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Criminal Law - Constitutional Law: Gould Rule and Authorization by Spouse of Search and Seizure in Absence of Defendant or Suspect

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tions; plaintiff could secure the information he sought, prior to a final hearing on making the injunction permanent, through discovery proceedings. Then, if the agent failed to permit discovery, appropriate sanctions, other than contempt,[33] could be imposed on him. One of these sanctions — a default judgment — would place the consequences of failure to disclose on the real party at fault, the Government, not a mere subordinate.

Criminal Law—Constitutional Law: *Gouled* Rule and Authorization by Spouse of Search and Seizure in Absence of Defendant or Suspect

Defendant appealed from a second degree murder conviction contending that a bullet admitted into evidence at his trial was obtained in violation of the fourth amendment.[1] Defendant's wife allowed the police to recover the bullet from a ceiling into which defendant had discharged his gun one year before the crime in question was committed. The murder weapon, which was never found, was linked to the defendant by proving that the bullets recovered from the ceiling and the victim were fired from the same gun. Had defendant's wife not permitted the officers to retrieve the bullet, it probably could not have been obtained by a search warrant.[2] The Eighth Circuit affirmed defendant's conviction and *held* that the wife, being in possession and control of the premises, could authorize a reasonable search for, and recovery of, the bullet, since it was not defendant's personal effect, and in any case he had abandoned it. *Roberts v. United States*, 332 F.2d 892 (8th Cir. 1964).[3]

33. See FED. R. CIV. P. 37. These sanctions include, besides contempt, orders to: (1) take any fact as established for the purposes of the action; (2) refuse to allow the disobedient party to support or oppose designated claims or defenses; (3) strike out pleadings, dismiss the action, or render a judgment by default against the disobedient party.

1. U.S. CONST. amend. IV provides, "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . ."

2. FED. R. CRIM. P. 41(b) only allows a search for stolen or embezzled property, instruments of a crime, and property used to aid a foreign government.

3. *Cf.* Abel v. United States, 362 U.S. 217, 240 (1960); United States v. Minker, 312 F.2d 632 (3d Cir. 1962), *cert. denied*, 372 U.S. 953 (1963). The *Roberts* court did not discuss the question of how one may abandon property in his own home. In Rios v. United States, 364 U.S. 253 (1960), the Court

The fourth amendment evolved from the fear of invasion of privacy by general searches under writs of assistance. By requiring that searches be reasonable, it insures that individual privacy is not at the mercy of every petty officer.[4] The fourth amendment also supplements the fifth amendment protection against self-incrimination by prohibiting the unreasonable seizure of many papers and effects, which the fifth amendment prevents from being admitted into evidence.[5] To effectuate the fourth amendment policies, it has been necessary to restrict the use of searches as an instrument of law enforcement.[6]

The fourth amendment directive is implemented in various ways. Illegally obtained evidence is excluded from criminal trials.[7] Search warrants, issued only on probable cause, must describe the place to be searched, and the objects sought.[8] *Gouled v. United States*[9] prohibits search and seizure of objects of purely evidentiary value. Designed to protect privacy, the restrictive effect of the rules on law enforcement arouses controversy. The *Gouled* rule, particularly, may exclude important evidence while affording little protection to privacy.[10] For this reason courts have

held that the mere dropping of contraband on the floor of a cab was not abandonment. Perhaps, the less personal an item is, the easier it is to find an abandonment.

4. Boyd v. United States, 116 U.S. 616, 630 (1886). In Wolf v. Colorado, 338 U.S. 25, 27 (1949), Mr. Justice Frankfurter declared, "the security of one's privacy against arbitrary intrusion by the police—which is at the core of the Fourth Amendment—is basic to a free society."

5. U.S. CONST. amend. V provides, "no person . . . shall be compelled in any criminal case to be a witness against himself . . . ." See Boyd v. United States, *supra* note 4, at 633.

6. Manwaring, *California and the Fourth Amendment*, 16 STAN. L. REV. 318, 351 (1964).

7. Mapp v. Ohio, 367 U.S. 643 (1961); Weeks v. United States, 232 U.S. 383 (1914).

8. FED. R. CRIM. P. 41(c).

9. 255 U.S. 298 (1921). See generally Note, 20 U. CHI. L. REV. 319 (1953).

