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AUTOMOBILE CONSENT SEARCHES: THE DRIVER'S OPTIONS IN A LOSE-LOSE SITUATION

*Arthur J. Park**

“Do you mind if I take a quick look in the vehicle?”

This is a question that countless Americans hear every day, but very few citizens understand the ramifications of their answer. How long can the officer keep me here? What if there is something in my car that I do not know about? Can I be arrested if I refuse the search? This article will address the legal context surrounding consent searches of automobiles in order to provide some clarity to drivers and passengers that are put in this lose-lose situation.

I. BASIS FOR THE STOP

Traffic stops generally occur in one of three situations: (1) stops based on probable cause, (2) stops based on reasonable suspicion, and (3) roadblocks. A quick overview of each type of stop will frame the overall discussion and highlight the areas of concern associated with automobile consent searches.

A law enforcement officer may pull over a vehicle if he has probable cause to believe that any offense has occurred.¹ Probable cause has been defined as “facts and circumstances within the officer’s knowledge that are sufficient to warrant a prudent person, or one of reasonable caution, in believing, in the circumstances shown, that the suspect has committed, is committing, or is about to commit an offense.”² It is important to note that

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1. See *Whren v. United States*, 517 U.S. 806, 810 (1996) (“As a general matter, the decision to stop an automobile is reasonable where the police have probable cause to believe that a traffic violation has occurred.”). For an excellent, comprehensive analysis of probable cause and other Fourth Amendment issues, see THOMAS K. CLANCY, *THE FOURTH AMENDMENT: ITS HISTORY AND INTERPRETATION* (Carolina Academic Press 2008).

2. *Michigan v. DeFillippo*, 443 U.S. 31, 37 (1979). However, the Supreme Court has also noted that “[P]robable cause is a fluid concept—turning on the assessment of probabilities in particular factual contexts—not readily, or even usefully, reduced to a neat set of legal rules.” The probable-cause standard is incapable of precise definition or quantification

the officer can act whenever *any* law has been violated.³ Thus, an individual can be pulled over if he commits a traffic violation of any sort.⁴ This is true even though “the use of automobiles is so heavily and minutely regulated that total compliance with traffic and safety rules is nearly impossible” and despite the fact that “a police officer will almost invariably be able to catch any given motorist in a technical violation.”⁵ Accordingly, an officer has the authority to follow an individual for as long as it takes for the driver to commit a traffic violation, and thus create probable cause.⁶

An officer may also pull over a vehicle based on articulable suspicion that any offense has been committed.⁷ Articulable suspicion, also known as reasonable suspicion, is defined as “a particularized and objective basis for suspecting the particular person stopped of criminal activity.”⁸ The reasonable suspicion standard is somewhat less demanding than probable cause: “a policeman who lacks probable cause but whose ‘observations lead him reasonably to suspect’ that a particular person has committed, is committing, or is about to commit a crime, may detain that person briefly in order to ‘investigate the circumstances that provoke suspicion.’”⁹ The articulable suspicion standard was announced in *Terry v. Ohio*¹⁰ and has since been applied to traffic stops, because “most traffic stops resemble, in duration and atmosphere, the kind of brief detention authorized in *Terry*.”¹¹ For example, articulable suspicion likely exists when an officer believes, but is not positive, that a vehicle’s windows are too tinted or its registration tags are expired.

into percentages because it deals with probabilities and depends on the totality of the circumstances.

Maryland v. Pringle, 540 U.S. 366, 370–71 (2003) (quoting Illinois v. Gates, 462 U.S. 213, 232 (1983)).

3. *DeFillippo*, 443 U.S. at 37.

4. *See, e.g., Atwater v. City of Lago Vista*, 532 U.S. 318, 354 (2001) (seat belt violation).

5. *Whren*, 517 U.S. at 810.

6. *See id.* at 808 (officer believed driver possessed drugs but pulled over the driver for failing to signal a turn); *United States v. Herring*, 35 F. Supp. 2d 1253, 1254 (D. Or. 1999) (officer followed gang-related shooting suspect for thirty blocks before suspect made an illegal lane change).

7. *Terry v. Ohio*, 392 U.S. 1, 21 (1968) (holding that “in justifying the particular intrusion the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion”).

8. *United States v. Cortez*, 449 U.S. 411, 417–18 (1981).

9. *Berkemer v. McCarty*, 468 U.S. 420, 439 (1984) (quoting *United States v. Brigoni-Ponce*, 422 U.S. 873, 881 (1975)).

10. 392 U.S. at 21.

11. *Berkemer*, 468 U.S. at 439 n.29; *see also Arizona v. Johnson*, 129 S. Ct. 781, 786 (2009) (upholding traffic stop that was justified by suspicion “reasonably grounded, but short of probable cause”).

The third general basis for a traffic stop is a roadblock. Any police roadblock constitutes a seizure for purposes of the Fourth Amendment.¹² Thus, the permissive use of roadblocks will be judged on the basis of reasonableness.¹³ However, the Supreme Court has prohibited roadblocks established “primarily for the ordinary enterprise of investigating crimes,” such as narcotics or firearms.¹⁴

II. CONSENT SEARCHES IN GENERAL

Unlike many other rights,¹⁵ an individual does not have to be aware of his right to refuse consent before “waiving” it.¹⁶ Practically speaking, this means that an officer seeking consent to search the vehicle is not required to advise the driver that he may lawfully refuse consent.¹⁷ In *Schneckloth v. Bustamonte*, the Court cited three reasons for this rule: (1) the police have a “legitimate need” for consent searches,¹⁸ (2) a consent search “may result in considerably less inconvenience for the subject of the search,”¹⁹ and (3) “the community has a real interest in encouraging consent, for the resulting search may yield necessary evidence for the solution and prosecution of crime, evidence that may insure that a wholly innocent person is not wrongly charged with a criminal offense.”²⁰

Critics of *Schneckloth* argue that regular citizens are unaware of their right to refuse consent, and consequently, they give consent in the vast

12. *United States v. Martinez-Fuerte*, 428 U.S. 543, 556 (1976) (“It is agreed that checkpoint stops are ‘seizures’ within the meaning of the Fourth Amendment.”).

