CONSENT SEARCHES

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Constitutional Provisions

Florida Constitution: Article 1, Section 12.

The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures, and against the unreasonable interception of private communications by any means, shall not be violated. No warrant shall be issued except upon probable cause, supported by affidavit, particularly describing the place or places to be searched, the person or persons, thing or things to be seized, the communication to be intercepted, and the nature of evidence to be obtained. This right shall be construed in conformity with the 4th Amendment to the United States Constitution, as interpreted by the United States Supreme Court. Articles or information obtained in violation of this right shall not be admissible in evidence if such articles or information would be inadmissible under decisions of the United States Supreme Court construing the 4th Amendment to the United States Constitution.

United States Constitution: Fourth Amendment

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated; and no Warrants shall issue but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Important Note: The conformity clause of Article 1, Section 12, mandates that Florida must follow the case law established by the United States Supreme Court in Fourth Amendment matters. In general, individual states can provide citizens with more protections than afforded by the United States Constitution, but not less. The Florida courts have frequently rejected rulings by the Unites States Supreme Court and imposed greater restrictions on police conduct than federal law requires. The Florida Constitution prohibits this and therefore, United States Supreme Court cases are the ultimate controlling authority. Please take note that the conformity clause has been in existence since 1982, so cases decided prior to that date may no longer be valid. See State v. Scott, 26 Fla. L. Weekly D22 (Fla. 3d DCA 2001).

Consent Searches

Commenting of Refusal to Consent

Bravo v. State, FLW (Fla. 1st DCA 2011):

Trial court abused its discretion in allowing State's use of evidence commenting on assault defendant's Fourth Amendment refusal to consent to a police officer's request to conduct a warrantless search of his home for a gun, as well as State's subsequent emphasis on defendant's exercise of that right in closing argument.

Computer Repairman Consent Searches

General Rules:

- A computer repairman is not a government agent and therefore his searches are not subject to 4th Amendment.

- The repairman can become an agent of the government, however, if law enforcement directs him to search for more evidence. It should also be noted that the repairman may become an agent of the government if the police know and acquiesce in his continued search and he is searching for the benefit of the police.

- Generally, the repairman can reconstruct for the police what he already done on his own, but cannot expand his search for the police.

- The safest course of action, especially under state law, is to take a detailed statement from the repairman about his observations. If his observations are clear and explicit, a warrant can be obtained based on his sworn testimony. If he is not clear about the age of the children or the nature of the sexual acts, such as mere nudity, the officer should simply observe what the repairman viewed prior to calling the police and look no more. The repairman should then be instructed to cease his search for images and secure the computer pending a warrant. If circumstances show that the computer may be in danger of tampering or destruction, the computer can be seized for a short period of time while obtaining the warrant.

- Don’t ask the repairman to copy the images to a disk, because it will make him you agent.

- If you look at more than you should, present the warrant based solely on the statement of the repairman and leave out the fact that you viewed extra images.

Federal law suggests that your mistake will not be fatal as long as the judge does not rely on it in the warrant.

United States v. Hill, (9th Cir. 2006)

Facts: Agents got a search warrant for suspect's residence after repair shop advised them they had seen child pornography on computer. When they went into home with warrant, the computer was not there, but they seized storage media that was later found to contain child pornography. The court ruled that the repair shop worker's description was sufficient to support probable cause.

United States v. Peterson, F.Supp (South Carolina 2003) **Computer Repair Shop**

Facts: Computer repairman found child pornography during a repair of computer. He was aware of a South Carolina law that required repairpersons to report child pornography if found during a repair. He reported his findings to police and a warrant was issued.

Holding:

- Legal requirement to report child pornography did not make repairman an agent of the state and thus, no 4th amendment violation.
- In light of the strong presumption in favor of warrants, and in light of the common sense approach used in testing the validity of those warrants, the magistrate had enough information to issue the warrant. The magistrate had a direct statement from an eye-witness that the computer in question contained pictures of pre-pubescent boys in various stages of undress and other boys (unidentifiable as to age) engaged in sexual acts together with links to "underage" internet cites. Together these facts were enough evidence for the magistrate, using the common sense totality of the circumstances test, to find that there was probable cause that defendant's computer contained items subject to seizure.
- "In the present case, Griffin claimed that defendant "left the store to go home and get his computer" after a conversation about the problem with the computer. The government asserts that this direct statement by the witness, together with a common sense argument that computers are usually stored in the home, provide a sufficient nexus between defendant's residence and the evidence observed on the computer. Furthermore, the computer was a "desktop," not capable of easy mobility, and the images were of a private nature, all suggesting that the

computer was likely maintained in a private residence. "

United States v. Grimes, 244 F.3d 375 (5th Cir. 2001): **Computer Repair Shop**

Facts: The defendant's wife took his computer to a repair shop for repair. The technician noticed that the hard drive was almost full and asked the wife for permission to delete some of the image files on the computer. The wife consented and the technician searched for jpg files to delete. During this routine procedure, the technician observed child pornography. A local detective was called and the technician showed him the images. The detective only viewed the images previously discovered and did not request any further searching. The technician gave the detective a disk with the images on it and the detective sent the images to an FBI agent. A search warrant was then obtained to look for more images. During the search, several narratives were found which described violent, sexual abuse of young girls.

Holding:

- Computer store employee was not an agent of the government, so there were no Fourth Amendment implications in the discovery of the images.

- The warrantless seizure of the images by a law enforcement officer did not violate the defendant's Fourth Amendment rights.

- The sexually explicit narratives found on the computer were relevant to the issue of intent, but their prejudicial effect outweighed their probative value, especially since the narratives were violent and the images were not.

Discussion: This is a very interesting case that gives some details of effective ways an expert can be used in court to describe the significance of how data is stored on a computer. The opinion also discusses how blurring the genital area in the images does not remove the images from the scope of the statute.

United States v. Grosenheider, 200 F.3d 321 (5th Cir. 2000): **Computer Repair Shop**

Facts: The defendant dropped his computer off at a computer repair shop for repairs. An employee at the shop noticed a few child pornography images on the hard drive and showed them to other workers. After the defendant picked

up the computer and took it home, the employee called the police to report his discovery. A detective came to the shop and interviewed the employees. While the detective was still at the shop, the defendant brought the computer back to the store for more work. The detective told the repairman to "stall" the defendant. The defendant once again left the computer at the shop and drove away. While the detective continued to take statements, the repairman fixed the computer. After the statements, the repairman tried to show the detective the images he had found, but the images were now password blocked. A senior technician was able to get around the password and show the images to the detective. After the detective saw the images described by the employees and a few more, he seized the computer and contacted a customs agent. The customs agent agreed to take the case and immediately began to work on a search warrant. His warrant relied exclusively on the statements by the employees and did not even mention the seizure of the computer or the images that were viewed by the detective. After getting the warrant signed, the customs agent went to the computer shop and seized the computer. His subsequent search of the computer revealed hundreds of child pornography images.

Holding:

- Even if police officer's breaking password lock, with assistance of computer repairmen who had initially discovered child pornography on defendant's computer hard-drive, in order to view graphic files that repairmen had not seen constituted illegal search, evidence was nonetheless admissible under both independent source and inevitable discovery rules, where customs agent, who was contacted by police officer, obtained search warrant based solely on statements made by repairmen who originally saw images.

- Even if police officer's warrantless seizure of defendant's computer in repair shop, after officer viewed graphic files on hard-drive in addition to those seen by computer repairmen who initially contacted officer, was illegal, evidence was nonetheless admissible based on subsequent reseizure of computer pursuant to warrant, which was obtained by customs agent whom police officer had contacted and which was based solely on statements made by repairmen who initially discovered child pornography on hard-drive.

Discussion: This is a fascinating case for issues that may arise during a computer repair shop case. Unfortunately, the court did not rule on several issues because of the application of the independent source doctrine. For

instance, the court did not specifically rule on the legality of the search after the password was broken. The court also failed to directly rule on whether the seizure of the computer was legal, but in a footnote said that the 4 or 5 hours the computer was held pending the warrant was reasonable. Of particular interest was the court's tacit approval of the customs agent leaving important facts out of the search warrant. The agent never mentioned the detective saw the images and never mentioned the computer had been seized. The appellate court actually stated that these deletions made the warrant stronger because the reviewing judge was not influenced by the taint of any errors made by the police. Basically, what should have been done was the detective or agent should have interviewed the employees without requesting them to do anything else to the computer and then obtained a warrant. If there was any risk that the computer would be altered, destroyed, or returned, the detective should have seized it and then quickly obtained a warrant. Fortunately in this case, the customs agent undid the damage done by the detective by drafting a good warrant.

United States v. Hall, 142 F.3d 988 (7th Cir. 1998): **Computer Repair Shop**

Facts: The defendant took his computer to a repair shop. The next day, a repairman noticed some files with sexually explicit titles. He opened about five of them and noted that they all contained sexually explicit conduct involving children. The repairman called the police and was instructed to copy a few files to a disk to preserve as evidence. The police retrieved the disk, but did not look at its contents. When the defendant called to check on his computer, the repairman told him he had to order a part and it would be another week before he would finish the repair. The FBI was then notified and they took over the investigation. The agents subpoenaed AOL and verified that the defendant had an account that was listed at the same address as the defendant provided to the repair shop. The FBI then obtained a warrant to search the computer and the defendant's home. The warrant affidavit mentioned the files copied to the disk, but did not rely on them to establish probable cause. The warrant relied primarily on the statements from the repair shop employees. The FBI then asked the computer repair shop to delay returning the computer for an extra day so that their expert could view the contents pursuant to the warrant. When the defendant picked up his computer the next day at the shop, FBI agents confronted him in the parking lot (after he obtained the computer) and informed the defendant that he was being investigated for possessing child pornography. The defendant admitted he possessed the images and gave consent to search his home for more.

Holding:

- Viewing of files on defendant's computer by employee of company to which defendant took computer for repairs was private search, and thus Fourth Amendment was inapplicable to search and to employee's later description of pornographic evidence found on computer to law enforcement officials.

- When determining whether private citizen has acted as government agent, for Fourth Amendment purposes, question is whether, in light of all circumstances, person must be regarded as having acted as instrument or agent of state; court is to determine whether government knew of and acquiesced in intrusive conduct and whether private party's purpose for conducting search was to assist law enforcement efforts or further his own ends, and whether government offered private party a reward may also be considered.

- Police officer's act of asking repair company employee to copy files which employee found on defendant's computer, though constituting warrantless search, did not require suppression of evidence seized pursuant to subsequent warrants from computer or from defendant's apartment, as copied disk was never reviewed by law enforcement, nor was it used as basis of reasonable suspicion in affidavit supporting search warrants, and employee's statements provided independent source for warrants.

- Repair company's detention of defendant's computer for one extra day at request of Federal Bureau of Investigation (FBI) while FBI obtained search warrants for defendant's home and his computer files, based on company employee's discovery of pornographic materials on computer, was not unreasonable.

- Search warrants for defendant's computer and his residence were supported by probable cause, based on repair company employee's estimate that computer contained approximately 1,000 files with names indicative of child pornography, employee's statement that he viewed three to five files that depicted minors engaged in sexual activity, and expert information addressing common practices of child pornographers.

- Defendant knowingly possessed child pornography discovered on

defendant's computer and disks, within meaning of statute prohibiting knowing possession of images, transported in interstate commerce, which contain visual depictions of minors engaged in sexually explicit conduct, where defendant downloaded files at issue and did not delete them.

Discussion: This is an excellent case to read when you encounter a computer repair shop case. The case is also discussed in the Particularity Section. The main lesson to be learned is not to make the repairman an agent of the government. Do not instruct him to look for more pictures. Get a sworn statement from him as soon as possible and get your warrant based upon his testimony. Do not delay, because the court may rule that the delay was unreasonable and thus, a 4th amendment violation.

United States v. Barth, 26 F.Supp.2d 929 (W.D. Tex. 1998): **Computer Repair Shop**

Holding:

- Computer technician, entrusted with hard drive by owner for purpose of repairing unit, did not have actual authority to consent to warrantless search of computer files for examples of child pornography after he uncovered one apparent example while reviewing files for diagnostic purposes.

Melton v. State, 2010 WL 3834048 (Ala.Crim.App.)

Defendant did not have reasonable expectation of privacy with regard to names of files, which were extremely explicit and highly suggestive of child pornography, on computer that defendant had voluntarily brought to store for virus removal, with result that viewing of contents of files by police officers, who were summoned by store staff, based on file names did not violate defendant's Fourth Amendment rights; defendant knew of existence of files on his computer, defendant did not place any limitations on store's access to computer, and defendant did not attempt to place password lock on individual files.

Coercive or Involuntary Consent

General Rules:

- A consent to search must be freely and voluntarily given.

- Voluntariness is to be determined from the totality of circumstances.

- Consent after an illegal detention is presumed involuntary.

- Mere acquiescence to authority is not valid consent.

- Where there is an illegal detention or other illegal conduct on the part of the police, a consent will be found voluntary only if there is clear and convincing evidence that the consent was not a product of the illegal police action; otherwise, the voluntaries of the consent must be established by a preponderance of the evidence.

- Officer does not have to tell a suspect he has the right to refuse consent, but suspect must not be placed in such a situation that he feels he has no right to refuse.

Florida v. Bostick, 111 S.Ct. 2382 (1991)

Facts: As part of a drug interdiction effort, Broward County Sheriff's Department officers routinely board buses at scheduled stops and ask passengers for permission to search their luggage. Two officers boarded respondent Bostick's bus and, without articulable suspicion, questioned him and requested his consent to search his luggage for drugs, advising him of his right to refuse. He gave his permission, and the officers, after finding cocaine, arrested Bostick on drug trafficking charges.

Holding:

- Proper test, in deciding whether officer's request to search bus passenger's luggage was so coercive as to vitiate that consent, was not whether reasonable person would feel free to leave, but whether he would feel free to decline officer's requests or otherwise to terminate encounter; "free to leave" test does not apply where party's freedom of movement is restricted by factor independent of police conduct, e.g., by his being a passenger on bus.

- Even when officers have no basis for suspecting particular individual of any criminal activity, they may generally ask questions of that individual, ask to examine his identification, and request consent to search his luggage, as long as police do not convey message that compliance with their requests is required.

- Random bus searches pursuant to passenger's consent are not per se unconstitutional; cramped confines of bus are but one relevant factor to be considered in evaluating whether passenger's consent is voluntary.

Schneckloth v. Bustamonte, 412 U.S. 218 (1973):

Holding:

- Knowledge of the right to refuse consent to search is one factor to be taken into account, but the government need not establish such knowledge as the sine qua non of an effective, voluntary consent.

- In examining all the surrounding circumstances to determine if in fact consent to search was coerced, account must be taken of subtly coercive police questions, as well as the possibly vulnerable subjective state of the person who consents.

- It is not necessary to a voluntary consent to a search that the police, before eliciting consent, advise the subject of the search of his right to refuse consent.

- When the subject of a search is not in custody and the state attempts to justify search on the basis of his consent, the Fourth and Fourteenth Amendments require that it demonstrate that the consent was in fact voluntarily given, and not the result of duress or coercion, express or implied.

Bumper v. North Carolina, 88 S.Ct. 1788 (1968)

Facts: The petitioner lived with his grandmother, Mrs. Hattie Leath, a 66-year-old widow, in a house located in a rural area at the end of an isolated mile-long dirt road. Two days after the alleged offense but prior to the petitioner's arrest, four law enforcement officers--the county sheriff, two of his deputies, and a state investigator--went to this house and found Mrs. Leath there with some young children. She met the officers at the front door. One of them announced, 'I have a search warrant to search your house.' Mrs. Leath responded, 'Go ahead,' and opened the door. In the kitchen the officers found the rifle that was later introduced in evidence at the petitioner's trial after a motion to suppress had been denied.

Holding:

- Defendant's grandmother did not consent to search of house in which defendant lived with grandmother, and, therefore, admission in evidence in rape prosecution of rifle allegedly used in offense and found in house as result of search was constitutional error, where "consent" had been given only after official conducting search had asserted that he possessed a search warrant.

Discussion: The issue defined by the Supreme Court was "Whether a search can be justified as lawful on the basis of consent when that 'consent' has been given only after the official conducting the search has asserted that he possesses a warrant." The Court held that there can be no consent under such circumstances. The primary rationale for this ruling is that the person giving consent is led to believe that she has no right to refuse, which is contrary to the requirement of free and voluntary consent.

Johnson v. United States, 68 S.Ct. 367 (1948):

Facts: Federal agents got a tip that someone was smoking opium in a hotel room. When the agents approached the room, they smelled the odor of opium coming from the room. The agent knocked on the door and announced himself as a law enforcement officer. After a slight delay, the defendant opened the door. The agent said, "I want to talk to you a little bit." The defendant then "stepped back acquiescently and admitted us." The agent then said "I want to talk to you about the opium smell in the room here." She denied that there was such a smell. The agent then said "I want you to consider yourself under arrest because we are going to search the room." The agents then found the contraband.

Holding:

- Where government enforcement agents traced odor of burning opium to hotel room and under color of office demanded entry, entry granted in submission to authority did not operate as waiver of constitutional rights against illegal searches and seizures.

