Consent Searches

Presented By Joe Troy

Consent Searches

- Exception to Warrant Requirement
- Encouraged by Supreme Court

“The community has a real interest in encouraging consent, for the resulting search may yield... evidence for the solution and prosecution of crime....” and quickly exonerates the innocent.

Fourth Amendment Rights Are Given Less Protection
Fifth and Sixth Amendments Rights

“The protections of the Fourth Amendment are of a wholly different order, and have nothing to do with promoting the fair ascertainment of truth at a criminal trial.”


“There is a vast difference between those rights that protect a fair criminal trial and the rights guaranteed under the Fourth Amendment.”

*Schnickloth v. Bustamonte, 412 U.S. 218 (1973)*
Sixth Amendment Rt. to Counsel

“Any waiver of the right to counsel must be knowing, voluntary, and intelligent.”


“Waiver of counsel is ‘intelligent’ when the defendant knows what he is doing and his choice is made with eyes open.”


Fourth Amendment Requires Only That Consent Be “Voluntary”

“…that a consent not be coerced, by explicit or implicit means, by implied threat or covert force.”

_Bustamonte_, 412 U.S. 218, 228 (1983)

“…knowledge of the right to refuse is not a prerequisite of a voluntary consent.”

_Bustamonte_, 412 U.S. 218, 224 (1983)

“…it would be impractical to require police officers to always inform detainees that they are free to go before consent to search may be deemed voluntary.”

“It wholly escapes me how our citizens can meaningfully be said to have waived something as precious as a constitutional guarantee without ever being aware of its existence.”

J. Brennan Dissent, Bustamonte


Officer Lang:
“We’re conducting a bus interdiction, attempting to deter drugs and illegal weapons being transported on the bus. Do you have any bags on the bus?”

- Asked for permission to search bag
- Asked for permission to search him personally
- Found contraband in bag and on person
“The Court has rejected … the suggestion that police officers must always inform citizens of their right to refuse when seeking permission to conduct a warrantless consent search.”


Whether Consent Voluntary Determined By Totality of Circumstances

- What was said by subject and officer
- The degree/show of force by officers
- *Personal characteristics / experience of subject*
- Environmental conditions: where, when, what else going on
• Lying about having search warrant
  Bumper v. N. Carolina, 389 U.S. 1034 (1968)

• Actions may speak as loud as words
e.g., handing over keys, opening door
  U.S. v. White, 42 F.3d 457 (8th Cir. 1994)

• Consent given in context of illegal
detention not voluntary
e.g., Extended detention,
  No reasonable suspicion

• Acquiescence not voluntary consent
e.g., “Stop put hands in the air”
  “Empty your pockets”
  People v. Anthony, 761 N.E.2d 1188 (Ill. 2001)

‘Scope’ of Consent Search
Limited by Terms of Authorization
Consent to search for a stolen appliance
does not authorize search of couch for
contraband.
Consenting for officer To come into the kitchen is not consent for unfettered Search of the house.

**Florida v. Jimeno (1991)**

- Jimeno consents to search of car.
- Officer finds bag on floor
- Opens bag; finds kilo of cocaine.

**Scope of Consent Is Determined by Reasonableness Test:**

“What would a typical reasonable person have understood by the exchange between the officer and the suspect?”

J. Rehnquist, Jimeno, 500 U.S. at 251.
The Permitted Scope of the Search Is Limited by the Object of the Search

“...it was reasonable for the police to conclude that the general consent to search [the] car included consent to search containers within that car which might bear drugs.”

Jimeno, 500 U.S. at 251.

However, majority expressly did not extend such general consent to include locked containers found in the car.

“It is very likely unreasonable to think that a suspect, by consenting to the search of the trunk of his trunk, has agreed to the breaking open of a locked briefcase within the trunk ….” 500 U.S. at 251-252.

Consent by Third Party Concepts

• Common Authority
  The consenting party shares use and authority over the place or property searched

• Apparent Authority
  Police had a reasonable belief, at time of search, that consenting party had authority to consent
Live-in girlfriend consents to search of Wisconsin bank robber’s bedroom

“Common authority not to be implied by mere property interest third-party has in property”

• Whose name on lease or deed not determinative
• Often involves situations involving transient populations

• “Common authority ... rests ... on mutual use of the property by persons generally having joint access or control for most purposes ....” 415 U.S. at 172, n. 7

• “co-inhabitants ... have assumed the risk that one of their number might permit the common area to be searched.”
What If Husband and Wife Disagree on Giving Consent to Search?

Georgia v. Randolf (‘06)
5-3 Souter, maj.
Scalia, Roberts, Thomas diss.

“A physically present occupant’s refusal to permit entry renders warrantless entry and search unreasonable and invalid as to him.”
• “It is beyond dispute that the home is entitled to special protection as the center of the private lives of our people”
  

• “Disputed permission is thus no match for this central value of the Fourth Amendment.”