13. *Michigan Dept. of State Police v. Sitz*, 496 U.S. 444, 450 (1990) (upholding sobriety checkpoint); *Brown v. Texas*, 443 U.S. 47, 50 (1979).

14. *City of Indianapolis v. Edmond*, 531 U.S. 32, 44 (2000) (holding roadblock set up to inquire about narcotics and firearms invalid). In addition, the Supreme Court has prohibited random, suspicionless stops commenced solely for the purpose of checking licenses and registrations. *See Delaware v. Prouse*, 440 U.S. 648, 661 (1979) (“This kind of standardless and unconstrained discretion is the evil the Court has discerned when in previous cases it has insisted that the discretion of the official in the field be circumscribed, at least to some extent.”).

15. Such as the right to counsel or the right to remain silent. *See Gideon v. Wainwright*, 372 U.S. 335, 339–40 (1963) (holding counsel must be provided for defendant unless he waives that right); *Miranda v. Arizona*, 384 U.S. 436, 444 (1966) (holding that after the defendant is informed of his right to silence, he may then waive his right).

16. *Schneckloth v. Bustamonte*, 412 U.S. 218, 234 (1973). However, a few states, under their own state constitution, require that the driver must possess knowledge of the ability to refuse consent and that the officer must have reasonable suspicion of a more serious offense. *See, e.g., State v. Carty*, 790 A.2d 905, 907 (N.J. 2002). For more on independent state grounds, see *infra* Part V.A.

17. *See Schneckloth*, 412 U.S. at 234.

18. *Id.* at 227.

19. *Id.* at 228.

20. *Id.* at 243. However, one could certainly argue that the community also has a “real interest” in preventing the police from performing baseless consent searches at the end of every traffic stop.

majority of situations, even when the individuals know that there is incriminating evidence in the car.²¹ There is some empirical data to support this claim. Approximately 90% of all searches conducted by the police are consensual in nature.²² Professor Marcy Strauss notes that “most people would not feel free to deny a request by a police officer.”²³ Further, the likelihood of compliance increases “when the authority figure has visible trappings of authority, such as a uniform.”²⁴ Justice Stevens has aptly opined that “[r]epeated decisions by ordinary citizens to surrender that [privacy] interest cannot satisfactorily be explained on any hypothesis other than an assumption that they believed they had a legal duty to do so.”²⁵

Consent is valid when voluntarily given, and the courts consider the totality of the circumstances in determining whether consent is, in fact, voluntary.²⁶ The *Schneckloth* Court listed a number of factors that may be considered as part of the totality of the circumstances, including

the youth of the accused, his lack of education, his low intelligence, the lack of any advice to the accused of his constitutional rights, the length of detention, the repeated and prolonged nature of the questioning, and the use of physical punishment such as the deprivation of food or sleep.²⁷

It is a violation of the Fourth Amendment for an officer to state that the individual does not have the right to refuse consent.²⁸ Further, consent cannot be coerced “by explicit or implicit means, by implied threat or covert force,” including “subtly coercive police questions.”²⁹ However, an officer’s “threat” to return with a search warrant if the individual refused consent has been upheld as not coercive.³⁰ Applying that logic, an officer could threaten to call in a drug dog unit or to arrest the driver (assuming the officer has probable cause for an arrest) if the individual refuses to give consent to a search of the vehicle.

21. Ric Simmons, *Not “Voluntary” But Still Reasonable: A New Paradigm for Understanding the Consent Search Doctrine*, 80 IND. L. J. 773, 800–01 (2005).

22. *Id.* at 773.

23. Marcy Strauss, *Reconstructing Consent*, 92 J. CRIM. L. & CRIMINOLOGY 211, 236 (2002).

24. *Id.* (citing Leonard Bickman, *The Social Power of a Uniform*, 4 J. APPLIED SOC. PSYCHOL. 47 (1974)).

25. *Ohio v. Robinette*, 519 U.S. 33, 48 (1996) (Stevens, J., dissenting).

26. *Id.* at 40 (majority opinion) (citing *Schneckloth*, 412 U.S. at 248–49).

27. *Schneckloth*, 412 U.S. at 226 (citations omitted).

28. See *Bumper v. North Carolina*, 391 U.S. 543, 550 (1968). The Court went on to state that “[w]here there is coercion there cannot be consent.” *Id.*

29. *Schneckloth*, 412 U.S. at 228–29.

30. *People v. Yuruckso*, 746 N.Y.S.2d 33, 34 (N.Y. App. Div. 2002).

III. WHEN CONSENT IS REFUSED

An individual has the constitutional right to refuse consent.³¹ The driver's exercise of that right "may not later be used to implicate guilt" and "cannot form the basis of reasonable suspicion or probable cause."³² However, a nervous demeanor, in responding to police questioning or in stating the refusal of consent, can be a factor in establishing reasonable suspicion.³³ A driver who refuses to consent to a search of his vehicle opens himself up to a smorgasbord of unappealing possibilities: further questioning by the officer, a long delay in waiting for a canine drug sniff, or perhaps an arrest for the underlying offense.