U.S. v. Charbonneau, 979 F.Supp. 1177 (S.D. Ohio 1997):

Defendant's wife did not voluntarily consent to search of defendant's home during interrogation by government agents at high school at which wife worked; six government agents simultaneously, and in different rooms, questioned

defendant's wife and son, who attended same high school, and threatened to break down front door of house if wife did not consent to search.

Norman v. State, 379 So.2d 643 (Fla.1980):

Facts: Deputies received information from an informant whose reliability was not shown that marijuana belonging to persons other than the defendant was stored in a barn on the outskirts of town. The property was owned by someone who was not suspected of criminal activity and the defendant had been farming the property for several months. The Sheriff, who acknowledged he had insufficient evidence to obtain a warrant, went to the property and climbed over the locked gate. He walked 250 yards to one of the tobacco barns and looked through a window. He saw marijuana wrapped in tobacco sheets. Three days later, deputies observed the defendant drive a truck to the barn and return shortly thereafter. The deputies stopped him, informed him that the Sheriff had seen the marijuana in the barn, and asked him if he would consent to a search of the barn. The defendant was not formally arrested at the time. The deputies entered the barn and found the contraband.

Holding:

- The Sheriff illegally entered the property without a warrant and the subsequent consent of the defendant was the result of that illegal action.

- When consent to search is obtained after illegal police activity such as an illegal search or arrest, the unlawful police action presumptively taints and renders involuntary any consent to search, and consent will be held voluntary only if there is clear and convincing proof of unequivocal break in chain of illegality sufficient to dissipate taint of prior official illegal action.

- Where evidence showed that deputy told defendant upon first confronting him that sheriff had personally seen marijuana in defendant's barn and that sheriff and deputy knew defendant was aware of its presence, and that although defendant was not formally arrested deputy testified that defendant was never free to leave and for all intents and purposes was arrested, defendant's compliance with deputy's request to view the marijuana could possibly be deemed acquiescence but was not free and voluntary consent to search; state therefore failed to carry its burden to show by clear and convincing evidence that defendant's consent to search was not product of initial illegal police action in entering farm and discovering marijuana.

Discussion: The court ruled that the defendant took several overt steps to designate his farm and barn as a place not open to the public. Once the Sheriff violated his reasonable expectation of privacy, the state's burden to prove the consent became harder.

Luna-Martinez v. State, 984 So.2d 592 (Fla. 2d DCA 2008)

Defendant's consent to warrantless residential search, made in the course of a 3:00 a.m. knock-and-talk encounter, was voluntary and not the product of police misconduct or coercion, even though police initiated contact via a ruse, multiple officers were present, police informed defendant about a tip that there was contraband in apartment, and police did not obtain written consent to search; police addressed defendant in a very amicable and casual manner, defendant's response was polite and cooperative, defendant was alert and awake, police did not say anything that a reasonable person would have understood as an assertion of authority to search, defendant was not aware of the several officers outside apartment in addition to the three or four in apartment, police explained true nature of encounter and informed defendant of his right not to talk before he consented, and defendant apparently had some knowledge of the legal system and his rights prior to incident.

The late hour of a knock-and-talk encounter is a relevant factor to consider in the totality of the circumstances for determining the voluntariness of a defendant's consent to warrantless search, but it does not carry great weight; due to the exigencies of public safety, it is not unusual for the police in their investigative efforts to have late night encounters with individuals.

In and of itself, police deception does not negate consent to search.

The number of officers involved in an encounter may well have a significant bearing on the voluntariness of a consent to search obtained in that encounter.

Although the presence of a written consent to warrantless search tends to support the conclusion that the consent was given voluntarily, an inference of involuntariness does not arise from the absence of a written consent.

McDonnell v. State, 981 So.2d 585 (Fla. 1st DCA 2008):

Defendant's consent to warrantless search of his home was not voluntary, for Fourth Amendment purposes; encounter between police and defendant took

place at defendant's home at 4:00 a.m. and lasted between one-and-a-half to two hours, there were at least four officers who showed up at home at late hour, defendant was asked twice over the span of one-and-a-half to two hours if he would consent to a search of his home, and officers indicated to defendant that they believed he was involved in certain thefts and that they thought they would find evidence of the crimes within his home

United States v. Aaron, ** (6th Cir. 2002)

Facts: Detectives received information that defendant had taken nude photos of a minor and propositioned her for sex. They sought out the defendant's live-in girlfriend to see if she would consent to search the apartment and his computer. They found her in her car and pulled her over to ask about the consent. They told her she was not in trouble and had not done anything wrong, but they just wanted to speak to her. She claimed that they told her they would get a warrant and come back and break the door down if she did not consent.

Holding:

- "When they pulled Mayes over, the detectives reassured Mayes that she was not the focus of the investigation, that she was not under arrest, and that she had not done anything wrong. Although Mayes was somewhat frightened by the officers, when we view the entire encounter in context of the officers' statements, we cannot conclude the district court's finding of voluntariness was in error."

- "This court has held that an officer's statement that he or she will obtain a search warrant if the individual does not consent does not void an otherwise permissible consent search, provided the claim is neither baseless nor pretextual. *United States v. Salvo*, 133 F.3d 943, 954 (6th Cir. 1998) (collecting cases). In light of this precedent, the officer's statement that they would return with a search warrant and kick the door down also does not vitiate the voluntariness of Mayes's consent."

State v. Shuttleworth, 31 Fla. L. Weekly D958 (Fla. 2d DCA 2006):

- Defendant's alleged consent to search of her bedroom, during which police discovered cocaine and drug paraphernalia in plain view, did not preclude suppression of evidence found in bedroom based on lack of Miranda warnings since purported "consent" was given under circumstances reflecting coercion or acquiescence to police authority; defendant allegedly consented to search of bedroom after police officer

had already questioned her about possibility of contraband in her car and she had admitted to the presence of drugs in her car.

Wyche v. State, 30 Fla. L. Weekly D1537 (Fla. 1st DCA 2005):

Deception on the part of police officers, standing alone, does not invalidate consent to a warrantless search; absent coercion, threats, or misrepresentation of authority, deception is a viable and proper tool of police investigation.

Defendant's consent to warrantless search in form of saliva sample, obtained by police officer after he manufactured a fictitious burglary in order to obtain defendant's consent to take saliva sample for sexual assault investigation, was not an acquiescence to claim of lawful authority, and thus consent was voluntary; police deception did not negate consent, defendant was clearly aware of fact that officer wanted DNA sample in order to investigate a crime, officer did not misrepresent fact that he had no search warrant, and officer did not indicate that defendant had no choice regarding whether to provide sample.

Discussion: This issue arises occasionally in sex crimes investigations when a detective wants to obtain consent for a suspect's DNA and thinks he is more likely to get it if a non-existent offense is used as a justification. This case approves such tactics, but points out that it is in conflict with State v. McCord, 833 So.2d 828 (Fla. 4th DCA 2004), which held such misrepresentations of the nature of the investigation *may* provide evidence of coercion. This case contains a good discussion of existing case law on the topic. Hopefully the Supreme Court will side with the Wyche court.

Reynolds v. State, 592 So.2d 1082 (Fla. 1992):

Facts: The police stopped a drug dealer based upon a tip from an informant. They ordered him out of the car and placed handcuffs on him. After they searched him and found no weapons, they asked for his consent to search him. The defendant, who was still handcuffed, consented to the search and drugs were found.

Holding:

- Police officers' continued use of handcuffs on defendant during investigative stop after pat-down search did not reveal any weapons was improper; at that point, officers had no reason to believe that weapons

were present and defendant offered no resistance, was not particularly belligerent, and did not make any threats.

- Generally, voluntariness of consent to search must be established by preponderance of evidence; however, if there is illegal detention or other illegal conduct on part of police, consent will be found to have been voluntary only if there is clear and convincing evidence that consent was not product of the illegal police action.

- Even though officer told defendant of his right to refuse to consent to search, defendant's consent was not voluntary where defendant was illegally handcuffed and confronted by three police officers who, without probable cause, told defendant he was under arrest.

Discussion: The court refused to establish a clear rule that handcuffed defendants could not give a voluntary consent to search. The court noted, however, that the state would have a very difficult time showing the consent was voluntary if the defendant was handcuffed.

State v. McCord, 27 Fla. L. Weekly D2633 (Fla. 4th DCA 2002):

No error in granting motion to suppress DNA evidence taken from defendant by means of police trickery, because defendant did not freely and voluntarily consent to search of his body when he gave saliva samples.

Where detective assigned to investigate armed robberies met with defendant and told him he was suspect in rape case and that he could exclude himself from rape investigation by providing saliva sample, and where detective acknowledged that sexual battery never occurred and that he fabricated rape charge to obtain defendant's consent to search, this deception, while defendant was in jail, was so manipulative that defendant's "consent" did not "validate the search".

V.P.S. v. State, 27 Fla. L. Weekly D1162 (Fla. 4th DCA 2002):

Facts: Police obtained an arrest warrant for a suspect who lived in the same house as VPS, a 16-year-old boy. VPS told the police that the defendant was not home so the police asked if they could come inside. During their search, they found drug paraphernalia and arrested VPS.

Holding:

- Police could not enter home pursuant to arrest warrant because they did not have a reasonable belief that the subject of the warrant was inside the home.

- The boy's consent was not valid because he was led to believe that the warrant gave him no choice but to consent. *see Bumper v. North Carolina.*

State v. Sakezeles, 26 Fla. L. Weekly D388 (Fla. 3rd DCA 2001):

Facts: The police were looking for the defendant, a graffiti tagger, pursuant to an investigation. They got a tip regarding his whereabouts and responded to his apartment complex. The door was slightly ajar when they arrived and when they looked in, the defendant ran to the bathroom. The officer chased the defendant into his bathroom and dragged him into the living room. The defendant then consented for the police to search his apartment.

Holding:

- Officers' warrantless entry into defendant's apartment after seeing him in apartment through partially open door was illegal, where there was no showing of exigent circumstances.

- Defendant's consent to search of apartment was involuntary where defendant consented to search only after officers had entered apartment, chased him into bathroom, and pulled him into living room.

- Taint of illegal search was not dissipated by apartment owner's consent to search after search was well underway.

Findley v. State, 25 Fla. L. Weekly D2609 (Fla. 2d DCA 2000):

Facts: The police responded to the defendant's house based upon a phone call claiming the defendant was smoking crack. They were met outside by the defendant's 12-year-old daughter who informed them that her father and another man were smoking crack in the bathroom. The girl then walked into the living room of the house where the defendant was sitting on a couch. The officers followed the girl into the house and asked the defendant and his friend to step outside so that they could talk to them. The officers were never expressly invited into the house, but just followed the girl. The two men followed the officers outside and provided consent to search the house. The

search revealed cocaine residue on a beer can in the living room.

Holding:

- The officers' uninvited entry into the home was illegal.

- When two uniformed police officers walk uninvited into a person's home and asked that person to step outside, a reasonable man would feel he had no choice but to comply, thus, the defendant was being illegally detained.

- Defendant's consent to search of residence was tainted by prior illegal action of police and State was unable to show by clear and convincing evidence that there had been an unequivocal break in the chain of illegality sufficient to dissipate the taint of the prior illegal police action.

Discussion: The court noted that the fact that the officers requested rather than ordered the defendant to step outside was irrelevant because a reasonable person, under similar circumstances, would believe he had to comply. The defendant argued that he was simply acquiescing to authority and the court agreed. The court implied that if the defendant had been advised of his right to refuse to consent, it might have dissipated the taint of the illegal entry and validated the consent.

Gillis v. State, 634 So.2d 725 (Fla. 3rd DCA 1994):

Facts: Police learned that defendant might have been involved in an attempted murder. They went to his apartment where he lived with his wife. His wife allowed them inside to make a preliminary sweep of the apartment. During the sweep, they saw the defendant's wedding picture on the TV set. They asked the wife if they could borrow it and she refused. The officers then approached the manager of the apartment complex and explained the situation to her. Upon learning that the complex might be harboring a suspect in a crime and also knowing the couple was behind in their rent, the manager explained the circumstances to the building owner. The owner then approached the defendant's wife and plainly told her that unless she acceded to the police's request for the photo, she would be evicted. The wife then gave the photo to the police. The defendant claimed his wife's ultimate consent was coerced.

Holding:

- Police did not coerce defendant's wife into letting them borrow the photograph; police did not accompany or force building owner to take

action they sought, but rather, owner, armed with independent, legitimate, and private business interest, had motive to prevail upon wife which was separate apart from interest of police.

Gonzalez v. State, 578 So.2d 729 (Fla. 3rd DCA 1991):

Facts: Police observed what appeared to be narcotics activity and followed the suspect to his house. After he left, they went to the door and asked the man's wife if they could step inside and speak with her. The facts showed that five officers confronted the woman at 9 o'clock at night. The five police officers were clad in police raid jackets, three of whom were on her front doorstep and two who were on both sides of her house in the yard for supposed security purposes. The court held that this was "a truly frightening display of authority." One of the officers identified himself, said the police were conducting a narcotics investigation, and indicated he "would like to speak with her."

Holding:

- Defendant's wife's voluntary acquiescence to police request to enter home "to speak with her" was not consent to search, and, thus, police's room-to-room search immediately after entering home was unreasonable warrantless search.

- Police's illegal search of house rendered involuntary subsequent verbal and written consent given by defendant's wife to search.

- Police had authority to seek voluntary consent to search constitutionally protected premises without prior proof of criminal wrongdoing.

Discussion: The court noted "we think a reasonable person might well have interpreted this statement as an order, not a request, to let the police enter her house so they could speak to her; if this be the case, her subsequent 'invitation' to enter the house was an acquiescence to authority, not a voluntary consent." Even if she validly allowed them inside to speak with her, it did not justify their room-to-room "protective" sweep of the home to see if anyone else was there. Once they conducted this illegal sweep of the house, her subsequent consent for further search was invalid because she was given the impression that she could not refuse.

State v. Boyd, 615 So.2d 786 (Fla. 2d DCA 1993):

Facts: The police got a call that the defendant was outside shooting a gun.

When the officer arrived, he saw the defendant standing with a shotgun and yelling something. The officer also noted three recently fired shells on the ground and that the name given by the defendant was different than that on the mailbox. Fearing that the victim of a crime might be injured in the house, the officer put the defendant in the patrol car and did a brief search of the house for injured persons. While in the house, the officer noticed stolen goods and narcotics. When he returned to the car, he asked the defendant if he could search the home. The defendant agreed and signed the appropriate forms.

Holding:

- Where state seeks to rely upon consent to search, state has burden to establish that consent was freely and voluntarily given by preponderance of evidence, except where consent was obtained after illegal police action, in which event state's burden becomes higher standard of clear and convincing evidence.

- Even where consent to search is obtained after taint of illegal police action, taint may be dissipated by advise to defendant of his right to refuse to consent so as to render subsequent consent free and voluntary.

- Defendant voluntarily consented to search of his residence; state presented uncontradicted testimony of deputy sheriff that, prior to defendant's giving of consent and signing of consent form, deputy read both Miranda rights and consent form to defendant, that defendant was advised of his right to refuse consent, and that defendant requested and was given right to be present during search, and by evidence that defendant signed both written Miranda form and written consent to search form.

Discussion: This case has a good discussion of emergency or exigent circumstances.

State v. Stregare, 576 So.2d 790 (Fla. 2d DCA 1991):

Facts: Narcotics officers noticed defendant get into a car and speed away from a home in an area known for narcotics. When the officers approached the car, they saw her try to give a cigarette pack to the driver, but the driver would not take it. After making some other observations that arose their suspicions, the officer requested the defendant to give him the cigarette pack. When she failed to respond, he stuck out his hand and asked again. She gave him the cigarette

pack and he found cocaine inside.

Holding:

- The defendant did not relinquish the cigarette pack voluntarily, but merely acquiesced to authority.

Discussion: On the bright side, the court held that the officer had probable cause to seize and search the pack based upon his various observations at the scene.

State v. Swank, 399 So.2d 510 (Fla. 4th DCA 1981):

Facts: The manager of a motel called the police and told them he was concerned because the defendant was making excessive long distance telephone calls and might skip out without paying. The officers went to the room and knocked on the door. They were both dressed in standard police uniform, including hats, badges, guns, nightsticks and walkie- talkies. They heard scurrying around and the sliding glass door close. When the defendant answered the door, the police asked if they could enter. The defendant invited them inside. The officers then asked if they could search the balcony and the defendant said, "go ahead." The police found a duffel bag stuffed between the bars of the balcony railing which contained cocaine.

Holding:

- Where police officers were expressly invited into defendant's hotel room and expressly given permission to check balcony area, and where there was no evidence of coercion, misrepresentation, deceit or trickery, defendant's consent to search of balcony area was freely and voluntarily given and officers' observations of duffel bag on balcony was not in violation of defendant's rights.

- Presence of uniformed and armed police officers, absent indication of coercive words or acts, misrepresentation, deceit or trickery, is insufficient to raise inference of submission to police authority.

