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NOTES

THE CONSENT-ONCE-REMOVED DOCTRINE: THE CONSTITUTIONALITY OF PASSING CONSENT FROM AN INFORMANT TO LAW ENFORCEMENT

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I. INTRODUCTION

In 2002 Brian Bartholomew was charged with possession of methamphetamine.[1] In hopes of obtaining leniency, Bartholomew chose to assist the Central Utah Narcotics Task Force as a confidential informant.[2] As an informant, Bartholomew arranged to buy drugs from Afton Callahan at Callahan's home.[3] Bartholomew then contacted narcotics officers to set up the sting operation.[4] As part of the sting operation, Bartholomew entered Callahan's home with Callahan's consent and proceeded to buy drugs.[5] After making the exchange with Callahan, Bartholomew signaled narcotics officers, who then entered and arrested Callahan.[6]

At first glance the arrest appears to be an everyday, straightforward law enforcement tactic, but actually the situation poses a difficult constitutional problem: Was the entry by the police officers in *Callahan* authorized when the Fourth Amendment requires police officers to be authorized by warrant, consent, or exigent circumstances to enter a home? If Callahan gave his consent to Bartholomew, a civilian, can that consent be passed to law enforcement? On July 16, 2007, Callahan appealed to the Tenth Circuit Court of Appeals, alleging that the police officers violated his constitutional rights when they entered his home.[7] The state conceded there was no warrant or exigent circumstances authorizing the officers' entry into Callahan's home.[8] Instead, the state relied on the consent-once-removed doctrine to establish the officers' authority to enter and arrest Callahan.[9]

The consent-once-removed doctrine allows one individual to receive consent from the homeowner and then pass that consent to another individual, who can then legally enter the home to assist the first individual.[10] Traditionally, the concept has been applied only to undercover

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1. Callahan v. Millard County, 494 F.3d 891, 893 (10th Cir. 2007), *rev'd on other grounds*, Pearson v. Callahan, 129 S. Ct. 808 (2009).

2. *Id.*

3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.*

7. *Id.* at 894. Callahan brought a civil action against the counties and cities involved and the individual officers who made the arrest. He alleged that his Fourth Amendment rights were violated when the police raided his home. The district court held that his rights were violated, but the officers were afforded qualified immunity. *Id.* The Tenth Circuit, upon review, affirmed that the rights were violated, but reversed the qualified immunity holding, finding that the officers relied on rights that were not clearly established. *Id.* at 898–99.

8. *Id.* at 896.

9. *Id.*

10. United States v. Pollard, 215 F.3d 643, 648 (6th Cir. 2000) (quoting United States v. Akinsanya, 53 F.3d 852, 856 (7th Cir. 1995)); *accord* United States v. Yoon, 398 F.3d 802, 806 (6th Cir. 2005).

officers who received the initial consent,[11] but cases like Callahan's pose the question of whether this doctrine is valid when extended to confidential informants.[12]

In Callahan's case, the Tenth Circuit considered extending the consent-once-removed doctrine to include consent obtained by a confidential informant. Ultimately, however, the court declined to extend the doctrine to civilians and instead held that consent to a confidential informant is insufficient under the Fourth Amendment to allow police officers to enter a home.[13] This decision created a circuit split in the application of the doctrine and proves the need for a clear answer to the question of whether the consent-once-removed doctrine should be extended to situations involving confidential informants.[14]

This Note examines the establishment and history of the consent-once-removed doctrine from its conceptual basis to its current level of acceptance. Part II outlines the basic Fourth Amendment concepts that underlie the consent-once-removed doctrine. Part III looks more specifically at the definition of the doctrine and its gradual formation over the past thirty years, as well as its current application to undercover officers. Part IV looks more critically at the issues posed by the extension of the doctrine to confidential informants, including analysis of the inherent differences between a confidential informant and an undercover officer, and the subsequent constitutional effects of those differences. Finally, Part V concludes that the consent-once-removed doctrine should be extended to situations involving confidential informants and that this extension is constitutional.

II. CONCEPTUAL BASIS FOR THE DOCTRINE: COMPETING BACKGROUND PRINCIPLES

The *Callahan* case illustrates the consent-once-removed doctrine and the attenuating issues involved in its extension to confidential informants.[15] *Callahan* exemplifies the fundamental principles that are in direct conflict: the basic privacy right of an individual to be free from unreasonable intrusion in his own home and the established concept of waiving, through consent, the right to this expected protection.

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11. *See* United States v. Bramble, 103 F.3d 1475, 1478 (9th Cir. 1996); United States v. Diaz, 814 F.2d 454, 459 (7th Cir. 1987); United States v. Samet, 794 F. Supp. 178, 181 (E.D. Va. 1992); Commonwealth v. Moye, 586 A.2d 406, 409 (Pa. Super. Ct. 1990).

12. *See Yoon*, 398 F.3d at 806; *Akinsanya*, 53 F.3d at 856; United States v. Paul, 808 F.2d 645, 648 (7th Cir. 1986); Baith v. State, 598 A.2d 762, 766 (Md. Ct. Spec. App. 1991).

13. *Callahan*, 494 F.3d at 898.

14. *Compare Callahan*, 494 F.3d at 898 (rejecting the application of the doctrine to confidential informants), *with Yoon*, 398 F.3d at 808 (treating confidential informants the same as undercover officers), *and Paul*, 808 F.2d at 648 (extending doctrine to confidential informants).

15. The *Callahan* case also presents the issue of the informant's character, which is typically questionable. *See infra* Part IV.B.4.

A. *The Warrant Requirement*

The Fourth Amendment to the U.S. Constitution provides distinct protection for the security of a citizen's privacy in his home.[16] In particular, the Amendment provides that the American people have the right "to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures . . . and no Warrants shall issue but upon probable cause . . . ."[17] The Supreme Court determined in *Payton v. New York*[18] that this language prohibits police entry into a person's home to make a felony arrest without a warrant.[19] The Court in *Katz v. United States* reasoned that the Constitution requires the impartial decision of a judicial officer to step between the citizen and the police.[20] The *Katz* Court stated further that a search absent judicial approval is per se unreasonable under the Fourth Amendment,[21] subject to only a few specific exceptions.[22] One of these exceptions, consent, establishes the initial basis for the consent-once-removed doctrine and its possible extension.[23] Importantly, however, the Supreme Court has cautioned that exceptions to the warrant requirement are "few in number and carefully delineated."[24]

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16. *See* Payton v. New York, 445 U.S. 573, 586–87 (1980) (stating "[i]t is a 'basic principle of Fourth Amendment law' that searches and seizures inside a home without a warrant are presumptively unreasonable," while "objects . . . found in a public place may be seized by the police without a warrant"); Coolidge v. New Hampshire, 403 U.S. 443, 474–75 (1971) (stating "[i]t is accepted, at least as a matter of principle, that a search or seizure carried out on a suspect's premises without a warrant is *per se* unreasonable, unless the police can show that it falls within one of a carefully defined set of exceptions based on the presence of 'exigent circumstances'").

17. U.S. CONST. amend. IV.

18. 445 U.S. 573 (1980).

19. *Id*. at 576.

20. Katz v. United States, 389 U.S. 347, 357 (1967); Wong Sun v. United States, 371 U.S. 471, 481–82 (1963).

21. 389 U.S. at 357; *see also* Chapman v. United States, 365 U.S. 610, 614–15 (1961) (noting that the Fourth Amendment requires a detached magistrate to determine the issuance of a search warrant and that attempts by officers to search without a warrant "would reduce the Amendment to a nullity"); Rios v. United States, 364 U.S. 253, 261 (1960) (stating "[t]he seizure can survive constitutional inhibition only upon a showing that the surrounding facts brought it within one of the exceptions to the rule that a search must rest upon a search warrant."); Jones v. United States, 357 U.S. 493, 499 (1958) ("The exceptions to the rule that a search must rest upon a search warrant have been jealously and carefully drawn . . . .").

22. Various exceptions to the warrant requirement have been recognized, such as consent and exigent circumstances. Exigent circumstances involve an emergency situation which justifies the police's warrantless entry or search. Exigent circumstances that have appeared more often include: 1) degree of urgency and amount of time necessary to obtain a warrant, 2) reasonable belief that the contraband is about to be removed, 3) possibility of danger to police officers, 4) information indicating that the possessors of contraband are aware that the police are on their trail, and 5) the ready destructibility of the contraband. United States v. Rubin, 474 F.2d 262, 265–66 (3d Cir. 1973); *see also* Dorman v. United States, 435 F.2d 385, 390–93 (D.C. Cir. 1970) (providing similar list of relevant factors for determining existence of exigent circumstances exception).

23. *See* United States v. Diaz, 814 F.2d 454, 459 (7th Cir. 1987) (holding that the first entry was valid through consent and extending that consent to the second entry); United States v. Paul, 808 F.2d 645, 647–48 (7th Cir. 1986).

24. United States v. United States District Court for the E.D. of Mich., 407 U.S. 297, 318

B. *Exception to the Warrant Requirement: Consent Through Deception*

The consent exception is routinely thought of as a valuable alternative to the warrant requirement.[25] Not only does the use of consent avoid the complex process of obtaining a warrant, but it can also be used to search even when there is no probable cause.[26] The basic concept of the consent exception is that a person may waive the protection from unreasonable searches and seizures. Prior to 1973 many courts thought that a valid consent could be given only when the consenter knew he had the right to refuse consent.[27] Then, in 1973, the Supreme Court in *Schneckloth v. Bustamonte* held that the consenter's ignorance of the right to refuse consent was only one factor in the determination of valid consent.[28] Thus today a "totality of the circumstances" test exists, which focuses on whether the consent was voluntary.[29] There is no need to ensure that the consenter knows of his right to refuse and therefore, law enforcement may obtain consent through deception.

