Training Key® #631

Residential Searches

Recent U.S. Supreme Court case decisions have had an effect on several procedural aspects of residential searches. Three such cases are discussed in this *Training Key®*.

Anticipatory Search Warrants

An anticipatory search warrant is a warrant based upon an affidavit showing probable cause to believe that, at some future time, particular evidence of a crime will be located at a particular place. Anticipatory warrants may not be executed until some specified event (other than the passage of time) has occurred. These specified events are called triggering conditions, and even though the warrant has been issued and is in the hands of the police, the search may not be carried out until the triggering condition has arisen.

Anticipatory search warrants have been the subject of a great deal of litigation, much of it based upon the argument that all anticipatory warrants are unconstitutional because they violate the Fourth Amendment requirement of probable cause. The contention of many defendants has been that because, by definition, anticipatory search warrant affidavits show only that there will be probable cause to search the premises at some later time, not that there is at present probable cause to search, the Fourth Amendment requirement is not satisfied. Although this argument has been repeatedly rejected by various federal courts of appeals,[1] the issue came before the Supreme Court of the United States in the case of *United States* v. *Grubbs*.[2] Although the case involved a warrant obtained by federal officers for a federal crime, the Supreme Court's opinion in that case is of value to all law enforcement officers and agencies in understanding anticipatory search warrants and their use.

United States v. *Grubbs*: The Facts

Respondent Jeffrey Grubbs purchased a videotape containing child pornography from a Web site operated by an undercover postal inspector. Officers from the Postal Inspection Service arranged a controlled delivery of a package containing the videotape to Grubbs's residence. A postal inspector submitted a search warrant application to a Magistrate Judge for the Eastern District of California, accompanied by an affidavit describing the proposed operation in detail.

The affidavit stated:

> *Execution of this search warrant will not occur unless and until the parcel has been received by a person(s) and has been physically taken into the residence. . . At that time, and not before, this search warrant will be executed by me and other United States Postal inspectors, with appropriate assistance from other law enforcement officers in accordance with this warrant's command. . . .*

In addition to describing this triggering condition, the affidavit referred to two attachments, which described Grubbs's residence and the items officers would seize. These attachments, but not the body of the affidavit, were incorporated into the requested warrant.

The Magistrate Judge issued the warrant as requested. Two days later, an undercover postal inspector delivered the package. Grubbs's wife signed for it and took the unopened package inside. The inspectors detained Grubbs as he left his home a few minutes later, then entered the house and commenced the search. Roughly 30 minutes into the search, Grubbs was provided with a copy of the warrant, which included both attachments but not the supporting affidavit that explained when the warrant would be executed. Grubbs consented to interrogation by the postal inspectors and admitted ordering the videotape. He was placed under arrest, and various items were seized, including the videotape.

A grand jury for the Eastern District of California indicted Grubbs on one count of receiving a visual depiction of a minor engaged in sexually explicit conduct per 18 U.S.C.

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§2252(a)(2). He moved to suppress the evidence seized during the search of his residence, arguing that the warrant was invalid because it failed to list the triggering condition. After an evidentiary hearing, the District Court denied the motion. Grubbs pleaded guilty, but reserved his right to appeal the denial of his motion to suppress.

The Court of Appeals for the Ninth Circuit reversed the conviction, and the Supreme Court granted certiorari.[3]

The Supreme Court first ruled that anticipatory search warrants are permissible under the Constitution because, as Justice Scalia stated, in part, that "because the probable cause requirement looks to whether evidence will be found when the search is conducted, all warrants are, in a sense, 'anticipatory.'" And further he noted, "the fact that the contraband is not presently located at the place described in the warrant is immaterial, so long as there is probable cause to believe that it will be there when the search warrant is executed."[4]

Specifying the Triggering Condition in the Warrant and Affidavit

The Supreme Court next turned to the defendant's additional contention that in this case the triggering condition had not been adequately specified in the warrant or affidavit or both. The Supreme Court agreed that sufficient information must be included in the affidavit to justify issuance of the anticipatory search warrant.

However, the Supreme Court rejected the Ninth Circuit's view that because the warrant did not specify the triggering condition, the search was invalid. The Supreme Court also rejected the defendant's contention that, because the affidavit was not immediately presented at the time that the search commenced, the search was unlawful. As the Court said, the Constitution does not give property owners "license to engage the police in a debate over the basis for the warrant." Consequently, the fact that the defendant was not immediately presented with a copy of the affidavit specifying the triggering condition did not invalidate the search.