Randolph’s Narrow Holding Exempts:
• Parent-Child situation
• College dorm
• The military, or other situation where consenting party has clearly recognized greater authority

Entering residence over objection to protect someone from suspected domestic violence:

  “...so long as they have a good reason to believe such a threat exists”

  “The undoubted right of the police to enter in order to protect a victim...has nothing to do with the question in this case....”
"The role of the peace officer includes preventing and restoring order, not simply rendering first aid to casualties; an officer is not like a boxing (or hockey) referee, poised to stop a bout only if it becomes too one-sided."

_Brigham City v. Stuart, 547 U.S. 398, 406 (2006)_

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**Police Not Required to Solicit Consent From Every Resident**

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**Illinois v. Rodriguez, (1990)**

**Apparent Authority**

- Police called to meet w/severely beaten woman at her mother’s house.
- She says Rodriguez beat her and he's asleep back in ‘our’ apartment.
- She unlocks door w/her key.
- Rodriguez found w/cocaine.
At Motion Hearing She Testified:

- Had vacated weeks earlier
- Had no clothes or furniture there
- Didn’t contribute to rent
- Couldn’t invite others when Rodriguez not present

Apparent Authority:

“Even if a third-party lacks the actual authority to consent to a search, police may rely upon (their) consent, if such reliance is reasonable under the circumstances.”


J. Scalia, Rodriguez, 497 U.S. at 185.

“The ‘reasonableness’ requirement of the Fourth Amendment…is not that [the officers] always be correct, but that they always be reasonable.”
Consent Searches
Joseph M. Troy, Presiding Circuit Court Judge
Eighth District Wisconsin
April 2007

Introduction

The Fourth Amendment preserves the “right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures.” A search by law enforcement pursuant to voluntary consent is a clearly recognized exception to the probable cause and warrant provisions of the Fourth Amendment: “A search authorized by consent is wholly valid.” Schneckloth v. Bustamonte, 412 U.S. at 222 (1973). However, a consensual search is still a ‘search’ under the Fourth Amendment, so the reasonableness requirement applies. Generally, the reasonableness test is applied to: whether the citizen was coerced or tricked into granting consent, whether law enforcement exceeded the scope of the consent given, or whether the person granting the consent had actual or apparent authority to act.

The U.S. Supreme Court has expressed strong public policy justifications for favoring consent searches:

‘It is no part of the policy underlying the Fourth Amendment…to discourage citizens from aiding to the utmost of their ability in the apprehension of criminals’…Rather, the community has a real interest in encouraging consent, for the resulting search may yield necessary evidence for the solution and prosecution of crime and evidence that may insure that a wholly innocent person is not wrongly charged with a criminal offense.” Id. at 243 (quoting Coolidge v. New Hampshire, 403 U.S. 443, 488 (1971).

However, a number of state legislatures and supreme courts have more recently expressed concerns law enforcement is employing this authority in a discriminatory or overly aggressive manner. See e.g., State of Minnesota v. Fort, 660 N.W.2d 415 (2003); State v. Carty, 332 N.J. Super. 200 (App. Div. 2000); “Racial Profiling: The State of the Law,” Police Foundation, March 2005; New Jersey The End of Racial Profiling Act of 2004 31-21.2-1; U.S. v. State of New Jersey, Consent Decree Civil No. 99-5970; Ohio v. Robinette, 73 Ohio St. 3d 650, 653 N.E.2d 695 (1995). Unless an unexpected coalition of justices develops, such as in Kyllo v. U.S., 533 U.S. 27 (2001), any limitation on consent searches is likely to continue to come from state legislatures and supreme courts.
Summary of Fundamentals

- Consent searches are permitted without warrant or exigent circumstance as long as it is ‘reasonable’ in how consent obtained and the scope of the search undertaken. *Florida v. Jimeno*, 500 U.S. 248 (1991)

- Government “has burden of proving that necessary consent was obtained and that it was freely and voluntarily given, and not the result of duress or coercion, express or implied.” *Schneckloth v. Bustamonte*, 412 U.S. 222 (1973), *Florida v. Royer*, 460 U.S. 491 (1983)

- Showing a mere acquiescence or “submission to a show of authority” does not satisfy burden. *Bumper v. North Carolina*, 391 U.S. 543 (1968)


- Officers are not required to inform citizens of their right to refuse permission or to leave scene of interaction with police…but it is part of ‘totality’ of the circumstances court should consider. *Bustamonte*, supra; *Ohio v. Robinette*, 519 U.S. 33 (1996).

- Reasonable suspicion not required for officers to seek consensual search, i.e. ‘knock and talk’ and ‘any drugs, guns, or contraband’ auto searches. See *Robinette*, supra; *Florida v. Bostick*, 501 U.S. 429 (1991)

- The scope of the search permitted is determined by applying the ‘objective reasonableness test’: “What would the typical reasonable person have understood by the exchange between the officer and the suspect.” *Florida v. Jimeno*, 500 U.S. 248 (1991).

- Common authority to consent to search – By sharing control over a place or object, a person assumes the risk that the other person will allow the government to search it. *U.S. v. Matlock*, 415 U.S. 164 (1974).

- Apparent authority—Consent may be valid if the police reasonably believe the third party granting permission to search actually had authority, even if after the search it is proven he/she did not have such authority. *Illinois v. Rodriguez*, 497 U.S. 177 (1990).
I. Questions of ‘Consent to Search’ Are Subject to Fourth Amendment ‘Reasonableness’ Analysis, Not the More Demanding Fifth and Sixth Amendment ‘Waiver’ Analysis.