In fact, an effective tool for police in obtaining consent is through a misrepresentation of the officer's identity.[30] Commonly this tactic involves undercover officers posing as potential narcotics purchasers, similar to the factual situation in *Callahan v. Millard County*.[31] The Supreme Court in *Hoffa v. United States* directly addressed the constitutionality of this issue

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(1972); *see also* Illinois v. Rodriguez, 497 U.S. 177, 192 (1990) ("The Court has often heard, and steadfastly rejected, the invitation to carve out further exceptions to the warrant requirement for searches of the home . . . ."); Welsh v. Wisconsin, 466 U.S. 740, 749 (1984); *Katz*, 389 U.S. at 357.

25. WAYNE R. LAFAVE, SEARCH AND SEIZURE § 8.1 (4th ed. 2004) (discussing advantages of consent over obtaining a warrant as the burdensome constitutional and statutory requirements which attend the issuance and execution of a search warrant, and that in some cases search based on consent can allow for a somewhat broader search, and the overall expediency effect of consent on the investigation).

26. Schneckloth v. Bustamonte, 412 U.S. 218, 219 (1973) (stating "one of the specifically established exceptions to the requirements of both a warrant and probable cause is a search that is conducted pursuant to consent"); *see also* State v. Zachodni, 466 N.W.2d 624, 628 (S.D. 1991).

27. Courts were confused as to whether consent to search was a matter of voluntariness or whether it involved an actual waiver of the Fourth Amendment rights. LAFAVE, *supra* note 25, § 8.1, at 8. *Compare* Zap v. United States, 328 U.S. 624, 628 (1946) (appearing to focus on voluntariness), *with* United States v. Nikrasch, 367 F.2d 740, 744 (7th Cir. 1966) (applying knowing waiver standard to consent searches).

28. 412 U.S. 218, 227 (1973) ("While the state of the accused's mind, and the failure of the police to advise the accused of his rights, were certainly factors to be evaluated in assessing the 'voluntariness' of an accused's responses, they were not in and of themselves determinative.").

29. *Id.* at 226.

30. *See* Lewis v. United States, 385 U.S. 206, 210 (1966) (stating that the elimination of the use of deception by police would "severely hamper the Government in ferreting out those organized criminal activities that are characterized by covert dealings with victims who either cannot or do not protest. A prime example is provided by the narcotics traffic").

31. Callahan v. Millard County, 494 F.3d 891, 893–94 (10th Cir. 2007), *rev'd on other grounds*, Pearson v. Callahan, 129 S. Ct. 808 (2009).

and firmly stated that at no time has the Court held "that the Fourth Amendment protects a wrongdoer's misplaced belief that a person to whom he voluntarily confides his wrongdoing will not reveal it."[32] In *Lewis v. United States* the Court further stated that when the home of an individual is "converted into a commercial center . . . for purposes of transacting unlawful business," those transactions should be treated no differently than if they occurred in open public.[33] This language has been cited by at least two courts as evidence of the validity of the consent-once-removed doctrine.[34] Conclusively, in *Lewis*, the Court made clear that the consent provided through deception is valid and that to hold otherwise would unreasonably deem any action by an undercover officer as per se unconstitutional.[35] Thus, *Lewis* is dispositive on the issue of deception and undercover officers.[36]

III. DEFINING THE DOCTRINE

A. *Development and the Present Status of the Consent-Once-Removed Doctrine*

Presently, the consent-once-removed doctrine is recognized in some form by four circuit courts and two state supreme courts.[37] In addition, many other state and federal courts have considered either the base concepts of the doctrine or the doctrine itself.[38] Generally, these courts

32. 385 U.S. 293, 302 (1966). This concept is an important foundation for the consent-once-removed doctrine, as it accounts for the completion of the first element of the doctrine. *See* United States v. Pollard, 215 F.3d 643, 648 (6th Cir. 2000).

33. 385 U.S. 206, 211 (1966).

34. State v. Henry, 627 A.2d 125, 132 (N.J. 1993); United States v. Samet, 794 F. Supp. 178, 182 (E.D. Va. 1992).

35. *Lewis*, 385 U.S. at 210. Some opinions, such as the dissent in *Henry*, have noted that in *Lewis* no evidence was seized as a result of a warrantless entry and thus, the case does not authorize seizure of evidence beyond what was originally purchased during the undercover buy. *Henry*, 627 A.2d at 134 (O'Hern, J., dissenting).

36. *See* United States v. White, 401 U.S. 745, 749 (1971) (concluding that *Lewis* is still good law); United States v. Bramble, 103 F.3d 1475, 1478 (9th Cir. 1996) (citing *Lewis* as evidence that it is well-settled that undercover officers may lawfully misrepresent their identity).

37. Callahan v. Millard County, 494 F.3d 891, 896 (10th Cir. 2007), *rev'd on other grounds*, Pearson v. Callahan, 129 S. Ct. 808 (2009); United States v. Pollard, 215 F.3d 643, 648–49 (6th Cir. 2000); *Bramble*, 103 F.3d at 1478; United States v. Akinsanya, 53 F.3d 852, 856 (7th Cir. 1995); *Henry*, 627 A.2d at 130–32; State v. Johnston, 518 N.W.2d 759, 764 (Wis. 1994) (citing *Diaz* and *Paul* and recognizing the doctrine, but not adopting the term "consent-once-removed").

38. *See Samet*, 794 F. Supp. at 181. The *Samet* court, facing a typical undercover narcotics purchase by an officer, used the doctrine and opined a straightforward application:

> [The detective] was lawfully in the apartment, and no one disputed that he had the authority and probable cause to arrest defendants upon the exchange of the cash for the cocaine. The arrest did not become unlawful merely because [the detective], as an undercover agent, first signaled the arrest team to assist him.

approve the doctrine based on the view that, where the first entry is obtained through valid consent, the second entry is a mere technicality and sufficiently justified.[39] Earlier cases that validated entry based on similar reasoning as the consent-once-removed doctrine were termed "second entry" cases.[40] For example, *United States v. Janik*, decided in 1983, approved the "second entry" concept.[41] Judge Posner's opinion in *Janik* exemplifies the early reasoning that preceded the consent-once-removed doctrine.[42] Judge Posner parsed the issue into a discussion of two separate entries.[43] First, the initial undercover officer's entry was lawful because he received valid consent.[44] Second, the entry of back-up officers was dismissed as being "trivial" in its privacy implications because of the previously-established consent given to the undercover officer.[45]

Similarly, in a natural progression towards the adoption of the doctrine,

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Id.; *see also* United States v. Schuster, 684 F.2d 744, 748 (11th Cir. 1982) (reasoning that consent could be passed to agent but not addressing the doctrine); Baith v. State, 598 A.2d 762, 768 (Md. Ct. Spec. App. 1991) (relying on *Schuster*, the court allowed consent to be passed from confidential informant to agent but did not explicitly mention the doctrine); Commonwealth v. Moye, 586 A.2d 406, 409 (Pa. Super. Ct. 1990) (relying on *Diaz* and United States v. Janik, 723 F.2d 537 (7th Cir. 1983), the court formally adopts the consent-once-removed doctrine); *Johnston*, 518 N.W.2d at 765 n.6 (declining to adopt doctrine but acknowledging that the doctrine is very similar to its present analysis).

Florida's case law provides another example of the natural development of the concepts underlying the doctrine, though not explicitly adopting consent-once-removed. In *Lawrence v. State*, undercover officers received consent to enter the defendants' home and then witnessed contraband in plain view. 388 So. 2d 1250, 1251–52 (Fla. 4th DCA 1980). One of the officers then left and elicited back-up officers to arrest the defendants. *Id.* at 1252. The court's majority found that the undercover officer and back-up officers who reentered still had valid consent and thus the departed officer's reentry was constitutional. *Id.* The concurring opinion by Judge Anstead, later adopted in *State v. Schwartz*, 398 So. 2d 460, 462 (Fla. 4th DCA 1981), gives an even more noticeable identification of the doctrine as it stands today. *Lawrence*, 388 So. 2d at 1253 (Anstead, J., concurring). "In my view once the defendants admitted the undercover police officers to their premises and proceeded to openly engage in criminal conduct in the officers' presence they could not thereafter claim any violation of their reasonable expectation of privacy . . . ." *Id.*

39. *See, e.g.*, *Janik*, 723 F.2d at 548 (reasoning that the subsequent entry of other officers makes no difference from a constitutional standpoint); *Schuster*, 684 F.2d at 748–49 (stating that the entry of additional agent did not change the fact that the defendant was engaged in illegal activity and could not reasonably expect secrecy in his activities); *Schwartz*, 398 So. 2d at 462 (finding that the entry of other officers does not bear on the reasonableness or do injustice to the Constitution).

40. United States v. Diaz, 814 F.2d 454, 459 n.4 (7th Cir. 1987) (terming both *White* and *Janik* as "second entry" cases).

