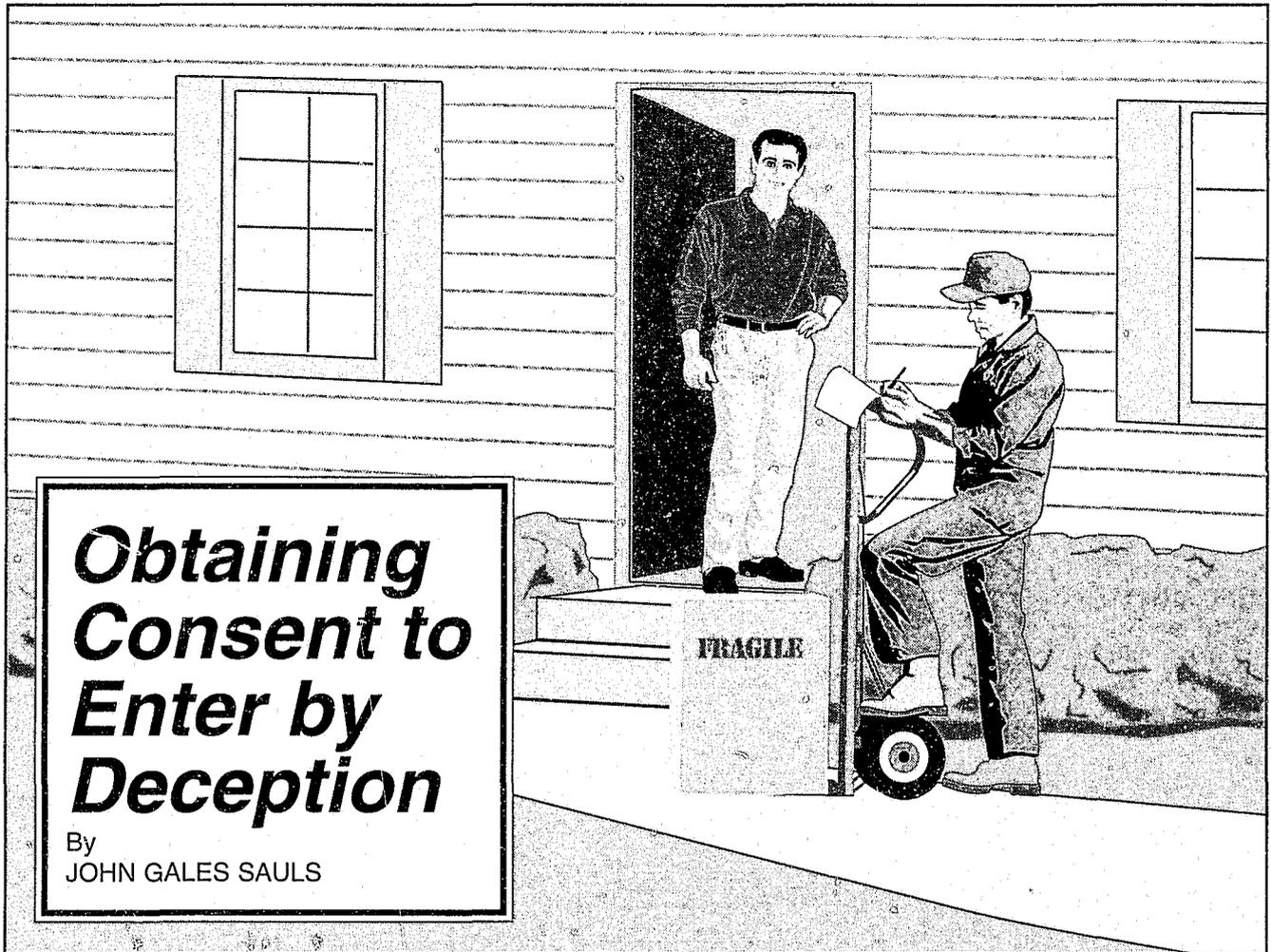
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A delivery service truck pulls to the curb in a residential neighborhood, and a uniformed delivery man walks to the front door of a house. The package that he carries bears the address of the house, but the addressee of the package is not the resident. He asks the person who answers the door if the addressee is there, and when told no one of that name lives at the house, the delivery man asks if he might use the phone to call his company.