A. Bustamonte Distinguishes Constitutional Interests Involved In Consent Searches.

Fifth and Sixth Amendment rights are designed to insure a defendant a fair trial. The potential for loss of life or liberty for conviction of criminal charges often results in the Court formulating stricter standards of compliance for government officials. The Court has often applied a more fluid standard of government conduct when considering whether the privacy interests protected by the Fourth Amendment have been violated.

The Bustamonte decision addresses this dichotomy:

There is a vast difference between those rights that protect a fair criminal trial and the rights guaranteed under the Fourth Amendment.” 412 U.S. at 241.

The Court does not insist on the government proving the free and knowing waiver required when Fifth and Sixth Amendment rights are involved.

A strict standard of waiver has been applied to those rights guaranteed to a criminal defendant to insure that he will be accorded the greatest possible opportunity to utilize every facet of the constitutional model of a fair criminal trial.

…

The protections of the Fourth Amendment are of a wholly different order, and have nothing whatever to do with promoting the fair ascertainment of truth at a criminal trial…[T]he Fourth Amendment protects the “security of one’s privacy against arbitrary intrusion by the police….” Id. at 241-42; See also, Wolf v. Colorado, 338 U.S. 25,27 (1949).

Justice Brennan’s dissent raises the question that reverberates among those who continue to argue for a more bright-line rule to protect Fourth Amendment rights: “It wholly escapes me how our citizens can meaningfully be said to have waived something as precious as a constitutional guarantee without ever being aware of its existence.” Id. at 277.
B. Police Do Not Have To Inform Suspects They Have Right To Refuse Request To Search – No Miranda ‘Knowing’ Waiver Required.

The requirement that police inform suspects undergoing custodial interrogations of their right to refuse to talk is the direct relationship between a confession and the criminal trial process itself:

That counsel is present when statements are taken from an individual during interrogation obviously enhances…the fact-finding processes in court…Without the protections flowing from adequate warnings and the right of counsel, all the careful safeguards erected around the giving of testimony…would become empty formalities… *Miranda v. Arizona*, 384 U.S. 436, 466 (1966).

The Court in *Bustamonte* found that requiring a similar obligation for consent searches would be unnecessary and impractical: “It would be unrealistic to expect that in the informal, unstructured context of a consent search, [officers], upon pain of tainting the evidence obtained, could make the detailed type of examination” required when Miranda or trial-related rights are at issue. *Bustamonte* at 245. The government’s duty is limited to proving that consent was, under the totality of circumstances, voluntarily given. Knowledge of one’s rights are part of those circumstances, but not something the government must prove.

C. Officers Do Not Have To Inform Motorists That They Are Free To Go Before Asking For Permission To Search Their Vehicles.

Consent searches associated with routine traffic stops are both prevalent and controversial. They have been criticized for being associated with racial profiling, selective enforcement, and subject to questionable police practices. They have also proven to be very effective at detecting criminal conduct. Jayme Walker Holcomb, *Consent Searches*, 73 FBI Law Enforcement Bulletin (Feb. 2004).

In *State v. Robinette*, 653 N.E.2d 695 (Ohio 1995), the Ohio Supreme Court ruled that an officer must warn a motorist when an investigative detention has ended, before attempting to obtain the consent to search the motorist’s car. Because the Ohio Supreme Court based its decision on both state and federal constitutional grounds, the U.S. Supreme Court reviewed and reversed its interpretation of what the Fourth Amendment requires. *Ohio v. Robinette*, 519 U.S. 33 (1996):

[J]ust as it would be thoroughly impractical to impose on the normal consent search the detailed requirements of an effective
warning, so too would it be unrealistic to require police officers to always inform detainees that they are free to go before a consent to search may be deemed voluntary.”  Id. at 39-40.

This ruling reinforces the Court’s view that consent searches need not be preceded by warnings of Fourth Amendment rights in the way Fifth and Sixth Amendment waivers are legally obtained.

D. Officers Have No Duty to Inform Citizens They Can Refuse Requests To Search Them Or Their Property “Provided a reasonable person would understand that he or she is free to refuse”.  U.S. v. Drayton, 122 S. Ct. 2105 (2002)

As in Florida v. Bostik (1991), officers in Drayton were involved in a drug interdiction effort on a bus.  Three officers boarded during a fuel stop.  One stayed at the front of the bus to provide security and two worked their way from the back to the front on the bus as they asked passengers about their travel plans and baggage.  When one of the officers got to the aisle with the defendants, he showed them his badge and said:

“I’m Investigator Lang with the Tallahassee Police Department.  We’re conducting bus interdiction, attempting to deter drugs and illegal weapons being transported on the bus.  Do you have any bags on the bus?”  122 S. Ct. at 2109.

Both men pointed to a green bag.  After asking for permission, officers checked this bag and found no contraband.  The officer then asked to search them personally.  First, Brown agreed.  Contraband was found hidden in his pants.  He was arrested.  The officer then turned to Drayton and asked for permission to search him.  The officer found bundles of cocaine that had been duct-taped between several pairs of Drayton’s boxer shorts.