41. 723 F.2d 537, 547–48 (7th Cir. 1983).

42. *Janik* was cited by multiple courts in their establishment of the consent-once-removed doctrine. *See, e.g.*, United States v. Yoon, 398 F.3d 802, 810 (6th Cir. 2005); *Akinsanya*, 53 F.3d at 856; United States v. Paul, 808 F.2d 645, 648 (7th Cir. 1986).

43. *Janik*, 723 F.2d at 547–48.

44. *Id.* at 547.

45. *Id.* at 548.

the Eleventh Circuit in *United States v. Schuster*,[46] allowed a transfer of consent from an informant to a government agent.[47] The Eleventh Circuit relied on prior Supreme Court wiretap cases establishing a "misplaced trust" theory.[48] The wiretap cases allowed an informant to tape record private conversations and transmit them to agents.[49] In both cases, the Court held that the speaker's privacy interest was no longer protected from subsequent broadcast of the conversations.[50] The *Schuster* majority likened that situation to the warrantless entry of an individual's home based upon an informant receiving valid consent.[51] The court justified the warrantless entry by focusing on the depreciated privacy interest and the reasonableness of the search or seizure.[52]

The first case to term the doctrine and specifically set its parameters was *United States v. Diaz*.[53] *Diaz*'s basic reasoning built on the Seventh Circuit's previous holding in *United States v. Paul*[54] and *Janik*, which emphasized the trivial nature of the privacy interests involved in the second entry.[55] In *Diaz*, an undercover officer received valid consent to enter a suspect's hotel room and after establishing probable cause, signaled the entry of back-up officers to make the arrest.[56] The defendant was convicted on multiple counts and appealed the warrantless police entry.[57] In finding law enforcement actions constitutional, the court observed that the purpose of a warrant is to prevent unwarranted intrusions, but here the intrusion had already taken place by the first officer legally entering with

46. 684 F.2d 744 (11th Cir. 1982).

47. *Id.* at 748.

48. *Id*.

49. *See generally* United States v. Caceres, 440 U.S. 741 (1979) (holding that the Fourth Amendment does not protect against recording of consensual conversations or rebroadcast of those conversations to government agents); United States v. White, 401 U.S. 745 (1971) (holding that the monitoring of conversations without a warrant between an informant and the defendant does not violate the defendant's Fourth Amendment rights).

50. *Schuster*, 684 F.2d at 748.

51. *Id.*

52. *Id.* The court concluded that the search was the same as the one to which was originally consented. Thus, there was no privacy implication resulting from a different government agent conducting the search. *Id.* This reasoning is very similar to the reason later developed to justify the doctrine.

53. United States v. Diaz, 814 F.2d 454, 459 (7th Cir. 1987). The court applied the doctrine only when "the agent (or informant) entered at the express invitation of someone with authority to consent, at that point established the existence of probable cause to effectuate an arrest or search, and immediately summoned help from other officers." *Id.* This is the exact language used in *Pollard* to currently define the doctrine. United States v. Pollard, 215 F.3d 643, 648 (6th Cir. 2000).

54. 808 F.2d 645 (7th Cir. 1986).

55. *Diaz*, 814 F.2d at 459. The court critically noted the "fact that he was assisted by other law enforcement officers in securing his arrest cannot make a constitutional difference." *Id.*

56. *Id.* at 456.

57. *Id.* at 456–57.

consent.[58] The *Diaz* decision began the procession of cases dealing explicitly with the consent-once-removed doctrine, as defined by this court.[59]

The latest and most authoritative decisions on the consent-once-removed doctrine are within the Sixth and Seventh Circuits.[60] The Seventh Circuit reaffirmed the doctrine twice after *Diaz*, including most recently in 1995 in *United States v. Akinsanya*.[61] In 1993, the Sixth Circuit considered the doctrine in *United States v. Oqbuh*, but decided the case was distinguishable from *Paul*, the Seventh Circuit case.[62] The *Oqbuh* court reasoned the doctrine was inapplicable because the informant brought the narcotics into the defendant's home.[63] Furthermore, the police forcibly entered the home rather than being invited in by the informant as in *Paul*.[64] Nevertheless, in 2000, in *United States v. Pollard*, the Sixth Circuit formally recognized consent-once-removed, relying on *Akinsanya*.[65] In 1996, in *United States v. Bramble*, the Ninth Circuit also approved the Seventh Circuit's decision in *Akinsanya* and recognized the validity of the consent-once-removed doctrine.[66]

B. *Elements and Parameters of the Doctrine*

The elements of the doctrine generally consist of: 1) an undercover agent or government informant[67] entered at the express invitation of someone with authority to consent; 2) at that point established the existence of probable cause to effectuate an arrest or search; and 3) immediately summoned help from other officers.[68] Importantly, there is no requirement for an emergency situation to exist before the back-up officers enter the premises.[69] Thus, the doctrine stands apart from other accepted

58. *Id.* at 459.

59. *See* United States v. Pollard, 215 F.3d 643, 648 (6th Cir. 2000); United States v. Akinsanya, 53 F.3d 852, 856 (7th Cir. 1995); State v. Henry, 627 A.2d. 125, 130–31 (N.J. 1993).

60. United States v. Yoon, 398 F.3d 802, 806 (6th Cir. 2005); *Pollard*, 215 F.3d at 648; *Akinsanya*, 53 F.3d at 856.

61. *Akinsanya*, 53 F.3d at 856; United States v. Jachimko, 19 F.3d 296, 298–99 (7th Cir. 1994).

62. *See* 982 F.2d 1000, 1005 (6th Cir. 1993).

63. *Id.*

64. *Id.*

65. 215 F.3d 643, 648–49 (6th Cir. 2000).

66. United States v. Bramble, 103 F.3d 1475, 1478 (9th Cir. 1996).

67. Some courts are unwilling to extend the doctrine to confidential informants. *See infra* Part IV.

68. *Pollard*, 215 F.3d at 648; *Akinsanya*, 53 F.3d at 856; *Jachimko*, 19 F.3d at 299; United States v. Diaz, 814 F.2d 454, 459 (7th Cir. 1987); United States v. Paul, 808 F.2d 645, 648 (7th Cir. 1986).

69. *Akinsanya*, 53 F.3d at 856 (applying the doctrine while also acknowledging that no exigent circumstances existed); *Diaz*, 814 F.2d at 459 (noting that no exigent circumstances were present, but still applying doctrine).

exceptions based on exigent circumstances. Under the first element, it is apparent that the initial consent obtained must be valid to support the second entry but, as explained above, this consent can be obtained through deception or a ruse.[70] Despite the validity of consent obtained through deception, the consent required by the first element imposes an inherent limitation on law enforcement action. The doctrine is predominantly applied in situations similar to the *Callahan* case, where the initial consent is for entry specifically to purchase narcotics; consequently, consent is limited to entry and not a search of the premises.[71] The first officer or informant who has consent only to enter one room may not enter other rooms that are not impliedly consented to by the defendant in his offer to sell narcotics.[72] The second element requires the initial agent or informant to establish probable cause.[73] This is usually done through viewing the drugs in plain sight or actually completing the transaction and possessing the drugs.[74] The imperative of establishing probable cause can be contentious, particularly when considering the possible extension of the doctrine to confidential informants.[75]

The operation of the third element is the crux of the doctrine because it marks the point at which uninvited individuals enter the home. It also has the potential to implicate serious constitutional issues because the actions of the back-up officers can create further privacy compromises. First, in order to satisfy the third element, one may question whether the initial

70. *See supra* Part II.B.

71. *See* United States v. Yoon, 398 F.3d 802, 806 n.1 (6th Cir. 2005) (noting the doctrine is based on consent to enter the home and not to search). *See generally Akinsanya*, 53 F.3d at 855 (giving consent to informant to enter for drug transaction); *Diaz*, 814 F.2d at 456 (admitting undercover agent for purchase of narcotics only); *Paul*, 808 F.2d at 646 (giving consent to informant to enter and purchase drugs).

72. Even though police officers may receive valid consent from an individual to enter or search a home, that entrance or search can still be subject to limits. LAFAVE, *supra* note 25, § 8.1(c), at 19. Police are constrained by the limit that is expressly given to them by the individual. *Id.* (citing MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE § SS 240.3 (1975)). The Court in *Florida v. Jimeno* held that the scope of consent is determined through a standard of objective reasonableness, that is, what a reasonable person would believe the limits of the consent were. 500 U.S. 248, 249 (1991). In the context of consent gained through deception, the scope of consent is typically understood through the express purpose for the visit. In consent-once-removed cases, the express purpose is to purchase narcotics and thus the officer or informant is limited to areas that are reasonably within that purpose. *See* United States v. Bramble, 103 F.3d 1475, 1478 (9th Cir. 1996) ("[T]he . . . agents remained in the area where [defendant] had invited them and acted only for the purpose for which they had been invited, *i.e.*, to conduct an illegal transaction.").

73. *Pollard*, 215 F.3d at 648.

74. *See id.* (recognizing that the officer had probable cause to arrest upon seeing the drug containers); United States v. Samet, 794 F. Supp. 178, 181 (E.D. Va. 1992) (recognizing that probable cause was established through undercover agent receiving the narcotics from defendant); State v. Henry, 627 A.2d 125, 128 (N.J. 1993) (establishing probable cause through completion of drug transaction).

