Research Strategy--Spring 2019

• Finding the Law

• Reading the Law

• Updating the Law

• Christopher & Jill Wren, The Legal Research Manual (2d ed. 1986)
Goal

• Find mandatory authority. (Wren chart) 
  S. Ct. and 7th Cir.
• Use persuasive authority when:
  – No mandatory exists
  – Weak mandatory
  – Challenge the mandatory
Issues

• Under Fourth Amendment, was the warrantless search of defendant’s bedroom and bathroom valid when co-tenant consented to the search?

• Was the witness identification of the defendant consistent with Fifth Amendment Due Process requirements?
  
  – A. Was the photo array impermissibly suggestive?

  – B. If it was impermissibly suggestive, was it still sufficiently reliable under the totality of the circumstances?
Thinking about the Problem

• You need search terms. Use TARP (things, action, relief, parties) to determine facts and legal theories

• May not succeed at first, but must start somewhere.
Finding the Law—Search Methods

• Index

• Topic (Table of Contents)

• Known-authority (case or statute on point)

• Full text searching (online only)

• Some combination of these
Finding the Law

• Start with secondary sources?

• Check for constitutional provisions and statutes.

• Try to find leading case(s).

• Use leading case(s) to find cases from your jurisdiction.
Narrative Secondary Sources

- Books
- American Law Reports (ALR)
- Encyclopedias (national & state)
- Legal periodicals
- Restatements
Why Use Secondary Sources?

- To determine what law applies
- For analysis of the law
- To find jargon in the area
- To learn the black letter rules
- To identify important primary sources
Searching for Criminal law Books on Westlaw

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Criminal Law Secondary Sources
## Secondary Sources

**Search & Seizure Treatises**

**Filtered Publications** - Criminal Law, Texts & Treatises

<table>
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<tr>
<th>Publication Type</th>
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- Search & Seizure: A Treatise on the Fourth Amendment
- Search and Seizure Checklists
- Search Warrant Law Deskbook
- Searches & Seizures, Arrests & Confessions
- Securities Crimes
- Sentencing California Crimes (The Rutter Group, Criminal Practice Series)
Table of contents:

- Chapter 11. Vehicle Searches
- Chapter 12. Container and Luggage Searches
- Chapter 13. Inventory Searches
- Chapter 14. Plain View
- Chapter 15. Abandonment
- Chapter 16. Curtilage
- Chapter 17. Consent [Chapter View]

§ 17:4. Third-party consent: Consent to a warrantless search may be given by a third party who reasonably appears to share control of the premises or items to be searched

§ 17:4. Third-party consent: Consent to a warrantless search may be given by a third party who reasonably appears to share control of the premises or items to be searched

References

Supreme Court

- “Our cases firmly establish that police officers may search jointly occupied premises if one of the occupants consents. In Georgia v. Randolph, 547 U.S. 13, 126 S.Ct. 1515, 164 L.Ed.2d 208 (2006), we recognized a narrow exception to this rule, holding that the consent of one occupant is insufficient when another occupant is present and objects to the search. In this case, we consider whether Randolph applies if the objecting occupant is absent when another occupant consents. Our opinion in Randolph took great pains to emphasize that its holding was limited to situations in which the objecting occupant is physically present. We therefore refuse to extend Randolph to the very different situation in this case, where consent was provided by an abused woman well after her male partner had been removed from the apartment they shared.” Fernandez v. California, 134 S. Ct. 1126, 188 L. Ed. 2d 25 (2014).
§ 17:4. Third-party consent: Consent to a warrantless search may be given by a third party who reasonably appears to share control of the premises or items to be searched

Our cases firmly establish that police officers may search jointly occupied premises if one of the occupants consents. In Georgia v. Randolph, 547 U.S. 103, 126 S.Ct. 1515, 164 L.Ed.2d 208 (2006), we recognized a narrow exception to this rule, holding that the consent of one occupant is insufficient...
Search & Seizure—Consent by co-tenant

Chapter 8. Consent Searches

§ 8.1. Nature and scope of consent
§ 8.2. Factors bearing upon validity of consent
§ 8.3. Third party consent
§ 8.4. Family relationships
§ 8.5. Real property relationships

