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Scope of Consent Searches: Are Police Officers and Judges Misguided by the Objective Reasonableness Test

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Scope of Consent Searches: Are Police Officers and Judges Misguided by the Objective Reasonableness Test?

Florida v. Jimeno[1]

> These [Fourth Amendment rights], I protest, are not mere second-class rights but belong in the catalog of indispensable freedoms. Among deprivations of rights, none is so effective in cowing a population, crushing the spirit of the individual and putting terror in every heart. Uncontrolled search and seizure is one of the first and most effective weapons in the arsenal of every arbitrary government.[2]

I. INTRODUCTION

Law enforcement officials will arrest or temporarily detain over 14 million Americans this year for offenses ranging from murder to speeding.[3] During these stops, the police officer will frequently ask for and receive the individual's consent to search his or her belongings. In *Florida v. Jimeno*, the United States Supreme Court attempted to define the permissible scope for consent searches under an objective reasonableness test.[4] This Note will briefly explore the history of consent searches, examine the Supreme Court's rationale for adopting an objective test, analyze the ramifications of the decision, and propose modifications in the procedures for obtaining a valid consent search.

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1. 111 S. Ct. 1801 (1991).

2. Brinegar v. United States, 338 U.S. 160, 180 (1949) (Jackson, J., dissenting).

3. FEDERAL BUREAU OF INVESTIGATION, UNIFORM CRIME REPORTS, CRIME IN THE UNITED STATES (1989). This estimate is based on the fact that law enforcement officials made 14.3 million arrests in 1989 for all criminal infractions except traffic violations.

4. *Jimeno*, 111 S. Ct. at 1804.

II. FACTS AND HOLDING

On the afternoon of July 20, 1988, a Dade County, Florida police officer watched Enio Jimeno[5] drive into a parking lot, get out of his car, consult his pager, and make several calls from a public phone.[6] After overhearing one of the conversations, the officer suspected that Jimeno was engaged in drug trafficking.[7] Later, the police officer became more suspicious when he saw Jimeno drive to a nearby apartment building where Cesar Tabares, a passenger in Jimeno's car, took a brown paper bag inside.[8] A few minutes later Jimeno and Tabares returned to the car; Jimeno was carrying the brown paper bag and a briefcase.[9]

In an effort to confirm his suspicions, the police officer followed Jimeno's car as it left the apartment complex.[10] Shortly thereafter, the officer stopped Jimeno for running a red light.[11] During the stop, the officer told Jimeno that he was also conducting a narcotics investigation because he had reason to believe Jimeno was carrying narcotics in his car.[12] The officer then asked Jimeno for permission to search the car.[13] The officer also told Jimeno that he did not have to consent to the search of the car, but Jimeno said he had nothing to hide and allowed the search.[14]

The officer proceeded directly to the passenger side of the car, opened the door, and found the brown paper bag still lying on the floorboard.[15] The bag was rolled up so that its contents could not be seen without unfolding and

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5. Enio Jimeno was accompanied in the car by his wife, Luz Jimeno, who was seated in the front passenger seat, and Cesar Tabares, who was in the back seat, both of whom were similarly charged. Petition for Writ of Certiorari to the Supreme Court of Florida, State v. Jimeno, 564 So. 2d 1083 (Fla. 1990) (No. 90-622), *rev'd*, 111 S. Ct. 1801 (1991) (available on LEXIS).

6. *Id.*

7. *Jimeno*, 111 S. Ct. at 1803.

8. Brief for the United States as Amicus Curiae Supporting Petition for a Writ of Certiorari to the Supreme Court of Florida, State v. Jimeno, 564 So. 2d 1083 (Fla. 1990) (No. 90-622), *rev'd*, 111 S. Ct. 1801 (1991) (available on LEXIS).

9. *Id.*

10. *Jimeno*, 111 S. Ct. at 1803.

11. *Id.* Jimeno was stopped for making a right turn at a red light without stopping first.

