

## SEARCH AND SEIZURE OF RESIDENCE

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### House Bill 4321 (Substitute H-2 with floor amendments)

**Sponsor: Rep. Peter J. Lucido**

**Committee: Criminal Justice**

**Complete to 10-26-15**

Analysis available at  
<http://www.legislature.mi.gov>

### SUMMARY:

House Bill 4321 would add a new section to the Code of Criminal Procedure to specify that, except in exigent circumstances or as provided in the bill, a law enforcement officer could not enter or search a residence without a valid search warrant if a resident expressly objects to the entry or search. This provision would apply even if another resident consents to the entry or search after the objecting resident is no longer physically present at the residence. But, the provision would not apply to a circumstance in which a resident who consents to an entry or search is the victim of an alleged criminal act committed by a resident who objects to the search for which a law enforcement officer's purpose in entering the residence is to obtain evidence of the alleged criminal act.

Evidence knowingly obtained in the search of a residence after a resident objected to the entry or search would be inadmissible in any criminal action against a person who objected to the entry or search by which the evidence was improperly obtained. However, that evidence could be used to revoke parole or probation or impeach a defendant's testimony.

MCL 760.25c, proposed

### BRIEF DISCUSSION OF THE ISSUE:

It is common for multiple residents to share an apartment or house. Under current case law, if one resident consents to a law enforcement officer entering the premises and conducting a search without a warrant, but another resident who is physically present objects, the officer must leave and obtain a search warrant. Under a fairly recent U.S. Supreme Court case, the court held that if the resident who objected to the entry and search left the premises, the remaining resident may at a later time provide consent for a law enforcement officer to enter and conduct a warrantless search. *Fernandez v California*, 134 S Ct 1128 (2014).

The bill seeks to mitigate the ruling in *Fernandez* by specifying that if one resident who is physically present objects to the entry and search without a warrant, and then leaves the premises, the objection to the search stays valid and the law enforcement officer must obtain a search warrant. The consent of any resident who is still physically present at the dwelling cannot subsequently provide consent over the objection of the resident who has left the premises. This prevents the situation said to occur now where police wait for a person to go to work or otherwise leave and then try to get a resident still in the home to

give consent rather than petition a judge or magistrate for a warrant based on probable cause.

The only exception would be for exigent circumstances (for example, the police hear evidence that a crime may be in progress) or situations in which the consenting resident is the victim of an alleged criminal act committed by the resident who objected to the entry and search (for example, an act of domestic violence).

Thus, under the bill, if one resident objects to the entry of police officers and search of the premises, and then goes to work or to a store, or is removed by the police and later arrested, a warrant will be needed before police could search the residence, even if another resident who is physically present at the time the police return consents to the entry and search. In this way, say proponents of the bill, the Fourth Amendment rights of the person objecting to the entry and search are protected, yet appropriate exceptions are provided that will enable law enforcement officers to do their jobs.

The bill has raised some concerns, especially by those in law enforcement. The law is already clear that when more than one resident is present, an objection by just one requires the officer to leave and obtain a search warrant. *Fernandez* allowed the consent of a physically present resident to prevail over the objection of a resident who was no longer physically present. Critics say that the bill muddies the issue and will make it difficult for law enforcement officers to determine when and under what circumstances a warrant is needed. For instance, how would an officer define "no longer physically present"? Would that be a matter of hours or days? What if the person objected and then went on an extended personal or business trip? Or fled the jurisdiction? How would it be known when the consent of the remaining resident would not invalidate any evidence found in a warrantless search? Further, even the Supreme Court acknowledged, in *Ferguson*, that requiring an officer "to obtain a warrant when a warrantless search is justified may interfere with law enforcement strategies and impose an unmerited burden on the person willing to consent to an immediate search."

#### **FISCAL IMPACT:**

The bill would not have a significant fiscal impact on the state or local units of government.

#### **POSITIONS:**

A representative of the ACLU of Michigan testified in support of the bill on 5-5-15 and indicated support on 9-22 and 10-12-15.

The Criminal Defense Attorneys of Michigan indicated support for the bill. (5-5, 9-22, and 10-12-15)

The Michigan Domestic & Sexual Violence Prevention and Treatment Board indicated opposition the bill. (9-22-15)

The Michigan Coalition to End Domestic & Sexual Violence indicated opposition to the bill. (9-22-15)

The Michigan Sheriff's Association indicated opposition to the bill. (5-5, 9-22, and 10-12-15)

The Prosecuting Attorneys Association of Michigan indicated opposition to the bill. (9-22-15)

The Department of State Police (MSP) has not taken a formal position on the bill, but did express several concerns. (5-15-15)

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■ This analysis was prepared by nonpartisan House Fiscal Agency staff for use by House members in their deliberations, and does not constitute an official statement of legislative intent.