§ 8.5(a). Consent by lessor
§ 8.5(b). Consent by lessee
§ 8.5(c). Consent by co-tenant or other joint occupant
§ 8.5(d). Consent by host

Chapter 9. Stop and Frisk and Similar Lesser Intrusions
§ 8.5(c) Consent by co-tenant or other joint occupant

The Supreme Court dealt specifically with the joint occupancy situation in United States v. Matlock. The evidence in that case, which the Court concluded had been improperly excluded by the trial court, established that the defendant jointly occupied a bedroom with a Gayle Graff in the home of her parents. This being the case, the Court was of the view that Mrs. Graff's consent was sufficient because “obtained from a third party who possessed common authority over or other sufficient relationship to the premises or effect sought to be inspected.” In a footnote the Court explained that this common authority rests
This language was relied upon by the Court in *Illinois v. Rodriguez* in holding that a one-time joint occupant no longer had that status at the time of the consent. Gail Fischer, who consented to a search of Rodriguez’s apartment, had lived there with him and her two small children for about six months, but moved out about a month before the consent. She took her and her children’s clothes with her, but left behind some furniture and household effects. She thereafter sometimes spent the night at the apartment, but never invited friends there and never went there herself when Rodriguez was not at home. Her name was not on the lease and she did not contribute to the rent. She had a key to the apartment, but had taken it without Rodriguez’s knowledge. On such facts, the Supreme Court noted, the lower court’s “determination of no common authority over the apartment was obviously correct.”

The language quoted above from *Matlock* is not particularly helpful with respect to the issue which most frequently arises in the joint occupancy context, namely, whether each joint occupant possesses the authority to permit a full police search of every part of the premises leased with another tenant or otherwise jointly occupied, or whether instead (at least in some cases) each joint occupant may be recognized as retaining certain zones of privacy within the jointly occupied premises. Admittedly, *Matlock* was not an ideal case for getting into this issue, for the jointly occupied area consisted of but a single room and both men’s and women’s clothes were observed in the closet where the stolen money was found in a diaper bag. Yet, the Court’s language is far from clear; it is not explained whether the “common area” as to which the risk is assumed is coextensive with the boundaries of the property as to which others have “joint access or control for most purposes.”

Some courts appear to assume that each joint occupant has unlimited authority to consent to a search of the jointly occupied premises in their...
It may also be useful to take account of the nature of the object actually subjected to search. Certain objects are by their character quite clearly not the kind of thing as to which any real sense of privacy vis-a-vis another occupant could be justifiably expected. Where the object is a container, the extent to which it is subject to ready access is an important consideration. A search of an overflowing and unsealed box is quite a different matter than a search of a locked attache case, unless of course the consenting party possesses a key to the locked container. A court may incline to find that a co-occupant lacked a privacy expectation in the container if that co-occupant “stood by and
Footnote contains cases relevant to searching containers

United States v. Robinson, 479 F.2d 300 (7th Cir.1973). See also United States v. Caldwell, 518 F.3d 426 (6th Cir.2008) (woman sharing hotel room with defendant could consent to search “of partially opened (and thus less private) containers—such as a paper bag and an unzipped CD case” as here); People v. Posey, 99 Ill.App.3d 943, 55 Ill.Dec. 234, 426 N.E.2d 209 (1981) (defendant’s girl friend living with defendant in motel room and had no other residence, she could consent to search of his shaving kit, as she “was given complete access to all areas of that room”); State v. Buschkopf, 373 N.W.2d 756 (Minn.1985) (man could consent to search of own shaving kit for note he had been given by woman he was living with, notwithstanding her instructions to him not even to read it, as “she apparently did not seal it or otherwise physically prevent [him] from looking at it”).
§ 8.5(c) Consent by co-tenant or other joint occupant

Or, sometimes the facts of the individual case will show no such expectation of privacy regarding that object against the particular co-occupant. See United States v. Groves, 530 F.3d 506 (7th Cir.2008) (defendant's girlfriend and co-occupant of apartment could consent to search of nightstand in bedroom, as "there were no limits on where she could go in the apartment," and "although she did not use the nightstand . . ., she did clean it"); United States v. Moore, 917 F.2d 215 (6th Cir.1990) (defendant's girlfriend, who shared occupancy of his residence, could consent to search for stolen money orders in bedroom; court notes he had asked her to retrieve them for him).