75. *See infra* Part IV.

officer or informant must stay on the premises during the arrest. It is generally considered much safer to allow the undercover officer or informant to leave the premises before arresting the defendant.[76] Therefore, many undercover operations involve the agent or informant establishing probable cause and then leaving under the guise of retrieving money.[77] In these situations the apparent rule is that the momentary exit of the agent or informant does not render the doctrine inapplicable.[78] However, the rule can be contingent upon the agent or informant maintaining an express or implied right to reenter. If the informant or agent leaves the residence with no implied right to reenter the doctrine can be inapposite depending on the time in between and the location of the subsequent arrest.[79]

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76. Edward M. Hendrie, *Consent Once Removed*, THE FBI L. ENFORCEMENT BULL., Feb. 2003, at 24, 26; *see also Henry*, 627 A.2d at 130 (reasoning that removal of undercover agent was justified on safety grounds because "weapons are usually found where illegal drugs are sold").

77. *See* United States v. Akinsanya, 53 F.3d 852, 854–55 (7th Cir. 1995); United States v. Diaz, 814 F.2d 454, 457 (7th Cir. 1987); Fidalgo v. State, 659 So. 2d 290, 292 (Fla. 3d DCA 1994); Lawrence v. State, 388 So. 2d 1250, 1252 (Fla. 4th DCA 1980); Baith v. State, 598 A.2d 762, 765 (Md. Ct. Spec. App. 1991).

78. *Akinsanya*, 53 F.3d at 856 (holding that momentary exit does not matter because the initial consent acted as a substitute for a warrant); *Diaz*, 814 F.2d at 459 (stating "the fact that [undercover agent] momentarily stepped out to obtain help from other officers in making the arrest did not vitiate this consent"); United States v. Santiago, Nos. 92 CR 881-1, 881-2, 1993 WL 75140, at *4 (N.D. Ill. Mar. 15, 1993) (allowing the application of the doctrine despite the exit of the confidential informant); Commonwealth v. Moye, 586 A.2d 406, 409 (Pa. Super. Ct. 1990) (holding "an officer's momentary exit to secure back up does not invalidate an otherwise legal arrest"). *But see* United States v. Herrera-Corral, No. 01 CR 141, 2002 WL 69491, at *1, 7, 9 (N.D. Ill. Jan. 17, 2002). In *Herrera*, a confidential informant entered the defendant's apartment with consent and observed narcotics. *Id.* at *1. Thereafter, the informant left the apartment under the premise of collecting money and confirmed to waiting law enforcement agents the existence of the narcotics. *Id.* The informant then definitively left the scene and approximately two minutes later, law enforcement forcibly entered the defendant's apartment and arrested the defendant. *Id.* The court held that the third requirement of the consent-once-removed doctrine—"immediately summoned help from other officers"—was not met for two reasons. *Id.* at *7. First, the court treated the absence of the confidential informant during the arrest as nearly dispositive. *Id.* The court reasoned that the primary justification for the doctrine is to facilitate protection of the undercover officer or informant and thus, the absence of the informant obviates the primary purpose of the doctrine. *Id.* Second, the court restrictively defined "immediately" as only encompassing instances illustrated in *Diaz* and *Akinsanya*, that is where "the [confidential informant] or agent exited the premises momentarily, or at the same time that agents entered the apartment." *Id.* at *9.

79. *See* Smith v. State, 857 A.2d 1224, 1231–32 (Md. Ct. Spec. App. 2004). In *Smith*, the undercover agent was invited into the home of the defendant to purchase narcotics, and the agent completed the transaction and then left to inform the back-up team of the completion. *Id.* The court distinguished the instant case from that of *Baith v. State*, in which the concept of consent-once-removed was applied, though not explicitly adopted, in two respects. *Id.* at 1231. First, the transaction was completed and the undercover agent had no expected and implicit right to return. *Id.* Second, when the arrest team arrested the defendant he was already outside his home and on a public street, this gave them no right to enter the premises and obtain the narcotics. *Id.* The court further noted that the doctrine is not applicable in these situations because the specific language of the third element requires that the back-up officers assist in the arrest. *Id.* at 1232. Thus, if the

Second, even if the officer may leave momentarily, the length of time between the transaction and the arrest can potentially invalidate the back-up officers' authority to enter. Relatively few decisions have dealt specifically with a prolonged time period between the transaction and the arrest. In *State v. Henry*, the Supreme Court of New Jersey determined that fifteen to twenty minutes was not long enough to vitiate the consent obtained by the undercover officer.[80] The court reasoned that the delay between the two entries was relatively brief and, thus, the circumstances that originally established the probable cause had likely not dissipated.[81] Similarly, the court in *United States v. Santiago* held that a fifteen minute respite was sufficiently "immediate" under the doctrine.[82] However, in *United States v. Herrera-Corral*, the same court redefined "immediate" and held that a mere two minute delay was insufficient to apply the doctrine.[83] The court specifically relied on the holdings of *Diaz* and *Akinsanya* to determine that the "immediate" requirement is only satisfied when "the [confidential informant] or agent exited the premises momentarily, or at the same time that agents entered the apartment."[84] Additionally, a more recent New Jersey case limited the doctrine and held that thirty to forty-five minutes is too long to maintain valid authority to enter.[85] In *State v. Penalber*,[86] after the narcotics sale was complete the agent left and went back to the stationhouse to discuss the arrest of the suspect with the back-up officers who had been present at the initial transaction.[87] The court focused on the language in *Henry* that the separate entries must be "'of a single, continuous, and integrated police action and were not interrupted or separated by an unduly prolonged delay.'"[88] Because thirty to forty-five minutes had passed and the officers left the scene of the transaction, the court reasoned that the continuity requirement

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defendant was already arrested outside, there is no justification of the warrantless entry of back-up officers in the home. *Id.*; *see also* People v. Finley, 687 N.E.2d 1154, 1160–61 (Ill. App. Ct. 1997). The court in *Finley* declined to apply the doctrine to the instant situation because, among other things, the informant left the house and gave the signal to arrest with no apparent right to reenter. *Finley*, 687 N.E.2d at 1160–61. The court distinguished its case by pointing at the Seventh Circuit cases that did apply the doctrine, stating "[i]mportantly, the defendant understood that the informant would leave to obtain the money from his 'buyer' and would return to the defendant's premises." *Id.* at 1160.

80. 627 A.2d 125, 129–30 (N.J. 1993).

81. *Id.* The court also relied on the safety intentions of the police to remove the undercover agent and prevent undue risk in the arrest as well as on the language in *Diaz* that allowed the agent to momentarily step out to request back-up. *Id.*

82. Nos. 92 CR 881-1, 881-2, 1993 WL 75140, at *4 (N.D. Ill. Mar. 15, 1993).

83. No. 01 CR 141, 2002 WL 69491, at *9 (N.D. Ill. Jan. 17, 2002).

84. *Id.*

85. State v. Penalber, 898 A.2d 538, 542 (N.J. Super. Ct. App. Div. 2006).

86. *Id.*

87. *Id.* at 541.

88. *Id.* at 542 (quoting State v. Henry, 627 A.2d 125, 131 (N.J. 1993)).

established in *Henry* was not achieved and consent-once-removed was unjustified.[89]

C. *Justification for the Doctrine as to Undercover Officers*

The consent-once-removed doctrine as it applies to undercover officers has survived enough judicial scrutiny for its justifications to be considered valid. Using the basic concepts outlined in Part II, this Part illustrates the various justifications that have led to the establishment of the doctrine. It is helpful to first introduce these concepts in the context of an undercover officer and then compare them to the possibility of extending the doctrine to confidential informants.

1. Who Needs Privacy When You Have Drugs?

One justification for applying the doctrine to undercover officers is that the individual's privacy interest is eliminated and no longer reasonable once the individual brandishes his contraband to the police.[90] The court in *Henry* discussed the privacy interests involved in the drug transaction between the defendant and an undercover officer.[91] Relying on *United States v. Lewis*, the court stated that "[b]ecause [the] defendant had plainly opened her home to commercial drug traffic . . . her complaint now that some of her supposed customers invaded the sanctity of her home appears flimsy."[92] This disregard for the privacy complaints of the guilty underlies most decisions that have applied the consent-once-removed doctrine or its concept.[93] The Supreme Court in *Katz v. United States* stated that "[w]hat a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection."[94] Thus, if the drug

89. *Id.*

90. United States v. Pollard, 215 F.3d 643, 649 (6th Cir. 2000); United States v. Paul, 808 F.2d 645, 648 (7th Cir. 1986); State v. Henry, 627 A.2d 125, 132 (N.J. 1993).

91. *Henry*, 627 A.2d at 131–32. The *Henry* case involved an undercover officer approaching an apartment and knocking on the door. *Id*. at 126. Upon the defendant answering the door, the undercover officer stated, "let me get two," while at the same time entering the apartment. *Id.* The undercover officer was then directed to another individual from whom he proceeded to purchase drugs. *Id.* After exiting the apartment the undercover officer radioed back-up officers, who arrived and helped to effectuate the arrest. *Id*. at 126–27.

92. *Id.* at 132.