10. See 8 WIGMORE, EVIDENCE § 2184a, at 45–46 (McNaughton rev. 1961) (called an unfortunate rule). Both Professors Kamisar and Inbau agree that the *Gouled* rule is improper and unreasonable. Inbau, *Public Safety and Individual Civil Liberties: A Prosecutor's Stand*, 53 J. CRIM. L., C. & P.S. 85, 87 (1962); Kamisar, *Public Safety v. Individual Liberties: Some "Facts" and "Theories,"* 53 J. CRIM. L., C. & P.S. 171, 177 (1962).

Because of the difficulty of determining the exact location to be searched and goods to be seized, California police avoid use of the warrant process and usually search without one. In Los Angeles County only seventeen search warrants were issued in 1954. Barrett, *Exclusion of Evidence Obtained by Illegal Searches—A Comment on People v. Cahan*, 43 CALIF. L. REV. 565,

strained to find that items are fruits or instruments of the crime,[11] and one state attempts to avoid *Gouled* by statute.[12]

One of the serious problems raised by the fourth amendment is the extent to which a spouse may authorize a search of the premises in the absence of the defendant or suspect.[13] To the extent that the fourth amendment secures the "right of the people . . . in their . . . houses . . . against unreasonable searches and seizures," the determination in *Roberts* that the wife could allow the officers to search since she had control and use of the premises seems correct.[14] The sanctity of the home guaranteed by the

570 (1955). By 1962 the figure was still at an average of one and one-half warrants per month. Collings, *Toward Workable Rules of Search and Seizure —An Amicus Curiae Brief*, 50 CALIF. L. REV. 421, 455 (1962).

11. See Kamisar, *The Wiretapping-Eavesdropping Problem: A Professor's View*, 44 MINN. L. REV. 891, 915 (1960).

12. CAL. PEN. CODE § 1524(4). The validity of the California statute may be questioned since Ker v. California, 374 U.S. 23 (1963), appears to require the states to apply federal standards of search and seizure. Arguably, however, a seizure of purely evidentiary matter does not violate fourteenth amendment due process if the search is conducted in a reasonable manner. *Ker* may only impose the federal standard of reasonableness on states while not requiring adoption of every procedural device, such as the *Gouled* rule, to insure the limitation of the search.

From a practical standpoint the effect of *Gouled* on the states could be disastrous. Evidence forming the usual method of detection of many state crimes may be excluded by *Gouled*. For example, such basic evidence as fingerprints, hairs, or even a corpse, may be ruled inadmissible because of *Gouled*. See generally Collings, *Toward Workable Rules of Search and Seizure —An Amicus Curiae Brief*, 50 CALIF. L. REV. 421 (1962); CAL. SENATE INTERIM JUDICIARY COMM., FOURTH PROGRESS REPORT TO THE LEGISLATURE (1955–1957) 391.

13. The problem may also arise where one party allows a search over the other party's objection. *E.g.*, Waldron v. United States, 219 F.2d 37 (D.C. Cir. 1955); United States v. Rykowski, 267 Fed. 866 (S.D. Ohio 1920). Ordinarily such a search is not allowed. The best rationale appears to be that one joint tenant may not use his property rights to the injury of another joint tenant. Tompkins v. Superior Court, 59 Cal. 2d 65, 378 P.2d 113, 27 Cal. Rptr. 889 (1963). However, if the defendant does not make his objection known to the officers, and they reasonably rely on the waiver, he cannot voice his protest after the search. See United States v. Goodman, 190 F. Supp. 847 (N.D. Ill. 1961).

14. United States v. Sferas, 210 F.2d 69 (7th Cir.), *cert. denied*, 347 U.S. 935 (1954), and Stein v. United States, 166 F.2d 851 (9th Cir.), *cert. denied*, 334 U.S. 844 (1948), approach the problem in terms of the wife's control of the premises. When examined in this manner, it is no longer a question of waiver but one of assertion of the wife's property rights. At least one jurisdiction has gone so far as to judge the question from the standpoint of the control over the property that the police assume the wife had, rather than that which

fourth amendment is preserved when permission of the spouse is obtained. The *Roberts* court established no limitations on the search of the home other than that the search must be reasonable.[15] Since it might be possible to subvert the requirements for obtaining search warrants by obtaining the wife's permission to search the premises while the suspect is absent or in custody, this limitation may not be sufficient.[16] Rather than look solely at the manner in which the search is conducted to determine its reasonableness, it would be preferable to examine also what is searched or seized and determine whether the wife's right to control the premises outweighs the suspect's privacy interest therein.