A. Further Questioning

Upon a lawful stop, the police officer may ask questions related to the traffic offense.³⁴ Applying *Terry*, the officer may ask "pertinent questions" to the individual during the traffic stop.³⁵ The Supreme Court has also found that "[a]sking questions is an essential part of police investigations."³⁶ In *Muehler v. Mena*, the Court held that an officer did not need reasonable suspicion to inquire about an individual's "name, date and place of birth, or immigration status."³⁷ However, the Court recently clarified that "inquiries into matters unrelated to the justification for the traffic stop... do not convert the encounter into something other than a lawful seizure, so long as those inquiries do not *measurably extend* the duration of the stop."³⁸ It remains to be seen how the lower courts will use the "measurably extend"³⁹ test in light of the fact that "an investigative detention must be temporary and last no longer than is necessary to effectuate the purpose of the stop."⁴⁰ In short, a driver who refuses consent

31. *Robinette*, 519 U.S. at 39–40.

32. *Longshore v. State*, 924 A.2d 1129, 1159 (Md. 2007).

33. *See United States v. Vargas*, 57 Fed. Appx. 394, 400 (10th Cir. 2003).

34. *Hiibel v. Sixth Judicial Dist. Court*, 542 U.S. 177, 186 (2004); *Berkemer v. McCarty*, 468 U.S. 420, 439 (1984) ("[T]he officer may ask the detainee a moderate number of questions to determine his identity and to try to obtain information confirming or dispelling the officer's suspicions.").

35. *Terry*, 392 U.S. at 34 (White, J., concurring).

36. *Hiibel*, 542 U.S. at 185.

37. *Muehler v. Mena*, 544 U.S. 93, 101 (2005). Since "mere police questioning does not constitute a seizure," the issue becomes whether the questioning unreasonably prolonged the detention. *Id.*

38. *Arizona v. Johnson*, 129 S. Ct. 781, 788 (2009) (emphasis added).

39. *Id.*

40. *Florida v. Royer*, 460 U.S. 491, 500 (1983).

may very well be asked a series of questions that are either related or unrelated to the offense at hand, and such questioning appears to be lawful so long as it does not measurably extend the duration of the stop.

B. Canine Drug Sniffs

Surprisingly, the use of a drug detection dog does not constitute a “search” for purposes of the Fourth Amendment.⁴¹ Thus, an officer does not need probable cause or reasonable suspicion before utilizing a drug dog.⁴² In *United States v. Place*, the Supreme Court reasoned that a dog sniff is not a search, because it does not expose the property to public view, is “less intrusive than a typical search,” and “discloses only the presence or absence of narcotics.”⁴³ The Court has further upheld the use of a drug dog to sniff the exterior of a lawfully stopped vehicle.⁴⁴ In *Illinois v. Caballes*, the Court allowed a dog sniff of the driver’s vehicle, even though the dog sniff was not conducted by the same officer who had made the initial traffic stop.⁴⁵ Accordingly, the Tenth Circuit has stated the following reasons for upholding dog sniffs in the traffic context: (1) the dog sniffs occur only outside of the vehicle; (2) the driver does not experience any embarrassment or inconvenience by the transaction; (3) dog sniffs do not cause an unreasonable delay; and (4) the driver does not have a reasonable expectation of privacy in the air emanating from the exterior of his vehicle.⁴⁶

Although the use of a narcotics detection dog is not a search, an unreasonably prolonged traffic stop for the drug dog to arrive or perform the sniff may constitute a seizure. In *Place*, the Court noted that “the brevity of the invasion of the individual’s Fourth Amendment interests is an important factor in determining whether the seizure is so minimally intrusive as to be justifiable,”⁴⁷ and in *Caballes*, the Supreme Court’s ruling relied on the fact that the traffic stop was not extended beyond the time

41. *United States v. Place*, 462 U.S. 696, 707 (1983). “[E]xposure of respondent’s luggage, which was located in a public place, to a trained canine—did not constitute a ‘search’ within the meaning of the Fourth Amendment.” *Id.*

42. *Illinois v. Caballes*, 543 U.S. 405, 409 (2005).

43. *Place*, 462 U.S. at 707.

44. *Caballes*, 543 U.S. at 409.

45. *Id.* at 406.

46. *United States v. Morales-Zamora*, 914 F.2d 200, 205 (10th Cir. 1990). But see *infra* notes 124–27 and accompanying text regarding the Court’s recent validation of the driver’s reasonable expectation of privacy in the vehicle generally.

47. *Place*, 462 U.S. at 709.

necessary to issue a citation.⁴⁸ Thus, courts will likely first look to the length of the detention in determining whether to uphold a dog sniff during a traffic stop. Courts have upheld dog sniffs that resulted in a delay of only a few minutes,⁴⁹ ten minutes,⁵⁰ and thirty minutes.⁵¹ Although the *Place* Court declined “to adopt any outside time limitation for a permissible *Terry* stop,”⁵² it nevertheless stated that “in assessing the effect of the length of the detention, we take into account whether the police diligently pursue their investigation.”⁵³ Similarly, the Eighth Circuit has upheld a dog sniff that resulted in a three-hour delay for the driver, relying on the remote location of the vehicle and the fact that “the officers acted with diligence and pursued the quickest and least intrusive means of investigation reasonably available to confirm or dispel” their reasonable suspicion of drug trafficking.⁵⁴

Courts have disapproved the following dog sniffs: (1) waiting on the drug dog for ninety minutes because the police did not act diligently,⁵⁵ (2) calling for a second drug dog after the first dog failed to signal,⁵⁶ and (3) after completing an oral warning to the driver and thus concluding the traffic stop, conducting the dog sniff absent reasonable suspicion or consent.⁵⁷ Although a three-hour wait is certainly an uncommon occurrence, a driver that refuses consent could face a significant delay in waiting for a drug dog to be called in.