12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.*

opening it.[16] Without any additional request or consent, the police officer "picked up the bag, opened it, and found a kilogram of cocaine inside."[17]

Jimeno was later charged with "possession with intent to distribute cocaine in violation of Florida law."[18] Before trial, Jimeno moved to suppress the evidence of the cocaine, arguing that his consent to allow the police officer to search his car did not extend to the closed paper bag inside the car.[19] The Circuit Court of Dade County granted Jimeno's motion to suppress the evidence, holding that although Jimeno "'could have assumed the officer would have searched the bag' at the time he gave the consent" a general consent to search the car "did not carry with it specific consent to open the bag and examine its contents."[20] On review, the Florida District Court of Appeal upheld the trial court's decision to suppress the evidence of the cocaine.[21] The court of appeal held that "consent to a general search for narcotics does not extend to 'sealed containers within the general area agreed to by the defendant.'"[22] The Florida Supreme Court, relying on its opinion in *State v. Wells*,[23] affirmed the appellate decision.[24]

The United States Supreme Court reversed and remanded Jimeno's case to the Circuit Court of Dade County for further proceedings.[25] The Supreme Court held that a suspect's Fourth Amendment right to be free from unreasonable searches is not violated if a suspect gives permission to search

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16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.* The Circuit Court of the Eleventh Judicial Circuit In and For Dade County found there was no probable cause to search, no exigent circumstances existed, and the contraband was not in plain view. Petition for Writ of Certiorari to the Supreme Court of Florida, State v. Jimeno, 564 So. 2d 1083 (Fla. 1990) (No. 90-622), *rev'd*, 111 S. Ct. 1801 (1991) (available on LEXIS).

21. State v. Jimeno, 550 So. 2d 1176, 1176 (Fla. Dist. Ct. App. 1989), *aff'd*, 564 So. 2d 1083 (Fla. 1990), *rev'd*, 111 S. Ct. 1801 (1991).

22. *Id.*

23. State v. Wells, 539 So. 2d 464 (1989), *aff'd on other grounds*, 495 U.S. 1 (1990). In *Wells*, the United States Supreme Court affirmed the Florida Supreme Court's suppression of evidence discovered during an inventory search. *Wells*, 495 U.S. at 4-5. The Court determined that a lack of standardized procedures would invalidate a consensual inventory search. *Id.* at 5. The Court, however, did not address the portion of *State v. Wells* followed by Florida in *State v. Jimeno*, which limited the permissible scope of consent searches.

24. State v. Jimeno, 564 So. 2d 1083 (Fla. 1990), *rev'd*, 111 S. Ct. 1801 (1991).

25. *Jimeno*, 111 S. Ct. at 1803.

his car, and the police open a closed paper bag found inside the car that might "reasonably hold the object of the search."[26]

III. LEGAL BACKGROUND

A. *General Fourth Amendment Protections*

The Fourth Amendment protects "people"[27] against unreasonable searches and seizures conducted by police officers or other government agents.[28] Generally, a warrant issued with probable cause that particularly describes both the place to be searched and the person or things to be seized is required to satisfy this constitutional mandate.[29] There are, however, well-delineated exceptions to the general rule.[30] In the absence of a valid warrant or an exception to the warrant requirement, the search or seizure is per se unreasonable and any evidence thereby discovered will be excluded.[31]

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26. *Id.*

27. In Katz v. United States, 389 U.S. 347, 351 (1967), the Supreme Court held "the Fourth Amendment protects people, not places." All persons including businesses and corporations are protected, not just citizens. *See* New York v. Burger, 482 U.S. 691, 699 (1987) (Fourth Amendment protects commercial premises); Almeida-Sanchez v. United States, 413 U.S. 266, 273 (1973) (Fourth Amendment protects citizens of foreign nations).

28. The Fourth Amendment provides:

> 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.

U.S. CONST. amend. IV.

29. *E.g.*, *Katz*, 389 U.S. at 357.

30. A partial list of exceptions includes: searches incident to a lawful arrest, automobile searches, plain view, inventory searches, hot pursuit, stop and frisk searches and the "special needs" administrative and regulatory searches. See generally WAYNE LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT (1987), for a complete list of exceptions and more detailed information.