Several courts have sensed this problem and have taken steps to meet it. A wife may not allow a search or seizure of her husband's papers and effects[17] — they are independently protected

she actually had. This allows the police to make a "reasonable mistake." See People v. Caritativo, 46 Cal. 2d 68, 292 P.2d 513, *cert. denied*, 351 U.S. 972 (1956); People v. Gorg, 45 Cal. 2d 776, 291 P.2d 469 (1955). One author claims this approach places a premium on stupid and ignorant police who tend to see control when in fact there is none. Manwaring, *supra* note 6, at 336. Since the mistake must be reasonable, it would appear that Manwaring's argument is invalid because a "reasonableness" test makes no special allowance for the actions of an ignorant officer.

Contra, State v. Pina, 94 Ariz. 243, 383 P.2d 167 (1963); Simmons v. State, 94 Okla. Crim. 18, 229 P.2d 615 (1951). In both *Pina* and *Simmons* the courts felt that one person could not waive another's constitutional rights. The logical extreme of these decisions is Dalton v. State, 230 Ind. 626, 105 N.E.2d 509 (1952), where a wife could not authorize search of the family car though she held title to it.

15. 332 F.2d at 897.

16. *E.g.*, Bellam v. State, 233 Md. 368, 196 A.2d 891 (1964); Joslin v. State, 165 Tex. Crim. 161, 305 S.W.2d 351 (1957). Both of these searches were apparently exploratory since they involved the removal of stairs and paneling. In addition, neither court mentioned the fact that the police knew the contraband was in a different place all along.

17. *Accord*, United States v. Hopps, 215 F. Supp. 734, 750 (D. Md. 1962), which held an attorney could not allow a search of his client's personal papers. State v. Evans, 45 Hawaii 622, 372 P.2d 365 (1962), held a search of the defendant's cuff-link box could not be authorized by his wife. In Holzhey v. United States, 223 F.2d 823 (5th Cir. 1955), a search of the defendant's locked cases was declared invalid though done with the consent of the owners of the premises, in spite of the fact that the trial court seems to have found that the defendant was a guest rather than a lessee. *Contra*, United States v. Rees, 193 F. Supp. 849 (D. Md. 1961); State v. Shephard, 124 N.W.2d 712 (Iowa 1963). Both allowed searches of locked cases by means of third party waiver. *Rees* distinguished *Holzhey* because the latter involved a lessor-lessee relationship, contrary to the trial court's finding in that case. *Rees* involved kidnapping while *Holzhey* involved petty theft.

under the fourth amendment.[18] It would also follow that she may not authorize a search of a room over which her husband has exclusive control and use.[19] Nor would it be consistent with the fourth amendment to allow a search that could reasonably be expected to require the permission of both parties, such as one demanding the removal of flooring or other alteration of the premises.[20] However, there could be no harm in the wife allowing a search of rooms over which she has sole or joint control. Nor is it objectionable for her to authorize a search and examination of evidence that is in plain sight[21] — so long as the evidence is not papers and effects of the husband. Such rules lead to a harmonization of the conflicting interests, since the wife is allowed to exercise her right of control over the premises while not invading those areas where only the privacy of the husband is at stake.

The question whether the bullet was improperly seized — application of the *Gouled* rule — was not raised in *Roberts*. Language in *Abel v. United States*[22] indicates that seizure of purely evidentiary articles is illegal, even where a search is legitimate.[23] *Gouled* certainly limits seizures made under a valid search warrant to fruits and instruments of a crime.[24] The cases disagree with respect to whether it is permissible to seize solely evidentiary articles incident to a lawful arrest.[25] The necessity of preventing

18. See note 1 *supra*.

19. In Reeves v. Warden, 226 F. Supp. 953, 960 (D. Md. 1964), the court apparently attempted to formulate such a rule, holding that petitioner's mother could not authorize a search of any area of petitioner's room set aside exclusively for his own use, nor could she allow a seizure of his effects, since they were not fruits or instruments of crime.