93. *See Pollard*, 215 F.3d at 649 ("Moreover, the back-up officers were acting within constitutional limits . . . since no further invasion of privacy was involved once the undercover officer made the initial entry."); *Paul*, 808 F.2d at 648 (noting that "the interest in the privacy of the home . . . has been fatally compromised" once the owner admits the informant or officer); State v. Schwartz, 398 So. 2d 460, 462 (Fla. 4th DCA 1981) (applying a similar concept as consent-once-removed and holding that once defendant engaged in criminal activity with the undercover officer the defendant could not thereafter claim any violation of expectancy of privacy); Baith v. State, 598 A.2d 762, 764 (Md. Ct. Spec. App. 1991) (speaking about the defendant's home, the court stated, "its status as *sanctum sanctorum* is rudely diminished").

94. 389 U.S. 347, 351 (1967).

transaction is characterized as opening or exposing commercial activities to random strangers, there are no legitimate privacy interests to protect. Furthermore, if the consent-once-removed doctrine is executed properly and the back-up officers merely assist in making an arrest,[95] there is no illegal extension of the consent and no additional harm to defendants' privacy interests.

2. Power to Arrest and the Need for Safe Assistance

Courts often rely on the power to arrest and the need for safe assistance in executing arrests when affirming the doctrine.[96] Similar to many other courts, the court in *United States v. Yoon* relied on this justification and even stated that it is the basis upon which the doctrine rests.[97] In most

95. *See supra* Part III.B.

96. *See* United States v. Bramble, 103 F.3d 1475, 1478 (9th Cir. 1996) ("[P]rivacy was outweighed by the legitimate concern for the safety of [the officers inside]."); United States v. Diaz, 814 F.2d 454, 459 (7th Cir. 1987) ("[T]he fact that [the agent] was assisted by other law enforcement officers in securing his arrest cannot make a constitutional difference."); United States v. Janik, 723 F.2d 537, 548 (7th Cir. 1983) ("[I]f [the officer] was privileged to slip the gun underneath his jacket and leave the apartment we think he was also privileged to have a police escort to prevent interference by [the defendant]."); *id.* (holding, in a situation not applying the doctrine in name, that "[t]he fact that [the officer] got help from other officers in removing the submachine gun can make no difference"); United States v. White, 660 F.2d 1178, 1183 (7th Cir. 1981) (holding, while not applying the doctrine in name, that consent was part of an ongoing investigation and entry was permissible even where consent was obtained through deceit); Fidalgo v. State, 659 So. 2d 290, 293 (Fla. 3d DCA 1994) (stating that since the defendant would have no constitutional complaint if he was arrested by the undercover officer, it makes no constitutional difference if the arrest was done by other officers); United States v. Herrera-Corral, No. 01 CR 141, 2002 WL 69491, at *7 (N.D. Ill. Jan. 17, 2002) ("An important justification for consent once removed is the aid and protection of the undercover agent or [confidential informant] *still at the defendant's home*."); Commonwealth v. Moye, 586 A.2d 406, 409 (Pa. Super. Ct. 1990) ("[I]n this instance I'm satisfied that the officer, herself, of course had the right to make the arrest had she chosen to herself. But the arrest having been made only seconds later by her brother officer or officers in this Court's judgment does not alter the facts as viewed here."); United States v. Samet, 794 F. Supp. 178, 181 (E.D. Va. 1992) ("The arrest did not become unlawful merely because [the detective], as an undercover agent, first signalled [sic] the arrest team to assist him."); State v. Johnston, 518 N.W.2d 759, 764 (Wis. 1994) ("Thus, in terms of Fourth Amendment protections, the uniformed officers did nothing more than assist the undercover officers who were themselves lawfully on the premises and who were, as conceded by [the defendant], fully within the law to arrest the suspects and seize the incriminating evidence they had discovered.").

97. 398 F.3d 802, 809 (6th Cir. 2005). The court reasoned:

> The doctrine, therefore, is not based upon either the exigent circumstances or the traditional consent exception to the warrant requirement. Rather, it is based upon the theory that, because an undercover agent or informant who establishes probable cause to arrest the suspect may in fact arrest him then and there, he should be entitled to call in the agents with whom he is working to assist in the arrest.

Id.

consent-once-removed cases, the undercover officer gains valid entry through consent and then verifies probable cause by observing illegal items in plain view.[98] At this point, the undercover officer has the authority to arrest.[99] Accordingly, because the undercover officer has the authority to arrest upon establishing probable cause, the undercover officer should not be precluded from calling for back-up to assist in safely making the arrest. This justification rests on concern for the safety of the undercover officer engaged in the narcotics transaction.[100] Not only is it safer for the officer to receive back-up before making the arrest, but in many circumstances the safest route is for the undercover officer to remain in his undercover capacity and allow only back-up officers to make the arrest.[101] The *Callahan* court most aptly summarized the rationale for the power-to-arrest argument: there is no constitutional distinction between one officer who may legally arrest and many officers who may legally arrest.[102]

3. Reasonableness of Requiring a Warrant

If the elimination of a privacy interest has truly occurred and the arrest can legally be made, one may question why a warrant is required at that point. In applying the doctrine some courts have answered simply that the police actions are reasonable.[103] The Seventh Circuit in *United States v. White* noted that the purpose of requiring a warrant is to place the

98. *See Pollard*, 215 F.3d at 648 ("[T]he undercover officer[] entered the apartment at the invitation of [the defendant] and established the existence of probable cause to arrest when he saw [another man] pull out the three drug containers."); United States v. Akinsanya, 53 F.3d 852, 856 (7th Cir. 1995) ("[Defendant] consented to [the officer's] entry into the apartment; [the officer] saw the heroin (thus establishing probable cause)."); *Paul*, 808 F.2d at 648 ("[Defendant] invited [the informant] into his house and down to the basement, where the marijuana was in plain view.").

99. *See* United States v. Watson, 423 U.S. 411, 413–17 (1976) (discussing that the necessary standard for a warrantless arrest is probable cause); Gerstein v. Pugh, 420 U.S. 103, 111–14 (1975) (noting that when probable cause is established, the officer may arrest).

100. *See* Hendrie, *supra* note 76, at 26 (describing the danger of the typical undercover narcotics purchase).

101. *Id.* It is also more efficient for future police work to let the undercover officer keep his status as a drug purchaser or dealer, thus enabling him to go on further drug purchases in the area. The officer has the authority to make the arrest, but under the circumstances the most efficient and safest method may be to allow others to arrest. *Id.*

102. Callahan v. Millard County, 494 F.3d 891, 897 (10th Cir. 2007), *rev'd on other grounds*, Pearson v. Callahan, 129 S. Ct. 808 (2009). Despite the fact that the court was dealing with a confidential informant situation, it opined that "the consent granted to the hypothetical undercover officer would have covered additional backup officers without any need for additional exceptions to the warrant requirement." *Id.*

103. Although some decisions that apply the doctrine or its concept do not focus on overall reasonableness, it remains a justification that some believe clearly supports upholding the action of the police. *See* State v. Henry, 627 A.2d 125, 131 (N.J. 1993) ("Under all the surrounding circumstances, the subsequent entry into defendant's apartment by the police to effectuate an arrest was reasonable . . . .").

independent consideration of a neutral and detached magistrate between police and citizen, thereby preventing unwarranted intrusions.[104] However, in the common consent-once-removed situation, the primary intrusion of privacy has already legally occurred by the undercover officer.[105] Thus, "[i]t serves no purpose to require an arrest warrant where the same intrusion would occur whether or not the magistrate issued the warrant."[106] This argument focuses on the initial intrusion of privacy by the undercover officer and puts aside the possible further intrusion of the second entry.[107] But, as stated previously, the doctrine has been carefully articulated to only apply in situations where the back-up officers merely assist in the arrest,[108] and the requirement of a warrant would be redundant.

Under this theory, it might be possible to characterize the overall conceptual basis of the doctrine as a "quasi exigent circumstances and consent" justification.[109] Although this characterization is not used by most courts, it is helpful in providing further analysis of the reasonableness of police actions.[110] To recognize a new exigency and to legitimate a warrantless entry, the government interest and the citizen's privacy interest must be balanced.[111]

The consent-once-removed doctrine routinely is used in situations involving narcotics and weapons, and in many cases there could be a very large amount of narcotics.[112] The government has a great interest in removing these dangerous and illicit items from the possibility of distribution or use as soon as possible. Furthermore, there is an interest in efficiency, as in all consent-once-removed situations the government can immediately make an arrest.[113] When these government interests are

104. 660 F.2d 1178, 1183 (7th Cir. 1981).

105. *Id.*

106. *Id.*; *see also* United States v. Santiago, Nos. 92 CR 881-1, 881-2, 1993 WL 75140, at *4 (N.D. Ill. Mar. 15, 1993).

107. The case of *United States v. White* was decided before the articulation of the doctrine, but still dealt with circumstances similar to most other cases decided under the doctrine. The court focused ultimately on the intrusion of the undercover officer and dismissed the second entry by back-up officers as a non-issue because the undercover officer remained in the apartment at all times. *White*, 660 F.2d at 1183 n.3.

108. *See supra* Part III.C.1.

109. United States v. Yoon, 398 F.3d 802, 809 n.2 (6th Cir. 2005) (Kennedy, J., concurring).

110. Only the court in *Yoon* has made this characterization, while no other courts appear to explicitly recognize exigent circumstances at all in most consent-once-removed cases. *Id.* at 809 n.2.

111. United States v. Pollard, 215 F.3d 643, 649 (6th Cir. 2000) (Jones, J., dissenting) (citing United States v. Rohrig, 98 F.3d 1506, 1519 (6th Cir. 1996)).