United States v. Robinson, 479 F.2d 300 (7th Cir.1973). See also United States v. Caldwell, 518 F.3d 426 (6th Cir.2008) (woman sharing hotel room with defendant could consent to search "of partially opened (and thus less private) containers—such as a paper bag and an unzipped CD case" as here); People v. Posey, 99 Ill.App.3d 943, 55 Ill.Dec. 234, 426 N.E.2d 209 (1981) (defendant's girlfriend living with defendant in motel room and had no other residence, she could consent to search of his shaving kit, as she "was given complete access to all areas of that room"); State v. Buschkopf, 373 N.W.2d 756 (Minn.1985) (man could consent to search of own shaving kit for note he had been given by woman he living with, notwithstanding her instructions to him not even to read it, as "she apparently did not seal it or otherwise physically prevent [him] from looking at it").

Cf. People v. Murillo, 241 Cal.App.2d 173, 50 Cal.Rptr. 290 (1966) (court also of view that woman living with defendant, by giving general consent to search the premises, had not thereby authorized search of attache case, which police opened with key taken from defendant).

Murillo also suggests a reverse twist on the apparent authority doctrine, discussed in § 8.3(g), by intimating that although the woman had also used the case and had her own key to it, this indication of actual authority would not suffice where the police did not know this and thus lacked a reasonable belief that there was authority.

United States v. Denher, 212 F.3d 987 (7th Cir.2000).
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Useful ALR under Related documents > Secondary Sources

§ 8.5(c) Consent by co-tenant or other joint occupant
SEARCHSZR & 8.5(c) - Search And Seizure: A Treatise On The Fourth Amendment - Consent Searches (Approx. 16 pages)

Document

4. IT'S IN THE BAG: VOLUNTARINESS, SCOPE, AND THE AUTHORITY TO GRANT CONSENT
Touro Law Review - 2012

5. § 16:5. Consent—Authority
Warrantless Search Law Deskbook

6. Admissibility of evidence discovered in search of defendant's property or residence authorized by defendant's spouse (resident or nonresident)—state cases
American Law Reports ALR5th - The ALR databases are made current by the weekly addition of relevant new cases.

7. Admissibility of evidence discovered in warrantless search of property or premises authorized by one having ownership interest in property or premises other than relative
American Law Reports ALR Federal - The ALR databases are made current by the weekly addition of relevant new cases.

8. § 156. Generally; common authority doctrine; apparent authority doctrine
American Jurisprudence, Second Edition

9. Consent to Search Given Under Coercive Circumstances
American Jurisprudence Proof of Facts 2d
Useful ALR under Related documents > Secondary Sources

Filter by Jurisdiction

American Law Reports (ALR)
Results after filtering ALR by jurisdiction

B Application to searches of particular property

§ 5[a] Hotel or motel room—Held admissible
§ 5[b] Hotel or motel room—Held inadmissible
§ 6[a] Apartment—Held admissible
§ 6[b] Apartment—Held inadmissible
§ 7[a] Leased house—Held admissible
§ 7[b] Leased house—Held inadmissible
§ 8[a] Other property—Held admissible
§ 8[b] Other property—Held inadmissible

III Consent given by cotenant or common resident

A Generally

§ 9 Rule that cotenant or common resident can authorize search
§ 10 Effect of accused's prior refusal to consent
§ 11[a] Limitations on authority—Accused's personal effects
§ 11[b] Limitations on authority—Areas under accused's exclusive control