After determining that Drayton and his companion were not ‘seized’ within the meaning of the Fourth Amendment, the Court addressed the issue of whether the consents given were ‘voluntary.’

We turn now from the question whether respondents were seized to whether they were subjected to an unreasonable search, i.e., whether their consent to the suspicionless search was involuntary.  In circumstances such as these, where the question of voluntariness pervades both the search and seizure inquiries, the respective analyses turn on very similar facts.  And, as the facts above suggest, respondents’ consent to the search of their luggage and their persons was voluntary.  Nothing Officer Lang said indicated a command to consent to the search.  Rather, when respondents
informed Lang that they had a bag on the bus, he asked for their permission to check it. And when Lang requested to search Brown and Drayton’s persons, he asked first if they objected, thus indicating to a reasonable person that he or she was free to refuse. Even after arresting Brown, Lang provided Drayton with no indication that he was required to consent to a search. To the contrary, Lang asked for Drayton’s permission to search him (“Mind if I check you?”), and Drayton agreed. 122 S. Ct. at 2113.

The Court then reiterated the principle that a valid consent to search does not require the police to advise citizens of their right to refuse permission.

The Court has rejected in specific terms the suggestion that police officers must always inform citizens of their right to refuse when seeking permission to conduct a warrantless consent search. See, e.g., Ohio v. Robinette, 519 U.S. 33, 39-40 (1996); Schneckloth v. Bustamonte, 412 U.S. 218, 227 (1973). “While knowledge of the right to refuse consent is one factor to be taken into account, the government need not establish such knowledge as the sine qua non of an effective consent.” Ibid.

In a society based on law, the concept of agreement and consent should be given a weight and dignity of its own. Police officers act in full accord with the law when they ask citizens for consent. It reinforces the rule of law for the citizen to advise the police of his or her wishes and for the police to act in reliance on that understanding. When this exchange takes place, it dispels inferences of coercion. 122 S. Ct. at 2113-14.

II. Standard for Determining Whether Consent Given

A. ‘Totality of the Circumstances’ Test Used to Determine Whether Consent Actually Granted and Voluntary—Not Coerced.

A search conducted pursuant to lawfully given consent is an exception to the warrant and probable cause requirements of the Fourth Amendment. Bustamonte, 412 U.S. at 219. However, a consensual search conducted by government agents of a place or property in which a citizen has a privacy interest, is still a search subject to the reasonableness requirement of the Fourth Amendment. The government has the burden of proving that the citizen consented to the search. Bumper v. North Carolina, 391 U.S. 543 (1968). Consent is to be determined by considering the ‘totality of the circumstances’ surrounding the consent and search:
[W]hen the subject of a search is not in custody and the State attempts to justify a search on the basis of his consent, the Fourth Amendment requires that it demonstrate that the consent was in fact voluntarily given, and not the result of duress or coercion, express or implied. Voluntariness is a question of fact to be determined from all the circumstances…

*Bustamonte*, 412 U.S. at 248-49.

Under the ‘totality of circumstances’ test, the court must determine what actually occurred between the subject and law enforcement. Generally, the most critical facts involved in this encounter fall into the following three factors:

- What was said and done by both the subject and law enforcement officer(s) prior to and during the search.
- The personal characteristics of the subject, i.e. age, state of intoxication, education, physical condition, experience with law enforcement, any special vulnerability, any impediment to communication.
- The degree of force/control demonstrated by law enforcement, i.e. the number of officers, display of weapons, direct or implied threats.

**B. Examples of Circumstances Affecting Voluntariness of Consent**

- **Officers Lie to Subject About Having a Search Warrant.**

  In *Bumper v. North Carolina*, 391 U.S. 543 (1968), four law enforcement officers went to the rural home of the 66-year-old grandmother of a rape suspect. The officers told the woman that they had a warrant to search her house, even though they did not. The woman permitted them into the house where they found a rifle that had been used during the commission of the crime. Not surprisingly, the Court found the officers’ conduct to be coercive and the consent to search not voluntary: “Where there is coercion there cannot be consent.” 391 U.S. at 550. Claiming to have a warrant is tantamount to telling the subject they have no choice but to acquiesce.

  Some cases support the principle that officers may inform the subject of their intent to obtain a warrant, and not vitiate the validity of a subsequent consent search: “Police may not threaten to obtain a search warrant when there are no grounds for a valid warrant, but when the expressed intention to obtain a warrant is genuine…and not merely a pretext to induce submission, it does not vitiate consent.” *U.S. v. Evans*, 27 F.3d 1219, 1231 (1994); *State v. Kiekhefer*, 212 Wis. 2d 460, 569 N.W. 2d 316 (Ct. App. 1997); See also, *Barlow v. State*, 280
Clearly, statements by officers about obtaining a search warrant are significant to the analysis of consent, but must be weighed in the full context of all of the circumstances surrounding the interaction between the officers and the subject of the search.