31. *Katz*, 389 U.S. at 357. The exclusionary rule is a judicially created remedy designed to exclude evidence that is obtained directly from the illegal search or seizure or indirectly through the "fruit of the poison tree" doctrine. *See, e.g.*, Mapp v. Ohio, 367 U.S. 643, 648 (1961). The evidence is generally excluded unless allowed by the independent source, attenuation, inevitable discovery or good faith exceptions. *See* Murray v. United States, 487 U.S. 533 (1988) (independent source exception); United States v. Leon, 468 U.S. 897 (1984) (good faith exception); Nix v. Williams, 467 U.S. 431 (1984) (inevitable discovery exception); Brown v. Illinois, 422 U.S. 590 (1975) (attenuation exception).

To claim Fourth Amendment protection, a person must satisfy the two-pronged reasonable or legitimate expectation of privacy test.[32] Under this test, the individual must first have an actual or subjective expectation of privacy in the item or area to be searched.[33] Thus, the individual by his or her conduct must have shown that he or she intends to "preserve something as private."[34] Second, this subjective expectation of privacy must be one that society is willing to recognize as reasonable.[35]

Factors used in evaluating the reasonableness of an individual's subjective expectation of privacy include: the nature of the property;[36] possessory or property interests;[37] the steps taken to keep the information, property or activity private;[38] and the intrusiveness of the government activity.[39]

Generally, searches under the exceptions to the warrant requirement allow only limited intrusions designed to minimize the officer's discretion. For example, a search incident to a lawful arrest permits the officer to search the arrestee's person and the area within his or her immediate control to protect the officer and to prevent the destruction of evidence.[40] Similarly, a seizure is justified under the "plain view" exception only when an officer with right of access observes a contraband item that is immediately apparent from a lawful vantage point.[41] In addition, an inventory search, allowed to protect the arrestee's personal property and the police, must be conducted pursuant to a standardized procedure that minimizes the officer's discretion.[42] Finally, under *Terry v. Ohio*,[43] an officer with "reasonable suspicion" may "pat down" a suspect's outer clothing and may search an area within the suspect's immediate control to protect the officer and the public.[44] More extensive

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32. *Katz*, 389 U.S. at 361 (Harlan, J., concurring).

33. *Id.*

34. *Id.*

35. *Id.*

36. *See, e.g.*, California v. Greenwood, 486 U.S. 35, 40-41 (1988) (privacy in garbage); Payton v. New York, 445 U.S. 573, 589 (1980) (privacy in one's home).

37. *See, e.g.*, Rawlings v. Kentucky, 448 U.S. 98, 105 (1979) (privacy interest in another's purse).

38. *See, e.g.*, Smith v. Ohio, 494 U.S. 541, 542 (1990).

39. *See, e.g.*, Winston v. Lee, 470 U.S. 753, 759 (1985) (surgical intrusion into body).

40. *See* United States v. Robinson, 414 U.S. 218, 224-26 (1973); Chimel v. California, 395 U.S. 752, 755-60 (1969).

41. *See* Florida v. Riley, 488 U.S. 445, 449 (1989).

42. *See* Florida v. Wells, 495 U.S. 1, 4 (1990).

43. 392 U.S. 1 (1968).

44. *See id.* at 30; *see also* Michigan v. Long, 463 U.S. 1032, 1045-52 (1983).

searches typically have only been allowed for "special needs" when the government's interest in conducting the search outweighs the individual's privacy interests.[45]

The automobile exception allows a more extensive search based on a vehicle's inherent mobility and lowered privacy expectations.[46] This exception allows the officer to conduct a warrantless search of an automobile if the officer has probable cause to believe it contains evidence and is capable of being used on a public road.[47] The Supreme Court, however, traditionally accorded greater privacy expectations to packages or containers within the automobile.[48] If the police only had probable cause to search a particular container or package in the car, a warrant had to be issued before the package could be searched.[49] The automobile exception did not justify a warrantless search of containers.[50] This exception has been interpreted more broadly in recent decisions, however.[51]

B. Limits on Consent Searches

In *Davis v. United States*,[52] the Supreme Court determined that a valid consent search does not require a search warrant or probable cause.[53] Why this is so is less clear.[54] Some scholars view consent searches as "inherently

45. *See, e.g.*, Skinner v. Railway Labor Executive's Ass'n, 487 U.S. 602 (1989) (drug testing of safety sensitive employees); New York v. Burger, 482 U.S. 691 (1987) (searches in closely regulated industries); New Jersey v. TLO, 469 U.S. 325 (1985) (search of high school student); Hudson v. Palmer, 468 U.S. 517 (1984) (search of prisoners and probationers); Almeida-Sanchez v. United States, 413 U.S. 266 (1973) (border searches).

