FBI Law Enforcement Bulletin



# Search by Consent

PART II

## Lawful Possession—The First Key to Valid Consent

By
DONALD J. McLAUGHLIN
Special Agent
Legal Counsel Division
Federal Bureau of Investigation
Washington, D.C.

Having thus far considered the meaning of consent to search, and whether consent is even necessary, we next turn to a most critical stage—obtaining consent from the proper party.

An officer seeking permission to search must obtain this authority from the person in *lawful possession* of the premises. Note the key word is "possession," not "ownership." The fourth amendment is not concerned with legal title to premises, but rather the current right of possession, that is, the right to occupy and enjoy use of the premises to the exclusion of all others. Similarly, lawful presence is not the equivalent of possession. Simply because a person is a guest or invitee on the premises does not confer upon such a person the right to consent to a search thereof.

The fourth amendment guarantees the right to possess a protected place free from unreasonable invasion by the government. *Coolidge* v. *New Hampshire*, 403 U.S. 443 (1971); *Chapman* v. *United States*, 365 U.S. 610 (1961). It does not provide absolute protection against all intrusions, but prohibits only those deemed "unreasonable." When the need to search for fruits, instrumentalities, contraband, or evidence of crime is compelling, a reasonable search may be conducted, provided the officers do not act arbitrarily. Thus, a search warrant based on probable cause, correctly executed, meets the constitutional test of reasonableness; likewise, a warrantless search incidental to arrest, properly limited. Finally, the law recognizes as reasonable those searches made with the consent of one having possession of the specific place against which the search is directed.

Consent puts officers lawfully on the premises and permits their search, limited only by the terms expressed in the consent and the physical extent of the area in present possession. The fact that possession is held jointly is not fatal to the reasonableness of the search; for in reality, the one expressing consent does not assume to speak as the alter ego of his co-occupant. He speaks for himself as one fully in possession. His invitation to the officers lawfully commits the premises to their inspection, and as this is deemed a reasonable search for fourth amendment purposes, the results are admissible in evidence not only against the consenting party but also against the co-occupant and anyone else. *United States* v. *Matlock*, 415 U.S. 164 (1974).

## Actual v. Apparent Authority to Consent

A problem which has surfaced occasionally is whether a law enforcement officer may obtain a valid consent from one with apparent authority to permit the search. For example, where a search is made by an officer who in good faith reasonably believes he has received consent from the party in lawful possession, and when in fact the party had no such interest in the premises, will the search be deemed reasonable? In *Stoner* v. *California*, 376 U.S. 483 (1964), the Supreme Court responded as follows:

"Nor is there any substance to the claim that the search was

reasonable because the police, relying upon the night clerk's expressions of consent, had a reasonable basis for the belief that the clerk had authority to consent to the search. Our decisions make clear that the rights protected by the Fourth Amendment are not to be eroded by strained applications of the law of agency or by unrealistic doctrines of 'apparent authority'." *Id.* at 488.

More recently, the Court suggested that actual authority to consent is necessary. In *United States* v. *Matlock*, 415 U.S. 164 (1974), the Court, in explaining two earlier decisions, had this to say:

> "These cases [*Frazier* v. *Cupp*, 394 U.S. 731, 1969; *Coolidge* v. *New Hampshire*, 403 U.S. 443, (1971)] at least make clear that when the prosecution seeks to justify a warrantless search by proof of voluntary consent, it is not limited to proof that consent was given by the defendant, but may show that permission to search was obtained from a *third party who possessed common authority over or other sufficient relationship to the premises or effects sought to be inspected.*" 415 U.S. at 171 (emphasis added).

See also *Moffett* v. *Wainwright*, 512 F. 2d 496 (5th Cir. 1975) (warrantless search of suspect's apartment on alleged authority of three girls found therein not justified; girls had insufficient rights in premises to give consent); *Cunningham* v. *Heinze*, 352 F. 2d 1 (9th Cir. 1965), cert. denied 383 U.S. 968 (1966) (permission by one whom officers reasonably and in good faith believe to have authority to consent does not necessarily make a search reasonable); *People* v. *Taylor*, 333 N.E. 2d 41 (Ill. App. 1975) (nonresident son had no actual authority to consent to search of mother's house for evidence incriminating resident brother; co-occupancy is essential); *People* v. *Litwin*, 355 N.Y.S. 2d 646 (App. Div. 1974) (police had no fourth amendment right to rely on the consent of a suspect's babysitter or her companion for authority to make warrantless search of suspect's residence); *State* v. *Bernius*, 203 N.E. 2d 241 (Ohio 1964) (apparent authority to consent insufficient in light of *Stoner* decision).