112. *See supra* note 76 and accompanying text.

113. However, note the Supreme Court has repeatedly observed that police expediency alone is no justification for warrantless searches. *See* Callahan v. Millard County, 494 F.3d 891, 897 (10th Cir. 2007), *rev'd on other grounds*, Pearson v. Callahan, 129 S. Ct. 808 (2009) (citing Georgia v. Randolph, 547 U.S. 103, 115 n.5 (2006)); Coolidge v. New Hampshire, 403 U.S. 443, 481 (1971).

compared to the all-but-vanished privacy interest of the individual, the government interests appear clearly dominant. In other words, the interplay of the privacy interest and the government interest results in a determination that the actions by the police are reasonable. The initial privacy interest is diminished through the valid consent and the remaining interest is outweighed by the legitimate government interest of safety.[114]

IV. EXTENSION OF THE DOCTRINE TO CONFIDENTIAL INFORMANTS

If the previous discussion referring to undercover officers did not provide much controversy, the extension of the doctrine to confidential informants will unquestionably incite debate. Few courts have been challenged with determining the constitutionality of applying the doctrine to confidential informants.[115] But, when presented with the issue, a vigorous debate has ensued over its viability. These debates depend much on what each individual court views as the conceptual basis for the doctrine. When extending the doctrine, courts ultimately conclude that there is no recognizable difference between an informant and an officer.[116] While when rejecting the doctrine's extension, opponents argue that extension does not afford the requisite protection to the homeowner intended by the Supreme Court in *Payton v. New York*.[117] Dissenting opinions point specifically to drastic differences between an undercover officer and a civilian informant.[118] This Part thoroughly analyzes the main arguments for and against extension and illustrates why extension is ultimately constitutional. This constitutionality is based upon a confluence of factors: the diminished privacy interest of the defendant, the informant's power to arrest, and the informant's adoption into the investigation.

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114. The court in *Bramble* cited the government interest as concern for the safety of the undercover officer. The court stated that this interest outweighed any remaining expectation of privacy by the defendant. United States v. Bramble, 103 F.3d 1475, 1478 (9th Cir. 1996).

115. For more on the status of the doctrine and the outcomes of those decisions, see *infra* Part IV.A.

116. *See* United States v. Yoon, 398 F.3d 802, 811 (6th Cir. 2005) ("[T]here is no justifiable distinction between the undercover officer's and an informant's ability to call upon the police to aid in the arrest."); United States v. Paul, 808 F.2d 645, 648 (7th Cir. 1986) ("It makes no difference that the owner does not know he is dealing with an informant.").

117. *See* United States v. Pollard, 215 F.3d 643, 650 (6th Cir. 2000) (Jones, J., dissenting) (finding that the government has not shown that "any legitimate government interests purportedly vindicated by the 'consent once remove [sic] doctrine' override [the defendant's] privacy expectations").

118. Dissenting opinions also point out that the search of the home and exceptions to it are not taken lightly. The dissenting judge in *Yoon* stated, "[T]he [Supreme Court] has often heard, and steadfastly rejected, the invitation to carve out further exceptions to the warrant requirement for searches of the home." *Yoon*, 398 F.3d at 811 (Gilman, J., dissenting) (quoting Illinois v. Rodriguez, 497 U.S. 177, 192 (1990)).

A. *Present Status of Extension to Confidential Informants*

As defined in *United States v. Diaz*,[119] the consent-once-removed doctrine has been expressly extended to confidential informants in both the Sixth[120] and the Seventh[121] Circuits and rejected in the Tenth[122] Circuit. The Eleventh Circuit, in *United States v. Schuster*,[123] although prior to the terming of the doctrine, also held that consent can be passed from an informant to a government officer.[124] Additionally, the question has been addressed in lower courts across the country.[125] For example, Illinois's Second District Court of Appeals applied the doctrine to confidential informants in *People v. Galdine*.[126] While other cases such as *Baith v. State*[127] and *State v. Fernandez*[128] have extended the concept, though not

119. United States v. Diaz, 814 F.2d 454, 459 (7th Cir. 1987).

120. *Yoon*, 398 F.3d at 811. *See generally Pollard*, 215 F.3d at 649 (majority opinion). The defendant in *Pollard* was arrested after selling cocaine to both a confidential informant and an undercover officer in the same transaction. *Pollard*, 215 F.3d at 645. The court's analysis focused on the undercover officer's actions and his ability to arrest and summon back-up; therefore the extension was not recognized by this case. *Id.* at 648–49. However, *Pollard* clearly paves the way for the acceptance of the extension as it includes "informant" in the definition of the doctrine. *Id.* at 648.

121. *Paul*, 808 F.2d at 648.

122. Callahan v. Millard County, 494 F.3d 891, 896 (10th Cir. 2007), *rev'd on other grounds*, Pearson v. Callahan, 129 S. Ct. 808 (2009).

123. 684 F.2d 744 (11th Cir. 1982).

124. *Id.* at 748–49. The informant and the agent entered the premises together and then the informant directed the agent exactly which room to enter to retrieve the illicit item. *Id.* at 748. This situation is similar to that of *Pollard*, involving both an informant and an agent. *See Pollard*, 215 F.3d at 645. However, the court in *Schuster* appears to hurdle some of the discussion of the constitutional differences between an informant and an agent by recognizing the informant as an agent of the government, rather than focusing on the informant's civilian status. *Schuster*, 684 F.2d at 748–49. The court stated, "[t]he facts of this case, however, do require us to extend the consent given to one agent to yet another full-time Secret Service agent." *Id.* at 748.

125. *See also* United States v. Herrera-Corral, No. 01 CR 141, 2002 WL 69491 (N.D. Ill. Jan. 17, 2002); U.S. ex rel. McCalla v. Gramley, No. 96 C 0418, 1996 WL 699629 (N.D. Ill. Nov. 27, 1996); United States v. Jachimko, 905 F. Supp. 540 (N.D. Ill. 1995); United States v. Jones, Nos. 95 C 2907, 92 CR 427, 1995 WL 443929 (N.D. Ill. July 24, 1995); United States v. Santiago, Nos. 92 CR 881-1, 881-2, 1993 WL 75140 (N.D. Ill. Mar. 15, 1993); People v. Finley, 687 N.E.2d 1154 (Ill. App. Ct. 1997).

126. People v. Galdine, 571 N.E.2d 182, 190–91 (Ill. App. Ct. 1991). The informant arranged a narcotics sale with the defendant to take place in the defendant's office parking lot. *Id*. at 185. The transaction did not go as planned and the sale was made in the defendant's office building. *Id*. After observing the narcotics, the informant signaled the back-up officers and they entered and made the arrest. *Id*. The court validated the actions by the police by relying on *United States v. Paul*. *Id*. at 190–91.

127. Baith v. State, 598 A.2d 762, 766 (Md. Ct. Spec. App. 1991).

128. State v. Fernandez, 538 So. 2d 899, 900 (Fla. 3d DCA 1989). In *Fernandez* the confidential informant was invited into the home to conduct a narcotics transaction. *Id*. at 899. Once the informant observed and tested the cocaine he left under the auspice of obtaining money for the buy. *Id*. He returned with members of the Metro-Dade Police Department. *Id*. at 899–900. Although

explicitly addressing the doctrine.

B. *Examining the Differences Between an Undercover Officer and a Confidential Informant*

The consent-once-removed doctrine suggests by its name that the second entry is justified on a passing of valid consent from one individual to another. But as previously discussed, this suggestion is misleading:[129] most courts justify use of the doctrine in other ways.[130] In the case of undercover officers, courts generally reason that the second entry is the same as the valid first entry, treating the two as effectively one entry.[131] However, it is much more difficult to make this argument for a confidential informant. One may question whether a confidential informant and an officer can be considered as one entity, thus treating the two entries as one. Further, there exists inherent differences between them, namely the fact that one is an officer of the law and the other is a civilian. Arguments against extension of the doctrine naturally focus on the effect of these differences on the previously discussed justifications for undercover officers.

1. Privacy Interest Remains Compromised

If offering the sale of narcotics to an undercover officer is considered a destruction of the privacy interest,[132] how is an offer of sale to a confidential informant any different? The logic that applies in the undercover officer situation equally applies here. As stated previously, the non-recognition of a legitimate privacy interest in a narcotics sale situation is largely based on language in *United States v. Lewis* and its progeny.[133] As the Court in *Lewis* observed, "[the defendant] invited the undercover agent to his home for the specific purpose of executing a felonious sale of narcotics. [The defendant's] only concern was whether the agent was a

never adopting the doctrine itself, the court ruled that a confidential informant could pass consent to the officers. *Id*. at 900.

129. At least one court has chosen not to adopt the term "consent-once-removed" because the term was perceived as "confusing and unnecessary" and generally unhelpful in making a thorough analysis. State v. Johnston, 518 N.W.2d 759, 765 n.6 (Wis. 1994).

130. *See supra* Part III.C. *But see* Hendrie, *supra* note 76, at 28 ("[T]he consent once removed doctrine is not based upon an emergency concern for the safety of the undercover officer or informant; rather, it is founded on the premise that the initial consent given by the suspect to an undercover officer or informant can be transferred to the arrest team, justifying their second entry.").