46. Cardwell v. Lewis, 417 U.S. 583, 590 (1974).

47. *See, e.g.*, South Dakota v. Opperman, 428 U.S. 364, 368 (1976).

48. *See, e.g.*, Arkansas v. Sanders, 442 U.S. 753, 764-65 (1979).

49. *Id.* at 766.

50. *Id.* at 765.

51. In United States v. Ross, 456 U.S. 798, 825 (1981), the United States Supreme Court decided that when officers have probable cause to search the entire vehicle under the automobile exception, they may search anywhere in the vehicle that the object of the search may be found. Recently, in California v. Acevedo, 111 S. Ct. 1982, 1991 (1991), the Supreme Court reversed the basic Chadwick-Sanders rule and allowed warrantless searches of containers under the automobile exception where the police only had probable cause to search the container.

52. 328 U.S. 582 (1946).

53. *Id.* at 593-94; *see also* Zap v. United States, 328 U.S. 624, 628 (1946).

54. *See* Martin R. Gardner, *Consent As a Bar to Fourth Amendment Scope - A Critique of Common Theory*, 71 J. CRIM. L. & CRIMINOLOGY 443, 443-44 (1980).

reasonable non-searches altogether removed from fourth amendment purview."[55] Some theorists see consent searches as "instances of justified or excused warrantless governmental intrusions" while still others treat consent searches as simply another exception to the warrant requirement; both of these views provide that consent searches remain subject to Fourth Amendment scrutiny.[56]

In *Schneckloth v. Bustamonte*,[57] the Supreme Court acknowledged consent searches are subject to Fourth Amendment scrutiny.[58] The Supreme Court also recognized that officers often obtain "important and reliable evidence" from such searches which they would otherwise be unable to obtain.[59] Consent searches are particularly useful to an officer because no suspicion of wrongdoing is required before the officer may ask and obtain permission to conduct a full investigative search.[60] Thus, unlike either a *Terry* stop which requires "reasonable suspicion" prior to conducting a limited search,[61] or a search incident to arrest, which requires probable cause before the arrest,[62] an officer simply has to obtain an individual's voluntary consent to a search.[63] The Supreme Court has, however, imposed two prerequisites for a valid consent to search: the consent must be freely given,[64] and the scope must not exceed that authorized by the consenting individual.[65]

The first requirement for a valid consent is that it be "freely and voluntarily given"[66] and not result from duress or coercion.[67] In *Schneckloth*, the Supreme Court adopted a totality of the circumstances test to determine whether the consent was voluntarily given.[68] Voluntariness is a question of fact with the burden of proof on the government—a burden not

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55. *Id.*

56. *Id.* at 443.

57. 412 U.S. 218 (1973).

58. *Id.* at 219.

59. *Id.* at 227.

60. Peter Goldberger, *Consent, Expectations of Privacy, and the Meaning of "Searches" in the Fourth Amendment*, 75 J. CRIM. L. & CRIMINOLOGY 319, 344 (1984).

61. Terry v. Ohio, 392 U.S. 1, 30-31 (1968).

62. *E.g.*, Chimel v. California, 395 U.S. 752, 763 (1969).

63. Goldberger, supra note 60, at 344 n.119.

64. *Schneckloth*, 412 U.S. at 248-49.

65. *E.g.*, Walter v. United States, 447 U.S. 649, 656-57 (1980).

66. *E.g.*, Florida v. Royer, 460 U.S. 491, 497 (1983).

67. *Schneckloth*, 412 U.S. at 227; *see also* Florida v. Bostick, 111 S. Ct. 2382, 2386-87 (1991).