State v. Lanxon, 393 So.2d 1194 (Fla. 3rd DCA 1981):

Facts: An officer approached a passenger standing in line at Miami International Airport. He asked her if he could search her luggage and she refused. The officer testified that he stated:

> 'Okay, that's fine. I cannot look into your luggage without your permission and in your presence. However, I believe that either your suitcase or the other suitcase' and I pointed to the one that was next to Mr. Ralph Gettis 'and/or both contain narcotics and I want to inform you that I cannot prevent you from checking your luggage. However, I will contact a Narcotics Unit at our destination and request that a narcotics detection dog sniff your luggage.'

At that time, defendant replied: "Jesus Christ, go ahead and search it, then." Nothing was found in the suitcase, so the officer asked if he could search her briefcase, saying: "You don't have to allow me to if you don't wish to." She replied: "If you have to search it." Drugs were found in the briefcase.

Holding:

- Officer's statements were intended to coerce the defendant into giving her consent to a search of suitcase, and thus State failed to satisfy its burden of establishing free and voluntary consent, and evidence seized from defendant was properly suppressed.

Mobley v. State, 335 So.2d 880 (Fla. 4th DCA 1976):

Holding:

- Where 18-year-old defendant, who had little education and who had been separated from his stepmother after they voluntarily went to police headquarters for questioning in connection with robbery, twice denied officer's request for permission to search his apartment and did not tell police to go ahead until after officer stated that he had probable cause for arrest and that he would go ahead and place defendant under arrest and proceed the following day to get a search warrant to search defendant's room, State failed to prove conclusively that warrantless search was validated by defendant's knowing and voluntary consent.

Discussion: See Mack v. State, 298 So.2d 509 (Fla. 2d DCA 1974), for a similar fact scenario with a different result. This case distinguishes Mack in its opinion.

Holt v. State, 302 So.2d 775 (Fla. 1st DCA 1974):

Facts: The police suspected the defendant of burglarizing a pawnshop. An officer went to the defendant's motel room, read him his Miranda rights and asked if he could search the defendant's room. The defendant responded, "I

don't have anything to hide." Immediately thereafter, the deputy sheriff advised the defendant, "I'm glad you went along. If you hadn't I'd put a man on your heel; I'd put a guard on your door of the motel and I'd of went to the courthouse and got a search warrant."

Holding:

- Making of threat, after accused consented to search of his motel room, that deputy sheriff would have put a "tail" on accused and a guard on the door" to his room if permission to search were not given was not such a coercive tactic as to render consent void.

Padron v. State, 328 So.2d 216 (Fla. 4th DCA 1976): **Minor**

Facts: The defendant was arrested for a shooting incident and placed in the back seat of a police car. He told the police the gun was in his house, but he forbid them from entering the home to retrieve it. The house was occupied by the defendant's sons and several of their young friends. A deputy then approached the defendant's 16-year-old son and asked to enter the house. The boy denied this request. The deputy then ordered all of the children out of the house to "protect the evidence." It was an extremely cold night and one of the boys was ill at the time. In order to allow the boys to stay in the house, the boy capitulated and allowed entry.

Holding:

- Act of deputy sheriff in requiring defendant's son to make a choice between permitting a search of premises owned by defendant or yielding to unreasonable alternative of evacuating premises on an extremely cold night operated to effectively strip son's "consent" to search of any voluntary character.

Discussion: The court also ruled that a child could not consent to the search of a parent's house and that even if he could, his consent could not override the father's objection. Case law has since demonstrated that a child can consent to entry of a home.

Mack v. State, 298 So.2d 509 (Fla. 2d DCA 1974):

Facts: A Methodist minister called the Sheriff and told him he believed his son was going to purchase drugs from the defendant at a convenience store. The Sheriff went to the convenience store and stopped the defendant in the parking lot. He asked him for his license and then told the defendant that he had reason

to believe there were drugs in the van and he would like permission to search it. He informed the defendant that he did not have a search warrant at the time, but could obtain one while placing the van under surveillance. The defendant said, "Go ahead and search. I have nothing to hide." The defendant was 24 years old, had completed three years of college and had been arrested before.

Holding:

- Considering the defendant's age, experience and education, and there was no evidence that superior authority had any place in obtaining defendant's consent or that two police officers present made any promises or threats to defendant, defendant's consent to search was voluntary.

- In determining whether a consent to search was voluntary or whether defendant's will was overborne in a particular case, some of the factors taken into account include, youth of the accused, his lack of education, or his low intelligence.

Discussion: The result in this case may have been different if the defendant has been less educated and experienced. See Mobley v. State, 335 So.2d 880 (Fla. 4th DCA 1976) for a similar case with a different result. The Mobley court distinguishes this case in its opinion.

Family or Household Members Granting Permission to Search:

General Rules:

- Person granting consent must have common authority over the place to be searched.
- If one party consents, but another objects, the search will be illegal. (Federal law allows party with equal privacy interests to consent over other party's objection.
- Consent must be freely and voluntarily given.
- Minors can authorize a consent to search a home, but the law enforcement officer has the burden of making a thorough inquiry as to the minor's authority over the premises.

Illinois v. Rodriguez, 110 S.Ct. 2793 (1990): **Apparent Common Authority**

Facts: A woman named Gail Fischer informed police that she had received a severe beating by the defendant. She told them that the defendant was asleep in his apartment, but she had the key and would take them there and let them inside. She referred to the residence as "our" apartment and said she had clothes and furniture there. In fact, Gail had vacated the apartment several weeks earlier and was only an infrequent visitor there. She had previously lived there for several months, but had recently moved out. She did not pay rent and was not allowed to invite others to the apartment on her own. When they arrived at the defendant's apartment, Gail unlocked the door and let the police enter to arrest the defendant. When they entered, the police saw drugs in plain view. The defendant was arrested and the drugs were seized. The trial court granted the defendant's motion to suppress because the woman had previously moved out of the apartment and thus did not have common authority over the apartment.

Holding:

- The woman did not have "joint access or control for most purposes" over defendant's apartment.

- A warrantless entry is valid when based upon the consent of a third party whom the police, at the time of entry, reasonably believe to possess common authority over the premises, but who in fact does not.

- The reasonableness of a police determination of consent to enter must be judged not by whether the police were correct in their assessment, but the objective standard of whether the facts available at the moment would warrant a person of reasonable caution in the belief that the consenting party had authority over the premises. The case was remanded for the court to determine whether the police reasonable believed the woman had authority to consent to the entry.

Discussion: The issue in this case is not whether Gail had authority to authorize a search of the residence, but whether the police reasonably believed she had the authority. Perhaps the most significant observation by the Court was, "What he is assured by the Fourth Amendment itself, however, is not that no government search of his house will occur unless he consents; but that no such search will occur that is "unreasonable." The Court goes on to discuss at length that the police do not always have to be right, just reasonable. Many examples are provided to illustrate this point. The Court also discusses at length how to distinguish this case from Stoner v. California, 84 S.Ct. 889 (1964), which held

that police officer could not rely on consent of motel clerk to search defendant's room. In Stoner, the police used "unrealistic doctrines of apparent authority." In other words, the police should have known better.

United States v. Matlock, 94 S.Ct. 988 (1974): **Common Authority**

Facts: The police arrested the defendant in the front yard of his home. Although the police were aware the defendant lived at the house, they never asked him which room he occupied or whether he would consent to a search of the home. Instead, they went directly to the front door and asked a woman who also lived in the home if they could search for evidence of a bank robbery. The woman agreed and let them search the home. The woman also let them search a bedroom that she said was occupied by herself and the defendant. The police found the stolen money in a diaper bag in the closet.

Holding:

- It is not essential for the prosecution to show that the consenter knew of right to refuse consent to search in order to establish that consent was voluntary.

- Consent to a warrantless search by one who possesses common authority or other sufficient relationship to the premises or effect sought to be inspected is valid as against absent, nonconsenting person with whom that authority is shared.

- For purposes of validity of consent to search by one who possesses common authority over premises or effects with one or more other persons, common authority is not to be implied from a mere property interest, but rests on mutual use of the property by persons generally having joint access or control for most purposes, so that each has right to permit inspection in his own right and so that the others have assumed the risks thereof.

Discussion: The Florida Constitution provides that the Florida courts shall follow 4th amendment precedent as decided by the United States Supreme Court. This opinion is thus frequently cited by Florida appellate courts.

United States v. Andrus, F.3d (10th Cir. 2007): **Apparent Authority- Password Protected Computer**

Under totality of circumstances, Bureau of Immigration and Customs

Enforcement (ICE) agents could reasonably have believed defendant's father had authority to consent to search of defendant's home computer, and thus, father had apparent authority to consent; although computer was in defendant's bedroom in his father's home rather than in common area, father had unlimited access to bedroom, and agents knew that father owned home and paid for home's internet service, and that email address associated with father was used to register on website that provided access to child pornography, computer was in plain view on desk and appeared available for use by household members, and although agents did not ask father about his use of computer, father said nothing indicating need for such questions.

"Even if Dr. Andrus had no actual ability to use the computer and the computer was password protected, these mistakes of fact do not negate a determination of Dr. Andrus' apparent authority."

United States v. Aaron, ** (6th Cir. 2002)

Facts: Detectives received information that defendant had taken nude photos of a minor and propositioned her for sex. They sought out the defendant's live-in girlfriend to see if she would consent to search the apartment and his computer. The girlfriend sent the defendant on an errand and then let the police into the home. The girlfriend did not know how to use the computer, but it was not password protected and she was not specifically forbidden to use it.

Holding:

- "In assessing whether a third-party's authority includes a particular container, courts typically examine the nature of the relevant container and any precautions taken to ensure privacy."

- "In the personal computer context, courts examine whether the relevant files were password-protected or whether the defendant otherwise manifested an intention to restrict third-party access."

- "Although Aaron had a privacy interest in the computer akin to a suitcase or briefcase, the record does not contain any indication that Mayes could not access the computer. First, Aaron acknowledged that he never advised Mayes she could not use his computer. Second, Aaron did not protect his computer with a password or otherwise manifest an intention to restrict Mayes's access. On appeal, Aaron emphasizes that Mayes had not used the new computer. But because Aaron never told Mayes she could not use the new computer nor

> restricted her access with password protections, we cannot infer that Mayes's lack of use signaled lack of access. Additionally, we cannot conclude that the difference between Windows 98 and 95 was sufficiently substantial so as to effectively bar Mayes's access to the new computer."

Trulock v. Freeh, 275 F.3d 391 (4th Cir. 2002): **Password-Protected**

> Facts: A former intelligence official wrote a magazine article criticizing the government for ignoring a breach of security at a nuclear lab. Federal agents approached his former assistant who was also his current housemate and got her to consent to a search of their home and computer for sensitive documents. The assistant and the suspect shared the same computer, but each of them had their own password-protected section of the computer. The agents took the hard drive and searched all of the data.
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> Holding:
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> - Although the assistant had authority to consent to a general search of the computer, her authority did not extend to the suspect's password-protected files.
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> - Authority to consent to a search cannot be thought automatically to extend to the interiors of every discrete enclosed space capable of search within the area. The rule has to be one of reason that assesses the critical circumstances indicating the presence or absence of a discrete expectation of privacy with respect to the particular object.
>
> Discussion: The court notes that there are no reported cases confronting the issue about whether a defendant has a reasonable expectation of privacy in password-protected files in a shared computer. The court made the analogy to a locked footlocker in a room and discussed United States v. Bock on this matter. The case also contains a good discussion regarding the government's coercive actions that resulted in the consent.

Kelly v. State, 77 So.3d 818 (Fla. 4th DCA 2012):

> Though suspect's girlfriend had actual authority to consent to search of her house, which she shared with suspect, girlfriend lacked authority to consent to search of suspect's red bag, which was located in house; girlfriend repeatedly identified property belonging to suspect during search, officers did not attempt

to establish that girlfriend had joint control over suspect's items, and girlfriend's statements to officers showed that she did not have anything to do with red bag.

Kohn v. State, 2011 WL 4104778 (Fla.App. 1 Dist.)

Mutual use of premises by persons with joint access is commonly recognized as a sufficient relationship to the premises to validly consent to a warrantless search.

For purposes of determining whether a third party has a right to consent to a police officer's warrantless search of premises, in cases of mutual use of the property, 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.

Victim's statements to police officer, that she resided at defendant's apartment at defendant's invitation, that she had a key to the apartment, and that her name had been added to the lease, were sufficient to give officer a reasonable basis to rely on the victim's apparent authority to consent to warrantless entry of the apartment to investigate victim's claim that she had been raped; officer was not required to wait to enter until he confirmed or verified the woman's claim that she lived at the apartment, had a key, was named on the lease, and had left all her belongings, including her clothing, in the apartment when she fled from defendant.

Saavedra v. State, 622 So.2d 952 (Fla. 1993): **(Minor)**

Facts: A twelve-year-old girl was abducted from her home in the middle of the night and raped by two neighbors wearing masks. The girl was able to identify one of the neighbors when his mask came off. Upon receiving the report, the police immediately went to the suspect's house. A 15-year-old boy answered the door. The officer identified himself and said, "I informed him that I was Officer Benfield with the sheriff's office, was there to –and I needed to speak to an adult inside the residence. And if I may come in and he said, yes, and he opened the door and I went inside." Once inside the house, the officer arrested the suspect for sexual battery.

Holding:

- Absent consent or exigent circumstances, police may not make a warrantless entry into a suspect's home in order to make a felony arrest.

- Minor may provide valid third-party consent to warrantless entry into parent's home to effect an arrest or search if the state can show:
  - minor shares home with an absent, nonconsenting parent;
  - police officer conducting entry into the home reasonably believes, based on articulable facts, that minor shares common authority with parent to allow entry into the home; and
  - clear and convincing evidence establishes that minor's consent was freely and voluntarily given under totality of the circumstances.

- The parent is considered "absent," if at the time and place the police officer asks the minor for entry into the home, parent was not physically present with the minor.

- When officer effects warrantless entry into a home based on third-party consent of minor, officer may be admitted into any of the common-living areas of the house where a caller might normally be admitted; however, before officer may be admitted into other areas of the house, officer must have the reasonable belief that the child shares common authority over those areas with the parent as well; reasonable belief also must be supported by some articulable facts for the third-party consent to be valid.

- Joint occupant or one sharing dominion control over premises may provide valid consent for warrantless entry only if party who is target of search is not present or if party is present and does not object to the search.

- Common authority test is adopted for determining whether minor may grant consent to allow police officer warrantless entry into parent's home; in applying test, Florida courts should focus on whether police officer had reasonable belief based on articulable facts that the minor shared joint authority over home with parent; in determining reasonableness of police officer's belief, courts should consider minor's age, maturity and intelligence; courts should also consider any other facts which might show that police officer reasonably believed that minor shared joint authority over home, such as whether minor had permission to allow entry into home, whether minor had key to the home, and whether minor shared certain household duties with parent.

- Where police officer who effected warrantless entry into home did not conduct inquiry or elicit any facts upon which he could reasonably have

determined that minor answering the door had common authority over the house, officer acted unreasonably and his entry was without valid third-party consent.

Discussion: This case is a wealth of information and provides cites to other helpful appellate opinions. The Supreme Court ruled that the boy could have legally given consent, but the officer did not make a sufficient inquiry of the child to determine if he had common authority over the house.

United States v. Smith, 27 F.Supp. 2d 1111 (C.D. Ill. 1998): **Computer**

Facts: The defendant lived with his girlfriend and her two daughters. While they were all vacationing in Arizona, the mother learned the defendant had molested her daughter. She called the police in her hometown in Illinois and informed them of the allegations and told them the defendant had child pornography on the computer in the master bedroom. She gave the police permission to enter the home and search for evidence, including images on the computer. She even gave them the code to open the garage door.

Holding:

- Housemate of defendant was not acting as agent of government when she gave consent to search home where she was not recruited, but contacted law enforcement officers to make complaint about defendant and alert them to child pornography on computer in home, and where she was not offered any reward or other incentives at time she was asked for permission to search.

- Housemate had requisite joint access or joint control over defendant's computer and surrounding area to give consent to search computer where computer was located in open, accessible area of her bedroom, was not password protected, and was occasionally used by her children to play games, sometimes in defendant's absence.

- Even if housemate lacked requisite actual authority to consent to a search of computer in home, she had apparent authority, where she gave explicit directions as to where computer could be located, computer was located in her open area of her bedroom, computer area was easily accessible to family members, and her children's toys and software were found around computer.

Ferguson v. State, 2011 WL 1261147 (Fla.App. 4 Dist.):

> Defendant's girlfriend, a co-occupant, had actual authority to consent to entry of officers onto premises, even though she had not changed her address on either her license or other mailings; defendant's girlfriend, when officer arrived in response to emergency call regarding domestic disturbance, was in front yard of apartment, wearing long shirt, but no pants, and exhibited obvious signs of trauma, girlfriend, even though she did not have key prior to entry, had key to apartment in her purse on kitchen counter in apartment, and all of girlfriend's clothes were inside apartment and she was living at apartment for past two months.

Evans v. State, 33 Fla. L. Weekly D2119 (5th DCA 2008):

> Primary resident of apartment where defendant was staying did not have apparent authority to consent to search of defendant's duffle bag, and thus search premised on such consent was unreasonable; resident's comment to police officers that bag belonged to defendant put them on notice to make further inquiry sufficient to establish that resident had both common control over the bag and mutual use of it.