48. *Caballes*, 543 U.S. at 406. The *Caballes* Court explained that

A seizure that is justified solely by the interest in issuing a warning ticket to the driver can become unlawful if it is prolonged beyond the time reasonably required to complete that mission. . . . We may assume that a similar result would be warranted in this case if the dog sniff had been conducted while respondent was being unlawfully detained.

Id. at 407–08 (citation omitted).

49. *United States v. Burris*, 78 Fed. Appx. 525, 528 (6th Cir. 2003).

50. *Caballes*, 543 U.S. at 406; *United States v. Hare*, 932 F. Supp. 843, 847–49 (E.D. Tex. 1996).

51. *United States v. Brown*, 24 F.3d 1223, 1226 (10th Cir. 1994).

52. *United States v. Place*, 462 U.S. 696, 709 (1983).

53. *Id.*

54. *United States v. Maltais*, 403 F.3d 550, 558 (8th Cir. 2005).

55. *Place*, 462 U.S. at 709–10.

56. *United States v. Davis*, 430 F.3d 345, 354, 356 (6th Cir. 2005) (waiting approximately thirty minutes for first drug dog was reasonable, but waiting an hour for second dog was not).

57. *United States v. Kirkpatrick*, 5 F. Supp. 2d 1045, 1047 (D. Neb. 1998); *see also* *United States v. Beck*, 140 F.3d 1129, 1135–36 (8th Cir. 1998) (officer threatened to call in drug dog after telling driver that he was free to go). For more on what actions the officer can take after giving a warning or citation, *see infra* Part III.D.

C. Arrest

The driver's refusal to give consent "may not later be used to implicate guilt" and "cannot form the basis of reasonable suspicion or probable cause."⁵⁸ However, an officer already has authority to arrest the driver for any offense, even a minor traffic violation.⁵⁹ The Supreme Court has stated that when "an officer has probable cause to believe that an individual has committed even a very minor criminal offense in his presence, he may, without violating the Fourth Amendment, arrest the offender."⁶⁰ The Court noted that although a citation is given in the vast majority of cases, the applicable state statute authorized the officer to arrest the driver for a simple seatbelt violation.⁶¹

A similar conclusion may be reached even if the officer does not have statutory discretion to arrest.⁶² Under the Fourth Amendment, an officer may arrest when he has probable cause to believe that any criminal offense has occurred, regardless of whether the applicable state statute requires that only a citation be given.⁶³ In *Virginia v. Moore*, the arrest for driving with a suspended license was held to not violate the Fourth Amendment despite a Virginia law requiring the officer to issue a summons (and not perform an arrest) for such violations.⁶⁴ The Court reasoned that local statutes cannot control the meaning of the Fourth Amendment.⁶⁵ The officer in *Moore* had probable cause to believe that an offense had occurred, and therefore, the arrest was constitutionally permissible.⁶⁶ In short, the litmus paper test for an arrest is probable cause to believe that a criminal offense is occurring or has occurred. With this test in mind, a driver who refuses consent runs the risk of arrest for the underlying criminal action, given that the officer has a large degree of discretion.

After a traffic-based arrest, the individual is inevitably taken to jail, and the car is thus temporarily left behind. To protect the personal property of the defendant, the police are authorized to tow the vehicle to a safe area,

58. Longshore v. State, 924 A.2d 1129, 1159 (Md. 2007).

59. Atwater v. City of Lago Vista, 532 U.S. 318 (2001).

60. *Id.* at 354.

61. *Id.* at 323; see also United States v. Robinson, 414 U.S. 218, 235 (1973) (valid arrest for driving without a license).

62. *Virginia v. Moore*, 553 U.S. 164 (2008).

63. *Id.* at 176 ("We conclude that warrantless arrests for crimes committed in the presence of an arresting officer are reasonable under the Constitution, and that while States are free to regulate such arrests however they desire, state restrictions do not alter the Fourth Amendment's protections.").

64. *Id.* at 167 (citing VA. CODE ANN. § 19.2-74 (2004)).

65. *Id.* at 175-76.

66. *Id.* at 176.

such as a police impound lot.⁶⁷ Once the car is there, the police may perform an inventory search of the entire vehicle, including all containers.⁶⁸ By making the arrest and performing the subsequent inventory search of the vehicle, the officer can thus circumvent the consent issue.

D. If the Officer Has Already Issued a Citation or Warning

Once the officer has issued a verbal warning or written citation to the driver, the purpose of the traffic stop has been accomplished, and, in general, the officer's ability to detain the individual has ended.⁶⁹ The Court has stated that a "seizure that is justified solely by the interest in issuing a warning ticket to the driver can become unlawful if it is prolonged beyond the time reasonably required to complete that mission."⁷⁰ However, the purpose of the traffic stop is not accomplished until the warning or citation has actually been given to the driver.⁷¹ For example, one court held that a traffic stop was still ongoing when the officer had written, but not yet handed, the citation to the driver while the computer check was in progress.⁷²

After issuing the warning or citation, the officer may further detain the vehicle only if (1) he has reasonable suspicion of a more serious offense, or (2) the traffic stop has shifted into a consensual encounter.⁷³ As to consensual encounters, the officer in *Ohio v. Robinette*⁷⁴ completed his verbal warning for speeding and, on his way back to the car, he asked, "One question before you get gone: [A]re you carrying any illegal contraband in your car? Any weapons of any kind, drugs, anything like that?"⁷⁵ In upholding the subsequent consent search, the Court held that the officer was

67. *Colorado v. Bertine*, 479 U.S. 367, 371–72 (1987).

68. *Id.* There are three primary justifications for allowing inventory searches: "to protect an owner's property while it is in the custody of the police, to insure against claims of lost, stolen, or vandalized property, and to guard the police from danger." *Id.* at 372.