**Suspect Responds By Actions, Not Words.**

Courts have recognized that in determining whether consent to search was granted by a subject, ‘actions (may) speak louder than words’. Among the variety of circumstances where a person’s nonverbal conduct constituted consent to search are:

- Defendant handed over car keys, after being asked by officers if they could search his trunk. *U.S. v. White*, 42 F.3d 457 (8th Cir. 1994)
- Occupant of hotel room gestured for officers to enter and stepped back from doorway when asked by officers if they could come in. *U.S. v. Rosario*, 962 F.2d 733 (7th Cir. 1992).
- Defendant motioned for officers to follow her into another part of house in response to request by officers. *U.S. v. Walls*, 225 F.3d 858 (7th Cir. 2000).

The Illinois Supreme Court explained the higher burden on the government when relying on nonverbal consent:

> In the case of nonverbal conduct, where dueling inferences so easily arise from a single ambiguous gesture, the defendant’s intention to surrender this valuable constitutional right should be unmistakably clear. *People v. Anthony*, 198 Ill. 2d 194, 203, 761 N.E.2d 1188 (2001).

**Mere Acquiescence to a Claim of Lawful Authority Is Not Voluntary Consent.**

Few cases will present such clearly wrongful claims of authority as the officers presented in *Bumper v. North Carolina*, 391 U.S. 543 (1968). But there are other, more subtle ways that officers may imply they have authority when none exists. Wrongful temporary detention may communicate to reasonable people that compliance with any law enforcement request is required. *Florida v. Royer*, 460 U.S. 491 (1983). However, the presence of four uniformed officers in an enclosed space was not found to be a show of authority that was coercive. *U.S. v. Zamoran-Coronel*, 231 F.3d 466 (8th Cir. 2000).
Where a citizen responded to an officer’s request to search by ‘assuming the position’ (legs spread, hands clasped overhead), the Illinois Supreme Court found:

The State would have us draw an inference from these facts that the defendant intended to consent, not acquiesce. An equally valid inference from the defendant’s ambiguous gesture is that he submitted and surrendered to what he viewed as the intimidating presence of an armed and uniformed police officer who had just asked a series of subtly and increasingly accusatory questions. *Illinois v. Anthony*, 198 Ill. 2d at 203.

**If Consent Given in Context of Other Constitutional Violations, Government Must Prove Sufficient Attenuation to Dissipate Effects of Police Misconduct.**

Consent can be voluntary under all the circumstances, but still be tainted by prior illegal conduct by police. *Brown v. Illinois*, 422 U.S. 590 (1975). *Brown* involved the voluntariness of a confession given subsequent to a wrongful arrest. The Supreme Court rejected a per se rule that all such confessions be suppressed. Rather, the court held that voluntariness must be:

…answered on the facts of each case. No single fact is dispositive. The workings of the human mind are too complex, and the possibilities of misconduct too diverse, to permit protection of the Fourth Amendment to turn on such a talismanic test. 422 U.S. at 603.

The Supreme Court in *Brown* set forth three factors for determining whether the causal chain has been sufficiently attenuated:

1. the temporal proximity of the arrest and the confession
2. the presence of intervening circumstances
3. the purpose and flagrancy of the official misconduct

Taken together, the issue is whether the consent has come at the exploitation of a prior police illegality or instead by means sufficiently attenuated so as to be purged of the taint. *Wong Sun v. U.S.*, 371 U.S. 471 (1963).

The Wisconsin Supreme Court applied this analysis to a purely Fourth Amendment issue. *State of Wisconsin v. Phillips*, 218 Wis. 2d 180, 577 N.W.2d 794 (1998). The State conceded that officers illegally entered the defendant’s basement through an outside door. Once inside, they encountered the defendant, who had his bedroom in the basement level. The officers explained that they were responding to information that he had a large quantity of marijuana in his home and they asked
permission to search his bedroom. The defendant, incredibly, agreed. The search resulted in the discovery of a large quantity of marijuana. After applying the three Brown attenuation factors, the Court concluded:

Having concluded that the defendant voluntarily consented to the warrantless search of his bedroom and that the agents did not exploit their unlawful entry into the defendant’s home, we conclude that the evidence discovered and seized during the consensual search of defendant’s bedroom should not have been suppressed.” 218 Wis. 2d at 212-13.

Of course, another way to look at this issue is that it is really just a derivation of the dynamics in Bumper v. North Carolina. Instead of gaining entry by falsely representing that they had a search warrant, officers entered the defendant’s home under circumstances that conveyed that they had a legal right to be there to investigate the allegations of possession of illegal substances. Indeed, the dissent in Phillips would hold that the consent was not voluntary due to the show of force and authority illegally imposed on the defendant prior to the request to search his bedroom.

Five justices of the Supreme Court in Florida v. Royer, 460 U.S. 491 (1983), although unable to agree to one opinion, held that the defendant’s consent to a search of his luggage was insufficient to justify the search because the consent was tainted by his illegal detention. Narcotics investigators detained the defendant because he fit a drug dealer’s profile. The officers required the defendant to accompany them to an interview room and retrieved his luggage from the flight he had intended to take. By the time the suspect agreed to allow the officers to search his luggage, the majority felt that he had been illegally detained. The plurality felt that this illegal detention tainted the consent ultimately given by the suspect, and ordered the contraband suppressed.

