THE DEATH OF VOLUNTARY CONSENT

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1. The Fourth Amendment: 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. Consent

2.1. Consensual Encounters[1]

A person can be "seized" before he is actually restrained by physical force at the moment when, given all the circumstances, a **reasonable person** would believe he is not free to leave[2]. As the Supreme Court reaffirmed in *Florida v. Bostick*[3], the test for determining whether a *Terry* stop has taken place "is whether a **reasonable person** would feel free to decline the officers' requests or otherwise terminate the encounter." That turns on "whether, taking into account all of the circumstances surrounding the encounter, the police conduct would 'have communicated to a reasonable person that he was not at liberty to ignore the police presence and go about his business.'"[4]

The court stressed in *Chesternut* that there is a need for a seizure test which "calls for consistent application from one police encounter to the next" and permits police "to determine in advance whether the conduct contemplated will implicate the Fourth Amendment."[5] While this test is an "objective" one, it is "necessarily imprecise" because "what constitutes a restraint on liberty prompting a person to conclude that he is not free to 'leave' will vary, not only with the particular police conduct at issue, but also with the setting in which the conduct occurs."[6]

"While it is true that any one stop is a limited intrusion in duration and deprivation of liberty, each stop is also a demeaning and humiliating experience. No one should live in fear of being stopped whenever he leaves his home to go

[1] *U.S. v. Drayton*, 536 U.S. 194 (2002).
[2] *Michigan v. Chesternut*, 486 U.S. 567, 573 (1988).
[3] 501 U.S. 429, 436 (1991).
[4] *Bostick* at 437.
[5] *Chesternut* at 574.
[6] *Chesternut* at 573–74.

about the activities of daily life. Those who are routinely subjected to stops are overwhelmingly people of color, and they are justifiably troubled to be singled out when many of them have done nothing to attract unwarranted attention."[7]

"Law enforcement officers do not violate the Fourth Amendment by merely approaching an individual on the street or in another public place, by asking him if he is willing to answer some questions, by putting questions to him if the person is willing to listen, or by offering in evidence in a criminal prosecution his voluntary answers to such questions."[8] So long as a **reasonable person** would feel free to disregard the police and go about his or her business, the encounter is consensual and no reasonable suspicion is required.[9] "A consensual encounter becomes a seizure implicating the Fourth Amendment when, considering the totality of the circumstances, the questioning is 'so intimidating, threatening, or coercive that a **reasonable person** would not have believed himself free to leave.'"[10] And what may begin as a consensual encounter can quickly become non-consensual.

2.2 *Consent to Search*

Consent to search is invalid if the defendant did not give that consent freely and voluntarily based on a totality of the circumstances. The government bears the burden of proving "by clear and positive testimony" that the consent was voluntary and unequivocal. A consent cannot be coerced by explicit or implicit means, by implied threat or covert force. Voluntariness is a question of fact to be determined from all the circumstances, and in examining these circumstances, "account must be taken of subtly coercive police questions, as well as the possibly vulnerable state of the person who consents.[11]

2.2.1 The Fourth Amendment does not require police to inform a lawfully stopped defendant that he or she is free to go before requesting consent to search.[12]

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[7] *Floyd v. City of New York*, 959 F.Supp.2d 540 (S.D.N.Y. 2013).
[8] *Florida v. Royer*, 460 U.S. 491, 497, 523, & n. 3 (Rehnquist, J., dissenting).
[9] *Bostick* at 434 (*citing Terry v. Ohio*, 392 U.S. 1, 19 n.16 (1968)).
[10] *United States v. Flores–Sandoval*, 474 F.3d 1142, 1145 (8th Cir.2007) (quoting *United States v. Hathcock*, 103 F.3d 715, 718 (8th Cir.1997)).

[11] *Schneckloth v. Bustamonte*, 412 U.S. 218, 227 (1973); *see also U.S. v. Mendenhall,* 446 U.S. 544 (1980).

[12] *Ohio v. Robinette*, 519 U.S. 33 (1996).