Preston v. State, 444 So.2d 939 (Fla. 1984): **Mother-Absent Son**

> Facts: A convenience store clerk was found murdered in an open field. The next day, Preston was arrested on unrelated charges at which time the police noticed evidence on his clothing that connected him with the crime. The police went to the suspect's house and asked his mother if they could search his room. The mother consented and evidence of the crime was discovered.
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> Holding:
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> - Defendant had no reasonable expectation of privacy in items seized from his room pursuant to his mother's alleged consent to search, where defendant took no precaution to lock door of his room before search, nor instruct his mother not to let anyone enter room, nor otherwise exhibit expectation of privacy, and defendant was obviously aware of his mother's access to particular items seized as well as anything within regular scope of her cleaning activities.
>
> - The court held that common authority is decided on the basis of the following criteria:

1. the individual's reasonable expectation of privacy in the area;
2. whether others generally had access to the area;
3. whether the objects searched were the personal effects of the individual unavailable to consent.

Discussion: The defense argued that the mother did not have the authority to consent to the search of the room merely because she cleaned it. The defense relied on People v. Nunn, 304 N.E.2d 81 (1973) for the proposition that mere access to a premises to clean is insufficient access upon which to find authority to consent to its search. In Nunn, the Illinois Supreme Court invalidated the search of a son's room because, even though his mother had access to the room to clean it, the son had locked the door when he left before the search and had told his mother not to let anyone enter. The court found it apparent from the precautions taken that the son believed the locked room would not be entered. The Florida Supreme Court distinguished this case from Nunn, by stating, "No such precautions or other exhibition of expectation of privacy by Preston in those articles which were left out in the open in his room are apparent from the facts established here. Preston was obviously aware of his mother's access to the particular items seized here as well as anything within the regular scope of her cleaning activities. Thus, we agree with the district court of appeal's conclusion that he had no reasonable expectation of privacy in those items."

Moninger v. State, 32 Fla. L. Weekly D174 (Fla. 2d DCA 2007): **Agent of the State**

Where officers and child protective investigator responded to sexual battery complaint at defendant's residence, officer and child protective investigator told victim, defendant's fifteen-year-old daughter to go inside and start packing her belongings because she was going to be removed from the home, and the officer told victim that she could remove from defendant's bedroom two condoms defendant had allegedly used and gave victim a bag in which to place the condoms, victim was acting as a state agent when she retrieved the condoms used from defendant's bedroom and gave them to officer.

When victim retrieved the condoms, she was not acting for her own purposes, but was acting as an agent of the state.

Discussion: This is a very interesting case. The state tried to get around the state agent argument by pointing out that the officer told the victim she could retrieve the condoms if she wanted to. The court did not buy this distinction. If the police had obtained valid consent from the victim or the suspect, the search

would have been okay. A minor can technically grant consent for an officer to search a home, but the officers never asked her for consent. Since the suspect was present in the yard, he certainly could have overridden any consent given by the victim. The better course of action would have been ask the suspect for consent and obtain a warrant if he refused. Had the suspect not been present at the time of the search, the police could have obtained valid consent from the victim as long as they property tested her common authority and control over the place where the condoms were found.

Marganet v. State, 31 Fla. L. Weekly D950 (Fla. 5th DCA 2006): **Girlfriend in Motel Room**

Defendant's girlfriend lacked actual or apparent authority to consent to search of defendant's shaving kit located inside suitcase which was inside hotel room; items involved in search, suitcase and shaving case, were personal to user, girlfriend identified items as belonging to defendant, testimony also made clear that contents were wholly male, girlfriend seemed uncertain of contents of suitcase, which was closed and sitting against wall, there was no indication that she had been given permission to access either item or that she mutually used either item, and girlfriend informed police that defendant was hiding drugs from her and that they might be hidden in suitcase or shaving kit.

When police are told by a third party that the property belongs to another, the officers are obligated to make inquiries sufficient to establish that the person consenting to the search has both common control over the property and mutual use of it.

For purposes of searches of closed containers, mere possession of the container by a third party does not necessarily give rise to a reasonable belief that the third party has authority to consent to a search of its contents.

Silva v. State, 344 So.2d 559 (Fla. 1977): **One Party Objects**

Facts: Defendant hit his live-in girlfriend in the mouth. She fled the residence and called the police. She told the police that the defendant hit her and that he was a convicted felon and had guns in his closet. When the police arrived, the girlfriend let them into the house. The defendant told them not to search his closet, but the girlfriend told them they could.

Holding:

- Though joint occupant has authority to consent to a search of jointly held premises if the other party is unavailable, joint occupant does not have such authority if the other party is present and objects, particularly if the police are aware that such objecting party is the one whose constitutional rights are at stake.

Discussion: This is the first Florida Supreme Court case to address the issue of whether the police can conduct a search when one party consents and the other objects.

Bernovich v. State, 272 So.2d 505 (Fla. 1973):

Facts: After the defendant raped a woman, his wife found a knife, gun and stocking mask related to the crime in the defendant's car. The wife drove the car to her father's home and told him of the contents. The father inspected the items, put them back under the seat and then called the police, advising them of the articles and that they should see them. Upon the officers' arrival, the father advised them that the articles were in the car and the father went to the car and removed them and handed them to the police.

Holding: The evidence was recovered by a private individual without active participation by the police, therefore, Fourth Amendment protections do not apply.

Rivers v. State, 226 So.2d 337 (Fla. 1969):

Facts: The defendant confessed to murdering the victim and burying her in a shallow grave. After finding the body, the police went to the defendant's grandfather's house where the defendant lived. The grandfather signed a waiver of consent to search the room where they found the gun that fired the fatal shot and some of the victim's personal belongings.

Holding:

- Defendant's motion to suppress certain evidence taken from room where he slept in his grandfather's house was properly denied where defendant's grandfather signed waiver of consent and allowed officers to search room, and evidence established that although defendant customarily slept in that room, it was not exclusively his and other members of family had free use of room.

State v. Miyasato, 26 Fla. L. Weekly D698 (Fla. 2d DCA 2001): **Mother-Adult Son**

Facts: The suspect was a twenty-three year old man who lived in a bedroom in his parent's house with his girlfriend and their infant child. He did not work or pay his mother rent, although he did occasionally purchase food for the household. There was not rental agreement between him and his mother. Deputies were told the suspect had marijuana, so they went to his house and found him playing basketball in the driveway. The deputy noticed a plastic bag sticking out of his pocket and arrested him for possession. Another deputy contemporaneously asked his mother if he could search the son's room for marijuana. The mother consented to the search. Marijuana was then found in a dresser drawer in the son's room.

Holding:

- The record did not establish that the mother had actual or apparent authority to authorize a search of her son's personal effects inside his desk. The police did not determine that she owned or used the desk or had regular access to its contents.

- Even if police had determined that the mother regularly cleaned the desk drawer, it is questionable whether that would have been sufficient common authority to validate her consent to search.

Discussion: This case has some troubling language for the prosecution. In dicta, the court noted that because the suspect "was present at the time of this search, we question whether the deputies were authorized to obtain consent to search his room from his mother, at least upon the limited information the deputies received from the mother about her access and control over that room." This observation is clearly contrary to the federal interpretation of Matlock. The court also noted, "If Mr. Miyasato had been an eighteen-year-old high school student who had not yet established independence from his family, the result might be different. We do not have to decide that question today."

Leonard v. State, 659 So.2d 1210 (Fla. 4th DCA 1995): **Grandmother-Adult Son**

Facts: While the defendant was in custody on murder charges, the police went to his home and asked his grandmother if they could search his room for evidence. The grandmother, who also lived at the house, consented and the police found their evidence.

Holding:

- Grandmother had authority to consent to search of grandson's room within apartment rented by grandmother, though grandson was in custody at time of search, where grandson was nonetheless absent and did not object, and where grandmother was responsible for doing grandson's laundry and picking up his room.

Discussion: The appellate court rejected the defense argument that since the defendant was available to consent, the police had no right to go directly to the grandmother.

Cooper v. State, 492 So.2d 1059 (Fla. 1986): **Stepfather-Son previously moved**

Facts: The defendant was in custody for murder. The police learned from a cellmate that the defendant had placed the ski mask he was wearing at the time of the offense in a box in the closet of his stepfather's house where he had lived at the time of the offense. The police went to the stepfather's house and said they were looking for the mask in the closet. The stepfather let them inside to search for the mask. The police found the mask in a box in the closet. The stepfather later testified that he let the police in because he thought the defendant had authorized it. The police testified that they never told them who told them about the mask in the closet.

Holding:

- Defendant did not have reasonable expectation of privacy in bedroom he had formerly occupied in his stepfather's house, and thus his stepfather could consent to search of closet in which ski mask was found, where, because he had been arrested for murders committed when he allegedly was wearing ski mask, and had confessed to participation in them, it was not reasonable for defendant to expect that room he had occupied would not be searched and there was no evidence that he requested or desired his belongings to be kept in storage until he returned.

Discussion: The court noted that the defendant had not lived at the house for ten months when the search was conducted and he had no reasonable expectation that his room would be left undisturbed for that period of time. He never made any arrangements to have his belongings secured or placed in storage during that period of time either.

State v. Scott, 26 Fla. L. Weekly D22 (Fla. 3d DCA 2001): **Common Authority Girlfriend**

Facts: A shooting victim told the police that her assailant was her boyfriend with whom she had lived for five months. She told the police that she paid most of the bills and living expenses and had purchased furniture and appliances for their residence. She had also provided the defendant's address as her home address when she was treated at the hospital. She agreed to allow the police into the home, where they found evidence of the crime. The defendant objected to the search, saying that he had lived there all his life and the victim only occasionally slept there. He testified that her interests were hostile to his and she therefore did not have the right to waive his fourth amendment rights and consent to the search.

Holding:

- Even though the police were wrong in their belief that the victim lived at defendant's residence, the consent was valid because the facts available to the officer at the moment of the search warranted a man of reasonable caution in the belief that the consenting party had authority over the premises.

Discussion: Another interesting point addressed in this case was the defendant's reliance on State v. Gonzalez-Valle and Silva v. State, for the proposition that the victim's hostile interests toward the defendant precluded her giving consent to search his residence. The court noted that both of these opinions were decided prior to the conformity clause of 1982 and are therefore no longer valid.

Hampton v. State, 662 So.2d 992 (Fla. 2d DCA 1995): **Minor**

Facts: After police were notified that suspect had given bag of cocaine to medical technician summoned to respond to a seizure experienced by suspect's wife, police had called at suspect's trailer home, son answered stating that he lived there with parents, police confirmed statement by examining his driver's license, son signed consent form and allowed officers to search, showing his maturity and authority over premises by volunteering to secure family pit bull dog and several firearms within trailer.

Holding:

- Sixteen-year-old son of drug suspect had authority to consent to police search of suspect's trailer house;

- To establish constructive possession of contraband, state must prove

(1) accused's dominion and control over contraband, (2) accused's knowledge that contraband was within his or her presence, and (3) accused's knowledge of illicit nature of contraband.

State v. S.B., 758 So.2d 1253 (Fla. 4th DCA 2000): **Objecting Minor**

Facts: Minor son was arrested for a drug offense. Father, who did not live at home with the mother and son, came to the scene and allowed the police to search son's room even though the son objected to the search.

Holding:

- Nonresident father, by virtue of his ownership and authority to enter home in which his juvenile son lived, could consent to search of home.

- Father's consent to search of juvenile son's bedroom in home owned by father overrode juvenile's objection to search.

Discussion: This is a case of first impression in Florida. The first issue is whether the father could consent to a search of a house where he did not reside. The court ruled that since the father owned the house and possessed the keys to it, he could consent even though he did not live there with the wife and son. The second issue is whether the father could give consent to search the son's room even though the son objected. The son had been arrested for selling cannabis and the father consented to allow the police to search the child's room over the child's objection. Citing opinions from various other states, the court ruled that the father could give valid consent.

State v. Martin, 635 So.2d 1036 (Fla. 3rd DCA 1994): **Wife**

Facts: The police arrested the defendant outside of his home for his involvement in a home invasion robbery. They then asked the wife if they could search the home for the stolen property. She consented to the search. When the detective found a jewelry bag in the master closet, he asked whose bag it was and the wife responded she had never seen it. The stolen jewelry was found in the bag.

Holding:

- Scope of defendant's wife's consent to warrantless search of their residence following arrest of defendant outside home extended to jewelry bag found in master bedroom closet, where not only did wife have actual authority by virtue of her marital relationship to defendant,

she had joint control over commonly held areas, where bedroom closet was not set aside for defendant's exclusive use, but was shared by both defendant and his wife, and where wife was told that police officers wanted to search apartment for property stolen in home invasion robbery.

- Statement by defendant's wife who had consented to warrantless search of their residence that she had not seen jewelry bag found in master bedroom closet did not invalidate her consent to search, where wife had been told that police officers were looking for property stolen in home invasion robbery.

- Where defendant was asked shortly after his arrest where he had put contraband, and made no response to being informed that his wife had given her consent to their apartment being searched, consent search was valid.

Discussion: The court held that the fact that the wife had never seen the bag did not invalidate the scope of the consent search. The court also held that because the wife consented to a search for stolen property, the police could look anywhere that the property could be found. It should be noted that if the defendant had objected to the search, it would have been illegal.

Smith v. State, 465 So.2d 603 (Fla. 3rd DCA 1985): **Suspect at Station Objects-Sister at Home Consents**

Facts: The defendant was taken to the police station to be questioned about a murder. He denied shooting the victim and refused permission to conduct a warrantless search of his home. After his refusal, but while he was still being questioned, a detective went to his house and asked his sister if he could search the house. The sister consented and the detective found relevant evidence in the attic.

Holding:

- Defendant's refusal to permit warrantless search of his home invalidated his sister's subsequent consent, although defendant was not physically present on the premises when he objected to the search.

- Although joint occupants may consent to a search of their premises, where consent is refused by parties against whom search is directed, any subsequent consent by other joint occupant is invalid.

Discussion: The state argued that the fact that the defendant was not present at the home when he objected to the search made the sister's consent valid. The court rejected this contention because the police had detained him at the police station. If the police had simply not asked the defendant, the sister' search would likely have been valid. See Leonard v. State, 659 So.2d 1210 (Fla. 4th DCA 1995), Cooper v. State, 492 So.2d 1059 (Fla. 1986), and Preston v. State, 444 So.2d 939 (Fla. 1984).

Other Cases

Findley v. State, 25 Fla. L. Weekly D2609 (Fla. 2d DCA 2000):

> Defendant's 12-year-daughter did not have authority to consent to search of residence where parent was present.

Taylor v. State, 386 So.2d 825 (Fla. 3rd DCA 1980):

> Twenty-one year old defendant who lived with father could validly give consent to search of home owned by father.

Mitchell v. State, 558 So.2d 72 (Fla. 2d DCA 1992):

> Warrantless search of marital home and resultant seizure of cocaine and paraphernalia was illegal, although wife called police to home and told them where they could find cocaine belonging to defendant, where defendant was present and objected to warrantless search of home.

Dees v. State, 291 So.2d 195 (Fla. 1974):

> Where wife voluntarily turned over to officer certain items and consented to search of residence, warrantless search of residence was proper even though residence was in name of husband who was under arrest and officers had adequate time to obtain warrant.

Lenz v. Winburn, 51 F.3d 1540 (11th Cir. 1995): **(Minor)**

> Minor child's consent to guardian ad litem's entry of residence child shared with her father and grandparents represented valid consent by one with common authority over premises, thus precluding grandparents' Fourth Amendment claim against guardian ad litem, who

accompanied social worker to residence to retrieve some belongings of child, who was being removed from custody of her father.

Friends or Bailee Granting Consent

United States v. Bean, (8th Cir. 2003):

Facts: Defendant left an envelop containing several CDs in a sealed envelope with a friend. The envelope was marked "confidential" and he told the friend he wanted to keep it for him as storage. While incarcerated for another offense, the defendant wrote a letter to his friend, asking him to destroy the disks. The letter was intercepted and the police went to the friend's house to see about the CDs. The friend allowed the officers to take the disks and look at them. Child pornography was found on the disks.

Holding:

- The friend did not have common authority over the disks sufficient to consent to a search by law enforcement.
- By asking the friend to destroy the CDs, the defendant did not abandon the CDs.
- When a person entrusts material to a friend or bailee for storage purposes, the other party does not have authority to consent to a search of the material.

Hearsay: Testimony Concerning Consent to Search is Non-Hearsay

Dawson v. State, 34 Fla. L. Weekly D2535 (Fla. 5th DCA 2009)

"There is nothing in chapter 934 pertaining to security of communications which suggests that the consent must be proven only by the testimony of the consenting party.... [T]he deputy's testimony that [the informant] consented to the intercept sufficed to permit the introduction of the tape recordings.")

Lara v. State, 464 So.2d 1173 (Fla. 1985):

Hearsay evidence establishing murder victim's boyfriend consented to the search of victim's apartment was properly admitted at defendant's suppression hearing, even though boyfriend was unavailable for cross-examination.