In summary, the Supreme Court's decision in *Grubbs* upholds the constitutionality of anticipatory search warrants, provided that the following prerequisites are satisfied:

1. It must be true that if the triggering condition occurs, "there is a fair probability that contraband or evidence of a crime will be found in a particular place."
2. There is probable cause to believe the triggering condition will occur.
3. The affidavit supporting the warrant provides the magistrate with sufficient information to evaluate both these aspects of the probable cause determination.

However, it appears from the *Grubbs* opinion that it is not essential that the defendant be presented with a copy of the affidavit at the time that the search is instituted nor that the defendant be told at the time of the search what the triggering condition was.

Consent Searches

Throughout recent history, the courts have struggled to establish workable rules regarding consent searches of private premises. The variety of circumstances arising in these cases has resulted in a complex set of rules that are often difficult to apply under field conditions. Nevertheless, police have typically relied on the general principle that premises may be searched without a warrant provided that some person who has legal authority to consent has given such consent. However, in *Georgia* v. *Randolph*,[5] the U.S. Supreme Court imposed a significant restriction upon that rule.

Prior to the decision in *Georgia* v. *Randolph*, one of the leading rulings on the point had been the 1974 case of *United States* v. *Matlock*.[6] In that case, the Supreme Court held that "the consent of one who possesses common authority over premises or effects is valid as against the absent, nonconsenting person with whom that authority is shared."[7] Because in that case the nonconsenting occupant was not present at the time that the other person gave consent, the *Matlock* Court upheld a search based upon the consent of another occupant. This rule has since been followed, and the exception to the warrant requirement where consent has been obtained has been applied "even to entries and searches with the permission of a co-occupant whom the police reasonably, but erroneously, believe to possess shared authority as an occupant."[8]

This rule has sometimes been relied upon by police to justify consent searches of premises even in situations where a warrant could have been obtained—a dangerous practice, as the *Randolph* decision clearly proved.

Georgia v. *Randolph*

The facts of *Randolph* are important. The following statement is taken from the *Randolph* opinion:

Respondent Scott Randolph and his wife, Janet, separated in late May 2001, when she left the marital residence in Americus, Georgia, and went to stay with her parents in Canada, taking their son and some belongings. In July, she returned to the Americus house with the child, though the record does not reveal whether her object was reconciliation or retrieval of remaining possessions.

On the morning of July 6, she complained to the police that after a domestic dispute her husband took their son away, and when officers reached the house she told them that her husband was a cocaine user whose habit had caused financial troubles. She mentioned the marital problems and said that she and their son had only recently returned after a stay of several weeks with her parents. Shortly after the police arrived, Scott Randolph returned and explained that he had removed the child to a neighbor's house out of concern that his wife might take the boy out of the country again; he denied cocaine use, and countered that it was in fact his wife who abused drugs and alcohol.

One of the officers, Sergeant Murray, went with Janet Randolph to reclaim the child, and when they returned she not only renewed her complaints about her husband's drug use, but also volunteered that there were "items of drug evidence" in the house. Sergeant Murray asked Scott Randolph for permission to search the house, which he unequivocally refused.

The sergeant turned to Janet Randolph for consent to search, which she readily gave. She led the officer upstairs to a bedroom that she identified as Scott's, where the sergeant noticed a section of a drinking straw with a powdery residue he suspected was cocaine. He then left the house to get an evidence bag from his car and to call the district attorney's office, which instructed him to stop the search and apply for a warrant. When Sergeant Murray returned to the house, Janet Randolph withdrew her consent. The police took the straw to the police station, along with the Randolphs. After getting a

search warrant, they returned to the house and seized further evidence of drug use, on the basis of which Scott Randolph was indicted for possession of cocaine.[9]

Scott Randolph moved to suppress the evidence on the grounds that his wife's consent to search was not valid over his express refusal to consent. The Supreme Court of Georgia agreed, ruling that "the consent to conduct a warrantless search of a residence given by one occupant is not valid in the face of the refusal of another occupant who is physically present at the scene to permit a warrantless search."[10] The Georgia Supreme Court distinguished *Matlock* on the grounds that, in *Matlock*, the defendant was not present when the third person's consent was given, whereas in the *Randolph* case, the defendant, Scott Randolph, was present at the time that his wife gave her consent, and he then and there denied his own consent.[11] The U.S. Supreme Court granted certiorari to resolve a split in the lower court cases on the issue of the validity of one occupant's consent when another occupant is present and objects.