B Application to searches of particular areas

§ 12 House or apartment, generally
§ 13 Kitchen
Filter Case by Jurisdiction to Supreme Court & 7th Circuit
Search results for "container":
Groves also contends that even if Foster possessed the authority which allowed her to consent to the search of the apartment, she did not possess the authority, actual or apparent, to allow a search of the nightstand drawer in which the incriminating evidence was found. Groves argues that the search of his nightstand was improper because Foster did not give the officers permission to search the nightstand and never told them that she had access to the inside of Groves' nightstand. At most, she admitted to cleaning it. Groves relies heavily on *United States v. Rodriguez*, 888 F.2d 519 (7th Cir.1989) to support his argument, yet a close reading of *Rodriguez* indicates that this reliance is misplaced. In that case, we found that a wife's possession of the key to open the janitor room utilized by husband (from whom she was separated) gave her apparent authority to consent to a search of that room. The question then became whether she also had the apparent authority to consent to the opening of various closed containers within the room, including her husband's briefcase, which was marked on the exterior with his name, and a metal file box labeled “Mike,” his first name. Because there had been no argument as to those containers during the district court's evidentiary hearing, this court remanded for additional findings on the defendant's privacy interests in the closed, labeled containers and his wife's apparent authority to consent to a search of those containers. *888 F.2d at 525.*

Groves' case is more analogous to *United States v. Melgar*, 227 F.3d 1038, 1041 (7th Cir.2000). In Melgar, a woman (not the defendant) renting a hotel room consented to a search of that room by officers seeking
Take advantage of Westlaw Topic and Key Number System -- Controlled Indexing

Spin off “one good case”
Limit topic and key number search to 7th Cir. Cases
This 7th Circuit case addresses third party consent when defendant objects

L.Ed.2d 242 (1974), which recognized the permissibility of a search made with the consent of one co-occupant in the other's absence. The “absent” defendant in Matlock was arrested in the front yard of a house and detained in a squad car nearby while officers, at the doorway of the house, obtained consent to search from a woman with whom he lived.

Addressing the significance of Matlock—and also Illinois v. Rodriguez, 497 U.S. 177, 110 S.Ct. 2793, 111 L.Ed.2d 148 (1990), a case involving a defendant who was asleep when police obtained consent from a co-tenant—the Randolph Court observed:

Although the Matlock defendant was not present with the opportunity to object, he was in a squad car not far away; the Rodriguez defendant was actually asleep in the apartment, and the police might have roused him with a knock on the door before they entered with only the consent of an apparent co-tenant. If those cases are not to be undercut by today's holding, we have to admit that we are drawing a fine line; if a potential defendant with self-interest in objecting is in fact at the door and objects, the co-tenant’s permission does not suffice for a reasonable search, whereas the potential objector, nearby but not invited to take part in the threshold colloquy, loses out.

This is the line we draw, and we think the formalism is justified. So long as there is no evidence that the police have removed the potentially objecting tenant from the entrance for the sake of avoiding a possible
Check topic and key number outline for other potential key numbers.

349 SEARCHES AND SEIZURES

I. IN GENERAL, k11-k100
II. WARRANTS, k101-k140
III. EXECUTION AND RETURN OF WARRANTS, k141-k160
IV. STANDING TO OBJECT, k161-k170
V. WAIVER AND CONSENT, k171-k190

171 in general
172 Words or conduct expressing consent; acquiescence
173 Persons giving consent
  173.1 —In general
  174 —Owners of property; hosts and guests
  175 —Landlords and tenants
  176 —Hotels and motels
  177 —Joint occupants
  178 —Family members
Suggested searches for my keyword search

- What authority justifies third-party consent to search? 7th Circuit
- Can a third party give consent to search a container? 7th Circuit
- Can a third party consent to search? 7th Circuit
7th Circuit case on searching closed containers

Use KeyCite to find more cases
Full Text Journals & Law Reviews

• Westlaw: Secondary Sources > Law Reviews and Journals

• Lexis Advance: Secondary Materials > Law Reviews & Journals

• Bloomberg Law: All Legal content Search > U.S. Secondary Sources > Law Reviews & Journals

• Selected journals

• HeinOnline: More comprehensive coverage than Lexis Advance, Westlaw, Bloomberg Law (PDF)
Articles from last 3 years on third party consent
Lexis/Westlaw/Bloomberg Law Search Methods

Terms and Connectors

v.