69. "The temporary seizure of driver and passengers ordinarily continues, and remains reasonable, for the duration of the stop. Normally, the stop ends when the police have no further need to control the scene, and inform the driver and passengers they are free to leave." *Arizona v. Johnson*, 129 S. Ct. 781, 788 (2009).

70. *Illinois v. Caballes*, 543 U.S. 405, 407 (2005).

71. *See United States v. Singh*, 363 F.3d 347, 356 (4th Cir. 2004) (once an officer issues a warning or citation and returns the driver's license and registration, the driver may proceed without further delay).

72. *See Byndloss v. State*, 893 A.2d 1119, 1125, 1129 (Md. 2006) (while waiting for the computer to run a background check on the driver's license and registration, the drug dog alerted officers to the presence of narcotics in the vehicle).

73. *See United States v. Sanchez*, 408 F. Supp. 2d 1255, 1256 (S.D. Fla. 2005); *United States v. Parada*, 289 F. Supp. 2d 1291, 1300 (D. Kan. 2003).

74. 519 U.S. 33 (1996).

75. *Id.* at 35–36 (citation omitted) (the subsequent consent search revealed drugs).

not required to advise the driver that the encounter was over and the driver was “free to go” before seeking consent to search.⁷⁶ In another case, the traffic stop was properly converted into a consensual encounter when, after receiving his identification from the officer and being told he was free to go, the defendant asked the officer for directions.⁷⁷ Thus, the driver may still be subject to lawful delays even after the officer has issued the citation or warning.

IV. WHEN CONSENT IS GIVEN

Faced with the disconcerting possibilities of further questioning, waiting for a drug dog, or being arrested, it is not surprising that the vast majority of individuals give consent for the police to search their vehicles. Many individuals make their decisions based on feelings that they have nothing to hide or that they will look guilty if they refuse.

Who can give consent to search the vehicle? The general rule is that the owner or driver of the vehicle, not a passenger, can consent to a search of the car.⁷⁸ This rule may seem easy to apply, but multiple variations quickly arise. For example, some courts hold that an officer can obtain consent to search the vehicle from the registered owner without seeking permission from the driver.⁷⁹ Other courts reach the seemingly contrary conclusion that an officer can obtain consent to search the vehicle from the driver and does not have to seek permission from the owner, even where the owner is present as a passenger.⁸⁰ Reasoning that common authority to consent arises from mutual use of the property to be searched, at least one court has held that even the passenger can grant permission to search the vehicle, so long as the owner is not present.⁸¹

What if the occupants of the vehicle disagree, in which case one occupant consents but the other refuses? At least when it comes to a dwelling, the consent of one co-tenant cannot override the express refusal of another co-tenant.⁸² However, this holding was based on the co-tenants

76. *Id.* at 36.

77. *United States v. Munoz-Villalba*, 251 Fed. Appx. 90, 91–92 (3d Cir. 2007).

78. 68 Am. Jur. 2d SEARCHES & SEIZURES § 164 (2010).

79. *See, e.g., Flores v. State*, 194 S.W.3d 207, 212 (Ark. Ct. App. 2004).

80. *See, e.g., Houston v. State*, 286 S.W.3d 604, 608 (Tex. Ct. App. 2009); *People v. Barker*, 867 N.E.2d 1021, 1026 (Ill. Ct. App. 2007).

81. *State v. Williams*, 858 So. 2d 878, 881 (La. Ct. App. 2003) (“Both the [driver] and the passenger were guests in the third party’s car. Both had mutual use of the car. There is no indication that the defendant had exclusive control of the car or its contents.”).

82. *Georgia v. Randolph*, 547 U.S. 103, 120 (2006) (“We therefore hold that a warrantless search of a shared dwelling for evidence over the express refusal of consent by a physically present resident cannot

having completely equal rights in the residence.⁸³ Obviously, the owner has a greater property interest in the vehicle than the driver or any passengers, and the owner's grant or denial of consent should therefore prevail.⁸⁴ The driver and any passengers would likely have equal footing in conflicting consent situation.⁸⁵ Moreover, it should be noted that the passenger may have a serious hurdle to overcome regarding the issue of "standing" if he seeks to challenge the admissibility of evidence seized from the vehicle.⁸⁶

An important consideration is the scope of consent. The consenting individual may restrict "as he chooses the scope of the search to which he consents."⁸⁷ If the individual does not restrict the scope of his consent, the question becomes "what would the typical reasonable person have understood by the exchange between the officer and the suspect."⁸⁸ Generally, consent "extends to the entire area in which the object of the

be justified as reasonable as to him on the basis of consent given to the police by another resident.").

83. *Id.* at 114.

Unless the people living together fall within some recognized hierarchy, like a household of parent and child or barracks housing military personnel of different grades, there is no societal understanding of superior and inferior, a fact reflected in a standard formulation of domestic property law, that "[e]ach cotenant . . . has the right to use and enjoy the entire property as if he or she were the sole owner, limited only by the same right in the other cotenants."

Id. (citation omitted).

84. See *People v. Mendoza*, 599 N.E.2d 1375, 1381 (Ill. Ct. App. 1992) (owner could have objected to driver's grant of consent or limited the driver's authority over his property); *Hill v. State*, No. 05-08-01224-CR, 2010 Tex. App. LEXIS 5352, at *2-3 (Tex. Ct. App. July 8, 2010) (driver of company truck refused consent, and police called employer to obtain consent to search vehicle; police began search and kept employer on the line so that he could revoke consent at any time). Although the law of property is not controlling, property rights continue to influence Fourth Amendment analysis. See *Randolph*, 547 U.S. at 111. In addition, a lessor of the vehicle will be treated like the owner. *Rakas v. Illinois*, 439 U.S. 128, 140-43 (1978).