The U.S. Supreme Court then ruled in *Randolph* that "a warrantless search of a shared dwelling for evidence over the express refusal of consent by a physically present resident cannot be justified as reasonable as to him on the basis of consent given to the police by another resident."[12]

Significant Features of the Randolph Case

There are several aspects of the *Randolph* decision that should be noted.

1. The decision makes it clear that the rules of consent searches do not depend upon the rules of property law.

2. *Georgia* v. *Randolph* does not overrule *Matlock*. Rather, it distinguishes it on the grounds that in *Matlock* the objecting person was absent, whereas in *Randolph* the objecting person was present. Presence or absence of the nonconsenting occupant therefore becomes critical in determining the validity of the consenting party's agreement to the search.

3. The Supreme Court in *Randolph* drew what it acknowledges to be a fine line between presence and "absence." In *Matlock*, the nonconsenting party was actually only a few yards away, sitting in a squad car, when the other occupant gave consent to the search.[13] In another case, *Rodriguez*, the defendant was actually in the apartment but was asleep in another room at the time that consent was given by the other occupant for the police to enter and search.[14]

Thus, it appears that unless the objecting party is physically present at the immediate scene, the consent of another occupant is sufficient. The police have no obligation to try to find the other occupant(s) of the premises to determine whether they do or do not consent, even if the other occupants, though not immediately present, are nearby. Note, however, that this applies only if "there is no evidence that the police have removed the potentially objecting tenant from the entrance for the sake of avoiding a possible objection."[15]

4. Even assuming that the objecting occupant is absent, the requirement nevertheless remains that the person giving the consent must have authority to do so, or must at least reasonably appear to have authority to do so. Whether this authority actually exists, or reasonably appears to exist, is not always an easy question. There have been many cases examining the issue of what persons do or do not have authority to consent to a search. For example, it has been held that:

a. a landlord or hotel manager normally has no authority to consent to a search of rented premises, and[16]
b. even overnight house guests have a legitimate expectation of privacy in their temporary quarters, so that their host, although having authority to consent to search to other portions of the premises, may not have the authority to consent to a search of the guest's room.[17]

5. It must be remembered that these rules regarding consent searches do not in any way prevent the police from obtaining a warrant to search the premises if probable cause exists for obtaining the warrant. For example, the consenting occupant may provide the police with enough information to justify the issuance of a search warrant even though another occupant withholds consent.

6. The *Randolph* case does not alter the authority of the police to enter premises under exigent circumstances. For example, one of the arguments made in *Randolph* was that the *Randolph* holding would shield spousal abusers and other violent co-tenants who might refuse to allow the police to enter a dwelling when their victims ask the police for help. The court rejected this contention, saying:

> *[T]his case has no bearing on the capacity of the police to protect domestic victims. . . . No question has been raised, or reasonably could be, about the authority of the police to enter a dwelling to protect a resident from domestic violence; so long as they have good reason to believe such a threat exists.*[18]

7. Further, when exigent circumstances authorize an entry over an occupant's objection, "since the police would then be lawfully in the premises, there is no question that they could seize any evidence in plain view or take further action supported by any consequent probable cause."[19]

Summary

Georgia v. *Randolph* may be summarized as follows:

1. Police may search the premises based upon the consent of a person who has the authority, or who reasonably appears to have the authority, to grant that consent.
2. Police may not make a consent search of the premises based upon the consent of one occupant if another occupant who is physically present at the time objects.
3. "Present" means immediately present; as noted, *Randolph* approves cases in which consent has been held valid even though another occupant who gave no such consent was nearby (in a squad car, for instance, or even asleep in another room). This applies, however, only if the police did not contrive the removal of the nonconsenting occupant for the purpose of validating the consent of another occupant.
4. Even without valid consent, police may enter the premises when exigent circumstances justify it, and, once inside, may seize evidence in plain view or use their discoveries as the basis for the issuance of a warrant.

Finally, it should be noted that *Randolph* and its related cases once again establish with great clarity that whenever possible, police should obtain a warrant, rather than rely upon consent. The law of consent searches can be difficult to apply in a given situation, and what appears to be a valid consent may subsequently be held invalid, thus rendering any evi-

dence found, and any conviction obtained, invalid. There are many instances when the circumstances, either through exigency or because they provide probable cause, will empower the police to enter without running the danger of having a dubious consent later invalidated by a court due to factors beyond the control of the officers involved.