While being escorted to the phone, the delivery man observes a "hot box" and other drug trafficking

paraphernalia in one of the rooms. After making his call, he thanks his "host" and leaves. In a couple of hours, the delivery man and other police officers will return with a search warrant for the premises, based in part on what he saw on the covert visit.

This article discusses the legal considerations of police officers who conceal their official identities and use deception to gain admittance to homes and businesses. It first addresses whether entry into particular classes of premises constitutes a "search" implicating fourth amendment concerns. The

article then sets forth the requirements of the consent exception to the fourth amendment warrant requirement, emphasizing the factual predicate officers must be prepared to produce to establish the "reasonableness" of their entry and the lawfulness of their actions.

PLACES OPEN TO THE PUBLIC

On May 6, 1981, a plainclothes detective entered an adult bookstore, and after browsing through displayed merchandise for several minutes, purchased two magazines from a clerk. A short time later, after

determining the magazines to be obscene, the detective returned to the store and arrested the clerk. In the prosecution that followed, the clerk moved to suppress the magazines from evidence, claiming that the officer's entry into the store was an unreasonable search in violation of the fourth amendment.

The U.S. Supreme Court concluded that the clerk "...did not have any reasonable expectation of privacy in areas of the store where the public was invited to enter and transact business,"¹¹ and that the "...mere expectation that the possibly illegal nature of a product will not come to the attention of the authorities, whether because a customer will not complain or because undercover officers will not transact business with the store, is not one that society is prepared to recognize as reasonable."¹² The Court found the "...officer's action in entering the bookstore and examining the wares that were intentionally displayed to all who frequent the place of business did not infringe a legitimate expectation of privacy and hence did not constitute a search within the meaning of the Fourth Amendment."¹³

Consequently, officers may disguise their official identities and enter private commercial premises open to the public. Once there, they may examine items on display as any other member of the public might be expected to do without this conduct constituting a search.¹⁴

NONPUBLIC PLACES

An officer's entry into nonpublic places, such as nonpublic business premises, hotel rooms, or private residences, will constitute a

fourth amendment search.⁵ In determining the reasonableness of government intrusions under the fourth amendment, the Court has expressed an emphatic preference for searches made pursuant to judicially issued warrants.⁶ As the Court has stated, the "Constitution requires that the deliberate, impartial judgment of a judicial officer be interposed between the citizen and the police...[and] searches conducted outside the judicial process, without prior approval by a judge or magistrate, are per se unreasonable under the Fourth Amendment—subject to a few specifically established and well-delineated exceptions."⁷

One exception the Court has recognized to the warrant requirement is that of consent.⁸ An officer entering premises based on consent should be prepared to prove at a later time that: 1) The consent was voluntarily given;⁹ 2) the person giving

the consent was in apparent lawful control of the premises searched;¹⁰ and 3) the search performed was within the scope of the consent that was given.¹¹

VOLUNTARINESS

A voluntary consent is one that is the product of a person's exercise of free will.¹² In assessing voluntariness, courts examine the totality of circumstances surrounding the consent, scrutinizing the facts to detect if coercive factors were present, such as the use of force, the making of promises or threats, and badgering or harassment.¹³ Because the Supreme Court has held that a consent need not be a knowing waiver, the use of *noncoercive* deceptions by law enforcement in seeking consent is lawful.¹⁴ In this regard, certain types of deception used by officers in seeking consent have been routinely accepted by courts.

**“
...officers should use
care to choose a
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and to carefully
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circumstances under
which consent is
obtained....**



Special Agent Sauls is a legal instructor at the FBI Academy.

TYPES OF DECEPTION

“Loyal Friend” Deception

Between October 22 and December 23, 1962, James Hoffa was being tried in Federal court in Nashville, Tennessee, for a violation of the Taft-Hartley Act. During the trial, Hoffa occupied a three-room suite in the Andrew Jackson Hotel. Edward Partin, a Teamsters union official from Baton Rouge, Louisiana, was a frequent social guest in Hoffa's suite and was present when Hoffa and others discussed bribing the jurors in the case on trial.