While the majority view requires actual authority for a consent to search, several decisions would permit officers to search on apparent authority of the consenting party. *Mengarelli* v. *United States*, 426 F. 2d 985 (9th Cir. 1970), cert. denied 400 U.S. 926 (1970) (sanction of excluding evidence should not be applied where officers mistook the authority of consenting party); *People* v. *Parker*, 119 Cal. Rptr. 49 (Cal. App. 1975) (search is not unreasonable if made with consent of occupant of premises whom officers reasonably and in good faith believe has authority to consent to their entry); *People* v. *Robinson*, 116 Cal. Rptr. 455 (Cal. App. 1974) (search reasonable on consent of third party whom police reasonably and in good faith believe has authority to consent).

In light of the prevailing view that actual authority is required of the consenting party, officers in a sense assume the risk that their entry and search will be nullified later if it turns out that such a party had only apparent authority. And this is the case notwithstanding good faith and reasonable belief of the officers. To safeguard against this possibility, officers should make an intensive effort to identify exactly who controls the premises, i.e., who has lawful possession, before obtaining consent. This might require a records' check and most certainly entails the careful questioning of the person thought to possess the premises.

### Absentee Possessor

An individual in lawful possession of premises retains the constitutional protection therein during his temporary absence. Thus, he has the requisite "standing" to object to a search made while he is not present. *Chapman* v. *United States*, 365 U.S. 610 (1961) (tenant temporarily absent); *Steeber* v. *United States*, 198 F. 2d 615 (10th Cir. 1952) (absent lessee); *United States* v. *Wilcox*, 357 F. Supp. 514 (E.D. Pa. 1973) (separated husband, though residing elsewhere, had "sufficient interest" in wife's apartment to establish standing); *United States* v. *Thomas*, 216 F. Supp. 942 (N.D. Cal. 1963) (temporarily unoccupied building does not lose its character as house; constitutional protection extends to periods of vacancy); *State* v. *Mills*, 98 S.E. 2d 329 (N.C. 1957) (temporary absence of occupant does not change the character of a dwelling house).

If officers desire to search by consent premises temporarily vacated (e.g., where a party is on vacation, business trip, etc.), authorization for the search must be obtained from the absent party, from one who is the agent of the lawful possessor empowered to consent, or from one who has equal possessory rights in the premises, such as a spouse, joint tenant, or partner.

## Possessory Interests in Particular

### Owner—Landlord

If the owner of the house, office, or other protected premises to be searched enjoys the current right to possession and he is physically present, his consent must be obtained. This rule applies whether the search is to be made of the entire premises

or of specific suitcases, boxes, or other personal property located therein. It is the fact of his possession which triggers the fourth amendment protections and his physical presence which makes it mandatory that any relinquishment of his constitutional rights come directly from him.

A valid consent to search given by the owner-possessor-occupant is effective against himself and any third party who has no possessory right (i.e., no reasonable expectation of privacy) in the premises. Evidence collected during the course of such a search may be used against the third party, as well as the person giving consent, because the exclusionary rule is inoperative where either there was no fourth amendment right at the time of search or such rights as then existed were effectively relinquished. Examples of law enforcement officers properly obtaining consent from an owner in possession may be found in *United States* v. *Novick*, 450 F. 2d 1111 (9th Cir. 1971) cert. denied 405 U.S. 995 (1972); *United States* v. *Jones*, 352 F. Supp. 369 (S.D. Ga. 1972) aff'd 481 F. 2d 1402 (5th Cir. 1973); *Mares* v. *State*, 500 P. 2d 530 (Wyo. 1972).

If the owner-possessor is *not* physically present when a search is desired, authorization may be obtained from any other person having the requisite capacity to permit a search of the protected premises. In some cases, this may be a business partner, spouse, agent, or joint occupant. (See later discussion under these headings.)