Palmer v. State, 448 So.2d 55 (Fla. 5th DCA 1984):

Holding:

- Consent given by defendant's wife to search premises was a verbal act and not an out-of-court statement offered to prove the truth of the matter contained therein and, hence, officer who searched premises and discovered outboard motor could testify over hearsay objection that wife consented to search, at least where no issue was raised as to her authority to give such consent.

Discussion: This case presents a common dilemma wherein consent to search a home is provided by a spouse or other family member who later regrets the decision and either recants or refuses to testify regarding the consent. According to the Palmer opinion, the State must be prepared to present evidence at trial that the police search was pursuant to valid consent. Fortunately, the State does not actually need to present the person who gave the consent. The court noted, however, that another valid issue might have existed concerning whether the wife had standing to give the consent, but that issue was never made.

Hospital Searches

Jones v. State, 648 So.2d 669 (Fla. 1994):

Facts: The defendant killed a man and took his truck. The defendant subsequently wrecked the truck and was taken to the hospital. When the police were investigating the disappearance of the victim, they went to the victim's hospital room to question him. There were informed by hospital personnel that the defendant's clothing had been removed and placed in a paper bag in his room. After speaking with the defendant, the police seized the bag of clothing from his room. Subsequent incriminating evidence was found on the clothing. The police also retrieved some cash and lottery tickets that were being held by hospital security.

Holding:

- In order to challenge a search, defendant must demonstrate that he or she had reasonable expectation of privacy in premises or property searched, but in order to challenge a seizure, defendant need only establish that seizure interfered with his or her constitutionally protected possessory interests.

- Even if privacy interests of defendant while he was in hospital were in no way compromised, there was meaningful interference with his constitutionally protected possessory rights when his personal effects were seized without warrant from hospital room.

- Even though hospital staff generally has joint access to and control of personal effects kept in patient's room, staff cannot consent to search or seizure of effects, as it has no right to mutual use of patient's belongings.

- Hospital security, acting, as bailee of patient's belongings, has no authority to release belongings without patient's authorization.

Discussion: The State argued every search warrant exception possible, but the court shot down each one. First, the court distinguished between the legitimate expectation of privacy that pertains to searches and the possessory interests in property that pertains to seizures. The court then ruled out the plain view doctrine, open view doctrine and exigent circumstances. Thankfully, the error was ruled harmless.

Hotel and Motel Searches

General Rules:

- A hotel or motel room is generally treated the same as a home.
- A hotel or motel room is considered a private dwelling if the occupant is there legally, has paid or arranged to pay, and has not been asked to leave.
- Even though a cleaning lady or a hotel manager may have implied consent to enter a room for specific purposes, the police must have express consent.
- Manager or cleaning lady cannot invite police into room after they discover contraband. A search warrant must be obtained.
- A security guard cannot break into a guest's room against his wishes.
- A guest maintains his privacy rights until it is clear he has abandoned the room. Presence of his personal affects in the room raises a presumption that he intends to return.

Stoner v. California, 84 S.Ct. 889 (1964):

Facts: The suspect robbed a food market at gunpoint. The police located evidence showing that the defendant had rented a room at a local motel. The

police approached the motel clerk and advised him they were there to arrest the suspect. The clerk indicated that the suspect was still checked in at the motel, but not currently present. The clerk then gave them permission to search the suspect's room and unlocked the door for them. Several items of incriminating evidence were located in the room.

Holding:

- A search can be incident to an arrest only if it is substantially contemporaneous with the arrest and is confined to the immediate vicinity of the arrest. The search in this case was completely unrelated to the arrest, both as to time and as to place.

- When a person engages a hotel room, he gives implied or express permission to such persons as maids, janitors, or repairmen to enter the room in performance of their duties, however, the night clerk at the hotel had no authority to give police officers permission to search the hotel room of the absent guest without search warrant.

Discussion: This is a commonly cited case concerning consensual searches of hotel and motel rooms. The State argued that they a search incident to arrest and additionally executed a proper consent search. The Supreme Court rejected both arguments, especially since the defendant was not arrested until two days later in a different state. Be careful not to apply case law dealing with consensual searches of private dwellings to hotel and motel cases. If a resident of a home has common authority over the place to be searched, he or she can give consent to search it. On the other hand, a motel employee cannot grant the same scope of consent. The Court also discussed a case bridging the gap between homes and hotels. Chapman v. State, 81 S.Ct. 776. The Chapman opinion held that a search by police officers of a house occupied by a tenant invaded the tenant's constitutional right, even though the search was authorized by the owner of the house, who presumably had not only apparent but actual authority to enter the house for some purposes, such as to "view waste." The Court pointed out that the officers' purpose in entering was not to view waste but to search for distilling equipment, and concluded that to uphold such a search without a warrant would leave tenants' homes secure only in the discretion of their landlord's.

Sheff v. State, 329 So.2d 270 (Fla. 1976):

Facts: A cleaning maid at a motel discovered marijuana in an open suitcase in

the defendant's room while she was cleaning it. She notified the manager and owner and they both entered the room to view it. The owner called the police to the scene and invited them into the room to view the suspected marijuana. The police confirmed it was marijuana. A search warrant was later obtained to search the rest of the room and additional items were found.

Holding:

- The police officers' warrantless entry of the motel room and subsequent seizure of the suitcase by a police detective were illegal.

- While a motel guest impliedly consents to entries by employees for the performance of their customary duties, consent to an entry by the police must be express.

- Since the Fourth Amendment protects only against governmental intrusions, the actions of the maid, manager and owner did not violate any constitutional rights.

- Warrant to search defendant's motel room was valid in spite of the illegal entry because the information obtained from the motel manager and the defendant's subsequent flight from the scene were sufficient probable cause independent of the illegal entry.

Discussion: Several other issues were discussed in this case. For instance, when the defendant saw the police at his room, he fled from the parking lot. A police officer followed him, stopped him, and ordered him to return to the motel. While returning to the motel, the officer saw him throw a bag of marijuana from the window. The officer then approached the car and noticed marijuana in plain view in the car. The court ruled that the officer reasonably believed a felony was being committed by the defendant was thus justified in detaining him.

Green v. State, 27 Fla. L. Weekly D1927 (Fla. 1st DCA 2002):

Facts: Owner informed defendant that his right to the hotel room had terminated for failure to pay daily room rent, and denied him entry. The owner subsequently invited a deputy into the room who discovered cocaine.

Holding:

- Since the room was no longer the defendant's by the time that the deputy entered, the no Fourth Amendment violation took place.

Marganet v. State, 31 Fla. L. Weekly D950 (Fla. 5th DCA 2006):

Defendant's girlfriend had actual authority to consent to search of hotel room because she and defendant had shared use and joint access to or control over shared area.

Williams v. State, 25 Fla. L. Weekly D1326 (Fla. 5th DCA 2001):

Facts: The police received several complaints regarding the sale of drugs from a specific motel room. The police went to the room to conduct a "knock and talk." A detective knocked on the door and announced his presence. A woman opened the door and said, "come in." The detective noticed a man on the bed taking something out of the drawer and putting it into his mouth. A struggled ensued and narcotics were found. The defense argued that the woman did not have apparent authority to enter the room.

Holding:

- Mere consent to an officer's entry is not, standing alone, sufficient to justify the officer's belief that the person giving consent has the authority to do so.

- The police, based on nothing more than an unidentified woman with no known connection to the motel room other than her act of opening the door, concluded that she had the actual or apparent authority to consent to such entry. That conclusion was unsupported by the facts then known to the police officers.

Discussion: The police would have been all right if they has simply asked her who she was and what her standing was concerning the room. An interesting footnote says,

> *Although it was later determined that Quain (the woman) was the manager of the motel and was William' girlfriend, the police did not know this at the time they entered the motel room. As such, these facts cannot be considered in determining Quain's authority because Rodriguez requires the court to make that determination based upon the facts available to the officer the time of entry.*

Morse v. State, 604 So.2d 496 (Fla. 1st DCA 1992):

Facts: The defendant rented a room at the Destination Motel. Deputy Sheriff's investigating a burglary developed the defendant into a suspect. When the motel manager learned of this, he gave the defendant thirty minutes to pack and leave or he would call the police. The manager called the deputy to inform him that the defendant had been evicted and that he had packed his car and left. The deputy went to the motel and the manager let him into the room to search for evidence. Evidence was found in the room. The defendant left many of his personal belongings in his room and testified at the hearing that he had planned to return for them the next day.

Held:

- Verbal eviction of defendant giving him 30 minutes to leave his motel room did not justify search of room by police where it was not clear that the person who evicted defendant was actually the motel manager, the purported manager was intoxicated at the time, and the verbal eviction was invalid as a matter of law.

- Warrantless search of defendant's motel room could not be justified on the basis of abandonment where defendant left personal items such as clothing and furnishings in the room, defendant was not evicted in accordance with applicable statutes, and there was no other evidence of intent on defendant's part to relinquish control over the room.

- Good faith exception to exclusionary rule did not apply to validate warrantless search of defendant's motel room where officer claimed that he reasonably but mistakenly believed defendant had been validly evicted but knew that purported landlord had given defendant only 30 minutes verbal notice to leave, which was invalid under state law.

- The determination of authority to consent to enter premises and conduct warrantless search is to be judged by an objective standard: given the facts available to the officer at the time of the search warrant, a person of reasonable caution must believe that the consenting party had authority over the specific premises.

- Officer could not reasonably conclude that purported motel manager who gave defendant 30 minutes notice of eviction was authorized to consent to search of defendant's motel room; the officer was presumed

to be familiar with the applicable law, which did not authorize such an eviction.

Discussion: This opinion is a very valuable resource tool for consent searches and abandonment searches. There is an extensive discussion of both state and federal case law concerning consent searches. The main lesson here is that the officer always needs to inquire about the consenter's authority to provide valid consent of a residence. In this case, the court thought a reasonable officer should have known that the landlord couldn't evict a tenant with 30 minutes notice. The officer should also have known that the room was not abandoned when he saw many of the defendant's personal belongings in the room. The appellate court relied heavily on Blanco v. State, 438 So.2d 404 (Fla. 4th DCA 1983), which dealt with similar facts and issues.

Sturdivant v. State, 578 So.2d 869 (Fla. 2d DCA 1991):

Facts: The defendant's ex-girlfriend notified the police that the defendant was dealing in cocaine. She agreed to meet with the defendant in his motel room and then signal the police when she observed contraband. She would then let the officers in the room. After she was invited into the room by the defendant, they had some sort of disagreement and he twice told her to "get the H out of there." It was only after she inquired if he meant it that she opened the door. The police entered the room, arrested the defendant, and seized the evidence.

Holding:

- Hotel room or motel room is the private dwelling of the occupant and the constitutional protections of the Fourth Amendment apply to transient guests.

- Fourth Amendment prohibits warrantless and nonconsensual entry of lawfully occupied motel room for the purpose of making a felony arrest, absent exigent circumstances.

- Defendant's former girlfriend, as an invitee of defendant in motel room, did not have implied consent to open the door and allow officers to enter where the defendant had twice told her to "get the H out of there" and it was only after she inquired as to whether he really meant it that she opened the door; she no longer had implied consent to be in the room or to return when she left.

Cooper v. State, 706 So.2d 369 (Fla. 2d DCA 1998):

Facts: A detective was investigating auto burglaries at a motel when his attention was drawn to room 204. He learned from the manager that the room was rented to an adult woman, but it was occupied by two adult males. The detective knocked on the door of room 204 and it was opened by a 15-year-old girl. The detective identified himself and said he was looking for the occupants of the room. He asked if he could come inside and the girl allowed him to enter. Once inside the room, the detective saw items matching the description of the items stolen in the burglaries. He woke up the defendant and got consent from him to search the room. It was later learned that the girl was not an occupant of the room and did not have a key to it. She was a friend of a friend of the occupants and just happened to be present with the detective knocked on the door.

Holding:

- Minor friend of a friend of occupants of motel room did not actually possess common authority over premises to consent to detective's warrantless entry into room; minor was not occupant of room and did not have a key to it.

- Detective's warrantless entry into motel room was not rendered valid by consent given by minor girl who answered door as detective could not have reasonably believed she possessed common authority over premises.

- Mere fact that an unknown person opens motel room door when a police officer knocks cannot, standing alone, support a reasonable belief that the person possesses authority to consent to officer's entry.

- Even when police are aware of a minor's identity and know that he is an occupant of the home police seek to enter, the very fact that he is a minor calls for further inquiry before police may reasonably believe that minor possesses authority to grant police entry.

Discussion: The detective testified at the hearing that he never questioned the girl's authority to grant him entry, but instead felt that he had no reason to believe that she did not have that authority. He acknowledged that his belief that she had common authority over the room was based simply on the fact that she had opened the door. He never ascertained her age, how long she had been staying there, or whether she had a key. The court notes that when a minor answers a door, the police need to be especially careful to inquire about

the child's common authority over the premises.

Wassmer v. State, 565 So.2d 856 (Fla. 2d DCA 1990):

Facts: A security guard at Days Inn saw a man walk into the defendant's hotel room. The hotel had previously given the man a trespass warning because of his disruptive behavior. The security guard called the police to have the man removed. When the police arrived, the defendant knocked on the security guard knocked on the door. When the defendant refused to open the door, the security guard used his passkey to open it. Once inside the police found drugs and paraphernalia.

Holding:

- Neither a motel manager nor security guard have the power to violate a guest's Fourth Amendment Rights by forcing open the door of the guest who refuses to open it, therefore, the evidence found was illegal.
- A hotel or motel room is considered a private dwelling if the occupant is there legally, has paid or arranged to pay, and has not been asked to leave.

Discussion: The appellate court referred to McGibiany v. State, 399 So.2d 125 (Fla. 1st DCA 1981), which involved a motel manager who went to investigate the occupancy of an officially vacant room. An off-duty police officer, who was working as a hotel security guard, went along to protect her. Before they realized that the room was lawfully occupied, they found contraband inside it. The First District held that since a police officer accompanied the manager and participated in the search, all constitutional restrictions applied. Even though the manager had a right to enter the room, the officer only had a right to stand at the threshold of the door, ensuring the manager's safety. The Wassmer court distinguished this case by noting that the manager in McGibiany was investigating what was thought to be the unlawful occupancy of a vacant room, but the security guard in this case had no similar right because he knew the room was lawfully rented to the defendant. The fact that a law enforcement officer participated in the search kicked in the Fourth Amendment protections.

Hackett v. State, 386 So.2d 35 (Fla. 2d DCA 1980):

Facts: The defendant and his wife rented a motel room. When they checked out, they did not pay their full bill. The manager gave them until the next day to pay the remainder of their bill. He placed their luggage in storage until their

return. When the defendant did not contact him the next day, the manager called the police. The police came to the motel and searched through the defendant's luggage, looking for identification. During the search, they found drugs. They later found the defendant and his wife at another motel and asked them to come back to the police station to discuss their failure to pay their bill. While questioning the defendant, they asked him if he would consent to a search of his luggage. The defendant signed a consent to search form and the police found the drugs they had previously seen.

Holding:

- Warrantless search of defendant's luggage was illegal.

- Defendant, who had left his luggage at motel and informed motel owner that he would return to pay his bill, did not "abandon" his luggage by his failure to return by the following afternoon in that he had at all times exhibited an intention to return for his luggage as soon as he had obtained funds to pay his outstanding bill and had in effect left luggage as collateral, and thus, warrantless search of luggage by police was not justified.

- Where defendant was being investigated for defrauding an innkeeper, offense for which he was never arrested or charged, and was at police station during his interrogation and was not free to leave, defendant was in a coercive setting, and thus, his consent to a search of his luggage, which had earlier been illegally searched by police, was not voluntary and did not purge the taint of illegality.

Paty v. State, 276 So.2d 195 (Fla. 4th DCA 1973):

Facts: A cleaning lady saw what she believed to be marijuana in the defendant's motel room, so she called the police. When notified of the fact, the defendant fled from the room carrying a footlocker and ran across the street and into a nearby dwelling. An officer responded in a few minutes and entered the defendant's room. He noted the defendant's jacket and motorcycle helmet, and on the floor a brown paper bag containing what he believed to be marijuana. The defendant returned to the room shortly thereafter and was arrested by the officer. A second officer entered the room and found marijuana in a dresser drawer.

Holding:

- Where defendant had advised motel manager that he wished to have the

room for another day, he left in the room his jacket and motorcycle helmet, and left parked outside of the room his motorbike at time he fled from the room carrying a footlocker, and he returned a few minutes later, and there was no evidence to indicate that had he not been arrested for possession of marijuana he would not have remained in the room for some additional period of time, defendant had not abandoned the premises and warrantless search of the room was not validated by the consent of the motel owner.

Discussion: The appellate court ruled primarily based upon the authority of two federal opinions regarding abandonment: Abel v. United States, 80 S.Ct. 683 (1960) and United States v. Manning, 440 F.2d 1105 (5th Cir. 1971).

Knowledge of the Right to Refuse Consent

General Rules:

- The police do not have to advise a person of their right to refuse consent as long as the consent is free and voluntary.
- Advising someone of his right to refuse to consent helps dissipate the taint of prior illegal conduct on the part of the officer.