85. In *Williams*, the Louisiana Court of Appeals went on to uphold the search of the automobile based on the passenger's consent, even though the driver expressly refused consent. *State v. Williams*, 858 So. 2d, 878, 881 (La. Ct. App. 2003). Since neither the passenger nor the driver owned the vehicle, they had equal rights in the car. *Id.* However the holding of *Randolph* would likely require a different result today. See *Georgia v. Randolph*, 547 U.S. 103, 121 (2006).

86. See *Rakas v. Illinois*, 439 U.S. 128 (1978). The defendant in *Rakas* was a passenger in a vehicle that was searched; he did not own the car nor the property seized from the car. *Id.* at 129. "Fourth Amendment rights are personal rights which, like some other constitutional rights, may not be vicariously asserted." *Id.* at 133-34 (quoting *Alderman v. United States*, 394 U.S. 165, 174 (1969)). Since the defendant did not have a legitimate expectation of privacy in the areas searched, his Fourth Amendment rights were not infringed. *Id.* at 148. The Court went on to subsume the issue of "standing" into the substantive Fourth Amendment analysis:

[T]he question is whether the challenged search or seizure violated the Fourth Amendment rights of a criminal defendant who seeks to exclude the evidence obtained during it. . . . [T]his aspect of the analysis belongs more properly under the heading of substantive Fourth Amendment doctrine than under the heading of standing.

Id. at 140.

87. *Florida v. Jimeno*, 500 U.S. 248, 252 (1991).

88. *Id.* at 251.

search may be found and is not limited by the possibility that separate acts of entry or opening may be required to complete the search.”⁸⁹ Under this test, the officer’s search of a folded paper bag on the floorboard was upheld as reasonable when the object of the search was drugs.⁹⁰ However, courts have found the following actions to be unreasonable as exceeding the scope of consent: (1) unscrewing a panel in the trunk,⁹¹ (2) accessing the memory of a cell phone,⁹² and (3) searching items that do not belong to the individual who gave consent to search.⁹³ General consent to search the vehicle appears to be sufficient for the police to search any item that belongs to that individual, so long as the container is not locked.⁹⁴

As to the trunk, the officer will usually need the driver to open the trunk with the key or with a button in the passenger compartment, thus giving implied consent to the officer. The only other option would be for the officer to order the driver out of the vehicle and push the trunk button himself. A number of courts have distinguished giving “consent to search the trunk” from general consent to search the car.⁹⁵ In *Schneckloth*, the officer received general consent to search the car but then sought specific consent regarding the trunk.⁹⁶ In another case, the officer received consent to search the interior of the vehicle but was denied consent as to the trunk.⁹⁷ Drivers are most likely unaware of their ability to limit the extent of the search. However, the same justifications for giving consent (i.e., nothing to hide or fear of appearing guilty)⁹⁸ still resurface in the area of limiting consent.

As to time limitations, the driver’s failure to object to the duration of a

89. *United States v. Ross*, 456 U.S. 798, 820–21 (1982).

90. *Jimeno*, 500 U.S. at 249–50.

91. *People v. Cantor*, 57 Cal. Rptr. 3d 478, 480–81 (Cal. Ct. App. 2007).

92. *Smith v. State*, 713 N.E.2d 338, 343–44 (Ind. Ct. App. 1999).

93. *See People v. Stage*, 7 Cal. App. 3d 681, 682–83 (Cal. Ct. App. 1970) (passenger’s jacket); *State v. Williams*, 616 P.2d 1178, 1178–79 (Or. 1980) (passenger’s cassette tape); *United States v. Jaras*, 86 F.3d 383, 389–91 (5th Cir. 1996) (passenger’s suitcase in trunk).

94. *Jimeno*, 500 U.S. at 251–52 (finding it “very likely unreasonable to think that a suspect, by consenting to the search of his trunk, has agreed to the breaking open of a locked briefcase within the trunk”).

95. *See id.* at 252; *see also United States v. Hammons*, 152 F.3d 1025, 1027 (8th Cir. 1998); *United States v. Stribling*, 94 F.3d 321, 322–23 (7th Cir. 1996) (upholding written consent to search trunk); *United States v. Gay*, 774 F.2d 368, 371 (10th Cir. 1985) (driver denied consent to search trunk); *Gurleski v United States*, 405 F.2d 253, 262–63 (5th Cir. 1968) (owner’s mistress consented to search of trunk).

96. *Schneckloth v. Bustamonte*, 412 U.S. 218, 220 (1973).

97. *See People v. Martinez*, 65 Cal. Rptr. 920, 944 (1968) (holding defendant was within his rights to revoke consent after initially agreeing to search of trunk but later insisting officer stop).

98. *See supra* notes 23–25 and accompanying text.

consent search makes the continued search reasonable.⁹⁹ Thus, consent searches of vehicles that last thirty minutes, or even an hour, have been upheld as reasonable where the driver did not object to the length of time involved.¹⁰⁰ In one of the more extreme set of facts, the Tenth Circuit upheld a consent search of the vehicle in which the officer originally conducted a one-hour search, but after the driver consented to meeting another officer at a new location, a second search continued for an additional hour.¹⁰¹ The court reasoned that the grant of consent did not contain a durational limitation, and the driver never objected.¹⁰² In short, the driver has the right to object to the duration of the consent search, and it appears that he must object for the search to be considered unreasonable because of the time involved.

