**9.15 Particular Rights—Fourth Amendment—Unreasonable Search—Exception To Warrant Requirement—Consent**

 In general, a search of a [person] [residence] [vehicle] [property] is unreasonable under the Fourth Amendment if the search is not authorized by a search warrant. [A “search warrant” is a written order signed by a judge that permits a law enforcement officer to search a particular person, place, or thing.] Under an exception to this rule, a search warrant is not required and a search is reasonable if [the person] [a person in lawful possession of the area to be searched] knowingly and voluntarily consents to the search [and there is not any express refusal to consent by another person who is physically present and also in lawful possession of the area to be searched].

 In determining whether a consent to search is voluntary, consider all of the circumstances, including:

(1) whether the consenting person was in custody;

(2) whether the officers’ guns were drawn;

 (3) whether *Miranda* warnings were given;

(4) whether the consenting person was told [he] [she] had the right to refuse a request to search;

(5) whether the consenting person was told a search warrant could be obtained;

(6) [*any other circumstances applicable to the particular case*].

 *Miranda* warnings consist of advising a criminal suspect that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires.

In order to prove the search in this case was unreasonable, the plaintiff must prove by a preponderance of the evidence that this exception to the warrant requirement does not apply.

**Comment**

 Use this instruction only in conjunction with the applicable elements instructions, Instructions 9.3–9.8 and in conjunction with Instruction 9.12 (Particular Rights—Fourth Amendment —Unreasonable Search—Generally).

 It is a well-settled exception to the warrant requirement that an “individual may waive his Fourth Amendment rights by giving voluntary and intelligent consent to a warrantless search of his person, property, or premises.” *United States v. Cormier*, 220 F.3d 1103, 1112 (9th Cir. 2000); *see* *also Ohio v. Robinette*, 519 U.S. 33, 39-40 (1996). Whether a consent to search was voluntarily given is a question of fact to be determined from the “totality of all the circumstances.” *United States v. Taylor*, 60 F.4th 1233, 1243 (9th Cir. 2023) (quoting *Schneckloth v. Bustamonte*, 412 U.S. 218, 227 (1973)). The Ninth Circuit considers five factors in determining voluntariness, which have been incorporated into the above instruction. *See, e.g.*, *Liberal v. Estrada*, 632 F.3d 1064, 1082 (9th Cir. 2011) (applying five-factor test for voluntariness in § 1983 case). “No one factor is determinative in the equation” and “[b]ecause each factual situation surrounding consent to a search is unique,” a court may also consider other relevant factors. *Id.;* *United States v. Taylor*, 60 F.4th 1233, 1243 (9th Cir. 2023) (rejecting argument that “racial disparities in the policing of America” invalidated consent, court noted tensions between officers and suspects “may be heightened by personal experiences and other sociocultural factors,” but there was no evidence in this case that race affected voluntariness of consent).

 In *Georgia v. Randolph*, 547 U.S. 103, 106 (2006), the Supreme Court reiterated this rule: “The Fourth Amendment recognizes a valid warrantless entry and search of premises when police obtain the voluntary consent of an occupant who shares, or is reasonably believed to share, authority over the area in common with a co-occupant who later objects to the use of evidence so obtained.” The Court, however, also held that, as between a wife’s consent to a search of the family residence and her husband’s refusal to consent, “a physically present co-occupant’s stated refusal to permit entry prevails, rendering the warrantless search unreasonable and invalid as to him.” *Id.; see also Bonivert v. City of Clarkston*, 883 F.3d 865, 875 (9th Cir. 2018) (“Applying *Randolph*, we hold that the consent exception to the warrant requirement did not justify the officers’ entry into *Bonivert’s* home. Even though the officers secured [co-occupant] *Ausman’s* consent, *Bonivert* was physically present inside and expressly refused to permit the officers to enter on two different occasions” (emphasis added)). The Ninth Circuit clarified that “*Randolph* requires that the resident who is refusing consent both be present at the house and expressly refuse to allow the search.” *United States v. Moore*, 770 F.3d 809, 811 (9th Cir. 2014). In addition, the Supreme Court has clarified that *Randolph* does not apply when the objecting occupant has been removed and is no longer physically present, including removal through a lawful arrest. *Fernandez v. California*, 571 U.S. 292, 294, 301 (2014) (upholding warrantless search of apartment when consent later obtained from co-occupant after initially objecting occupant arrested on suspicion of assaulting co-occupant); *see also Brown*, 563 F.3d at 416-18 (finding voluntary consent from co-occupant of residence when defendant had been arrested pursuant to valid arrest warrant and placed in squad car prior to consent discussion with co-occupant).

 *Randolph’s* exception to the consent rule for third parties does not apply when the “consent” consists of a probationer’s search condition. That scenario requires an examination of whether a warrantless search “was reasonable under the Court’s general Fourth Amendment approach of ‘examining the totality of the circumstances,’ with the probation search condition being a salient circumstance.” *Smith v. City of Santa Clara*, 876 F.3d 987, 992 (9th Cir. 2017) (internal quotation marks and brackets omitted) (quoting *United States v. Knights*, 534 U.S. 112, 118 (2001) (rejecting jury instruction framed in terms of consent based on warrantless probation search condition)).

 Whether an individual was told he or she was “free to leave” may implicate both the

first factor—whether the individual was in custody—and the fourth factor—whether he or

she was informed he or she could refuse consent. *See*, *e.g*., *United States v. Russell*, 664 F.3d

1279, 1281 (9th Cir. 2012) (noting that officer’s instruction that individual is free to leave is “an instructive, but certainly less clear, way of saying that consent could be refused”); *United States v. Bassignani*, 575 F.3d 879, 886 (9th Cir. 2009) (noting that officer’s instruction that individual is free to leave is important consideration in determining whether individual is in custody); *but see United States v. Stephens*, 206 F.3d 914, 917 (9th Cir. 2000) (noting that, when searching bus passengers, “free to leave” warning is inadequate to ensure voluntariness).

 Under certain circumstances, a third party may have actual or apparent authority to give consent to the search of another’s property. *Espinosa v. City & Cnty. of San Francisco*, 598 F.3d 528, 536 (9th Cir. 2010) (citing *United States v. Ruiz*, 428 F.3d 877, 880-81 (9th Cir. 2005)) (stating three-part test to determine apparent authority of third person). When authority to consent is factually disputed, it may be necessary to instruct the jury on these standards.

 Relatedly, the “knock and talk” exception, which allows officers to approach a home and

knock on the door, does not apply when the officers’ purpose in conducting the “knock and talk”

is to arrest the occupant. *United States v. Lundin*, 817 F.3d 1151, 1160 (9th Cir. 2016).

 A plaintiff alleging a § 1983 claim based on an unreasonable search in violation

of the Fourth Amendment has the burden of proving at trial that an asserted exception to the warrant requirement did not apply. *Larez v. Holcomb*, 16 F.3d 1513, 1517-18 (9th Cir. 1994); *see Mueller v. Auker*, 700 F.3d 1180, 1193 (9th Cir. 2012) (placing burden on plaintiff to establish absence of imminent danger in claim of interference with parent-child relationship); *Pavao v. Pagay*, 307 F.3d 915, 919 (9th Cir. 2002) (reaffirming that plaintiff in § 1983 action “carries the ultimate burden of establishing each element of his or her claim, including lack of consent [to search]”).

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