2.2.2 At any point during the search, a person who has previously given consent may revoke it.[13]

2.2.3 A person may limit the scope of the consensual search.

3. Objective v. Subjective

3.1. Objective is a reasonable person in the client's position: "A **scared, defenseless man** is not in a position to say no to a police officer whose hands are still on or just removed from his body while another officer is standing just a few feet away."[14]

3.2. Subjective: "[T]he consenting party's **possibly vulnerable subjective state** is a factor in our balancing approach."[15]

3.3. Fourth Amendment interpreted by contemporary standards, such as in *Riley v. California* (cell phones) and *Jones* (GPS).

4. Types of Consent:

4.1 Consensual Encounter
4.2 Search[16]
4.3 Third party[17]
4.4 Access (phones, house keys)

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[13] *U.S. v. Buckingham*, 433 F. 3d. 508 (6th Cir. 2006).
[14] *United States v. Beauchamp*, 659 F.3d 560 (6th Cir. 2011).
[15] *United States v. Bey,* 825 F.3d 75 (1st Cir. 2016).
[16] *Florida v. Jimeno*, 500 U.S. 248 (1991)(Where the police receive consent from the driver to search a car, they are authorized to open and search a closed container found on the floor of the car without having to obtain an additional specific consent to search the container, where the container could have contained the object of the initial search.); *U.S. v. Worley*, 193 F. 3d. 380 (6th Cir. 1999)(A search based on consent requires more than mere expression of approval to the search. When drug enforcement officers asked to look inside defendant's bag, he replied, "You've got the badge, I guess you can," which the district court found to be an expression of futility in resistance to authority. The consent was not valid where defendant believed he had no choice, was not informed of his right to refuse, and the encounter occurred in an airport, a location where there is tremendous pressure on an individual to acquiesce to an officer's demands.)
[17] *Georgia v. Randolph,* 547 U.S. 103 (2006).

4.5 ID,[18] prints, photograph, DNA[19]

5 Police Authority or Misconduct

Here, we are talking about both police show of authority and misconduct. A show of authority is a critical factor on the voluntariness questions, but is not necessarily misconduct.

5.1 Systematic Misconduct
5.2 Training
5.3. Empirical data
5.4 Policies and practices (see footnote 21, below)
5.5 History of departmental or individual misconduct.

6 Race is a factor.

6.1 Specifically noted in *Mendenhall,* "On the other hand, it is argued that the incident would reasonably have appeared coercive to the respondent, who was 22 years old and had not been graduated from high school. It is additionally suggested that the respondent, a female and a Negro, may have felt unusually threatened by the officers, who were white males."

6.2 Maclin, Tracey, "*Black and Blue Encounters"—Some preliminary thoughts about Fourth Amendment Seizure: Should Race Matter?,* 26 Val. U.L. Rev. 243 (1991); Lee, Cynthia, *Making Black and Brown Lives Matter*, 60 St. Louis U. L. J. 481 (2016); Carbado, Devon, *(E)racing the Fourth Amendment,* 100 Mich. L.R.ev. 946 (2002).

7 *Whren*

7.1 Still room for challenge.

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[18] *United States v. Olivares-Rangel,* 458 F.3d 1104 (10th Cir. 2006) ("The answer to whether Defendant's A-file "[was] come at by exploitation" of illegal conduct necessarily depends on whether Defendant's fingerprints were obtained for an investigatory purpose exploiting the unconstitutional arrest or whether they were obtained as part of a routine booking procedure not linked to the purpose of the illegal arrest. Because the officers used Defendant's fingerprints to obtain his A-file, if those fingerprints are determined to be suppressible as fruits of the poisonous tree, then it follows that the A-file should also be suppressed.").

[19] *Cupp v. Murphy*, 412 U.S. 291, 295 (1973).

7.2 The reason (substitute) for pretextual stop must be within the authority of the police.[20]

7.3 Substitute must be a proper basis for the stop.

7.4 Motivated by improper factors such as race or ethnicity.

7.5 Overall arbitrariness.[21]

7.6 Deviation from usual procedures[22]

8 Guard against other government defenses

8.1 Independent source doctrine

8.2 Inevitable discovery

8.3 Attenuation

8.4 *Utah v. Streiff*[23]*:* "Three of these exceptions involve the causal relationship between the unconstitutional act and the discovery of evidence. First, the independent source doctrine allows trial courts to admit evidence obtained in an unlawful search if officers independently acquired it from a separate, independent source. Second, the inevitable discovery doctrine allows for the admission of evidence that would have been discovered even without the unconstitutional source. Third, and at issue here, is the attenuation doctrine: Evidence is admissible when the connection between unconstitutional police conduct and the evidence is remote or has been interrupted by some intervening circumstance, so that *the interest protected by the constitutional guarantee that has been violated would not be served by suppression of the evidence obtained.*

9 Exclusionary Rule as Remedy

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[20] *LaFave,* Search and Seizure: A Treatise on the Fourth Amendment, § 1.4

[21] *Id.*("The fundamental point in that argument, of course, is that probable cause as to a minor traffic violation can be so easily come by that its existence provides no general assurance against arbitrary police action.").