Where the owner of the premises to be searched is not entitled to immediate possession, he cannot give a consent valid against all other persons. He can, of course, waive whatever interest he has remaining in the premises. For example, an owner may rent a house to a tenant while reserving the use of a detached garage on the premises or even a storage room

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within the premises. Such a residual interest would permit the owner to consent to the search of the garage or the room. *United States* v. *Cook*, 530 F. 2d 145 (7th Cir. 1976), cert. denied 426 U.S. 909 (1976); *State* v. *Schrader*, 244 N.W. 2d 498 (Neb. 1976). Absent this condition, however, the owner lacks the current right to possession of the rented premises and his consent would be ineffective against one who enjoys the possessory right.

Some officers, in cases in which a tenant was the accused, have made the mistake of searching the premises by consent of the owner during a temporary absence of the tenant. These searches are unreasonable. The owner is not the one in possession and his consent is not valid against the current tenant. *Chapman* v. *United States*, 365 U.S. 610 (1961); *United States* v. *Nelson*, 459 F. 2d 884 (6th Cir. 1972) (motel manager, absentee guest). Moreover, the right of an owner-landlord to enter premises for inspection or maintenance purposes, frequently provided for in the rental agreement, does not confer on him the authority to permit law enforcement officers to search the rented premises.

The owner may consent where the present exclusive possessory interest of his tenant is terminated and he regains the right to immediate possession. For example, where the tenant has abandoned the premises, the owner or landlord may repossess and thereby acquire the right to consent. (See Abandoned Dwellings.) Similarly, the owner may give consent to search following termination of the tenant's right to possession where there has been a formal eviction for nonpayment of rent, *United States* v. *Roberts*, 465 F. 2d 1373 (6th Cir. 1972); where a month-to-month tenancy has been terminated by the owner, *United States* v. *Abbarno*, 342 F. Supp. 599 (W.D.N.Y. 1972); or where a landlord or owner otherwise asserts his right to regain possession, *Hayes* v. *Cady*, 500 F. 2d 1212 (7th Cir. 1974), cert. denied 419 U.S. 1058 (1974) (rent overdue and tenant disclaims any interest in room, right to consent reverts to landlady); *United States* v. *Wilson*, 472 F. 2d 901 (9th Cir. 1972), cert. denied 414 U.S. 868 (1973) (departed tenant with rent unpaid, landlord had right to assume control of premises). Nonpayment of rent, however, is not necessarily controlling. It has been held that the right to possession remains with the tenant even though the rent is overdue, where there is an argument to that effect, *United States* v. *Olsen*, 245 F. Supp. 641 (D. Mont. 1965); *State* v. *Taggart*, 491 P. 2d 1187 (Ore. App. 1971); and where the owner-landlord has failed to comply with a statutory requirement concerning dispossession, *United States* v. *Botelho*, 360 F. Supp. 620 (D. Hawaii 1973).

The landlord-tenant relationship is no bar to a search by voluntary consent of the landlord where the premises are being used by both in a conspiracy to violate the law. The law will look to the real relationship of the parties and where, as a part of a conspiracy, both have a current right to possession, either may give a valid consent to search, good against the other. *Drummond* v. *United States*, 350 F. 2d 983 (8th Cir. 1965), cert. denied sub nom. *Castaldi* v. *United States*, 384 U.S. 944 (1966).

The owner or other occupant, having the current right to possession of the premises, has the capacity to consent to a search for the purpose of lo-

cating and removing property stored on his premises by a trespasser. A trespasser simply has no standing to object to such a search. In *Jones* v. *United States*, 362 U.S. 257 (1960), the Supreme Court declared that only those "*legitimately on premises* where a search occurs" may challenge the legality of a search.

An illustrative case is *State* v. *Chavis*, 210 S.E. 2d 555 (N.C. App. 1974), petition for cert. dismissed 214 S.E. 2d 434 (1975), cert. denied 423 U.S. 1080 (1976), in which defendants, while carrying out a plan to firebomb various properties and ambush police and firemen when they responded, gathered unlawfully in a local church. Church officials consented to a warrantless search of the church and parsonage which disclosed incriminating evidence. In sustaining the trial court's denial of a motion to suppress this evidence, the appellate court stated:

> "It appears from the uncontradicted evidence that defendants had been trespassers on the church premises. In our view they have absolutely no standing to object to the search . . . . In addition the search was conducted with the permission of one of the officials of Gregory Congregational Church, who had several days earlier tried, without success, to evict defendants from the church premises." *Id.* at 587.