III. Scope Of The Search

A. The Scope of the Search Is Limited By the Terms of the Authorization.

The Supreme Court in Walter v. U.S., 447 U.S. 649, 656-57 (1980) compared the permitted scope of a consent search to the scope of a search authorized by warrant:

When an official search is properly authorized--whether by consent or by the issuance of a valid warrant--the scope of the search is limited by the
terms of its authorization. Consent to search a garage would not implicitly authorize a search of an adjoining house; a warrant to search for a stolen refrigerator would not authorize the opening of desk drawers…the Fourth Amendment requires that the scope of every authorized search be particularly described.

The scope of a search pursuant to warrant is determined by the issuing magistrate and described in the warrant; the scope of a consent search is determined by the party permitting the search and described by the interchange between the person granting consent and law enforcement.

B. The ‘Objective Reasonableness Test’ Is The Standard For Determining What Scope Was Authorized.

In *Florida v. Jimeno*, 500 U.S. 248 (1991), the Court attempted to clarify the scope of a lawful consent search. In *Jimeno*, an officer overheard the defendant arranging a drug deal over a public telephone. Jimeno then drove away, and the officer followed. The officer pulled Jimeno over when he observed a minor traffic violation. After issuing a traffic citation, the officer advised Jimeno that he had reason to believe that there were drugs in the car and asked for consent to search. Jimeno indicated that he had nothing to hide and consented to the search. The officer found a folded brown paper bag on the passenger side floorboard. The officer opened the bag, looked inside, and found a kilogram of cocaine.

In determining whether Jimeno’s consent to search his vehicle extended to a closed container located inside the vehicle, the Court first defined the proper standard to apply:

> The touchstone of the Fourth Amendment is reasonableness. The Fourth Amendment does not proscribe all state-initiated searches and seizures; it merely proscribes those which are unreasonable…[I]t is no doubt reasonable for the police to conduct a search once they have been permitted to do so. The standard for measuring the scope of a suspect’s consent under the Fourth Amendment is that of “objective” reasonableness—what would the typical reasonable person have understood by the exchange between the officer and the suspect? 500 U.S. at 250-51.

C. The Object of the Consent Search May Define the Scope of Search Permitted.

As noted in *Walter* above, the object of a search warrant is a critical consideration for determining the scope of the search authorized: “a warrant to search for a stolen refrigerator would not authorize the opening of desk drawers.” 447 U.S. at 657. The Court in *Jimeno* extended the same principle to determining the permitted scope of a search based on consent:
The scope of a search is generally defined by its expressed object. In this case, the terms of the search’s authorization were simple. Respondent granted [the officer] permission to search his car, and did not place any explicit limitation on the scope of the search. [The officer] had informed Jimeno that he believed Jimeno was carrying narcotics, and that he would be looking for narcotics in the car. We think that it was objectively reasonable for the police to conclude that the general consent to search [the] car included consent to search containers within that car which might bear drugs. 500 U.S. at 251.

The Court made a point of limiting this analysis to unlocked containers:

It is 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, but it is otherwise with respect to a closed paper bag.” 500 U.S. at 251-52.

D. Additional Factors Which Define the Scope of a Consent Search

- Officer’s explanation of: what, where, when and why search is being requested.
- Express—whether verbal or by conduct—limitations by person granting permission to search
- Modifications of request or limitations as search progresses

IV. Third-Party Consents

Generally, a search conducted with consent of someone other than the accused is valid if:

- The consenting person has common authority with the accused over the property to be searched, or
- The police, at the time of the search, reasonably believed the consenting party had such authority.

A. Common Authority: Does Person Giving Consent Have a ‘Sufficient Relationship’ to the Premises or Object Searched?

If officers want permission to search a person, then only the person to be searched has the authority to consent. If officers want to search premises, vehicles, or personal property that can be shared by two or more people, then any person with a reasonable expectation of privacy has the authority
to permit such a search. This doctrine of ‘common authority’ was first clearly delineated in *U.S. v. Matlock*, 415 U.S. 164 (1974).

Matlock lived in a house with a Mrs. Graff and several of her family members. He was arrested in the front yard of the house for bank robbery. Following his arrest, officers received permission from Mrs. Graff to search Matlock’s room. They discovered a large quantity of money in his closet. Matlock was not asked for permission, and the officers did not have a search warrant for his room. The exact nature of Matlock’s relationship with Mrs. Graff was not clear, but the Court reviewed the evidence in some detail to determine whether Mrs. Matlock shared the bedroom with Matlock: “When the officers searched the east bedroom, two pillows were on the double bed, which had been slept in, men’s and women’s clothes were in the closet, and men’s and women’s clothes were also in separate drawers of the dresser.” 415 U.S. at 169 n. 3. All of this, and some hearsay statements wrongfully excluded by the trial court, convinced the Court that Mrs. Graff had a sufficient relationship to the premises searched to establish common authority. Footnote 7 is the quote most often cited from Matlock: “Common authority…rests…on mutual use of the property by persons generally having joint access or control for most purposes…” 415 U.S. at 171 n. 7.