Natural Language
Terms and Connectors

• Must link **terms** with **connectors** (/p, /s, +3)

• Phrases in quotation marks

• Allows truncation (* and !)

• Only retrieves docs within search parameters

• No term-dropping
Natural Language

• String together words that might be relevant

• No truncation or connectors

• Enclose phrases in quotation marks

• String alternative terms together

• Some term-dropping to achieve results
Finding the Law

• Start with secondary sources?

• Check for constitutional provisions and statutes.

• Try to find leading case(s).

• Use leading case(s) to find cases from your jurisdiction.
Statutes and Constitution

- 21 U.S.C. §§ 841 (a)(1), 844, 846

- Fourth Amendment -- Search and Seizure

- Fifth Amendment -- Due Process

- Use annotated codes to find statutes & constitutions
• Read text carefully

• Note related sections in code’s statutory scheme -- Title, Chapter, Section

• Read the annotations
Westlaw’s search suggestions

Searching Constitution’s Fifth Amendment -- Westlaw
Another topic and key number to search
Limit to 7th Circuit Cases

When photo array is unduly suggestive, reviewing court considers whether it is sufficiently reliable to satisfy due process.

U.S. v. Kamahele
United States Court of Appeals, Tenth Circuit. - April 08, 2014 - 748 F.3d 984 - 2014 WL 1378269

When determining whether a photo array is unduly suggestive, a court considers the size of the array, the manner of its presentation, and the details of the photographs in the array.

U.S. v. Perkins

Cases (42)

1. Gregory-Bey v. Hanks
   Show synopsis

2. U.S. v. Carter
   United States Court of Appeals, Seventh Circuit. - June 10, 2005 - 410 F.3d 942 - 2005 WL 1367195
   Show synopsis

   Show synopsis
§ 907. Impermissibly suggestive pretrial procedures

American Jurisprudence, Second Edition


Part Two. Rights and Privileges of Persons Accused or Suspected of Crime
XXI. Rights and Privileges of Persons in Police Custody
B. Physical Examinations, Tests, Identification Procedures, and the Like

§ 906. When compelling suspect does not violate privilege against self-incrimination

§ 907. Impermissibly suggestive pretrial procedures

Use Westlaw annotated code to find cases
Searching Constitution’s Fifth Amendment on Lexis

1. Criminal actions--Provisions concerning--Due process of law and just compensation clauses.
   USCS - Constitution of the United States | USCS Const. Amend. 5, Part 7 of 13

CONSTITUTION OF THE UNITED STATES OF AMERICA > AMENDMENTS > AMENDMENT 5 AMENDMENTS

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property...}

... conducted with same due process protections as given conducting of photo array identification; tape must not be unduly suggestive but, as with photo arrays, totality of circumstances must be...

... rights even though it was based solely on prior out-of-court photo array identifications where was not unnecessarily suggestive. United States v. Apolin (1999, CA2 NY)
Difficult to find, but these seem like the best annotations
Neil v. Biggers, 409 U.S. 188 (1972): One Good Case (Known-Authority)

A major break with the Stovall/Simmons formulation occurred in the 1972 case of Neil v. Biggers, where the Court stated that it is "the likelihood of misidentification which violates a defendant's right to due process." It then enumerated five factors to be considered in determining this likelihood:

1. the opportunity of the witness to view the criminal, at the time of the crime
2. the witness's degree of attention
3. the accuracy of the witness's prior description of the criminal
4. the level of certainty demonstrated by the witness at the confrontation
5. the length of time between the crime and the confrontation.