See also *Government of Virgin Islands* v. *Gereau*, 502 F. 2d 914 (3d Cir. 1974), cert. denied 420 U.S. 909 (1975) (trespasser deemed to assume risk that owner of property will consent to search); *State* v. *Widemon*, 215 S.E. 2d 826 (N.C. App. 1975) (trespasser in the house has no standing to question validity of search of house); *State* v. *Pokini*, 367 P. 2d 499 (Hawaii 1961) (a trespasser who places his property where it has no right to be has no right of privacy as to that property—he has no standing). The principle announced in *Pokini* was endorsed more recently by a Federal appellate court in *Amezquita* v. *Hernandez-Colon*, 518 F. 2d 8 (1st Cir. 1975), cert. denied 424 U.S. 916 (1976).

### Tenant

Tenant is broadly defined to include one who, by express or implied agreement, acquires possession but not ownership of a ranch, farm, business building, office, house, apartment, room, or other place regardless of the duration of the contract. As long as the occupant has the sole right to possess the premises, whether it be by mutual agreement or simply until the owner orders him to leave, he and he alone has the capacity to consent to a search of those premises that would be good against himself. The landlord cannot give an effective consent. *Chapman* v. *United States*, 365 U.S. 610 (1961); *United States* v. *Williams*, 523 F. 2d 64 (8th Cir. 1975), cert. denied 423 U.S. 1090 (1976). But if the tenant consents, any evidence of crime uncovered can be used against him and against any other person having no immediate possessory right (i.e., expectation of privacy) to the leased premises or the things found therein.

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

As in the case of an owner in possession, if the tenant is not physically present or is otherwise unavailable, a consent search directed against his premises cannot be made unless the officers are able to obtain consent from someone else lawfully exercising the possessory right in the premises. Unless specifically empowered to do so by the tenant, the owner is *not* authorized to consent. He surrenders his right of possession when he agrees to the tenancy and retains no implied authority to give up the tenant's constitutional rights.

The tenant of an office building, apartment house, rooming house, etc., may sublease the rented premises or parts thereof, in which case the sublessee assumes lawful possession of the premises sublet and only he can consent to a search of that area.

Close questions can arise as to the precise limits of the space in lawful possession of the tenant, i.e., the area in which he has a reasonable expectation of privacy. Generally, the tenant possesses only that part of premises specifically described in the lease or commonly understood from the circumstances to be reserved for his exclusive use. Other parts of a building used for the landlord's purposes alone (e.g., the boilerroom, the rental office) or those used by everyone in common (e.g., hallways, elevators, laundry room), not leased specifically to any tenant, remain in possession of the landlord or owner and may be searched on his consent alone. *United States* v. *Gargiso*, 456 F. 2d 584 (2d Cir. 1972) (valid consent by landlord to search of basement used in common by several tenants); *United States* v. *Abbarno*, 342 F. Supp. 599 (W.D.N.Y. 1972) (lawful consent by owner to search section of warehouse not included as part of original rented area).

If the leased premises are commercial in nature and open to the general public, the tenant enjoys no expectation of privacy therein, and his con-

sent to enter is not necessary. In *United States* v. *Berkowitz*, 429 F. 2d 921 (1st Cir. 1970), FBI agents entered a retail store to "look around" in connection with a theft of shoes. Stolen property was observed in plain view. The court pointed out that it was not improper for the agents to walk into a commercial establishment open to the public. Such an entry in no way offends an individual's right against unwarranted government intrusions. See also *United States* v. *Berrett*, 513 F. 2d 154 (1st Cir. 1975) (officers may accept general public invitation to enter open garage for purpose not related to trade conducted thereon); *State* v. *Quatsling*, 536 P. 2d 226 (Ariz. App. 1975), cert. denied 424 U.S. 945 (1976) (no reasonable expectation of privacy in semipublic storage facilities open for business); *People* v. *Favela*, 333 N.E. 2d 284 (Ill. App. 1975) (fourth amendment not violated by police entry to house opened as place of illegal business to which outsiders are invited). Support for this view may also be found in the Supreme Court decisions of *Recznik* v. *City of Lorain*, 393 U.S. 166 (1968), where the Court appears to draw a distinction between a private home and a "public establishment," and *Lewis* v. *United States*, 385 U.S. 206 (1966) (home converted to commercial center for narcotics entitled to no greater sanctity than store).