Schneckloth v. Bustamonte, 93 S.Ct. 2041 (1973):

Facts: A police officer stopped the defendant for a traffic infraction. Six men were in the car, but only one had identification. After the six men stepped out of the car at the officer's request, and two additional police officers arrived, the officer asked the driver if he could search the car. The driver responded, "Sure, go ahead." Prior to the search, no threats of arrest were made and everyone was congenial. When the police opened the trunk, they found three checks that had previously been stolen from a car wash.

Holding:

- When the subject of a search is not in custody and the state attempts to justify search on the basis of his consent, the Fourth and Fourteenth Amendments require that it demonstrate that the consent was in fact voluntarily given, and not the result of duress or coercion, express or implied.

- While knowledge of a right to refuse consent is a factor to be taken into

account, the State need not prove that the one giving permission to search knew that he had a right to withhold his consent.

Discussion: Whether a consent to search is voluntary is based upon the totality of circumstances. The suspect's knowledge of is right to refuse is one factor to be considered, but it is not dispositive of the issue. This issue is also discussed in United States v. Matlock, 94 S.Ct. 988 (1974).

Motivations of the Consenting Party

Bertolotti v. State, 476 So.2d 130 (Fla. 1985):

Facts: The defendant brutally murdered a woman. His live-in girlfriend suspected his involvement in the crime and called Crime Stoppers. She then gave the police consent to search their shared apartment and they found the bloodstained pants the defendant used on the day of the murder. The defendant argued that she became an agent of the state when she accepted the one thousand dollar award.

Holding:

- Girl friend's expectations and ultimate receipt of $1,000 reward through police-operated "crime watch" program did not make her in effect a police agent and did not vitiate girl friend's consent to search of common living area under joint control of she and defendant on theory that the consent to search was itself a state intrusion into defendant's zone of privacy.

State v. Radcliffe, 483 So.2d 95 (Fla. 5th DCA 1986):

Facts: The roommate was arrested in the yard of his home. When arrested, he told the officer that since he was in trouble, he wanted to "bring someone else along with him." He then invited the officer into the house where drugs were found in common areas.

Holding:

- Roommate who jointly occupied trailer with defendant could give valid consent in defendant's absence to search of jointly controlled areas of trailer where defendant had no reasonable expectation of privacy, even though roommate's actions were motivated by hostility.

Discussion: The main issue in this case was whether the roommate's hostile motives invalidated the consent. The 5th DCA held that the motives were basically irrelevant, but noted that the 3rd DCA held otherwise in State v. Gonzalez-Valle, 385 So.2d 681 (Fla. 3rd DCA 1980). In the Gonzalez-Valle case, the defendant's wife called the police to inform them that the defendant had a gun and some narcotics in his possession. A subsequent consent search revealed a gun and narcotics. At the motion to suppress, it was revealed that the wife's consent was motivated by her anger and jealousy directed against her husband because of his marital infidelity. The court ruled that the wife's motivation was relevant and suppressed the search. The 5th DCA distinguished the present case by noting that it did not involve a husband-wife relationship and further observed that the Gonzalez-Valle court misinterpreted Florida Supreme Court precedent.

Nonverbal Consent to Entry of Home

Byrd v. State, 481 So.2d 468 (Fla. 1985):

Facts: The police developed probable cause to arrest the defendant for killing his wife. The defendant had previously given a statement to the police denying involvement in the murder. When the police arrived at the defendant's house to make a probable cause arrest, "[O]ne of the arresting officers knocked on appellant's door, identified himself to appellants through a window, and mentioned that he had previously spoken to him with regard to the death of appellant's wife. After a few seconds appellant opened the door and stepped back. Id. At 470

Holding:

- Warrantless arrest of defendant at threshold of his residence was result of consensual entry, where defendant knew arresting officer, who had identified himself and requested admission, and where defendant voluntarily opened door and stepped back to admit officers.

- Warrantless arrest is result of consensual entry, at least with respect to area immediately surrounding threshold or vestibule entrance of defendant's residence, where there is no forced entry or deception and defendant knows who is asking for admission and then opens the door, particularly where defendant makes no objection.

Discussion: The Florida Supreme Court ruled that this qualified as consent to

entry. Please note that pursuant to Payton v. New York, 100 S.Ct. 1371 (1980), an officer cannot enter a defendant's home to make an arrest without a search warrant or exigent circumstances.

One Party Objection to Search

Although both Florida and federal courts are bound to follow United States Supreme Court precedent on 4th Amendment issues, the two sovereigns seem to be interpreting United States v. Matlock in different ways. The federal courts frequently rule that a party sharing equal rights over property can consent to its search even if the other party is present and objects. It is only when the objector has superior possessory rights that he can override the third party's consent. See U.S. v. Sumlin, 567 F.2d 684 (6th Cir. 1977); United States v. Baldwin, 644 F.2d 381 (5th Cir. 1981); United States v. Morning, 64 F.3d 531 (9th Cir. 1995); United States v. Hendrix, 595 F.2d 883 (D.C. Cir. 1979); Lenz v. Winburn, 51 F.3d 1540 (11th Cir. 1995); United States v. Donlin, 982 F.2d 31 (1st Cir. 1992); United States v. Morales, 861 F.2d 396 (3d Cir. 1988); United States v. Esparaza, 162 F.3d 978 (8th Cir. 1998) (*police may not rely on third party's consent to intentionally bypass a person who is present, has a superior privacy interest in the premises, and actively objects to the search.)*

The Florida Supreme Court first addressed the issue in Silva v. State, 344 So.2d 559 (Fla. 1977) and later adopted it again in Saavedra v. State, 622 So.2d 952 (Fla. 1993). The Florida Courts hold that a present party can object to the search, especially when he is the subject of the investigation. The relevant language from the Matlock opinion is "Consent to a warrantless search by one who possesses common authority or other sufficient relationship to the premises or effect sought to be inspected is valid as against absent, nonconsenting person with whom that authority is shared." The federal courts interpret this clause differently from the state courts. Silva, Saavedra, and Matlock are all discussed above.

It should be noted that Georgia v. Randolph has thrown a new twist into the equation. In limited situations where both parties are present at the door when the consent is sought, the present objecting party prevails. Subsequent decisions have limited Randolph to a fairly narrow fact situation.

Georgia v. Randolph, 547 U.S. 103, 126 S.Ct. 1515, 164 L.Ed.2d 208 (2006)

> Warrantless search of marital residence, on basis of consent given to police by defendant's wife, was unreasonable and invalid as to defendant, who was physically present and expressly refused to consent.

U.S v. King, 604 F.3d 125 (3rd Cir. 2010):

Defendant's objection to seizure of his hard drive was insufficient to overcome tenant's consent to seizure of her computer, into which defendant had placed hard drive, and seizure of hard drive thus did not violate Fourth Amendment and evidence derived therefrom was admissible in prosecution for interstate transportation to engage in sex with a minor; defendant relinquished his privacy in hard drive with respect to tenant by placing hard drive inside computer that tenant owned, and that defendant and tenant shared, without any password protection, thereby assuming the risk that tenant would consent to its seizure.

Discussion: The court distinguishes cases involving personal property with cases involving dwellings. *Georgia v. Randolph* was limited to entering a suspect's dwelling, but does not prohibit searches of personal property.

U.S. v. Henderson, 536 F.3d 776 (7th Cir. 2008):

Resident's refusal of consent for warrantless search of home was no longer effective to bar voluntary consent of co-resident, once objecting resident was validly arrested and removed from home; objecting resident was no longer both present and objecting.

U.S. v. Ryerson,

Defendant's ex-wife had a sufficient relationship with defendant's residence to have actual authority to consent to a police search of residence; ex-wife had lived with defendant and their infant daughter at the residence for ten months preceding the search, she appeared to have left on her own accord after a tiff with defendant, and even if she was moving out, she had not yet done so at the time of the search, and she left many of her own and her baby's belongings in the residence, and she and defendant co-owned and ran a taxicab company from the residence, giving her a right to access the company records kept in the basement of the residence. http://web2.westlaw.com/find/default.wl?vc=0&ordoc=2017079901&rp=%2ffind%2fdefault.wl&DB=1000546&DocName=USCOAMENDIV&FindType=L&AP=&fn=_top&rs=WLW10.06&pbc=9715D1F4&ifm=NotSet&mt=122&vr=2.0&sv=Split

Defendant's ex-wife had apparent authority to consent to a police search of the garage of defendant's residence; ex-wife had lived with defendant and their

infant daughter at the residence for ten months preceding the search, and although she claimed she was locked out of the home, defendant's agent, who was entrusted to care for the house while defendant was in jail on a probation violation, readily allowed the police and the ex-wife to enter when police first searched the residence, prior to the consent to the garage search, and during first search of residence, police observed personal items indicating that ex-wife still used the home, and she demonstrated that she was familiar enough with the residence's basement that she easily located her company's business records there.

The court rejected defendant's claim that *Georgia v. Randolph* applies because police had him in custody.

U.S. v. Lopez, 547 F.3d 397 (2d Cir. 2008):

United States marshals who were in the defendant's house to execute an arrest warrant for the defendant had no duty, after obtaining the defendant's girlfriend's consent to a search of the bedroom she shared with the defendant, to ask the defendant whether he consented to the search, even though the defendant was present in another part of the house when his girlfriend consented to the search, and thus, the search conducted pursuant to the defendant's girlfriend's consent was reasonable, where the defendant did not object to the search, and there was no indication that the marshals removed the defendant for the purpose of avoiding his potential objection, or separated him from his girlfriend in order to conceal from him that they would ask her for consent.

State v. Johnson, 9 So.3d 1084, (La.App. 5 Cir. 4/28/09)

Officers did not purposely prevented defendant from objecting to search by having him arrested before arriving to begin search, thus defendant's friend's consent to search of home was valid; officers did not remove defendant to avoid his objection to search, officers legally arrested and removed defendant based upon valid arrest warrant, and once defendant was removed, apartment lessee's consent was valid and legally permitted police to search entire residence.

U.S. v. Foster, 654 F.Supp.2d 389 (E.D.N.C.,2009)

Even if defendant had objected to police officers' search of apartment in which he was residing before fiance, as leaseholder, consented to the search, defendant's initial objection did not act as permanent veto over fiance's invitation

into apartment, since defendant was no longer physically present when fiance consented to search.

Police officers' arrest of defendant was not based on any pretext to remove him as an objecting cotenant to search of apartment in which he was residing, as would render it invalid; officers reasonably believed that defendant posed a safety threat when he became increasingly belligerent as the investigation continued, because defendant admitted purchasing stolen property and officers found him with this stolen property, officers had probable cause to arrest him for possession of stolen property and did so, and when officers arrested defendant, they planned on applying for a search warrant, such that officers had no need to remove defendant pretextually because his objection would carry no weight over a valid search warrant.

U.S. v. Hudspeth, 518 So.2d 954 (8th Cir. 2008):

Fourth Amendment was not violated when officers sought wife's consent to search home despite having received husband's previous refusal; wife was co-tenant authorized to give officers consent to search, husband was not present when officer asked wife for consent, and officer was not required to inform wife that husband, who had been arrested at his place of employment, had refused consent.

Discussion: This case presents a good discussion of the recent Supreme Court case of *Georgia v. Randolph*. The *Hudspeth* court says the defendant's refusal to provide consent to a search of his home is only valid against the consent of another occupant if he is present at the door at the time of the consented entry. Hudspeth was in jail when officers went to his home to ask his wife for consent. Even though he had already refused consent to the police, *Georgia v. Randolph* was inapplicable because he was not present and objecting at the time of the subsequent consent. The opinion gives a good overview of the previous Supreme Court cases of *U.S. v. Matlock*, *Illinois v. Rodriguez* and *Georgia v. Randolph* and reconciles them all to a consistent conclusion.

Prophet v. State, 970 So.2d 942 (4th DCA 2008):

Officers did not act unreasonably in conducting warrantless search of shared premises, pursuant to consent of two co-tenants, without obtaining consent from third co-tenant, who was physically absent from presence but was nearby at time of search, having been arrested, handcuffed, and placed in back of patrol

car.

Shingles v. State, 29 Fla. L. Weekly D1149 (Fla. 4th DCA 2004):

Facts: Defendant refused to let police search his room. Police then went to defendant's house, where he lives with his mother, and obtained her consent.

Holding: Although joint occupants may consent to a search of their premises, where consent is refused by the party against whom the search is directed, any subsequent consent by the other joint occupant is invalid.

Private Party Searches-Exceeding the Scope

There are numerous federal cases addressing the issue of how far the government can expand upon a search by a private citizen. Though not technically "consent" searches, I have included these cases in this chapter for lack of a better place to insert them. (*also see Computer Repairman Searches above)*

United States v. Jacobson, 104 S.Ct. 1652 (1984):

Facts: A Federal Express employee opened a damaged package and found several plastic bags of white powder inside a closed tube wrapped in crumpled newspaper. The employee put the bags back in the tube, put the tube and the newspapers back in the box, and then summoned federal authorities. The agent who responded to the employee's call opened the box, unpacked the bags of white powder and performed a chemical field test confirming that the white powder was cocaine.

Holding:

- The agent's actions in removing the plastic bags from the tube and visually inspecting their content "enabled the agent to learn nothing that had not previously been learned during the private search." The Court noted that "the advantage the Government gained thereby was merely avoiding the risk of a flaw in the employees' recollection," and this confirmatory examination could not violate the Fourth Amendment because "protecting against the risk of misdescription hardly advances any legitimate privacy interest."

Walter v. United States, 100 S.Ct. 2395 (1980):

Facts: packages containing pornographic filmstrips were delivered to the wrong company. Employees of the company that erroneously received the shipment opened the packages and found film canisters. The content of each film was described on the exterior of its canister. The employees opened the canisters and one employee attempted to hold the films up to the light, but was unable to observe anything about the content of the films in this manner. The recipients then contacted federal agents, who viewed the films with a film projector without obtaining a warrant to search the contents of the packages.

Holding:

- The Fourth Amendment's protections apply to a government search conducted subsequent to a private search to the extent that the government's inquiry is more intrusive or extensive than the private search.
- Prior to their projection of the films, the officers could only draw inferences regarding the content of the films based on the exterior descriptions, thus, the official search significantly expanded on the private search by confirming the actual content of the films.

United States v. Runyan, 275 F.3d 449 (Fla. 5th DCA 2002):

Facts: Runyan and his wife separated and she moved in with her boyfriend. After she left, Runyan put a locked gate at the entrance to his ranch and changed the locks on the doors. In order to retrieve some of her personal belongings, the estranged spouse climbed over the locked gate and entered the home through a window. She also looked in the barn where she found a duffle bag full of computer disks and some ammunition boxes. She then viewed some of the disks she found and noticed some of them contained child pornography. She looked at about 20 disks, but turned over many more to the police. Upon receiving the disks, the police viewed the disks previously viewed by the woman plus many of the disks that had not been viewed by the woman. After viewing child pornography on numerous disks, law enforcement agents obtained a warrant to search the house for more child pornography.

Holding:

- The defendant had a legitimate expectation of privacy in the computer disks.
- A police view subsequent to a search conducted by private citizens does not constitute a search within the meaning of the Fourth Amendment so long as the view is confined to the scope and product of the initial search.

- The police could properly search every disk previously viewed by the private party and could also search every file on the disks even though the private party had only viewed a few files on each disk.
- The police could not view any disks that were not previously viewed by the private party. Any such disks and the fruits thereof, were subject to suppression.
- If the government can show that they would have sought a search warrant absent the viewing of the questioned disks and that the magistrate would have found probable cause absent references to the questioned disks, the evidence will not be suppressed by virtue of the independent source doctrine.

Discussion: This lengthy is an excellent reference source on this topic. The court reviews numerous other opinions in reaching its decision. It should be noted that if the estranged wife had common authority over the premises and its belongings, this would have been a basic consent search. The fact that the defendant took numerous precautions to protect his privacy once she left gave him a legitimate expectation of privacy. The court methodically analyzes other seemingly inconsistent federal opinions and reconciles them by concluding:

> "Thus, under Jacobsen, confirmation of prior knowledge does not constitute exceeding the scope of a private search. In the context of a search involving a number of closed containers, this suggests that opening a container that was not opened by private searchers would not necessarily be problematic if the police knew with substantial certainty, based on the statements of the private searchers, their replication of the private search, and their expertise, what they would find inside. Such an "expansion" of the private search provides the police with no additional knowledge that they did not already obtain from the underlying private search and frustrates no expectation of privacy that has not already been frustrated."

Thus, if the agents in this case could have ascertained with substantial certainty that the other disks would have contained child pornography, a warrant would not have been required. Since there was nothing about the disks that would strongly suggest they contained child pornography, the government could not rely on this legal premise.

In conclusion, if a private party searches a closed container, the government can search the same container more thoroughly than did the private party. The government can only search separate containers not viewed by the private party

when they know with substantial certainty what they will find inside. An example of this is multiple identically wrapped bundles containing cocaine. Once the private party opens one of them, the police do not have to obtain a warrant to search the rest. United States v. Bowman, 907, F.2d 63 (8th Cir. 1990).

United States v. Simpson, 904 F.2d 607 (11th Cir. 1990):

The F.B.I.'s search of a box containing pornographic videos and magazines "did not exceed the scope of the prior private searches for Fourth Amendment purposes simply because they took more time and were more thorough" than the private searchers.