B. Does Consent Have To Be Unanimous?; What If Husband And Wife Disagree?

The U.S. Supreme Court recently agreed to review a Georgia Supreme Court decision on this point. *Georgia v. Randolph*, 04-1067, cert. granted April 18, 2005. The police in Randolph were responding to a domestic disturbance. Randolph’s wife claimed he was high on cocaine and had taken their son away. She offered to show the officers where he kept his cocaine stash. Before the officers had a chance to enter the home, Randolph returned and objected. The officers went in over his protests and searched his bedroom, where his wife showed them where he had hidden his cocaine.

In a succinct decision, *State v. Randolph*, 604 S.E.2d 835, 837 (2004), the Georgia Supreme Court cited supreme court decisions from Florida and Washington as persuasive:

While a co-inhabitant has authority to consent to a search of joint premises, “a present, objecting party should not have his constitutional rights ignored [due to a] property interest shared with another.” *Silva v. State*, 344 So. 2d 559, 562 (Fla. 1977).

“Where the police have obtained consent to search from an individual possessing, at best, equal control over the premises,
that consent remains valid against a cohabitant, who also possesses equal control, only while the cohabitant is absent. However, should the cohabitant be present and able to object, the police must also obtain the cohabitant’s consent. State v. Leach, 113 Wash. 2d 735, 744, 782 P.2d 1035, 1040 (1989).

The Randolph case was only a 4-3 majority decision. The dissent characterized the majority decision as adopting “the minority view on this issue.” There is a substantial division among the various federal circuits and state supreme courts. A decision by the U.S. Supreme Court would certainly settle the issue among the federal circuits, but it may not change the view of differing state supreme courts that may interpret their state constitutional protections more broadly.

Justice Scalia’s words in Kyllo may foreshadow the Court’s decision in the Randolph case: “‘At the very core’ of the Fourth Amendment ‘[is a person’s right] to retreat into his own home and there be free from unreasonable governmental intrusion.” Kyllo v. United States, 533 U.S. 27, 31 (2001). Randolph’s attorney put the issue this way: “Which is more important: the right to be free from unwarranted search of one’s property, or the property right of one to allow a search?” Georgia v. Randolph, 04-1067, Respondent’s brief, p. 23.

C. The Supreme Court’s Decision (3-22-06) 5-3 (Alito did not participate)

J. Souter was joined by Stevens, Kennedy, Ginsberg and Breyer holding that:

“…a warrantless search of a shared dwelling for evidence over the express refusal to consent by a physically present resident cannot be justified as reasonable as to him…” (slip opn. P. 16)

The majority clearly intended that their holding be narrowly construed. They excluded situations where the consenting party had a superior interest to the property. i.e. parent-child. The majority expressly did not overrule Matlock’s holding regarding authority to consent when one of the residence is not present to agree or object. (if a potential objector with self-interest “is nearby, but not invited to take part in the threshold colloquy, (he) loses out”) Id. at 17.

Perhaps, most important the majority tried to make clear that this case does not change “the authority of police to enter a dwelling to protect a resident from domestic violence, so long as they have a good reason to believe such a threat exists.” Id. at 13.

D. Examples of Common Authority Interpretations
Two Cousins Sharing A Duffle Bag For Clothing And Personal Effects.

The Court in Frazier v. Cupp, 394 U.S. 731 (1969) held that, where the accused’s duffle bag had been searched by police pursuant to consent given by the accused’s cousin, who shared use of the bag, the search was lawful under the Fourth Amendment.

This duffel bag was being used jointly by petitioner and his cousin Rawls and it had been left in Rawls' home. The police, while arresting Rawls, asked him if they could have his clothing. They were directed to the duffel bag and both Rawls and his mother consented to its search. During this search, the officers came upon petitioner's clothing and it was seized as well. Since Rawls was a joint user of the bag, he clearly had authority to consent to its search… Petitioner argues that Rawls only had actual permission to use one compartment of the bag and that he had no authority to consent to a search of the other compartments. We will not, however, engage in such metaphysical subtleties in judging the efficacy of Rawls' consent. Petitioner, in allowing Rawls to use the bag and in leaving it in his house, must be taken to have assumed the risk that Rawls would allow someone else to look inside. 394 U.S. at 740.

Father-Son Joint Use Of Garage

In U.S. v. Evans, 27 F.3d 1219 (7th Cir. 1994), the appellate court, in affirming the defendant's conviction for operating an automobile "chop shop" out of his father's garage, found that the district court did not commit clear error in determining that the defendant's father possessed common authority to consent to a search of the garage that he shared with the defendant, where stolen vehicles were found, and admitting such evidence at trial. The father, who owned the garage and paid all utility bills for the structure, allowed the defendant to use the right bay of the building. The father testified that he had keys to the entrance doors to both his and the defendant's service bays in the garage, and although he had lost the key to the defendant's bay's entrance door, he had unobstructed access to the right bay when the interior door separating the bays was left unlocked, which it commonly was. Moreover, the father stated that he did not have to ask his son's permission to enter the right bay, although it was used for his son's business. Also, the court concluded, the consent was not tainted because the agents informed the father that they would obtain a search warrant if he would not consent to a search, there was a reasonable probability...
that evidence of the car theft operation would be found on the father's premises, and the agents could, in fact, have obtained a search warrant.