In the event a tenant, either by the terms of the lease or by mutual agreement with the landlord, is permitted to store personal property in a place remote from his living quarters, such as a storage locker for suitcases, the fourth amendment would protect such areas. Absent a warrant or emergency, consent to search from the tenant would be necessary. *United States* v. *Principe*, 499 F. 2d 1135 (1st Cir. 1974) (by implication, cabinet in hallway 3 to 6 feet from entrance to apartment); *United States* v. *Lumia*, 36 F. Supp. 552 (W.D.N.Y. 1941).

### Joint Tenants and Common Occupants

In recent years, there has been a uniform response to the question of whether a joint tenant or common occupant may consent to a search of premises mutually possessed. In a 1969 decision involving joint possession of personal property, the Supreme Court held that consent to the search of a duffel bag by one joint user was binding on the other user. The Court pointed out that a "joint user of the bag . . . clearly had authority to consent to its search" and the nonconsenting party "must be taken to assume the risk" that his co-possessor would allow someone else to look inside the bag, i.e., permit the police search. The Court recognized no valid search and seizure claim by the nonconsenting party. *Frazier* v. *Cupp*, 394 U.S. 731 (1969).

This same principle has been applied frequently by lower courts in consent searches of premises. It is stated succinctly in a Federal appellate decision:

> "The rule in this Circuit is that 'where two persons have equal rights to the use or occupation of the premises, either may give consent to a search, and the evidence thus disclosed may be used against either'." *Moffett* v. *Wainwright*, 512 F. 2d 496 (5th Cir. 1975).

See also *White* v. *United States*, 444 F. 2d 724 (10th Cir. 1971) (one endowed with right to use or occupy premises at time of consent may authorize search of premises, and evidence thus disclosed may be used against his cohabitant); *United States* v. *Hughes*, 441 F. 2d 12 (5th Cir. 1971), cert. denied 404 U.S. 849 (1971); *State* v. *Knutson*, 234 N.W. 2d 105 (Iowa 1975); cases collected in *United States* v. *Matlock*, 415 U.S. 164 at 170 nn. 5 & 6 (1974).

The reasoning which underlies the principle is best stated by Justice White in *United States* v. *Matlock*, *supra*:

> "The authority which justifies the third-party consent does not rest upon the law of property . . . but rests rather on mutual use of the property by persons generally having joint access or control for most purposes, so that it is reasonable to recognize that any of the co-inhabitants has the right to permit the inspection in his own right and that the others have assumed the risk that one of their number might permit the common area to be searched." *Id.* at 171, n. 7.

There are two exceptions to the general proposition that a joint tenant or occupant may consent to search of premises commonly occupied. First, where areas or things within such premises are understood to be reserved for the exclusive use of the nonconsenting party, such places may *not* be searched with the consent of a joint occupant. Such a limitation is implicit in the reasoning of the Supreme Court in *United States* v. *Matlock*, *supra*, and is expressly stated in other decisions. *United States* v. *Bussey*, 507 F. 2d 1096 (9th Cir. 1974); *United States* v. *Heisman*, 503 F. 2d 1284 (8th Cir. 1974); *Government of Canal Zone* v. *Furukawa*, 361 F. Supp. 194 (D.C.Z. 1973); *People* v. *Langley*, 234 N.W. 2d 513 (Mich. App. 1975).

The second exception exists where a joint occupant is present and objects to the consent given by his cohabitant. *Duke* v. *Superior Court*, 461 P. 2d 628 (Cal. 1969); *Tompkins* v. *Superior Court*, 378 P. 2d 113 (Cal. 1963); *Lawton* v. *State*, 320 So. 2d 463 (Fla. App. 1975); *Dorsey* v. *State*, 232 A. 2d 900 (Md. Ct. Spec.

App. 1967). In effect, the objection by one cotenant nullifies the consent of the other, and police may not proceed with an entry and search over such objection. A New York court carried this view a step further in *People* v. *Mortimer*, 361 N.Y.S. 2d 955 (App. Div. 1974), holding that shared premises may not be searched by consent obtained from co-occupants (parents) where the absent occupant has specifically refused police permission to search his house. The court pointed out:

> "But if the Fourth Amendment means anything, it means that the police may not undertake a warrantless search of defendant's property after he has expressly denied his consent to such a search. Constitutional rights may not be defeated by the expedient of soliciting several persons successively until the sought-after consent is obtained." *Id.* at 958.