Partin, a government informant, relayed information about the bribery to Federal officers, which resulted in a subsequent prosecution of Hoffa for bribery. In an effort to suppress Partin's testimony about the conversations, Hoffa asserted that Partin's failure to contemporaneously disclose his role as a government informant vitiated Hoffa's consent to Partin's repeated entries into his hotel suite.¹⁵

The Supreme Court held that Hoffa's consent was voluntary and binding.¹⁶ The Court noted that the fourth amendment did not protect “...a wrongdoer's misplaced belief that a person to whom he voluntarily confides his wrongdoing will not reveal it.”¹⁷ Similarly, courts have held that an employer who relies on an employee to conceal evidence of crime revealed to him and an employee who shares details of criminal conduct with a coworker assume the risk that the person is a government informant or an undercover police officer.¹⁸

“Fellow Criminal” Deception

On December 3, 1964, an undercover Federal drug agent telephoned a man named Lewis, and pretending to have been referred by a friend of Lewis', sought to purchase marijuana. Lewis told the agent to come to his home. The agent did so, knocked on the door, and continuing to conceal his official identity, was admitted. At his subsequent trial for sale of marijuana, Lewis claimed that this entry by the agent was an unreasonable search in violation of the fourth amendment, because the invitation to the agent to enter was the product of fraud and deception.



In holding that no fourth amendment violation had occurred, the Supreme Court focused on the evidence indicating that Lewis had voluntarily admitted the agent¹⁹ and noted that the agent did not “...see, hear, or take anything that was not contemplated, and in fact intended, by [Lewis] as a necessary part of his illegal business.”²⁰ In approving the use of deception in this circumstance, the Court stated that doing otherwise would “...severely

hamper the Government in ferreting out those organized criminal activities that are characterized by covert dealings with victims who either cannot or do not protest.”²¹ Consequently, lower courts have routinely approved consent to enter based on the deception by undercover law enforcement officers that they are also criminals.²²

“Mundane or Ordinary Visitor” Deception

On May 6, 1988, a United Parcel Service (UPS) delivery man and a police officer posing as a UPS employee entered the defendant's residence at his invitation in order to receive payment for a COD delivery. While inside the house, the police officer detected a strong chemical odor that he associated with the manufacture of methamphetamine. This fact was included in an affidavit supporting the issuance of a search warrant for the residence.

In the criminal prosecution that resulted, the defendant sought to have the warrant invalidated, claiming that the entry into his house by deception was an unreasonable search. In holding that no fourth amendment violation had occurred, the Eighth Circuit Court of Appeals noted that “...one who consents to an undercover agent's entry into his house ‘has no legally enforceable expectation that [the agent] is not an undercover officer.’ ”²³

Other courts have similarly upheld the validity of consent to enter based on the deception that the undercover officer is a sort of individual who might ordinarily visit one's

home. For example, in *United States v. Wright*,²⁴ undercover officers knocked on the door of the defendant's motel room, told him that they had experienced car trouble, and asked to borrow tools and a flashlight. While obtaining the flashlight and tools from the defendant, the officers saw white powder and drug paraphernalia in the motel room. This information was incorporated into an affidavit supporting the issuance of a search warrant for the room. In reviewing the use of deception to obtain the view of the incriminating objects, the court held that no fourth amendment violation had occurred.²⁵

Coercive Deception

In a few cases, courts have cited deceptions that were out of the ordinary in holding that a consent to enter was the product of coercion, and therefore not voluntary in a particular circumstance. For example, in *United States v. Giraldo*,²⁶ officers gained entry into the defendant's residence while dressed as utility company employees claiming to be investigating a gas leak.

In holding the consent to enter involuntary, the court noted the apparent danger of the situation presented to the defendant and the fact that the officers were presenting an offer that no reasonable person could refuse. Similarly, use of a second ruse when the first fails has been held "coercive."²⁷ Therefore, it is advisable to devise a deception that might routinely be experienced by residents in the ordinary course of events.