- **Landlord Has Limited Right To Consent**

  A warrantless search of a house which the accused was renting was not rendered lawful under the Fourth Amendment by the fact that the accused's landlord had consented to it, said the court in *Chapman v. United States*, 365 U.S. 610 (1961). Accordingly, the accused's conviction for violation of federal liquor laws, based on evidence found in the search, was reversed. The landlord had gone to the house on a social call, found no one at home, smelled an odor of whiskey mash, and advised the police of his observations. The landlord accompanied the police to the home and gave them his permission to enter by forcing a window. The government argued that the landlord had authority to permit the search under state law permitting a landlord to enter leased premises "to view waste." The Supreme Court observed that state law did not permit a landlord, in the absence of an express covenant, to break into leased premises without the consent of the tenant in order to view waste. The court noted that in the instant case, the landlord and the police had forced open a window, and that their purpose in any event was not to view waste, but to look for distilling equipment. The court went on to say that to uphold the search in this case would reduce the Fourth Amendment to a nullity and leave tenants' homes secure only in the discretion of landlords.

- **Adult Child Living With Parent Has Common Authority**

  Generally, adult children living with parents have common authority to permit searches of any part of the home freely used by the child: the living room, kitchen, bathroom, basement, etc. However, such authority does not extend to areas or property which the parent has kept sole control over or taken steps to keep private.

**E. Illinois v. Rodriguez—Apparent Authority**

Rodriguez was arrested in his apartment for possession of illegal drugs that were in plain view. The officers had no arrest or search warrant. They gained entry to the apartment with the permission and assistance of Gail Fischer.
The initial contact with Ms. Fischer was at her mother’s house. She reported being recently beaten by Rodriguez. Fischer told police that she had lived at the apartment with Rodriguez and had furniture and clothes there; she let them in with use of a key in her possession.

At the suppression hearing, Rodriguez testified that Fischer had vacated the apartment several weeks earlier and had no authority to consent to entry. Additionally, the record showed that Fischer was not on the lease, had never paid rent, had moved out about a month before the search, and had only spent an occasional night there since moving out.

The Court concluded that the lower court’s “determination of no common authority over the apartment was obviously correct.” 497 U.S. at 182. However, the issue remained whether the officer’s belief in her authority was reasonable, even if mistaken:

[I]n order to satisfy the “reasonableness” requirement of the Fourth Amendment, what is generally demanded of the many factual determinations that must regularly be made by agents of the government…is not that they always be correct, but that they must always be reasonable.” 497 U.S. at 185.

In holding that the officers reasonably relied on the apparent authority of Fischer to consent to the entry, the Court clarified that the question is: “not whether the right to be free of searches has been waived, but whether the right to be free of unreasonable searches has been violated.” 497 U.S. at 187.

- Hotel Clerk’s Authority To Consent To Search Limited

In Stoner v. California, 376 U.S. 483 (1964), the Court held that a warrantless search by police of the accused's hotel room was not justified for the purposes of the Fourth Amendment by the fact that the hotel clerk had consented to the search. The court said that even if a state statute giving a hotel proprietor blanket authority to search a guest's room could survive a constitutional challenge, there was no showing that such a law applied to the search at issue, nor was there any substance to the claim that the search was reasonable because the police had a reasonable basis for the belief that the clerk had authority to consent to the search. The rights protected by the Fourth Amendment, said the Court, are not to be eroded by strained applications of the law of agency or by unrealistic doctrines of "apparent authority." It was the accused's constitutional right, rather than the clerk's or the hotel's, which was at stake, said the Court, and therefore that right could be waived only by the accused, either directly or through an agent. Although the clerk clearly consented to
the search, noted the Court, there was nothing to indicate that he had been authorized by the accused to permit the search.

- **Apparent Authority Of Minor Child**

Although a parent’s interest in a home is generally superior to a minor child’s, there are situations where the child may reasonably consent to police entry. Factors frequently cited for consideration are the child’s age, intelligence, and maturity, and the scope of the search requested. *State v. Tomlinson*, 2002 WI 91 cited the prevailing view on a minor child’s apparent authority:

In the present case, given the age of the girl who answered the door, the limited scope of the entry, and the surrounding circumstances, the officers could have reasonably concluded that the consent to enter the house was valid. A high school-aged child will likely have at least some authority to allow limited entry into the home. Courts that have addressed this issue are generally in agreement on this point. *See, e.g.*, *Doyle v. State*, 633 P.2d 306, 309 (Alaska 1981); *Mears v. State*, 533 N.E.2d 140, 142 (Ind. 1989); *State v. Folkens*, 281 N.W.2d 1, 4 (Iowa 1979); *State v. Griffin*, 756 S.W.2d 475, 484-85 (Mo. 1988). There is no evidence here that the girl who answered the door lacked the intelligence or maturity such that the officers' reliance on the consent would have been called into question. 2002 WI 91 at ¶ 33.
UNITED STATES CONSTITUTION

Amendment IV
The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized. (Ratified December 15, 1791)

Amendment V
No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation. (Ratified December 15, 1791)

Amendment VI
In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence. (Ratified December 15, 1791)