131. *See* State v. Henry, 627 A.2d 125, 131 (N.J. 1993) ("[T]he separate entries can be viewed as components of a single, continuous, and integrated police action . . . ."); State v. Penalber, 898 A.2d 538, 540 (N.J. Super. Ct. App. Div. 2006) (holding officers may reenter the premises "if the separate entries can be viewed as components of a single, continuous and integrated police action").

132. *See supra* Part III.C.1.

133. *See supra* Part III.C.1.

willing purchaser who could pay the agreed price."[134] This language does not center on the identity of the supposed customer, but rather focuses on the defendant's actions and the reasonable expectations the defendant would have in those types of endeavors.[135] An individual does not distinguish between an undercover officer and an informant when an individual agrees to sell narcotics out of his home. Simply put, the defendant's privacy interest is vitiated by his actions and not the identity of the invitee.

Assuming that consent to the civilian informant vitiates the defendant's privacy interest for the reasons stated above, the more important question is: how far does that destruction of privacy extend? The next step in the doctrine, summoning the back-up officers to make the arrest, can potentially implicate privacy through the exchange of information from the confidential informant to the police and the subsequent entry by the police. However, the Supreme Court has frequently held that the Fourth Amendment does not protect information provided to a third party under the assumption that the information will remain private.[136] The third party is free to communicate knowledge to government authorities without thereby violating any constitutionally protected interests.[137] But the defendant also has the ability to limit the consent he gives.[138] The dissent in *Schuster* argues that in the informant context the defendant only consents to the entry of one person (the informant).[139] Thus, there is an

134. United States v. Lewis, 385 U.S. 206, 210 (1966).

135. After noting that the defendant has converted his home into a commercial center for illegal business and thus it is afforded no more protection than if it was done in public, the Court further stated, "[a] government agent, in the same manner as a private person, may accept an invitation to do business and may enter upon the premises for the very purposes contemplated by the occupant." *Id*. at 211.

136. *See* Hoffa v. United States, 385 U.S. 293, 302 (1966) (finding "[n]either this Court nor any member of it has ever expressed the view that the Fourth Amendment protects a wrongdoer's misplaced belief that a person to whom he voluntarily confides his wrongdoing will not reveal it"); *see also* United States v. White, 401 U.S. 745, 752 (1971) ("Inescapably, one contemplating illegal activities must realize and risk that his companions may be reporting to the police.").

137. *See* United States v. Miller, 425 U.S. 435, 443 (1976). The defendant attempted to suppress his bank records when they were obtained by the police through a subpoena. *Id*. at 439–40. The defendant argued that the Fourth Amendment protected the access to his financial records that the bank possessed. *Id*. The Court found the actions by the government were legal and stated:

> This Court has held repeatedly that the Fourth Amendment does not prohibit the obtaining of information revealed to a third party and conveyed by him to Government authorities, even if the information is revealed on the assumption that it will be used only for a limited purpose and the confidence placed in the third party will not be betrayed.

Id. at 443.

138. *See supra* note 72.

139. *Schuster*, 684 F.2d 744, 749–50 (11th Cir. 1982) (Johnson, J., dissenting).

implicit limitation,[140] and the additional entry of the police is beyond the defendant's privacy expectations.[141] This is attractive reasoning, but as the dissent in *Callahan* notes, it is a fiction to expect that in an undercover officer situation, consent is ever really given to the police.[142] In undercover officer situations, the defendant always consents to an individual whose true identity is unknown. The most intuitive conclusion is that the defendant vitiates his privacy interests when he illegally sells narcotics, whether he sells to an undercover officer or a confidential informant. Yet the defendant's diminished privacy interest alone does not authorize the entry of back-up officers; it merely raises the likelihood of reasonableness of the warrantless entry.[143] The legality of the entry of back-up officers in the undercover officer context also relies on the need to assist the undercover officer and on the back-up officer's restricted role.[144] Thus, there still remains the need for another justification to supplement the decreased privacy and authorize the entry of back-up officers in the confidential informant situation.

2. Confidential Informants' Power to Arrest and Need for Safe Assistance

A core feature of the doctrine, as applied to undercover officers, is that the officer has the ability to arrest the individual at the moment probable cause is established.[145] The back-up officers merely provide safe assistance and help effectuate that arrest.[146] Similarly, most states authorize their citizens to make arrests when a felony has been committed in their presence or when one has reasonable cause to believe a felony has been

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140. *Id.*

141. *Id*. at 749 ("The narrowness of [the defendant's] consent delimits the extent of the legitimate expectation of privacy that he agreed to give up . . . .").

142. *See* Callahan v. Millard County, 494 F.3d 891, 902 (10th Cir. 2007) (Kelly, J., dissenting), *rev'd on other grounds*, Pearson v. Callahan, 129 S. Ct. 808 (2009). Judge Kelly explained:

> While it is technically correct that [the defendant] never consented to the entry of police, no one ever consents to the entry of police in these undercover situations; they instead consent to the entry of someone who *might* be the police . . . or as in this case, someone who *might* be a government agent . . . .

Id.

143. The dissent in *Callahan* disagrees and would simply allow entry of law enforcement based upon the eroded privacy interest of the defendant without consideration of any other factors. *Id*. at 901.

144. *See supra* Part III.C.2.

145. *See supra* Part III.C.2; *see also* United States v. Yoon, 398 F.3d 802, 806 (6th Cir. 2005); United States v. Pollard, 215 F.3d 643, 648 (6th Cir. 2000).

146. *See Pollard*, 215 F.3d at 649; United States v. Diaz, 814 F.2d 454, 459 (7th Cir. 1987); United States v. Paul, 808 F.2d 645, 648 (7th Cir. 1986); United States v. Janik, 723 F.2d 537, 548 (7th Cir. 1983).

committed.[147] Therefore, in both the confidential informant and undercover officer situation, the entrance of back-up officers may be justified by the need for safe assistance in effectuating the arrest.[148] As the concurring opinion in *Yoon* concluded, after acknowledging that arrest power lies with citizens, "there is no justifiable distinction between the undercover officer's and an informant's ability to call upon the police to aid in the arrest."[149]

Yet despite its importance, the power to arrest is neither necessary nor dispositive for extension of the doctrine to confidential informants.[150] The third element of the doctrine asserts that the back-up officer's scope of responsibility is to assist the first agent or informant.[151] A reasonable interpretation of this element might conclude that for the back-up officers to be limited in responsibility and merely assist, the informant must be able to effectuate the arrest himself. Furthermore, many courts that affirm the application of the doctrine to informants cite the informant's arrest power.[152] The Sixth,[153] Seventh,[154] and Tenth Circuits,[155] in their discussions of a possible extension of the doctrine, have considered the citizen's power to arrest.[156] However, in all three circuits the arrest power, although contentious, was not dispositive in determining extension of the doctrine.[157]

147. Under the traditional common law, the private citizen was granted the power to arrest for felonies committed in his presence and felonies based on probable cause, provided that the crime actually occurred. 5 AM. JUR. 2D *Arrest* § 47 (2008). In states where common law is in force, the citizen's power to arrest still remains, but some states have modified this power through statute. *Id*.; *see*, *e.g.*, CAL. PENAL CODE § 837 (West 2008); MICH. COMP. LAWS ANN. § 764.16 (West 2008); N.Y. CRIM. PROC. LAW § 140.30 (McKinney 2008).

148. *See supra* Part III.C.2.

149. *Yoon*, 398 F.3d at 811 (Gilman, J., dissenting).

150. At least one concurring opinion has suggested that the power to arrest is "potentially necessary" to support the doctrine. *See id.* at 810 (Kennedy, J., concurring).

151. The doctrine as defined in *Diaz* reads: the undercover agent or government informant "entered at the express invitation of someone with authority to consent, at that point established the existence of probable cause to effectuate an arrest or search, and *immediately summoned help from other officers*." *Diaz*, 814 F.2d at 459 (emphasis added); *see supra* Part III.B.

152. *See Paul*, 808 F.2d at 648 ("If [the informant] had been a police undercover agent rather than a confidential informant, he could have arrested [the defendant] then and there . . . ."); Callahan v. Millard County, 494 F.3d 891, 896 (10th Cir. 2007), *rev'd on other grounds*, Pearson v. Callahan, 129 S. Ct. 808 (2009) (discussing the power to arrest in the possible extension of the doctrine to confidential informants); *Pollard*, 215 F.3d at 648 ("[The officer] could have arrested both [defendants] had he chosen to do so.").

153. *Yoon*, 398 F.3d at 807.

154. *Paul*, 808 F.2d at 648.

155. *Callahan*, 494 F.3d at 897.

156. Other courts that allow a confidential informant to pass consent to the police have not addressed the arrest power of citizens, but most of these were decided before the specific elements of the doctrine were articulated. *See Schuster*, 684 F.2d 744, 749 (11th Cir. 1982).

157. *See Callahan*, 494 F.3d at 897; *Yoon*, 398 F.3d. at 807; *Paul*, 808 F.2d at 648.

To determine the necessity of the power to arrest one must consider the language of the third element in the context of privacy implications as well as overall reasonableness, which is the primary concern in the warrantless entry of a home.[158] The utility of the third element of the doctrine is its restricting component. This component is designed to ensure the maintenance of a limited scope of entry and thereby reduce additional privacy implications. The back-up officers are not restricted to doing only what the first agent or informant could do (arrest) but rather to entering only where the first agent or informant could enter. Under this reasoning, the officers do not harm the defendant's privacy interest because they were going only where the undercover officer or informant was already permitted to go. Accordingly, the informant's ability to arrest is not necessary in order for the back-up officers to assist him.