United States v. Donnes, 947 F.2d 1430 (10th Cir. 1991):

Facts: The defendant's landlord found a glove in the defendant's apartment containing a syringe and a camera lens case. Police officers subsequently opened the camera lens case without obtaining a warrant and discovered plastic bags containing methamphetamines.

Holding:

- The police searchers exceeded the scope of the private search by opening the camera lens case. Closed containers are subject to protection under the Fourth Amendment and the police's lawful seizure of the glove did not compromise the defendant's expectation of privacy in the contents of the closed container found inside the box.

United States v. Kinney, 953 F.2d 863 (4th Cir. 1992):

Facts: The defendant's girlfriend called the police when she found guns in his closet that she suspected were stolen. The police confiscated the guns from the closet and then opened a white canvas bag located in the same closet. They found various items of drug paraphernalia in the bag.

Holding:

- The police exceeded the scope of the private search when they opened the canvas bag.

United States v. Bowman, 907 F.2d 63 (8th Cir. 1990):

Facts: An airline employee opened an unclaimed suitcase and found five

identical bundles wrapped in towels and clothing. The employee opened one bundle and found a white powdery substance wrapped in plastic and duct tape. He contacted a federal narcotics agent, who identified the exposed bundle as a kilo brick of cocaine and then opened the other bundles, which also contained kilo bricks of cocaine.

Holding:

- The court held that the agent did not act improperly in failing to secure a warrant to unwrap the remaining identical bundles, reasoning that the presence of the cocaine in the exposed bundle '"spoke volumes as to [the] contents [of the remaining bundles] -- particularly to the trained eye of the officer.'

Also see:

- United States v. Bomengo, 580, F.2d 173 (5th Cir. 1987)
- United States v. Paige, 136 F.3d 1012 (5th Cir. 1998)

Revocation or Withdrawal of Consent

Carter v. State, 762 So.2d 1024 (Fla. 3rd DCA 2000): **Home**

Facts: A woman was raped in the gym of her apartment complex. The assailant took her earrings, a watch and her panties. A security guard advised the police he observed a man loitering near the gym and directed them to the defendant's apartment. The police went to the apartment and found it was occupied by the defendant's mother and stepfather, with whom the defendant resided. The parents gave written consent to search the entire apartment except for their bedroom. The officers noted that the defendant was in his own bedroom. He agreed to step outside and talk to them. The defendant gave consent to the police to search his bedroom and after he did so, he asked if he could be present during the search. The detective agreed that the defendant could be present. While they were discussing the issue, the security guard stopped by and identified the defendant as the man loitering by the gym. The defendant became angry and began screaming at the guard, so the police decided to leave him in the police car while they searched the room. The defendant responded, "That's not fair. I could be there. That's not fair… You promised that I would be able to be there when you searched my apartment…It's not right." The police subsequently found the stolen property in his bedroom. The defense argued that the defendant withdrew his consent when he demanded to be present.

Holding:

- Defendant did not revoke his consent to search of his bedroom, even though officers had initially told defendant that he could be present during search but then restrained him in police car when he became agitated, where initial consent was unconditional and defendant never in words or substance told police to stay out of his room or otherwise conveyed the idea that he was revoking his consent.

Discussion: There are two interesting subtleties in this case. Since the defendant signed a consent form prior to his request to present at the search, his initial consent was unconditional and never revoked. There is the argument that if he had conditioned the search on his presence, the subsequent search would have been invalid. The second point is that the defendant simply did not lodge the proper objection to the search. If he had simply told the police he was revoking his consent, the search would have had to stop. The court also held that the consent of the parents was invalid because the defendant was present.

Towner v. State, 713 So.2d 1030 (Fla. 5th DCA 1998): **Person: Pocket**

Facts: After a traffic stop, the defendant gave the police officer permission to search her vehicle and her person. When the female officer reached into the defendant's shirt pocket, the defendant placed her hand over the officer's hand, described by the officer as a light touch, but gave no verbal indication she wanted the search stopped. By this time the officer felt an object in the pocket, which she immediately recognized by touch as a form of crack cocaine commonly used in the area, based on her experience in the field and prior arrests she had made.

Holding:

- The defendant did not withdraw consent by placing her hand over the officer's hand; defendant did not grab officer's hand and did not say that she wanted officer to stop.

- Search was valid irrespective of withdrawal of consent because search was valid under "plain feel" doctrine.

Parker v. State, 693 So.2d 92 (Fla. 2d DCA 1997): **Person: Pocket**

Facts: A police officer saw the defendant walking down the street and asked

her if he could speak with her. She complied. He then asked her if she had any narcotics on her and she said she did not. He asked her if she would show them she did not have any on her and she responded by emptying out her pockets. He then asked her if she would shake her bra to see if she had any drugs stored there. The defendant complied and a tissue fell to the ground. The defendant placed her foot on the tissue and tried to stomp it. The officer grabbed her arm to prevent her from destroying the evidence and found the tissue contained cocaine.

Holding:

- Any consent by defendant to search tissue that fell to ground as she shook bra as part of consensual narcotics search was withdrawn when she placed her foot on tissue.

- Officer lacked probable cause to seize and search tissue where officer could not see cocaine inside tissue, and where officer did not provide experiential testimony to provide a basis for his statement that women commonly carried narcotics in their bras and that crack cocaine was commonly placed in tissue.

Discussion: The main problem with this case is that the officers involved were not properly prepared for the hearing. The court noted that the officers might have had probable cause to seize and search the tissue without the defendant's consent if they had testified that their experience in crack cocaine cases had given them sufficient grounds to believe that the tissue contained crack cocaine. Simply testify that cocaine is frequently stored in tissue and in women's bras is insufficient. The officer must testify about the number of arrests made concerning this type of drug, the number of times he had been present at such arrests, the number of times he had seen or felt crack cocaine, and the number of times he had found it located in a particular area of a suspect's body. Doctor v. State, 596 So.2d 442, 445 (Fla. 1992; and State v. Ellison, 455 So.2d 424, 426 (Fla. 2d DCA 1984), were cited for this proposition.

Jimenez v. State, 643 So.2d 70 (Fla. 2d DCA 1994): **Person: Pocket**

Facts: A police officer was assigned to pat down people for drugs and weapons at the door of a National Guard Armory where a dance was being held. Because many of the people attending did not speak English, the officer would approach them with his arms raised as a gesture that he wanted to do a pat down search. When the officer approached the defendant, the defendant raised his arms for the officer to pat him down. When the officer grabbed a

cigarette pack in the defendant's pocket, the defendant grabbed his hand. The officer removed the defendant's hand and began to look inside the pack. The defendant once again grabbed the officer's hand. The officer removed the defendant's hand, looked inside the pack, and found cocaine.

Holding:

- The defendant consented nonverbally to the pat-down search, but that consent did not automatically extend to the cigarette packs.

- The defendant withdrew his consent when he twice grabbed the deputy's hand in an apparent attempt to stop the search of the cigarette packs.

- The officer did not have probable cause to believe that the defendant was concealing contraband.

Discussion: The court noted "In his capacity as a security guard for the dance, the officer's proper course of action was to inform the defendant that he could not enter the dance if he did not consent to a search of the cigarette pack." The court also discusses other similar cases: State v. Hammonds, 557 So.2d 179 (Fla. 3rd DCA 1990); State v. Stregare, 576 So.2d 790 (Fla. 2d DCA 1991); and Hutchinson v. State, 505 So.2d 579 (Fla. 2d DCA 1987).

Scope of Consent

State v. Bailey, --- A.2d ----, 2010 WL 724808 (Me.), 2010 ME 15

Evidence supported finding that defendant's consent to the search of his computer was voluntary, even though officer allegedly told defendant that he was investigating a problem of neighbors gaining access to others' computers when he was investigating the dissemination of child pornography; officer identified himself and stated he was investigating a computer "issue," defendant allowed officer to enter his home, officer asked for and was granted consent to search defendant's computer, and defendant was present for the entire duration of the computer search.

Police officer's search of defendant's computer exceeded the scope of defendant's consent; based on the exchange between officer and defendant, a reasonable person would have concluded that defendant consented to a search

to determine if someone had been accessing defendant's computer without his permission, and officer exceeded the scope when he ran a general search for all video filed on defendant's computer.

U.S. v. Richardson, 583 F.Supp.2d 694 (W.D.Pa.,2008):

Special agent's initial act of searching results from investigative software for images of child pornography to confirm that defendant was individual who attempted two failed instances of access to child pornography website exceeded scope of defendant's consented search, which agents had obtained by informing defendant that they believed he could have been the victim of identity theft through "wardriving," since search for images related to a separate crime, one unrelated to the ruse which was presented; if defendant's alleged attempts to access website had been unsuccessful, then looking for images downloaded from website, in contrast to web browser history or cache files, was irrelevant for purposes of the investigation, and images downloaded from the Internet were otherwise never a subject addressed with defendant by agents.

Government agents may not obtain consent to search on the representation that they intend to look only for certain specified items and subsequently use that consent as a license to conduct a general exploratory search.

Plain view exception to search warrant requirement did not justify agent's search of defendant's computer for images of child pornography to confirm that defendant was individual who attempted two failed instances of access to child pornography website; scope of defendant's voluntary consent to search was limited to a concern for illegal credit card activity of the Internet, not images.

United States v. Stierhoff, 477 F.Supp.2d 423 (D.R.I.,2007.)

Facts: Defendant was investigated for stalking and gave officer consent to search his computer for evidence of that crime. When looking at computer, officer saw folder entitled "offshore" and decided to look at the title of the documents. Based upon the titles, he obtained a search warrant related to tax evasion charges.

Government exceeded scope of consent to computer search, given by defendant arrested for stalking, when conducting authorized search of "creative writing" file authorities saw reference to "offshore" file, which they opened without warrant, discovering evidence of tax evasion.

Plain view doctrine did not allow admission of evidence, in tax evasion suit, obtaining through warrantless search of defendant's computer file "offshore," conducted after discovering existence of file through consensual search of file "creative writing," which police were examining to gather evidence on stalking charge for which defendant had been arrested; term "offshore" was not sufficiently reflective of criminal activity to allow search without first securing warrant.

United States v. Ross, 102 S.Ct. 2157 (1982): **Automobile**

Facts: After defendant gave police officer permission to search his automobile, officer opened closed container found within car that might reasonably hold object of search.

Holding:

- A lawful search of fixed premises generally extends to the entire area in which the object of the search may be found and is not limited by the possibility that separate acts of entry or opening may be required to complete the search.

- A search conducted pursuant to exception to warrant requirement applicable to searches of vehicles that are supported by probable cause is not unreasonable if based on facts that would justify the issuance of a warrant, even though a warrant has not actually been obtained.

- When a legitimate search is under way, and when its purpose and its limits have been precisely defined, nice distinctions between closets, drawers, and containers, in the case of a home, or between glove compartments, upholstered seats, trunks and wrapped packages, in the case of a vehicle, must give way to the interest in prompt and efficient completion of task at hand.

- The scope of warrantless search based on probable cause is no narrower, and no broader, than the scope of a search authorized by warrant supported by probable cause; only prior approval of magistrate is waived, and the search otherwise is as the magistrate could authorize.

- Police officers who had legitimately stopped automobile and who had probable cause to believe that contraband was concealed somewhere within it could conduct warrantless search of the vehicle as thorough as a magistrate could authorize by warrant, since scope of warrantless

search of automobile is not defined by nature of container in which the contraband is secreted, but rather, is defined by the object of the search and places in which there is probable cause to believe that it may be found;

Florida v. Jimeno, 111 S.Ct. 1801 (1991): **Automobile: Paper Bag**

Facts: Police officer stopped defendant's car for a traffic infraction. Suspecting the defendant may have narcotics in the car, the officer asked for consent to search the car. The defendant consented and the officer found cocaine inside a folded paper bag on the car's floorboard.

Holding:

- A criminal suspect's Fourth Amendment right to be free from unreasonable searches is not violated when, after he gives police permission to search his car, they open a closed container found within the car that might reasonably hold the object of the search.

- The Fourth Amendment is satisfied when, under the circumstances, it is objectively reasonable for the police to believe that the scope of the suspect's consent permitted them to open the particular container.

Discussion: The key fact here is that the defendant did not place any limitations on the search and a reasonable person would expect that narcotics are generally kept in some type of container. The opinion noted that the Florida Supreme Court relied on State v. Wells, 539 So.2d 464 (Fla. 1989) in its decision to disallow the search of the closed container. The Supreme Court distinguished the facts in this case from Wells, by noting that the Wells case involved the police prying open a locked briefcase in the trunk of a car. The Court noted, "It is very likely unreasonable to think that a suspect, by consenting to the search of his trunk, has agreed to the breaking open of a locked briefcase within the trunk, but it is otherwise with respect to a closed paper bag."

Walter v. U.S., 100 S.Ct. 2395 (1980): **Mailed Package**

Facts: A private shipping company mistakenly delivered a dozen cartons to a private party. The receiving party opened some of the sealed cartons and found individual boxes of film. They noted that one side of the boxes had suggestive drawings and the other had explicit descriptions of the contents. The private party attempted to hold the film up to a light to see what was on it, but was unable to do so. The FBI was called to examine the merchandise. The agents

displayed the contents with a projector and found obscene material in violation of federal law.

Holding:

- Government agents were in lawful possession of the boxes of film, but they could not search them without a warrant.

- The agents had probable cause to seek a warrant based upon the pictures and labels on the outside of the boxes and a warrant should have been obtained.

- Projection of allegedly obscene films was a significant expansion of the search that had been conducted previously by a private party and therefore had to be characterized as a separate search, which was not supported by any exigency or by a warrant even though one could easily have been obtained.

Discussion: This case shows us how to handle evidence obtained by private searches. A common example of this is the computer repairman who stumbles across child pornography while repairing a computer. The Fourth Amendment does not apply to searches by private parties and law enforcement is authorized to view the material submitted to them in plain view. Law enforcement, however, cannot expand upon the search conducted by the private party without a warrant. The government is confined to the scope of the original private party search.

U.S. v. Hudspeth, 459 F.3d 922 (8th Cir. 2006): **Computer**

Law enforcement officers' prolonged search of defendant's office computer after they discovered images of child pornography on compact disc on defendant's desk did not exceed scope of defendant's consent to search of his computer; defendant gave consent to search of his computer located at his place of business, indicating that his consent was not limited to business records only, and defendant failed to object to search or withdraw consent after state trooper told him about images discovered on computer.

United States v. Brooks, 427 F.3d 1246 (10th Cir. 2005)

Manual search of defendant's computer for child pornography images did not exceed objectively reasonable interpretation of his written consent to in-home

search, notwithstanding that officer told him that specific software-driven search would be used to call up images on hard drive, whereas manual search using computer search functions was ultimately used when software search disk failed, where consent form provided for "complete search" of computer for pornographic images and what officer did manually was functional equivalent of employing pre-search disk that he orally described for defendant, such that manual search was no more invasive than automated one would have been.

United States v. Raney, (7th Cir. 2003)

Facts: The defendant solicited an undercover officer posing as a 14-year-old girl on the Internet. The defendant indicated in his chats and emails that he wanted to teach the virgin girl how to have sex and indicated he was going to bring a camera to photograph the encounter. When the defendant was arrested at the scene, he signed a written consent form authorizing agents to search his car, residence, computer, and on-line computer accounts for materials "in the nature of" child abuse, child exploitation, and child erotica. During the search of the defendant's residence, the police found a large stack of photographs of the defendant engaged in sexual acts with his ex-wife. The defense moved to suppress the photos of the homemade adult pornography because they were not related to child exploitation and thus, beyond the scope of his consent.

Holding:

- "We have long recognized that "government agents may not obtain consent to search on the representation that they intend to look only for certain specified items and subsequently use that consent as a license to conduct a general exploratory search."
- By using the phrase "in the nature of" in the consent form, the government broadened the scope of the search beyond that necessary for the retrieval of only the specific items in the form.
- Since the defendant intended to take pictures of the girl in the same manner as he took pictures of his ex-wife, those pictures were "in the nature of" child exploitation, etc…

United States v. Al-Marri, 230 F.Supp 2d 535 (S.D. NY 2002)

Facts: In the period shortly after the September 11, 2002 terrorist bombings, the FBI received information that the suspect might be involved with terrorist activities. They asked if they could look around in his house and he consented. When they saw a laptop computer, they asked if they could take it back to their office "to take a look at it." When they asked the suspect to sign a consent

form back at the office, he refused. They made it clear that he was not going to get his computer back in the near future and he never revoked his oral consent. They eventually found evidence of credit card fraud on the computer.

Holding:

- It is clear that a refusal to execute a written consent form subsequent to a voluntary oral consent does not act as an effective withdrawal of the prior oral consent.
- Courts have uniformly agreed that computers should be treated as if they were closed containers. The general rule is that separate consent to search such an item found within a fixed premises is unnecessary.
- The government's search was proper.