Ironically, officers may increase the likelihood that a consent to enter will be deemed involuntary

when they reveal that they are law enforcement officers, but are deceptive regarding the purpose or justification for their visit. In *United States v. Bosse*,²⁸ a Federal firearms enforcement agent accompanied a State firearms licensing agent to the defendant's home, pretending to be the State officer's assistant. The State officer wanted to ask the defendant questions about the firearms license application that he made.

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The Ninth Circuit Court of Appeals held that the Federal agent's entry into and observation of the defendant's home was an unreasonable search due to the deception employed.²⁹ Although the reasoning of this case seems in conflict with the Supreme Court's decisions relating to the use of deceit to obtain consent, officers overtly seeking consent to enter should recognize that deception regarding their purpose may be viewed by some courts as coercive conduct that invalidates a consent.³⁰

FACTUAL PREDICATE FOR DECEPTION

A few courts have imposed a requirement that officers possess at least reasonable suspicion that per-

sons in a residence are engaged in criminal conduct prior to seeking a consent to enter by means of deception. For example, in *United States v. Maldonado Garcia*,³¹ the U.S. District Court for Puerto Rico stated:

“[O]fficers cannot use a ruse to gain access unless they have more than conjecture that criminal activity is underway. To hold otherwise would be to give police a blanket license to enter homes randomly in the hope of uncovering incriminating evidence and information.”³²

The Supreme Court has upheld as constitutional the suspicionless following³³ or questioning³⁴ of persons in public places and officer requests of persons in public places for consent to search.³⁵ However, until the Court rules on the legality of seeking a consent by deception from a person not suspected of criminal activity, it is recommended that officers preserve a complete record of all the facts known about a person's suspected criminal activity at the time they seek to obtain consent by deception.

APPARENT AUTHORITY REQUIREMENT

Gaining a voluntary consent to enter satisfies the first requirement of a lawful entry. The second requirement is that the consent be acquired from a person who apparently has the authority to admit guests.³⁶ Generally, an adult who answers the door will apparently have such authority. Where the person who admits the officers is someone other than the defendant, it is prudent to determine the person's

relationship to the premises so that the person's authority can be factually established at a later time.³⁷

SCOPE OF ACTION

As with any other search based on consent, officers may not exceed the limits of the license they have been given. Consequently, the officer pretending to be a delivery man may only do those things a genuine delivery man would be likely to do under the circumstances. Exceeding the scope of the consent by walking unescorted away from the area into which one has been invited or by looking into drawers or other places that a delivery man would not will result in an unreasonable search that violates the fourth amendment.³⁸

CONCLUSION

Obtaining consent to enter through deception is an extremely useful law enforcement tool in certain circumstances, particularly when acquiring a search warrant is not possible because of insufficient facts for establishing probable cause. In using this technique, officers should use care to choose a noncoercive deception and to carefully document the circumstances under which consent is obtained, the scope of license acquired, and the factual support for use of the technique. ♦

Endnotes

¹ *Maryland v. Macon*, 105 S.Ct. 2778, 2782 (1985).

² *Id.*

³ *Id.*

⁴ *Id.* See also, *Autoworld Specialty Cars, Inc. v. United States*, 815 F.2d 385 (6th Cir. 1987)(Customs agent entered car dealership and inspected illegally imported cars); *Winkel v. Reserve Officer of City of Beloit, Kansas*, 773 F.Supp. 1487 (D. Kan. 1991)(19-year-old

reserve officer entered tavern and bought beer, claiming to be the legal drinking age).

⁵ *Michigan v. Tyler*, 436 US 499 (1978); *Michigan v. Clifford*, 464 U.S. 287 (1984); *Payton v. New York*, 445 U.S. 573 (1980); *Steagald v. United States*, 451 U.S. 204 (1981); *Minnesota v. Olsen*, 110 S.Ct. 1687 (1990).

⁶ See *Katz v. United States*, 389 U.S. 347 (1967).

⁷ *Id.* at 357.

⁸ *Illinois v. Rodriguez*, 110 S.Ct. 2793 (1990); *United States v. Matlock*, 415 U.S. 164 (1974).