Violation of Knock-and-Announce Rule Does Not Require Suppression of Evidence

The reasons given for the knock-and-announce rule include the following:

- Protection of human life and limb, because an unannounced entry may provoke violence in supposed self-defense by a surprised resident.
- Protection of property, because it gives residents the opportunity to avoid the destruction of property occasioned by a forcible entry.
- Protection of privacy and dignity, which can be destroyed by a sudden entrance.[20]

However, the courts have recognized many situations where the rule does not apply, and it is therefore not mandatory that police knock-and-announce. For example, it is not necessary when

- circumstances present a threat of physical violence,[21]
- if there is reason to believe that evidence would be destroyed if advance notice were given,[22] or
- knocking and announcing would be futile.[23]

If police have a reasonable suspicion that, under the circumstances, one of these grounds for failing to knock-and-announce exists, the rule does not apply.[24]

Knock-and-Announce and the Exclusionary Rule

Even in situations where the knock-and-announce rule does apply, one question has remained: Does a violation of the knock-and-announce rule require suppression of evidence that is seized by law enforcement officers during the entry?

In the case of *Hudson* v. *Michigan*, the U.S. Supreme Court repudiated the idea that all evidence seized subsequent to a constitutional violation must be excluded.[25]

Hudson v. *Michigan*

The facts in *Hudson* are as follows:

Detroit police with a warrant entered a residence to search for drugs and firearms, and discovered both. Although they did announce their presence, they waited only a few seconds thereafter before entering. The defendant contended that the knock-and-announce rule had been violated, and that this violation necessitated suppression of the evidence seized during the search. The prosecution conceded both at trial and on appeal that the knock-and-announce rule was applicable to the situation, and that the rule was violated by the police during their entry into the premises. The only issue before the Supreme Court in *Hudson* v. *Michigan* was therefore whether the admitted violation of the knock-and-announce rule necessitated suppression of the evidence under the exclusionary rule.

In his majority opinion in *Hudson*, Justice Scalia noted that: "[T]he exclusionary rule has never been applied except 'where its deterrence benefits outweigh its "substantial social costs."'... The costs here are considerable."[26]

After reviewing the interests protected by the knock-and announce rule (human life and limb; property; and privacy and dignity), the Supreme Court noted in *Hudson* that: "What the knock-and-announce rule has never protected, however, is one's interest in preventing the government from seeing or taking evidence described in a warrant."[27]

Concluding that no interest protected by the knock-and-announce rule was affected in this case, and that the social costs of applying the exclusionary rule to knock-and-announce violations would exceed any deterrence factors, the Court's majority in *Hudson* decided that the violation of the knock-and-announce rule did not require suppression of the evidence, and affirmed the defendant's conviction.

Summary

This ruling is obviously favorable to law enforcement. However, all law enforcement executives, officers, and agencies should note the following:

1. The *Hudson* decision does NOT alter the knock-and-announce rule itself. Where otherwise applicable, the rule is still in full force and effect. Thus, officers seeking to execute a search warrant must still announce their presence and wait a reasonable time before making a forcible entry, unless the previous noted exigent circumstances exist.
2. The decision does NOT insulate law enforcement officers or agencies from civil liability. Violation of the knock-and-announce rule, where that rule is applicable, is still a violation of civil rights, and may subject officers to civil suits under 42 U.S.C. §1983.28
3. Law enforcement should also note the Supreme Court's reliance in *Hudson* v. *Michigan* upon "the increasing professionalism of police forces, including a new emphasis on internal police discipline."[29] While this is not, strictly speaking, a legal condition for non-applicability of the exclusionary rule to knock-and-announce violations, it is entirely possible that, should the Supreme Court encounter a future knock-and-announce case in which such professionalism is notably lacking, this lack could produce a different result than was reached in *Hudson*. This is particularly true since *Hudson* was a 5–4 split decision by the Supreme Court, and the stability of rules announced by the Supreme Court in 5–4 decisions is sometimes rather uncertain.

Endnotes

[1] See, for instance, *United States* v. *Loy*, 191 F. 3d 360, 364 (3rd Cir. 1999) (collecting cases).

[2] *United States* v. *Grubbs*, 547 U.S. 90 (2006).

[3] Id.

[4] Id.

[5] *Georgia* v. *Randolph*, 547 U.S. 103 (2006).

[6] *United States* v. *Matlock*, 415 U.S. 164 (1974).