In its discussion the Court gave little emphasis to the basic unfairness of the procedure employed (i.e., a showup) with its potential for suggestiveness, but concentrated on the factors which the Court said would determine the "reliability" of the identification. In addition, the Court applied this "reliability" test as a standard for the admissibility of the out-of-court identification as well as the in-court testimony, thus allowing the jury to hear evidence stemming from an admittedly

Two good headnotes. Note the Topic Summary
**Topic Summary: Fair Identification Requirement**

**Practice Area:** Criminal Law & Procedure

**Jurisdiction:** U.S. Federal

**Context:**
Criminal Law & Procedure > ... > Eyewitness Identification > Due Process Protections > Fair Identification Requirement

**Definitions (1)**

1. Eyewitness identification testimony violates a defendant’s right to due process of law when it creates a very substantial likelihood of irreparable misidentification. [*United States v. Jones*, 454 F.3d 642]

**Seminal Cases (10)**

1. [*Manson v. Brathwaite*, 432 U.S. 98]
2. [*Foster v. California*, 394 U.S. 440]
3. [*United States v. Hill*, 967 F.2d 226]

[View more]
Statutes and Rules (2)
1. U.S. Const. Amendment Amend. 6
2. U.S. Const. Amendment Amend. 5

Secondary Sources (3)
1. 2-5 Criminal Constitutional Law § 5.05
2. 2-11 Criminal Constitutional Law § 11.02
3. 1-2 Criminal Defense Techniques § 2.03

Burden of Proof (1)
1. A defendant has the initial burden of proving that the identification procedure was impermissibly suggestive. It is only after a defendant meets this burden that the burden then shifts to the prosecutor to prove that the identification was reliable, independent of the suggestive procedure. Johnson v. Warren, 344 F. Supp. 2d 1081

Standards of Review (1)

Convictions based on eyewitness identification at trial following a pretrial identification by photograph will be set aside only if the photographic identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification.

**HN4** Due Process Protections, Fair Identification Requirement

The factors to be considered in evaluating the likelihood of misidentification include the opportunity of the witness to view the criminal at the scene of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation.

Shepardize - Narrow by this Headnote (2923)

18 573

Shepardize - Narrow by this Headnote (4727)

5 1592
Limited jurisdiction to 7th Circuit

Find cases with all these Lexis features

Shepardize - Narrow by this Headnote (2)

Criminal Law & Procedure > ... > Eyewitness Identification ▼ > Due Process Protections ▼ > Fair Identification Requirement ▼
View more legal topics

**HN8** Due Process Protections, Fair Identification Requirement
First, a defendant must demonstrate that the lineup identification procedures were unduly suggestive. If a defendant clears this threshold, suppression is warranted unless the identification, in view of the totality of the circumstances, was reliable enough to prevent a substantial likelihood of misidentification. 
More like this Headnote

Shepardize - Narrow by this Headnote (6) ▲ 3

Criminal Law & Procedure > ... > Eyewitness Identification ▼ > Due Process Protections ▼ > Fair Identification Requirement ▼
View more legal topics

**HN9** Due Process Protections, Fair Identification Requirement
There are a number of factors bearing on the reliability of lineup identifications, including the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of his prior description of the criminal, the level of certainty demonstrated at the confrontation, and the time between the crime and the confrontation. 
More like this Headnote

Shepardize - Narrow by this Headnote (2)
More on Finding the Law

Use Shepard’s, KeyCite or Bloomberg Law to find additional cases and secondary sources
West Headnote 13 is relevant

**Criminal Law**

Factors to be considered in evaluating likelihood of misidentification because of suggestiveness of confrontation procedures, for purpose of determining admissibility of testimony concerning out-of-court identification, include opportunity of witness to view criminal at time of crime, witness' degree of attention, accuracy of witness' prior description of the criminal, level of certainty demonstrated by witness at the confrontation, and length of time between the crime and the confrontation.

5873 Cases that cite this headnote
Filter to 7th Circuit citing cases
Updating the Law

• Cases
  -- Shepard’s, KeyCite or BCite: Watch for negative history and treatment cases.

• Statutes
  -- Shepard’s or KeyCite: Watch for legislative and judicial treatment
  -- BCite: Can only watch for judicial treatment
When Should I Stop?

- Stop when find same sources through independent means.
- Have you looked in the really important places?
- Did you update everything?
- Do you understand the law? If not, you are definitely not done!
- You are probably not going to find all law on an issue!
There is no one right way to do research.

Master a wide variety of research tools to develop an effective method.
THE END