“
**One exception the
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⁹ See *Schneekloth v. Bustamonte*, 412 U.S. 218 (1973).

¹⁰ *Illinois v. Rodriguez*, 110 S.Ct. 2793 (1990).

¹¹ *Florida v. Jimeno*, 111 S.Ct. 1801 (1991).

¹² *Schneekloth v. Bustamonte*, 412 U.S. 218 (1973).

¹³ *Id.*

¹⁴ Compare *Lewis v. United States*, 385 U.S. 206 (1966), with *Bumper v. North Carolina*, 391 U.S. 543 (1968).

¹⁵ *Hoffa v. United States*, 385 U.S. 293, 300 (1966).

¹⁶ *Id.* at 302.

¹⁷ *Id.* at 301. See also, *United States v. Scherer*, 673 F.2d 176 (7th Cir. 1982)(undercover officer invited on defendant's property to help build duck blind observed evidence of crime); *United States v. Raines*, 536 F.2d 796 (8th Cir. 1976)(undercover officer gained entry into defendant's apartment where he observed evidence of crime by claiming to be friend of defendant's drug associate).

¹⁸ See *Pleasant v. Lovell*, 876 F.2d 787 (10th Cir. 1989)(employer); *Matter of John Doe Trader Number One*, 894 F.2d 240 (7th Cir. 1990)(co-worker).

¹⁹ *Lewis v. United States*, 385 U.S. 206 (1966).

²⁰ *Id.* at 210.

²¹ *Id.*

²² See *United States v. Paul*, 808 F.2d 645 (7th Cir. 1986)(undercover drug purchase in defendant's residence); *United States v. Robinson*, 720 F.2d 18 (8th Cir. 1983)(undercover officers enter defendant's residence to engage in illegal gambling); *United States v. Lyons*, 706 F.2d 321 (D.C.Cir. 1983)(undercover drug purchase in defendant's hotel room); *United States v. Shigemura*, 682 F.2d 699 (8th Cir. 1982)(entry into defendant's residence to purchase stolen meat).

²³ *United States v. Wagner*, 884 F.2d 1090, 1095 (8th Cir. 1989).

²⁴ 641 F.2d 602 (8th Cir. 1981).

²⁵ *Id.* at 604 (and cases cited therein). See also, *Hrubev v. United States*, 734 F.Supp. 60 (E.D.N.Y. 1990)(postal inspector disguised as letter carrier admitted into defendant's residence while defendant signed receipt).

²⁶ 743 F.Supp. 152 (E.D.N.Y. 1990).

²⁷ *United States v. Rivera*, 762 F.Supp. 49 (S.D.N.Y. 1991).

²⁸ 898 F.2d 113 (9th Cir. 1990).

²⁹ *Id.*

³⁰ See also, *United States v. Briley*, 726 F.2d 1301 (8th Cir. 1984)(officers claimed purpose for entry was desire to talk to roommate when in fact they were there to arrest him. The court noted that deception could be a coercive factor, but that in this case, it did not render the consent invalid.)

³¹ 655 F.Supp. 1363 (D.P.R. 1987). See also *United States v. Montoya*, 760 F.Supp. 37 (E.D.N.Y. 1991).

³² 655 F.Supp. at 1367. The court's reasoning appears to disregard a citizen's ability to turn away unwanted visitors from his door, a frequent occurrence for most.

³³ *Michigan v. Chestnut*, 486 U.S. 567 (1988).

³⁴ *United States v. Mendenhall*, 446 U.S. 544 (1980); *Florida v. Bostic*, 111 S.Ct. 2382 (1991).

³⁵ *Id.*

³⁶ See *Illinois v. Rodriguez*, 110 S.Ct. 2793 (1990).

³⁷ See *United States v. Matlock*, 415 U.S. 164 (1974).

³⁸ See *United States v. Aguilar*, 883 F.2d 662 (9th Cir. 1989); *Pleasant v. Lovell*, 876 F.2d 787 (10th Cir. 1989).

Law enforcement officers of other than Federal jurisdiction who are interested in this article should consult their legal advisor. Some police procedures ruled permissible under Federal constitutional law are of questionable legality under State law or are not permitted at all.