68. *Schneckloth*, 412 U.S. at 248-49.

satisfied by simply showing "submission to a claim of lawful authority."[69] The Supreme Court, however, determined that the suspect is not required to have knowledge of the right to refuse to consent.[70]

A valid consent authorizes a search, but for the search to be reasonable, law enforcement officials must limit the scope of their search to the authority given.[71] In *Walter v. United States*,[72] the Supreme Court stated:

> 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. Because "indiscriminate searches and seizures conducted under the authority of 'general warrants' were the immediate evils that motivated the framing and adoption of the Fourth Amendment," that Amendment requires the scope of every authorized search to be particularly described.[73]

Before *Jimeno*, a general consent to search a particular place such as a residence or vehicle would allow the police to search unlocked containers, but the police could not break into locked containers or cause physical damage.[74] If there were an expressed object for the search or limitations on the consent, the search could not exceed the express boundaries or expand into areas where the expressed object could not be found.[75] Thus, expressed or implied limitations placed on the consent could set limits on the time, duration, area, or intensity of the search.[76] In trying to evaluate these constraints, courts used either a subjective (actual belief of the consenter or police officer)[77] or objective (apparent consent)[78] standard to determine first whether consent had been given and, if given, the limits placed on the search. As one court has noted, it is often "devilishly difficult" to determine the scope of the consent, despite consideration of all the surrounding circumstances.[79] In *Jimeno*, the

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69. *See, e.g., Royer*, 460 U.S. at 497; Bumper v. North Carolina, 391 U.S. 543, 548-49 (1968).

70. *Schneckloth*, 412 U.S. at 248-49.

71. LAFAVE, *supra* note 30, § 8.1(c).

72. 447 U.S. 649 (1980).

73. *Id.* at 656-57 (citation omitted).

74. WAYNE LAFAVE & JEROLD ISRAEL, CRIMINAL PROCEDURE § 3.10(f) (1985).

75. *Id.*

76. *Id.*

77. United States v. Elrod, 441 F.2d 353, 356 (5th Cir. 1971) (consent by mental incompetent is invalid despite genuine belief of officers that consent was freely given).

78. *E.g.*, United States v. Dyer, 784 F.2d 812, 816 (7th Cir. 1986).

79. State v. Hyland, No. 17131, 1991 WL 238599, at *4 (Mo. Ct. App. Nov. 18,

United States Supreme Court attempted to eliminate some of these difficulties by selecting an objective reasonableness test to measure the scope of consent searches.[80] Under this test, the boundaries on consent searches for Fourth Amendment purposes would theoretically be decided by viewing the entire transaction between the officer and the consenter from a reasonable person's point of view.[81]

IV. THE INSTANT DECISION

A. *Rehnquist's Majority Opinion*

Rehnquist began the majority opinion by noting that the Fourth Amendment only proscribes unreasonable state-initiated searches and seizures.[82] Rehnquist stated that consent searches therefore satisfy Fourth Amendment standards because it is reasonable for the police to conduct a search once they have been given permission to do so.[83] Rehnquist then proceeded to select an "objective" reasonableness test—what the "typical reasonable person" would have understood the conversation between the police officer and Jimeno to have meant—as the majority's standard for determining the permissible scope of the consent search.[84] To support the majority's choice, Rehnquist cited two consent cases which he believed supported the use of an "objective" reasonableness standard: *Illinois v. Rodriguez*,[85] a third-party consent case, and *Florida v. Royer*,[86] a coerced consent case.[87] Rehnquist framed the question before the Court as "whether it is reasonable for an officer to consider a suspect's general consent to a search of his car to include consent to examine a paper bag lying on the floor of the car."[88]

Applying the objective test, Rehnquist found that a reasonable person would interpret Jimeno's consent to search his car for narcotics as including permission to search the paper bag inside.[89] To reach this conclusion,

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1991). *Hyland* was transferred to the Missouri Supreme Court, and oral arguments were heard on September 3, 1992.

80. *Jimeno*, 111 S. Ct. at 1803.
81. *Id.*
82. *Id.* at 1803.
83. *Id.*
84. *Id.* at 1803-04.
85. 110 S. Ct. 2793 (1990).
86. 460 U.S. 491 (1983).
87. *Jimeno*, 111 S. Ct. at 1804.
88. *Id.*
89. *Id.*

Rehnquist relied on the holding in *United States v. Ross*,[90] a case involving a warrantless search conducted pursuant to the automobile exception, which held that the scope of a search is defined by its expressed object.[91] Rehnquist noted that the police officer told Jimeno that he was searching for narcotics, and any reasonable person knows that narcotics are generally carried in some form of container.[92] Therefore, it was reasonable for the police officer to conclude that Jimeno's consent to search his car, with no explicit limitations attached, included permission to search containers in the car which might bear drugs.[93]