### Business Partners

A valid consent to search obtained from one partner is binding on all members of the partnership as to business premises jointly occupied. *United States* v. *Sferas*, 210 F. 2d 69 (7th Cir. 1954), cert. denied sub nom. *Skally* v. *United States*, 347 U.S. 935 (1954). The rule is essentially the same as that applicable to joint tenants and common occupants. (See Joint Tenants and Common Occupants.) It applies to financial records and documentary materials, as well as to physical evidence. *United States* v. *Goodman*, 190 F. Supp. 847 (N.D. Ill. 1961).

Consent from a partner presupposes the consenting party is a full partner occupying or sharing possession of the business premises. Consent from a "silent partner," one who contributes money but has no right to occupy the premises or participate in management of the enterprises, would likely be ineffective against the other partners. The same might be said of absentee and limited partners. Whether a partner has the requisite authority to bind other partners by his consent, therefore, will depend upon the terms and conditions of the partnership agreement, the nature of the business operation, and the understanding of the parties.

Even in the case of consent received from a full partner, the search should be limited to premises and property which the partners clearly possess in common. Any place or thing within the premises reserved for the exclusive use of one partner could not be searched by consent of another. For example, where two full partners operate a small office and manufacturing plant, either partner could consent to the search of the production area, storage rooms, lavatories, etc., but neither could authorize the entry by police to desk, locker, or briefcase possessed solely by the other partner.

### Husbands, Wives, and Paramours

Though there is general agreement that persons in joint possession may independently consent to a search of their mutual premises that is valid not only as to themselves but also as to each other, there has been some disagreement in the law when this principle has been applied to the case of husband and wife.

At one time, married women did not enjoy the same legal rights as men. At least insofar as the right to possess premises was concerned, a wife was living in her husband's house. In early cases, such as *Hume* v. *Tabor*, 1 R.I. 464 (1850), it was held that she had no implied authority to license a search of *his* house for stolen goods. These older cases stressed the agency relationship of husband and wife and generally concluded that the wife had no authority to waive *his* constitutional right.

Times have changed, of course, and the legal status of married women has changed with them. Nevertheless, some courts have continued to bar the use of evidence against one spouse where it was seized pursuant to consent of the other. See, e.g., *State* v. *Blakely*, 230 So. 2d 698 (Fla. App. 1970) (husband-wife relationship alone does not impute authority to one spouse to waive the other's constitutional right); *Henry* v. *State*, 154 So. 2d 289 (Miss. 1963), vacated on other grounds 379 U.S. 443 (1965) (wife cannot waive constitutional right of husband); *State* v. *Hall*, 142 S.E. 2d 177 (N.C. 1965) (wife's consent to search not sufficient to waive husband's constitutional right). But see *Loper* v. *State*, 330 So. 2d 265 (Miss. 1976), in which the Mississippi Supreme Court seems to have limited its holding in *Henry* v. *State*, *supra*, to those situations where the wife has no interest whatsoever in the property of her husband.

Today, the weight of authority favors the view that a spouse *can* consent to the search of the family dwelling. Such a rule is based not on an agency relationship or an implied grant of authority to the consenting party, but rather on the principle that each spouse has full authority over property mutually used and subject to common access and control. Thus, the key is *joint possession*. The party giving consent waives his or her own right, not that of the spouse. *United States* v. *Long*, 524 F. 2d 660 (9th Cir. 1975); *Burge* v. *Estelle*, 496 F. 2d 1177 (5th Cir. 1974); *McCravy* v. *Moore*, 476 F. 2d 281 (6th Cir. 1973); *Chism* v. *Koehler*, 392 F. Supp. 659 (W.D. Mich. 1975), cert. denied 425 U.S. 944 (1976). See also cases collected in Fisher, Search and Seizure 300 (Appendix C), as supplemented (1972). The more recent trend was given added support by the

Supreme Court in *United States* v. *Matlock*, 415 U.S. 164 (1974). Though *Matlock* concerned a consent to search obtained from a mistress, Justice White, speaking for six members of the Court, noted:

> "This Court left open, in *Amos* v. *United States*, 255 U.S. 313, 317 (1921), the question whether a wife's permission to search the residence in which she lived with her husband could 'waive his constitutional rights,' but more recent authority here clearly indicates that the consent of one who possesses common authority over premises or effects is valid as against the absent, nonconsenting person with whom that authority is shared." *United States* v. *Matlock, supra* at 170 (1974).