What if there is something illegal found in the car? In *Maryland v. Pringle*, the officer had probable cause to arrest all three occupants of the vehicle at 3:16 a.m. where \$763 of rolled-up cash was found in the glove compartment and five plastic bags of cocaine were located behind the armrest – thus accessible to all three occupants.¹⁰³ Under *Pringle*, the officer will likely have probable cause to arrest any occupant of the vehicle when he finds something illegal in the car; the officer is not required to conclusively establish ownership of the item.¹⁰⁴

Another significant concern is the possibility of planted evidence. The issue is raised in dozens of cases each year, but very rarely do these accusations show any merit. However, some officers have planted evidence in order to generate a conviction.¹⁰⁵ Once consent is given, it is a possibility (though admittedly a rather remote one) that the officer could plant evidence, most likely drugs, and then “find” the evidence during the search of the vehicle.

99. See, e.g., *United States v. Alcantar*, 271 F.3d 731, 738 (8th Cir. 2001) (citing *United States v. Gleason*, 25 F.3d 605, 607 (8th Cir. 1994)).

100. See *id.* (one-hour search upheld); see also *United States v. Lopez-Mendoza*, 601 F.3d 861, 868–69 (8th Cir. 2010) (thirty-minute search upheld).

101. *United States v. Carbajal-Iriarte*, 586 F.3d 795, 802 (10th Cir. 2009).

102. *Id.*

103. *Maryland v. Pringle*, 540 U.S. 366, 370–72 (2003).

104. Of course, a defendant could attempt to distinguish *Pringle* if he did not have access to the item. In addition, a passenger in a larger vehicle would have a legitimate argument that *Pringle* should not be extended to situations involving more than three individuals.

105. See, e.g., *United States v. Epley*, 52 F.3d 571 (6th Cir. 1995) (two officers convicted for planting drugs and guns).

V. PROTECTING THE DRIVER'S FOURTH AMENDMENT RIGHTS REGARDING CONSENT

Unfortunately, there are very few options available to remedy this lose-lose situation and protect the driver's Fourth Amendment rights. One possibility is a voluntary change in police protocol. Since police procedures are generally determined on the local level, this would require a large number of independent decisions. Police departments are unlikely to reduce their dependence on consent searches because consent is so willingly granted in most cases and because consent searches can be conducted without the burden of obtaining a warrant.

A. Independent State Grounds

A few states have already afforded drivers increased protection regarding consent through decisions based on state constitutional grounds.¹⁰⁶ In *State v. Johnson*, the New Jersey Supreme Court found that while

Schneekloth is controlling on state courts insofar as construction and application of the Fourth Amendment is concerned and is dispositive of defendant's federal constitutional argument[,...] each state has the power to impose higher standards on searches and seizures under state law than is required by the Federal Constitution.¹⁰⁷

The *Johnson* Court held that “[u]nless it is shown by the State that the person involved knew that he had the right to refuse to accede to such a request, his assenting to the search is not meaningful,” because the driver “cannot be held to have waived a right if he was unaware of its existence.”¹⁰⁸ New Jersey has gone even further, later holding that “unless there is a reasonable and articulable basis beyond the initial valid motor vehicle stop to continue the detention after completion of the valid traffic stop, any further detention to effectuate a consent search is unconstitutional.”¹⁰⁹

In 1983, Mississippi appeared to join New Jersey in requiring a knowing waiver for consent in *Penick v. State*.¹¹⁰ The Mississippi Supreme Court held that “in order for there to be a valid waiver of the Constitutional right

106. Robert H. Whorf, *Consent Searches Following Routine Traffic Stops: The Troubled Jurisprudence of a Doomed Drug Interdiction Technique*, 28 OHIO N.U. L. REV. 1, 34–36 (2001).

107. *State v. Johnson*, 346 A.2d 66, 67 (N.J. 1975).

108. *Id.* at 68. For general rule that constitutional rights must be knowingly waived, see *supra* notes 15–17 and accompanying text.

109. *State v. Carty*, 790 A.2d 903, 912 (N.J. 2002).

110. *Penick v. State*, 440 So. 2d 547 (Miss. 1983).

against an illegal search, [it is] necessary that the person searched be aware of his right under the law to refuse.”¹¹¹ No matter how the United States Supreme Court might rule, the state’s highest court must maintain “the sole and absolute right to make the final interpretation” of its own constitution.¹¹² The *Penick* Court even had some colorful language describing its willingness to depart from the *Schneckloth* standard:

The words of our Mississippi Constitution are not balloons to be blown up or deflated every time, and precisely in accord with the interpretation the U.S. Supreme Court, following some tortuous trail, is constrained to place upon similar words in the U.S. Constitution. Putting the matter another way, although the sheet music might appear the same, in reading the musical score of our Mississippi Constitution we are not required to play the same tune the U.S. Supreme Court may play in its rendition from the musical score of the U.S. Constitution.¹¹³

A mere eight years later, the *Penick* decision was limited to only the situations “where the consenter is impaired or has diminished capacity.”¹¹⁴ In all other circumstances, Mississippi courts would “apply the same test for valid consent as the federal standard and place the burden on the defendant to show impaired consent or some diminished capacity.”¹¹⁵ In short, the prosecution was no longer required to demonstrate the defendant’s knowledge of his right to refuse consent.¹¹⁶ Surprisingly, the pendulum swung back towards individual liberties, at least slightly, when the Mississippi Supreme Court later held that the defendant may prevail upon a showing that his waiver of consent was not knowingly made.¹¹⁷ Under current Mississippi law, the accused may raise lack of knowledge about the right to refuse consent as an affirmative defense.

In Minnesota, the prosecution’s claim of voluntary consent in the routine traffic stop context is subject to “careful appellate review” due to the ability to pull over virtually anyone, the “enormous discretion in enforcing traffic

111. *Id.* at 550.

112. *Id.* at 551.

113. *Id.* at 552.

114. *Jones v. State*, 607 So. 2d 23, 28 (Miss. 1991).