3. The Informant as an Agent of the Police

What is necessary for the constitutionality of extension is the general adoption of the informant into the police investigation and his use as an agent of their actions. Confidential informants working as government agents may potentially face civil liability for their actions in that capacity.[159] This fact, along with the power to arrest, is important because it makes the confidential informant more like the undercover officer in his responsibilities,[160] and as stated above, the consent-once-removed doctrine's constitutionality is partially rooted in the existence of one contiguous police action.[161] On the other hand, the police have further responsibilities and powers not recognized in informants which can make their appearance less like that of an officer.[162] Powers such as the ability to seize evidence in plain view and the theory of collective knowledge can be considered duties and privileges that have been narrowly granted to police only.[163] Even so, these privileges are inconsequential to the confidential informant's restricted action in a consent-once-removed situation. Ultimately, an informant appears all but identical to an officer from the defendant's perspective.[164] In many undercover narcotics purchases the

158. Illinois v. McArthur, 531 U.S. 326, 330 (2001); Texas v. Brown, 460 U.S. 730, 739 (1983); United States v. Schuster, 717 F.2d 537, 538 (11th Cir. 1983) (Tjoflat, J., concurring).

159. *Callahan*, 494 F.3d at 902 (Kelly, J., dissenting) (citing Pleasant v. Lovell, 876 F.2d 787, 798–99 (10th Cir. 1989)).

160. *See id.*

161. *See supra* note 138.

162. *Callahan*, 494 F.3d at 897 (majority opinion) (noting that police have other powers and responsibilities such as the duty to execute warrants).

163. United States v. Yoon, 398 F.3d 802, 813 (6th Cir. 2005) (Gilman, J., dissenting).

164. It is important to note the general action expected of an informant in a consent-once-removed situation is to purchase narcotics and, upon purchasing the narcotics, summon the assistance of law enforcement. This action does not necessitate any particular skills or responsibilities besides arguably the ability to recognize the illicit drugs in establishing probable

undercover officer or informant typically remains in his undercover capacity throughout, thereby further limiting his role and reducing any dissimilarities.[165] As the court in *Baith v. State* recognized, "[t]he status of the observer of the crime as a cooperating civilian, on the one hand, or an official police officer, on the other hand, has no bearing on the observer's legal competence to trigger the arrest scenario."[166] The use of an informant as an agent of police action and his limited decision-making in the investigation create the most logical argument for extension. The informant's limited agency role also refutes the argument some have posed about the initial consent never really being given to law enforcement.[167] The informant is not simply a civilian but rather an agent working under the close supervision of law enforcement with specific and restricted responsibilities.[168] Nonetheless, the true identity of most informants is cited by opponents as a reason to limit the doctrine to undercover officers.[169]

4. Entrusting the Suspect Class

It can be illustrative here to return to the *Callahan* case to provide an important distinction between undercover officers and informants.[170] In that case, Bartholomew, the confidential informant, contacted the defendant to engage in the sale of narcotics, completed the transaction, and finally signaled the officers into the defendant's home.[171] But importantly, Bartholomew was first charged with drug possession before he decided to become an informant and assist law enforcement.[172] Furthermore, he was intoxicated at the time he acted as an official informant.[173] This raises valid concerns about the capacity of informants to carry out functions normally entrusted to law enforcement officers.[174] Just as in *Callahan*, confidential informants are typically criminals or have criminal charges pending against

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cause, but this is obviously within the realm of the typical informant. *See infra* Part IV.B.4. In this limited activity there is no real perceptible difference between an informant and an officer.

165. *See infra* Part IV.B.4.

166. Baith v. State, 598 A.2d 762, 767 n.1 (Md. Ct. Spec. App. 1991).

167. *See supra* note 148; *see also Callahan*, 494 F.3d at 897.

168. To be a government agent for Fourth Amendment purposes two questions must be considered: 1) whether the government knew of and acquiesced in the intrusive conduct, and 2) whether the party performing the search intended to assist law enforcement efforts or to further his own ends. *Callahan*, 494 F.3d at 902 (Kelly, J., dissenting) (citing Pleasant v. Lovell, 876 F.2d 787, 797 (10th Cir. 1989)).

169. *See* United States v. Yoon, 398 F.3d 802, 813 (6th Cir. 2005) (Gilman, J., dissenting); United States v. Jachimko, 905 F. Supp. 540, 542 (N.D. Ill. 1995).

170. *See supra* Part I.

171. *Callahan*, 494 F.3d at 893 (majority opinion).

172. *Id*.

173. *Id*.

174. *See Yoon*, 398 F.3d 802, 813 (Gilman, J., dissenting).

them.[175] The resulting issues that arise are obvious. The determination of probable cause is squarely in the hands of someone who has little experience in such an area and one who also has much less accountability.[176] Moreover, because it is commonplace for informants to receive favorable prosecutorial treatment[177] or large amounts of cash to cooperate with law enforcement,[178] the informant's own self-interest could result in entrapment of innocent individuals.[179]

On the other hand, the most effective confidential informants are often those "most deeply implicated in the crimes being investigated."[180] In the world of drug trafficking, it is very difficult to obtain evidence without a decoy[181] and the role of confidential informants is crucial in combating the illegal narcotics system.[182] Considerations about entrapment are also reduced because of the innately close supervision necessary to meet the elements of the consent-once-removed doctrine. The doctrine requires officers to be presently located at the scene and prepared to make the arrest; the informant has relatively little decision-making ability.[183] Moreover, the most important questions pertaining to constitutionality of extending the doctrine lie with assessing the privacy interest of the defendant and the necessity of back-up officers to assist an informant with arrest.

V. CONCLUSION

Despite the possibility of ruling on the consent-once-removed doctrine and its extension, the Supreme Court's recent *Callahan* decision instead confined its holding to an assessment of qualified immunity.[184] A

175. MALACHI L. HARNEY & JOHN C. CROSS, THE INFORMER IN LAW ENFORCEMENT 10, 32 (Thomas 1960).

176. *See* Jacqueline E. Ross, *Tradeoffs in Undercover Investigations: A Comparative Perspective*, 69 U. CHI. L. REV. 1501, 1513 (2002) (noting that it is more difficult for police officers to monitor the actions of confidential informants and that the lessened accountability of informants can cause some agencies to move away from their use).

177. *Yoon*, 398 F.3d 802, 813 (Gilman, J., dissenting).

178. *See* Dennis G. Fitzgerald, INFORMANTS AND UNDERCOVER INVESTIGATIONS 21-22 (CRC Press ed.) (2007); Thomas A. Mauet, *Informant Disclosure and Production: A Second Look at Paid Informants*, 37 ARIZ. L. REV. 563, 564 (1995) (citing the federal government's tab for payment to confidential informants as $97 million in 1993); *see also* Baith v. State, 598 A.2d 762, 764 (Md. Ct. Spec. App. 1991) (noting that the confidential informant had on one occasion previously received $10,000 for assisting law enforcement).

179. Mauet, *supra* note 178, at 564.

180. Ross, *supra* note 176, at 1513 (citing GARY T. MARX, UNDERCOVER: POLICE SURVEILLANCE IN AMERICA 320 (Twentieth Century Fund 1988)).

181. Amanda J. Schreiber, *Dealing with the Devil: An Examination of the FBI's Troubled Relationship with its Confidential Informants*, 34 COLUM. J.L. & SOC. PROBS. 301, 301–02 (2001).

182. *Id*.

183. *See supra* Part IV.B.3.

184. Pearson v. Callahan, 129 S. Ct. 808 (2009).

definitive judgment of the doctrine's constitutionality will have to wait. Nevertheless, the doctrine's relative universal approval as to undercover officers demonstrates the lack of any challenging constitutional issues and its acceptance will likely continue in this respect.[185] However, the extension of the doctrine to confidential informants proffers legitimate debate. Presently, the courts in favor of an extension of the doctrine outnumber those opposed[186] and it appears there is a general trend of assent to the doctrine's extension.[187]

Given the diminished privacy interest of the defendant and the relative similarity of an undercover officer and an informant in the consent-once-removed situation, the extension should be regarded as constitutional by future courts. When rights forfeited by a narcotics seller are placed alongside the incremental invasion of assisting law enforcement, the reasonableness of allowing extension of the doctrine becomes clear. Furthermore, many of the same reasonableness factors that led to general approval in an undercover officer situation equally apply to confidential informants.[188] Firstly, if the defendant's privacy interest has already been vitiated, the incoming officers will affect no more than what was already affected. Secondly, requiring a warrant where the same intrusion would legally occur whether or not a magistrate issues the warrant serves no purpose.[189] Therefore, the extension of the consent-once-removed doctrine to confidential informants provides law enforcement officers with an extremely efficient tool in combating illegal narcotics and its use should be readily accepted.

185. *See supra* Part III.C.

186. *See supra* Part IV.A.

187. *Contra* Ben Sobczak, Note, *The Sixth Circuit's Doctrine of Consent Once Removed: Contraband, Informants and Fourth Amendment Reasonableness*, 54 WAYNE L. REV. 889 (2008).

188. *See supra* Part III.C.3.

189. United States v. White, 660 F.2d 1178, 1183 (7th Cir. 1981).