20. Joslin v. State, 165 Tex. Crim. 161, 305 S.W.2d 351 (1957) (where flooring and paneling were removed).

21. United States v. Eldridge, 302 F.2d 463, 466 (4th Cir. 1962). The court allowed a bailee to let officers search the bailor's car but implied that if the search were detailed it would have been invalid. *Contra*, Bellam v. State, 233 Md. 368, 196 A.2d 891 (1964).

22. 362 U.S. 217 (1960).

23.

> [N]ot every item may be seized which is properly inspectible by the Government in the course of a legal search; for example, private papers desired by the Government merely for use as evidence may not be seized, no matter how lawful the search which discovers them . . . .

Id. at 234–35.

24. 255 U.S. at 310.

25. Since the *Gouled* decision, the Supreme Court has limited permissible seizures to contraband, instruments or fruits of crime, and weapons. Harris v. United States, 331 U.S. 145, 154 (1947); see, *e.g.*, Abel v. United States, 362 U.S. 217, 234–35 (1960); Marron v. United States, 275 U.S. 192, 199

destruction of contraband, escape of the captive, and the need to protect the arresting officer[26] may justify a broader scope of seizure. But none of the considerations peculiar to an arrest apply if a search is conducted with the authorization of the spouse or other person in control of the premises. Therefore, the *Gouled* limitations seem to apply in the *Roberts* case.[27]

The *Gouled* limitations on seizure have sometimes been viewed as having the sole purpose of insuring that the preceding search is reasonable.[28] Even if this be so, an attempt to avoid the *Gouled* seizure limitations by examining only the reasonableness of the search cannot be justified without completely vitiating *Gouled* itself.[29] More often, application of *Gouled* is limited by a very liberal interpretation of what are fruits and instruments of a crime.[30] Assuming, as indicated in *Gouled*, that the subjects of seizure have a constitutional significance of their own, the bullet in *Roberts* was not a fruit or instrument of a crime. Hence the only basis for admitting the bullet into evidence would be that it was abandoned.[31] In passing on the different question whether the search was reasonable, the *Roberts* court simply stated that the bullet had been abandoned. Even though it is difficult to find an abandonment in one's own home, the impersonal character of the bullet and the lack of interest shown in it by the defendant seem to justify the court's conclusion. Thus the result on the seizure question raised by *Gouled*, and not treated in *Roberts*, seems to turn on the same factors as the search question actually treated by the court.

(1927). Yet cases like United States v. Pardo-Bolland, 229 F. Supp. 473 (S.D.N.Y. 1964), still arise in the lower federal courts. *Pardo-Bolland* denied defendant's motion to return as illegally seized incident to his arrest for a narcotics violation, *inter alia*, cash, travelers checks, a wallet, a passport, and a United Nations Delegation Pass. On its own motion the Government consented to return a lock of hair with a card saying, "I love you." The court relied on language in Weeks v. United States, 232 U.S. 383, 392 (1914)—a pre-*Gouled* case. 229 F. Supp. at 476.

26. 47 AM. JUR. *Searches & Seizures* § 19 (Supp. 1964); Annot., 4 L. Ed. 2d 1983, 1988 (1960).

27. United States v. Rees, 193 F. Supp. 849 (D. Md. 1961), applied *Gouled* to a waiver situation. Moreover, the same court in Reeves v. Warden, 226 F. Supp. 953, 960 (D. Md. 1964), held that *Gouled* must be applied to the states because of Ker v. California, 374 U.S. 23 (1963), and Mapp v. Ohio, 367 U.S. 643 (1961).

28. See United States v. Poller, 43 F.2d 911, 914 (2d Cir. 1930). For a good criticism of this reasoning see Kaplan, *Search and Seizure, a No-Man's Land in the Criminal Law*, 49 CALIF. L. REV. 474, 478–79 (1961).

29. *Cf.* Matthews v. Correa, 135 F.2d 534, 537 (2d Cir. 1943).

30. See note 12 *supra*; cases cited note 25 *supra*.

31. *Cf.* Abel v. United States, 362 U.S. 217, 241 (1960).