

Consent-Once-Removed: When Your Houseguest Brings The Police With Him Legal Question of The Week Vol. 2, Number 5 February 20, 2009

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Several of my eagle-eyed law enforcement friends contacted me recently about a recent U.S. Supreme Court ruling that they found interesting. It deals with a doctrine called “consent-once-removed.” Contrary to popular belief, this doctrine has nothing to do with that girl you brought home who has been leading you on all night only to shoot you down at the last possible moment.¹ Instead, the “once-removed” in “consent-once-removed” is like the “once-removed” when you have a second cousin “once-removed.”^{2 3} This doctrine deals with whether consent given to an undercover officer or a person acting as an agent of an officer grants consent to all law enforcement officers to enter a house without a warrant.

In 2002, Brian Bartholomew,⁴ an informant for the Central Utah Narcotics Task Force, informed Officer Jeffrey Whatcott⁵ that a person named Afton Callahan⁶ had arranged to sell Bartholomew methamphetamine later that day. That evening, Bartholomew arrived at Callahan’s residence, went inside, and confirmed that Callahan had the meth available for sale. Bartholomew told Callahan he needed to get the money for the purchase and left.

Bartholomew met up with the officers and was given a marked \$100 bill and a wire to wear during the buy. They agreed on a signal that he would give after completing the purchase. The officers drove Bartholomew to Callahan’s trailer, where Callahan

¹ Not that I know anything about that from personal experience. It happened to a friend of mine. Really. He told me about it. It didn’t happen to me.

² I’ve never understood how this relative stuff works. And before you start working on the email that will explain it to me, please understand that I don’t care how it works.

³ That’s not to say that your cousin once removed can’t lead you on all night only to shoot you down at the last moment, but that’s sick and I promised the Chief that I wouldn’t include any more incest jokes in these updates. On a related note, North Carolina allows you to marry your first cousin, so I guess this wasn’t an incest joke after all.

⁴ An interesting name. Bartholomew was one of the lesser known disciples of Jesus.

⁵ What’s your name? Whatcott. What? Whatcott.

⁶ For those keeping score at home, we now have Bartholomew, Whatcott, and Afton as characters in this story. While no official statistics exist, my unscientific research shows that having a weird name makes you 70% more likely to wind up as a participant in a Supreme Court case. That means I’ve got my eye on our own J’Arrante, Anthro, Szentmariay, and Garo Nordstrom. It’s only a matter of time really.

retrieved a large bag of meth from his freezer, sold a gram to the informant, whereupon Bartholomew said the magic words which alerted officers that the sale was complete. The officers then entered the trailer through a porch door, saw the defendant drop the bag of meth and recovered the \$100 bill from his person. Callahan was charged with the unlawful possession and distribution of methamphetamine.

At trial, the defendant argued that the warrantless entry made by police into his trailer violated the Fourth Amendment, which gives citizens the right to be secure from unreasonable searches in their trailers...I mean homes. The trial court ruled that there were exigent circumstances that supported the search.⁷ The defendant appealed and the Utah Court of Appeals overturned the trial court's ruling and vacated the conviction. Based on that, the defendant turned around and sued the police, saying that they had violated his Fourth Amendment rights.

The civil case wound its way to the Supreme Court,⁸ where the people that watch these types of things⁹ became excited that the Supreme Court might make a ruling on whether the "consent-once-removed" doctrine was constitutional. Unfortunately, no one told the Supreme Court this¹⁰ and their ruling never reached this important issue. The Court did find, however, that because several Federal circuit courts had upheld the constitutionality of the consent-once-removed doctrine, the officers had qualified immunity because they could reasonably have believed that it authorized their conduct.¹¹

Now that we know the background, let's take a few questions:

Q: What exactly is the "consent-once-removed" doctrine?

A: The "consent-once-removed" doctrine permits a warrantless police entry into a home when consent to enter has already been granted to an undercover officer who has observed contraband in plain view. Some courts have extended it to also cover private citizens acting as confidential informants.

Q: What is the argument in favor of this doctrine?

A: The argument is that by inviting a person into your house to conduct a criminal transaction, you have compromised the privacy of your home and assumed the risk that your partner in crime will reveal your dealings to the police.

⁷ As much as I like rulings that go in the State's favor, there were no exigent circumstances in this case to support a warrantless entry into the trailer. In fact, on the appeal, the Utah attorney general didn't even attempt the exigent circumstances argument.

⁸ Pearson v. Callahan, 555 U.S. ____ (2009).

⁹ I'm much too busy watching LOST and updating my Facebook page to pay attention to cases before they are decided by the Supreme Court.

¹⁰ In fairness, someone probably did tell the Supreme Court this. They just ignored them. They can do that because they are the Supreme Court.

¹¹ So the drug case got thrown out, but the officers avoided civil liability. Kind of like your dog died, but at least he didn't crap on the carpet first.

Q: Sounds great! Does North Carolina recognize this doctrine?

A: Not at this time. Neither the appellate courts of the state of North Carolina nor the Fourth Circuit have decided this issue.

Q: What courts have held this doctrine to be constitutional?

A: The Seventh Circuit,¹² the Ninth Circuit,¹³ the Sixth Circuit,¹⁴ the New Jersey Supreme Court, and the Wisconsin Supreme Court.

Q: What courts have held this doctrine to be Unconstitutional?

A: Only the Tenth Circuit¹⁵ – which did so in the case we are looking at.

Q: On 24, are Jack Bauer and the FBI lady going to “hook up” before the end of the season?¹⁶

A: I would say that things look promising, but the clock is ticking.¹⁷

Q: Should I rely on the consent-once-removed doctrine?

A: I wouldn't – until a North Carolina court approves the practice. Of course, for that to happen, some officer somewhere has to do a search based on this doctrine to get it into the courts. Just remember, the Pearson case only said that the officers had qualified immunity in a lawsuit against them. Their meth case against Callahan was still thrown out.

Q: What should I do instead?

A: For those of you that stayed awake in my In-Service Legal Update class, you might remember that an anticipatory search warrant might be an option under State v. Stallings, 657 S.E. 2d 915 (2008). Or you could get a search warrant after the drug transaction occurred.

Q: Who are your final four picks this year?

A: I'm going to go with Pittsburgh, Memphis, Oklahoma, and Carolina. Dook should do well in the NIT.

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¹² Wisconsin, Illinois, and Indiana. The “Wii” Circuit, sponsored by Nintendo.

¹³ California and the other Western states. Motto: We're liable to do anything.

¹⁴ Michigan, Ohio, Kentucky, Tennessee. Motto: From the Great Lakes to a big mistake.

¹⁵ From Utah to Oklahoma. Motto: The rest of the west.

¹⁶ This was an actual question posed to me this week. There is no limit to the kinds of advice coming out of the legal office.

¹⁷ I know that some of you didn't get this joke.