[22] *Id.* ("The fact the traffic stop was by plainclothes officers in an unmarked car is relevant because a police department regulation prohibited such stops . . .", citing Metropolitan Police Dep't,Washington, D.C., General Order 303, pt. 1, Objectives and Policies (A)(2)(4) (Apr. 30, 1992), permits plainclothes officers in unmarked vehicles to enforce traffic laws "only in the case of a violation that is so grave as to pose an immediate threat to the safety of others.").

[23] 136 S.Ct. 2056 (2016) (internal citations omitted).

9.1 Again, *Utah v. Streiff:* "The exclusionary rule "is a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved. But the significant costs of this rule have led us to deem it applicable only ... where its deterrence benefits outweigh its substantial social costs. Suppression of evidence ... has always been our last resort, not our first impulse."[24]

9.2 Identify the to be excluded: search, statements, derivative searches, *and* how it will deter police misconduct. The more evidence that the police disregarded training or have a history of misconduct or over-aggression, the better the argument.

10 Hearing

10.1 *Government's burden of proof*

In response to a defense motion to suppress evidence, the prosecution has the burden of proving that consent to a warrantless search was freely and voluntarily given. Consent to a search must be proved by clear and positive testimony. There must be no duress or coercion, actual or implied, and the prosecution must show a consent that is unequivocal and specific, freely and intelligently given. The court looks at the totality of the circumstances to determine whether consent is voluntary.[25]

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[24] *Id.* at 2061.

[25] In assessing voluntariness, the Court considered the totality of the circumstances, including the accused's youth, lack of education, low intelligence, lack of advice about constitutional rights, and length of detention, as well as the nature of the questioning and the use of physical punishment. *Schneckloth* at 226. These factors include: the use of violence or threats of violence; the police's use of and the defendant's reliance upon promises, deception, or claims that a warrant is obtainable; whether the defendant was in custody at the time of consent; the defendant's physical or mental condition; the location where consent was given; the defendant's level of cooperation; the defendant's understanding or awareness of the right to refuse to consent; and the defendant's belief that no incriminating evidence would be found. *See*, *e.g., United States v. Raibley*, 243 F.3d 1069, 1075-76 (7th Cir. 2001) (*citing United States v. Strache*, 202 F.3d 980, 985 (7th Cir. 2000); *Valance v. Wisel*, 110 F.3d 1269, 1278 (7th Cir. 1997)) (considering custodial status at time of consent); *United States v. Worley*, 193 F.3d 380, 386 (6th Cir. 1999) (quoting *United States v. Riascos-Suarez*, 73 F.3d 616, 625 (6th Cir. 1996)) (considering defendant's understanding of right to refuse consent); *United States v. Chan-Jimenez*, 125 F.3d 1324, 1327 (9th Cir. 1997) (*citing United States v. Welch*, 4 F.3d 761, 763 (9th Cir. 1993)) (considering officer's drawn weapon, claim that warrant was available, and failure to

inform defendant of right to refuse consent); *United States v. Glover*, 104 F.3d 1570, 1583-84 (10th Cir. 1997) (*citing United States v. McCurdy*, 40 F.3d 1111, 1119 (10th Cir. 1994)) (considering defendant's physical and mental condition and capacity as well as officer's use of violence, threats of violence, promises or deception); *United States v. Chaidez*, 906 F.2d 377, 381 (8th Cir. 1990) (considering defendant's reliance upon promises or misrepresentations, his level of cooperation, and seclusion of location where consent was given); *see also United States v. Solis*, 299 F.3d 420, 436 n.21 (5th Cir. 2002) (*quoting United States v. Kelley*, 981 F.2d 1464, 1470 (5th Cir. 1993)) (considering defendant's belief that no incriminating evidence would be found).