Implicit in the interspousal consent cases is the doctrine of assumed risk, invoked by the Supreme Court in *Frazier* v. *Cupp*, 394 U.S. 731 (1969), and referred to more recently in *Matlock*. If one spouse occupies premises jointly with the other, both must assume the risk that the other will permit a search of the property. As pointed out in a 1970 Federal decision:

> "Clearly, the 'risk' involved is that someone with an equal or similar Fourth Amendment right will consent to a warrantless search of the place of concealment chosen by one against whom evidence thereby discovered is used." *United States ex rel. Cabey* v. *Mazurkiewicz*, 431 F. 2d 839, 846 (3d Cir. 1970) (dissenting opinion).

It makes no difference in the law whether the consent is given by wife or husband. While in most cases the wife is the consenting party and evidence found is used against the husband, the reverse situation occasionally is presented. See, e.g., *State* v. *Shephard*, 124 N.W. 2d 712 (Iowa 1963) (husband's consent to search apartment valid against wife in search for murdered newborn infant); *Jones* v. *State*, 177 P. 2d 148 (Okla. Crim. App. 1946) (husband's consent to search home for evidence against wife authorized search of cookie jar in closet); *Bannister* v. *State*, 15 S.W. 2d 629 (Tex. Crim. App. 1929) (illegally possessed liquor seized pursuant to consent of husband admissible against wife).

Where the consenting party is a mistress or paramour, the rule applicable to the husband-wife relationship is generally applied. Thus, in *Matlock*, a girl with whom Matlock had been living for 7 months possessed the requisite authority to permit officers to search the closet of the bedroom they shared. Bank robbery loot was found. Searches based on consent of a paramour have been approved in both Federal and State courts. *United States* v. *Robinson*, 479 F. 2d 300 (7th Cir. 1973) ("If a spouse does not have complete expectation of privacy in his own home in view of the possibility of his mate's consent, the casual lover who drops in at his convenience can hardly expect more when he turns his part-time home over to the full-time dominion of his paramour . . . ."); *White* v. *United States*, 444 F. 2d 724 (10th Cir. 1971); *Gurleski* v. *United States*, 405 F. 2d 253 (5th Cir. 1968), cert. denied 395 U.S. 981 (1969); *Nelson* v. *People of State of California*, 346 F. 2d 73 (9th Cir. 1965), cert. denied 382 U.S. 964 (1965); *People* v. *Smith*, 246 N.E. 2d 689 (Ill. App. 1969), cert. denied 397 U.S. 1001 (1970); *State* v. *Wigglesworth*, 248 N.E. 2d 607 (Ohio 1969), rev'd on other grounds 403 U.S. 947 (1971); *State* v. *Gordon*, 543 P. 2d 321 (Ore. App. 1975); *Powers* v. *State*, 459 S.W. 2d 847 (Tex. Crim. App. 1970). But cf. *United States* v. *Pagan*, 395 F. Supp. 1052 (D.P.R. 1975), aff'd 537 F. 2d 554 (1st Cir. 1976).

Whether the consent is obtained from a spouse or a lover, it is clear that the consenting person must possess joint control over the place or thing searched. As in the case of joint tenants and business partners, a spouse or paramour may *not* consent to officers entering or searching an area within the exclusive control and possession of the mate. *State* v. *Evans*, 372 P. 2d 365 (Hawaii 1962) (wife could not validly consent to police search of husband's jewelry case in bedroom bureau drawer); *People* v. *Gonzalez*, 270 N.Y.S. 2d 727 (App. Div. 1966) (while original entry was by permission of wife, she could not validly consent to a search of husband's personal effects not in plain view); *State* v. *McCarthy*, 253 N.E. 2d 789 (Ohio App. 1969), aff'd 269 N.E. 2d 424 (Ohio 1971) (to allow a search of husband's personal effects on consent of wife would unduly destroy the former's right against unreasonable search).

*McCarthy* is a decision illustrating how a court analyzes a spousal consent problem. The principal issue was whether a wife could lawfully consent to a police search of a jointly occupied family dwelling. In concluding that the wife validly consented, the court answered three questions: (1) Whether the wife had the authority to permit a warrantless search of the family home in the absence of the husband (yes); (2) whether the item sought was among "personal effects" of the husband not commonly or jointly possessed by the spouse (no); (3) whether the wife's consent to search was voluntarily given (yes). The Ohio court in *McCarthy* traces the development of the law of interspousal consent and concludes that the modern and better view is that such consent is valid except for personal effects or areas not jointly occupied.

(Continued Next Month)

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