Discussion: The court ruled that the consent to search the computer was valid. The court went to great lengths to point out how the defendant's non-verbal conduct implicitly authorized the search of the computer. The defendant had numerous opportunities to withdraw his consent, but failed to do so. Although unnecessary, the court then spent some time comparing a computer to a closed container in the home that might store the evidence requested. Possibly the most helpful language of the opinion comes in footnote n3 which states, "While seizing the computer for examination at the FBI office may have inconvenienced Al-Marri, the Court acknowledges that current technology does not permit proper on-site examination of computer files. Thus until such technology does become available, a complete seizure of the computer will be necessary, provided that proper safeguards are put in place to prevent problems such as evidence tampering. See Hunter, 13 F. Supp 2d at 583 ('Until technology and law enforcement expertise render on-site computer records searching both possible and practical, wholesale seizures, if adequately safeguarded, must occur.')"

United States v. Lemmons, ????? (7th Cir. 2002)

Facts: A woman complained that the defendant had a lens on the side of his house directed toward her home and she was concerned that he was filmimg her inside her bedroom. The police went to the defendant's home and informed him of the complaint. The officer asked the defendant if he could come into his trailer and look for evidence concerning whether the defendant had any videos of the victim. The defendant said he would consent, but he was concerned about some drugs in the trailer. The officer assured him that he was only there to look for evidence of the videotaping of the victim. The suspect then allowed the officer into his home. Once in the home, the defendant told the officer he

might also want to know about various videos of children he had in the house. After seeing what the defendant voluntarily brought to his attention, the officer asked the defendant if he could look at his computer. The defendant said the officer could look at it and then turned it on for the officer. The officer subsequently found images of child pornography on the computer. The defendant argued that these images should be suppressed because they exceeded the scope of consent.

Holding:

- The consent form signed by the defendant was probative of the Voluntariness of his consent, but it helps little in determining its scope.

- The defendant continued to expand the boundaries of his consent as the police proceeded through his trailer.

- A search of the computer prior to the defendant's specific consent to search it would have been beyond the scope of the original consent unless the police had seen a wire running from the hidden camera to the computer.

- There was no evidence that the defendant limited the officer scope to search his computer, therefore, the images were not suppressed.

United States v. Carey, 172 So.2d 1268 (10th Cir. 1999): **Computer**

Facts: Police officers executed an arrest warrant charging the defendant with a drug offense. During the execution of the warrant, he consented to a search of his apartment. The consent form stated, "to have conducted a complete search of the premises and property located at …" It further stated, "I do freely and voluntarily consent and agree that any property under my control…may be removed by the officers…if said property shall be essential in the proof of the commission of any crime in violation of the Laws of the United States…" Armed with this consent, the officers searched his home. In addition to finding drug evidence, they also discovered and took two computers, which they believed would either be subject to forfeitures of evidence of drug dealing. After bringing the computers to the police station, the officers obtained a search warrant allowing them to search the files on the computers for "names, telephone numbers, ledger receipts, addresses, and other documentary evidence pertaining to the sale and distribution of controlled substances." During the subsequent search of the computer, the detective did not find any

relevant text file, but he did find "JPG" image depicting child pornography. He then continued to search for more "JPG" files and found numerous other such images. The defendant argues that the search of the computer exceeded the scope of the warrant.

Holding:

- Consent defendant gave to the search of his apartment did not carry over to the contents of his computer files, where the arresting officer sought permission to search only the "premises and property located at" a specified address; seizure of the computer was permitted by the consent to remove property that shall be essential to the proof of any crime, but the agreement did not permit the officer to open the files contained in the computer.

Discussion: For a more detailed analysis of this case, see the Particularity Requirements chapter.

U.S. v. Turner, 169 F.3d 84 (1st Cir. 1999): **Computer**

Facts: A masked intruder broke into a woman's apartment and assaulted her in her bed at knifepoint. She struggled with the intruder and he fled. The police noticed blood on her windowsill and her neighbor's windowsill, Mr. Turner. The police asked Turner if they could search his house for evidence of the assault. At their request, Turner signed a written consent to search "the premises," "his vehicle," and "personal property." Before doing so, he was expressly told that the officers would search for "any signs the suspect had been inside [the apartment]," "any signs a suspect had left behind, or anything of that sort," and "evidence of the assault itself." During the search, an officer noticed an image on Turner's computer screen that resembled the victim. He then began looking at files on the computer and noticed that there were child pornography images on the computer. Turner was charged with possession of the pornography and objected that the police exceeded the scope of his consent to search.

Holding:

- The standard for measuring the scope of a suspect's consent under the Fourth Amendment is that of objective reasonableness, which looks at what the typical reasonable person would have understood by the exchange between the officer and the suspect.

- Resident's consent to search of his apartment for signs of intruder who

had broken into neighbor's apartment did not extend to search of resident's computer files, notwithstanding suggestive image on resident's computer screen; rather, search was limited to places where an intruder hastily might have disposed of any physical evidence of assault immediately after it occurred.

- Resident did not expand his authorization of search of his apartment, in connection with intruder's assault on neighbor, to search of resident's computer files by failing to object to such search, where resident was downstairs while his computer was searched upstairs, and resident thus had no meaningful opportunity to object before computer search was completed.

Discussion: The court really focused on the objective standard governing the defendant's consent. Would an objective person providing consent to search his home for evidence of an aggravated assault reasonably expect the police to search his computer? The court noted that even if the police had been justified at looking at the computer to find relevant information concerning the victim, they would not have had an objective basis to look at files with child pornography-like names. The court also noted that the defendant gave consent when he was not a suspect and believed the police were only going to look in areas where an intruder may have disposed of evidence.

U.S. v. Martinez, 949 F.2d 1117 (11th Cir. 1992): **Storage Unit: Auto Trunk**

Facts: Narcotics officers went to the home of a suspect and asked for permission to search a mini-storage unit in her name. Neither the consent form she signed nor her oral statements to the police placed any limitations on the agents' authority to search the mini-warehouse. After obtaining consent, the agents went to the storage unit and cut the lock. When they did not find any narcotics, they looked inside a car stored in the unit. An agent could see through the back seat area into the trunk and noticed what looked like narcotics. The trunk was forced open and drugs found. The defendant argued that the agents exceed the scope of her consent.

Holding:

- When an individual gives a general statement of consent without express limitations, the scope of a permissible search is not limitless. Rather, it is constrained by the bounds of reasonableness: what a police officer could reasonably interpret the consent to encompass.

- Defendant's general consent to search of mini-warehouse unit for contraband gave officers authority to pen locked automobile trunk within that unit.

- General consent to search specific area for specific things includes consent to open locked containers that may contain subjects of the search, in the same manner that such containers would be subject to search pursuant to a valid warrant.

U.S. v. De La Rosa, 922 F.2d 675 (11th Cir. 1991): **Automobile: Notebook**

Holding:

- It was reasonable for detective to open notebook found lying on seat of defendant's automobile, where defendant voluntarily consented to search of interior of automobile and placed no special restrictions on search.

United States v. Habershaw, F.Supp (Ma) **Computer**

The police went to defendant's apartment following a report that someone was yelling profanities at children through a loudspeaker. Defendant consented to the officers' entry and later to viewing his computer. The officer saw what appeared to be child **pornography** sites and asked to search further and found an illegal picture. Defendant signed a consent form. Later a warrant was obtained. The court found that defendant's initial consent reasonably included the computer room and it was reasonable to believe that the scope of the consent had broadened from the originally stated purpose. Based on the officer's observation, probable cause existed to search the computer under the plain view doctrine. Moreover, defendant voluntarily signed a consent form. His mental state did not preclude the voluntariness of his consent nor was he coerced or intimidated.

Discussion: This one is worth reading for the bizarre facts alone!

State v. Hester, 618 So.2d 1365 (Fla. 1993): **Automobile: Paper Bag**

Holding:

- Consent to search lawfully stopped motor vehicle extended to brown, folded-over paper bag within vehicle.

Davis v. State, 594 So.2d 264 (Fla. 1992): **Airport: Person: Crotch**

Facts: Two detectives approached the defendant at the Fort Lauderdale International Airport. They identified themselves, asked if she would speak with them, and then asked for her identification and her airline ticket. After examining her ticket and identification, one of the detectives asked if they could search her luggage and her "person" and advised her of her right to refuse. The defendant agreed to the search. While examining the defendant's bag, the female detective noticed an object protruding from underneath her skirt and asked the defendant if she would prefer stepping around the corner for a pat-down. Once in private, the detective placed her hand on the package between the defendant's legs. The detective testified that the object was taped to the defendant's' thigh, about two or three inches below her crotch.

Holding:

- In case of random stop without suspicion in public area of airport, voluntary consent to search of one's "person" does not include pat down or search of going area.

- A substantial expectation of privacy exists with respect to an individual's crotch or groin area; therefore, an officer must obtain specific consent to search that area.

- Since the detective never touched the defendant's private parts and the package was taped two to three inches below the crotch, the search did not extend to impermissible areas.

Discussion: One of the factors noted by the court was the fact that the detective saw the bulge prior to searching and went immediately to it. There was no groping around prior to locating it. For a similar case dealing with a crotch search of a driver on the roadway, see Johnson v. State, 613 So.2d 554 (Fla. 4th DCA 1993).

Brown v. State, 26 Fla. L. Weekly D939 (Fla. 2d DCA 2001):

Facts: The defendant was a passenger in a car that was stopped for a traffic infraction. She had a fanny pack in her lap. When the officer stopped the car, he asked the driver if he could search the car for narcotics. The driver agreed. The officer asked both occupants to get out of the car so he could search it. When the defendant got out of the passenger seat, she left her fanny pack on the floor board. Even though the officer had seen the pack in her possession, he searched it without her consent and found narcotics.

Holding:

- The officer did not have probable cause to search the purse and the driver did not have actual authority to authorize its search.

- The search was valid only if the driver had the apparent authority to consent to the search of the fanny pack, either through the driver and passenger's shared use or joint access to the fanny pack or because the circumstances gave rise to a reasonable belief that the driver had authority to consent to the search of the pack.

- The officer did not have a reasonable basis to conclude that the driver's consent to search the car included a search inside the passenger's purse or fanny pack if the passenger left the item in the car when ordered by the police to get out of the car.

Discussion: The court distinguishes the opinion in State v. Walton, 565 So.2d 381 (Fla. 5th DCA 1990) where that court ruled that a driver's consent to search an automobile, and specifically the contents of the trunk, extended to a suitcase located in the trunk over which the passenger and driver had common authority, even when the suitcase ultimately belonged to the passenger. The distinguishing fact was that in Walton, the officer had no indication to whom the suitcase belonged, given its location and nature.

Howard v. State, 645 So.2d 156 (Fla. 4th DCA 1994): **Person**

Facts: Officers conducted a traffic stop of the defendant. The officer asked the defendant if he could search him for weapons and the defendant replied in the affirmative. While conducting the search, the officer noticed a 35 mm film canister in the defendant's waistband. The officer shook it and heard pebbles drop inside. The officer suspected crack rocks were inside the container and searched it.

Holding:

- Police officers exceeded bounds of consensual search for weapons when they felt 35-millimeter film canister in detainee's waistband and shook it. Officers knew that film canister was not a weapon and they did not have level of experience to be able to say that there was high probability that canister contained contraband.

- Reasonable suspicion that the object may be cocaine did not justify a

seizure of the object. Probable cause must exist.

Oliver v. State, 642 So.2d 840 (Fla. 4th DCA 1994): **Automobile: Trunk**

Facts: After noticing car being driven erratically, officer approached driver and asked if he had drugs or weapons in car. Driver said he did not and officer asked if he could search car. Defendant replied, "Go ahead, you can search." The officer did not find anything in passenger compartment, but he took the keys, opened the trunk, and found weapon inside. Because of the presence of the weapon in the trunk and the defendant's erratic behavior, the officer conducted a pat-down search of the defendant for his own safety. The officer felt a bulge and the subsequent search revealed a small, flat, hard object containing 54 packages of cocaine.

Holding:

- It was objectively reasonable for police officer to conclude that driver's general consent to search automobile included consent to search trunk, in view of evidence that driver gave general go ahead to search of his automobile after he had been asked about contraband, drugs, or weapons in automobile, and that driver did not protest when police officer searched interior of automobile or when officer took keys fro ignition and opened trunk.

Discussion: The court also held that the officer had a reasonable belief that defendant was armed for purposes of conducting a pat-down search where loaded weapon was found in trunk after defendant had denied having any weapons and where defendant was exhibiting unusual movements.

Fahie v. State, 603 So.2d 91 (Fla. 5th DCA 1992): **Home**

Holding:

- Police officer's return to defendant's bedroom after initial walk-through produced no results did not exceed scope of defendant's consent, which did not contain express limitation on search; conclusion that second inspection was within scope of consent was supported by testimony concerning communications between defendant and officers, fact that officers never left premises, fact that there was no significant delay, and fact that both searches were made for same purpose.

Soldo v. State, 583 So.2d 1080 (Fla. 3rd DCA 1991): **Home**

Facts: A police officer accompanied an informant to a residence to make a cocaine purchase. Plain-clothed police officers were outside as backup. The informant and officer were invited into the house with the officer being instructed to wait on the couch while the informant was invited into a bedroom. The backup officers prematurely began to converge on the house and a woman inside yelled "It's the cops!" Without permission or consent, the officer left the living room couch and followed the female down the hallway to the back bedroom. From the common hallway, he could see cocaine in the bedroom.

Holding:

- The officer's consent to enter the residence was confined to the couch in the living room and he exceeded the scope of consent when he ventured into the common hallway.

Discussion: The court also ruled that there were no exigent circumstances and the plain view doctrine did not apply.

Cross v. State, 560 So.2d 228 (Fla. 1990): **Train: Handbag**

Holding:

- When detective approached defendant as she was getting on a train and obtained her consent to search her bag, he had a right to search the bag, but not to cut into or break pen sealed container located therein.

Discussion: This case contains other very important issues, such as the validity of the citizen-police encounter and probable cause to arrest and search incident to arrest.

State v. Drysdale, 25 Fla. L. Weekly D2627 (Fla. 4th DCA 2000): **Home**

Facts: A deputy responded to the defendant's home after a 911 hang-up call. Upon arrival, he discovered that the defendant's home had been invaded and she had been robbed at gunpoint. Another deputy arrived at the scene and found the defendant crying hysterically. After learning of the details of the robbery, he told her he needed forensics to come into her home and search for evidence. At first she refused, but when he started to leave, she became more upset and agreed to sign a consent form authorizing the deputies to search for fingerprints and to take photographs. While the defendant was walking the deputy and forensics officer through the parts of the house involved in the crime, the deputy noticed marijuana seeds in the carpet. A narcotics deputy then arrived at the scene to assist in the search. He was not even aware of the

robbery, but was there to search for drugs. He was advised when he got there they had consent to search the house. While in the house, he found marijuana in an ashtray and cocaine in the defendant's purse.

Holding:

- The deputy who saw the marijuana seeds in the carpet noticed them in plain view from a place he was authorized to be, therefore, that evidence was admissible.

- The narcotics deputy who was there exclusively to search for drugs was not lawfully in the home because his presence exceeded the scope of consent given by the defendant and therefore, the drugs he found were not admissible.

Discussion: The majority of this case is about the plain view doctrine. It should be noted that the narcotics deputy showed up with a drug-sniffing dog, but the defendant insisted the dog leave the house.

Hernderson v. State, 535 So.2d 659 (Fla. 3rd DCA 1988): **Airport: Luggage**

Holding:

- After detective asked defendant if he could have permission to search defendant's luggage, defendant gave an unqualified affirmative response, entitling detective to pick up and shake deodorant container seen in luggage.

Flanagan v. State, 440 So.2d 13 (Fla. 1st DCA 1983): **Home: Trailer**

Facts: An informant flagged down and deputy and told him that the suspect from an armed robbery was hiding out in a nearby trailer. When the deputy and informant arrived at the trailer, a man named Taylor came out and began conversing with the deputy. He told the deputy he had the authority to grant or deny entry into the trailer. He advised there were drugs in the trailer and he would not allow the deputy inside unless he agreed not to conduct a search. The deputy agreed and was allowed inside. Taylor led the deputy to a bathroom door and began conversing with the defendant inside. When the door was opened enough for the deputy to see inside, he saw the defendant holding a syringe, preparing to inject himself with what appeared to be illegal drugs. The deputy arrested the defendant and charged him with possession of cocaine. The defendant argued that the deputy exceeded his consent to enter by arresting the defendant and seizing his drugs.

Holding:

- The deputy agreed not to search trailer for drugs and not to arrest anyone other than the defendant, but did not agree that he would not seize any drugs from the defendant should he find them in his possession; therefore, police officer did not exceed bounds of "limited consent" to search trailer by seizing drugs discovered in the defendant's possession.

Gunn v. State, 336 So.2d 687 (Fla. 4th DCA 1976): **Automobile**

Holding:

- Where defendant after arrest asked arresting officer if he could call his mother so that she could pick up car he had been driving, but he was told that car was to be impounded and he could have tow truck called or allow police to drive vehicle to police department, defendant, in permitting officer to drive car to police station, did not consent to search of it.

Discussion: This opinion also points out that the police cannot automatically have a car towed whenever an arrest is made. If the car is not illegally parked or posing a hazard, the defendant must be given the opportunity to have a relative pick it up or make other arrangements. Therefore, the inventory search in this case was also invalid.