115. *Id.*

116. *Id.* (citing *Schneckloth v. Bustamonte*, 412 U.S. 218, 220 (1973)).

117. *Graves v. State*, 708 So. 2d 858, 863-64 (Miss. 1998). Although “the State has no initial burden to demonstrate knowledgeable waiver,” the defendant can raise the issue and may claim that his waiver of consent was not knowingly made. *Id.* at 864.

laws,” and the inherently coercive nature of a traffic stop.¹¹⁸ In South Dakota, the state must prove the voluntariness of consent by clear and convincing evidence.¹¹⁹

B. Overrule *Schneckloth*

Although it is unlikely to happen, the United States Supreme Court could simply overturn *Schneckloth v. Bustamonte*. In *Planned Parenthood of Southeastern Pennsylvania v. Casey*, the Court set forth the general standard for overruling its prior precedent:

Even when the decision to overrule a prior case is not, as in the rare, latter instance, virtually foreordained, it is common wisdom that the rule of *stare decisis* is not an “inexorable command,” and certainly it is not such in every constitutional case. Rather, when this Court reexamines a prior holding, its judgment is customarily informed by a series of prudential and pragmatic considerations designed to test the consistency of overruling a prior decision with the ideal of the rule of law, and to gauge the respective costs of reaffirming and overruling a prior case. Thus, for example, we may ask whether the rule has proven to be intolerable simply in defying practical workability; whether the rule is subject to a kind of reliance that would lend a special hardship to the consequences of overruling and add inequity to the cost of repudiation; whether related principles of law have so far developed as to have left the old rule no more than a remnant of abandoned doctrine; or whether facts have so changed, or come to be seen so differently, as to have robbed the old rule of significant application or justification.¹²⁰

A legitimate argument could be made that “related principles of law have so far developed” in cases such as *Arizona v. Gant* and that “facts have so changed, or come to be seen so differently” based on the vast usage of automobile consent searches.¹²¹

Some intriguing language can be found in the recent case of *Arizona v. Gant* that could eventually lead to a reversal of *Schneckloth*. After numerous opinions indicated a reduced expectation of privacy in the automobile,¹²² the Supreme Court stated that an individual’s privacy and

118. *State v. George*, 557 N.W.2d 575, 579–80 (Minn. 1997).

119. *State v. Nemeti*, 472 N.W.2d 477, 478 (S.D. 1991).

120. 505 U.S. 833, 854–55 (1992) (citations omitted).

121. For a thoughtful look at the likely grounds for such a reversal, see Arnold H. Loewy, *Knowing “Consent” Means “Knowing Consent”: The Underappreciated Wisdom of Justice Marshall’s Schneckloth v. Bustamonte Dissent*, 79 Miss. L. J. 97 (2010) (focusing on the dissent itself rather than arguing for reversal).

122. See, e.g., *Colorado v. Bertine*, 479 U.S. 367, 372 (1987) (noting the “the diminished expectation of privacy in an automobile” and upholding inventory search); *New York v. Class*, 475 U.S. 106, 114

liberty interests in his vehicle are “important and deserving of constitutional protection.”¹²³ In *Gant*, the Court prohibited searches of the entire vehicle incident to arrest when there is no threat to officer safety and no possibility of finding evidence related to the arresting offense.¹²⁴ Such a search “creates a serious and recurring threat to the privacy of countless individuals” and “implicates the central concern underlying the Fourth Amendment – the concern about giving police officers unbridled discretion to rummage at will among a person’s private effects.”¹²⁵ It remains to be seen how far the Court will extend this logic to protect drivers and passengers in the automobile consent search context.

VI. CONCLUSION

The driver is placed in a lose-lose situation when the officer seeks consent to search the vehicle following a routine traffic stop. *Schneckloth* held that the officer does not have to inform the driver of his ability to refuse consent.¹²⁶ If the driver gives consent, the officer may search any part of the vehicle in which the item sought could be located. Since police officers often seek consent to search for narcotics, consensual searches allow the officer to examine almost the entire vehicle, including a paper bag on the floorboard. If the driver does not object to the length of the search, the officer can continue the search indefinitely, even up to two hours. The driver will always be delayed, and the officer will have probable cause to arrest all occupants of the vehicle if he finds any incriminating evidence.

If the driver refuses to give consent, the officer is more likely to exercise his discretion in certain areas. For example, the officer can call in a drug dog without reasonable suspicion because a dog sniff is not considered a search. Further, the officer may engage in further questioning of the driver regarding the underlying offense, as well as general topics unrelated to the offense. Most importantly, the officer does not violate the Fourth Amendment when he arrests the driver for any traffic offense. This is true regardless of the severity of the offense, such as driving just slightly over the speed limit, and regardless of whether a state statute forbids the officer to make such an arrest.

(1986) (driver has no reasonable expectation of privacy in the vehicle identification number, “VIN”, and thus examination of the VIN does not constitute search).

123. *Arizona v. Gant*, 129 S. Ct. 1710, 1720 (2009).

124. *Id.*

125. *Id.*

126. *Schneckloth v. Bustamonte*, 412 U.S. 218, 220 (1973).

There are few options available to remedy this lose-lose situation. Police departments are unlikely to voluntarily relinquish their vast authority related to consent searches. Although states could offer additional protection by requiring a knowing waiver of consent or insisting that the prosecution prove the voluntariness of consent by a high standard, few states have chosen to do so. Finally, the Supreme Court offered a glimmer of hope in *Arizona v. Gant* that it may one day overturn *Schneekloth*.¹²⁷ Until more states choose to offer greater protection or the Supreme Court opts to reverse the *Schneekloth* decision, drivers and passengers will remain in a lose-lose situation when it comes to consent searches of the vehicle.

127. *Gant*, 129 S. Ct. at 1720.