[7] *United States* v. *Matlock*, 415 U.S. 164, 170 (1974)

[8] *Georgia* v. *Randolph*, 547 U.S. 103, 109 (2006).

[9] *Georgia* v. *Randolph*, 547 U.S. 103, 107 (2006).

[10] 278 Ga. 614, 604 S.E.2d 835, 836 (2004).

[11] Id., 837. The Georgia Supreme Court stressed that the officers in *Matlock* had not been "faced with the physical presence of joint occupants, with one consenting to the search and the other objecting," whereas in *Randolph* the nonconsenting occupant was present at the time.

[12] *Georgia* v. *Randolph*, 547 U.S.103, 119 (2006).

[13] *United States* v. *Matlock*, 415 U.S. 164 (1974).

[14] *Illinois* v. *Rodriguez*, 497 U.S. 177 (1990).

[15] *Randolph*, 126 S. Ct. 1515, 1527–1528.

[16] See, for instance, *Chapman* v. *United States*, 365 U.S. 610 (1961) (landlord); *Stoner* v. *California*, 376 U.S. 483 (1964) (hotel manager).

[17] See *Minnesota* v. *Olson*, 495 U.S 91 (1990).

[18] *Georgia* v. *Randolph*, 547 U.S 103, 118 (2006).

[19] Id., citing *Texas* v. *Brown*, 460 U.S. 730, 737-739 (1983).

[20] *Hudson* v. *Michigan*, 547 U.S. 586 (2006), citing *Richards* v. *Wisconsin*, 520 U.S. 385, 394 (1997), *Wilson* v. *Arkansas*, 514 U.S. 927 (1995), and *McDonald* v. *United States*, 335 U.S. 451 (1948).

[21] *Wilson* v. *Arkansas*, 514 U.S. 927, 936 (1995).

[22] *Wilson* v. *Arkansas*, 514 U.S. 927, 936 (1995).

[23] *Richards* v. *Wisconsin*, 520 U.S. 385, 394 (1997).

[24] *Richards* v. *Wisconsin*, 520 U.S. 385, 394 (1997).

[25] *Hudson* v. *Michigan*, 547 U.S. 586, 595 (2006).

[26] Id., citing *Pa. Bd. of Prob. & Parole* v. *Scott*, 524 U.S. 357, 363 (1998), citing *United States* v. *Leon*, 468 U.S. 897, 907 (1984).

[27] *Hudson* v. *Michigan*, 547 U.S. 586, 594 (2006).

[28] Federal officers are subject to suit for Fourth Amendment violations under the rule of *Bivens* v. *Six Unknown Federal Narcotics Agents*, 403 U.S. 388, 391 (1971).

[29] *Hudson* v. *Michigan*, 547 U.S. 586, 597 (2006).

questions

The following questions are based on material in this *Training Key®*. Select the one best answer for each question.

1. Which of the following statements is false with regard to anticipatory search warrants?

(a) Searches cannot be carried out until a specified triggering event(s) takes place.
(b) Some argue that these searches are unconstitutional because they violate the Fourth Amendment requirement of probable cause.
(c) There need not be probable cause that the triggering event will actually occur.
(d) There must be a fair probability that contraband or evidence of a crime will be found in the location designated in the warrant.

2. Which of the following statements is false with regard to consent searches?

(a) Search of a dwelling may not be conducted if one resident who is not present at the immediate scene objects to the search over one who is present.
(b) A landlord or hotel manager normally has no authority to consent to the search of rented premises.
(c) Even without valid consent, officers may enter a residence under exigent circumstances.
(d) Officers may enter a dwelling over the objection of one tenant who is physically present in order to protect a resident from domestic or other violence.

3. Which of the following statements is false with regard to the knock-and-announce rule?

(a) Officers need not knock and announce if circumstances present a threat of physical violence.
(b) Officers need not knock and announce if there is reason to believe that evidence would be destroyed if advance notice were given.
(c) The requirement to knock and announce is based in part on the need to protect human life and limb, since an unannounced entry may provoke violence in self defense by a surprised resident.
(d) None of the above.

answers

1. (c) There must be probable cause to believe that the triggering event will occur.
2. (a) The objecting resident must be physically present at the scene in order to prevent a search.
3. (d) All of the statements are true.

have you read….?

Executing Search Warrants Update, Parts I and II, *Training Keys®* #577 and 578, International Association of Chiefs of Police, Alexandria VA.

These documents provide detailed instructions on preparation and procedures for conducting a residential search.