However, the majority opinion may not permit the investigating officer to search all containers inside the vehicle.[94] Distinguishing *State v. Wells*,[95] the case relied on by the Supreme Court of Florida to suppress the evidence, Rehnquist concluded that although it was reasonable to interpret Jimeno's consent to search his car as including the authority to open a closed brown paper bag found inside the car, it would likely be unreasonable to interpret this consent as a grant of authority "to pry open a locked briefcase found inside the trunk."[96]

Finally, Rehnquist rejected Jimeno's argument that the officer should be required to ask for permission to search each closed container.[97] Rehnquist believed that adding such a "superstructure" to the "Fourth Amendment's basic test of objective reasonableness" is not required because the consenting individual has a right to limit the scope of the search.[98] Furthermore, Rehnquist stated that the community has a strong interest in encouraging consent searches to aid in both the solution and prosecution of crime and to ensure that innocent people are not wrongly charged with criminal offenses.[99]

B. Marshall's Dissent

Justice Marshall, joined by Justice Stevens in dissent, would not interpret an individual's consent to search his or her car as consent to search containers found inside the car because of the different privacy expectations traditionally

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90. 456 U.S. 798 (1982).

91. *Jimeno*, 111 S. Ct. at 1804.

92. *Id.* In *Ross*, the Supreme Court stated that "[c]ontraband goods rarely are strewn across the trunk or floor of a car." *Ross*, 456 U.S. at 820.

93. *Jimeno*, 111 S. Ct. at 1804.

94. *Id.*

95. 539 So. 2d 464 (Fla. 1989), *aff'd on other grounds*, 495 U.S. 1 (1990).

96. *Jimeno*, 111 S. Ct. at 1804.

97. *Id.*

98. *Id.*

99. *Id.*

attached to each.[100] Marshall conceded that *South Dakota v. Opperman*[101] and *Cardwell v. Lewis*[102] afford less privacy expectations to cars because they are generally exposed to public view, subject to extensive governmental regulation or seizure, and rarely used as a repository for personal effects.[103] He contended, however, that *United States v. Chadwick*[104] recognized heightened privacy expectations in closed containers because the individual has manifested an intent to keep possessions private by placing them in the container.[105] Marshall asserted that, under *Robbins v. California*,[106] these distinct privacy expectations do not merge when the individual places the container inside a car.[107]

Given these distinct expectations of privacy, Marshall argued that consent to search the car should not be understood to extend to containers in the car.[108] Therefore, Marshall concluded these independent and divisible privacy interests mandate that a police officer obtain additional consent before searching a closed container found in the car.[109] Marshall stated that "[t]he only objection that the police could have to such a rule is that it would prevent them from exploiting the ignorance of a citizen" who is not aware of his or her rights.[110] Marshall contended that the newly-created rule that permits the police to construe a consent to search more broadly than it may have been intended will discourage individuals from consenting to searches of their cars.[111] Marshall also argued that the state's interest in efficacious law enforcement cannot and should not be achieved by permitting the police to disregard an individual's constitutional rights.[112] Finally, Marshall firmly rejected what he saw as the heightened privacy expectations the majority was willing to attach to containers according to their type.[113] Marshall viewed the majority's "distinction between 'worthy' containers, like locked briefcases,

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100. *Id.* at 1805. The different privacy expectations attached to cars and containers are in doubt following the decision in California v. Acevedo, 111 S. Ct. 1982 (1991).

101. 428 U.S. 364 (1976).

102. 417 U.S. 583 (1974).

103. *Jimeno*, 111 S. Ct. at 1805.

104. 433 U.S. 1 (1977).

105. *Jimeno*, 111 S. Ct. at 1805.

106. 453 U.S. 420 (1981).

107. *Jimeno*, 111 S. Ct. at 1805.

108. *Id.*

109. *Id.*

110. *Id.* at 1806.

111. *Id.*

112. *Id.*

113. *Id.*

and 'unworthy containers,' like paper bags" as infirm.[114] Marshall believed that "just as the most frail cottage in the kingdom is absolutely entitled to the same guarantees of privacy as the most majestic mansion,"[115] so too should a simple brown paper bag be given the same privacy expectations as a locked briefcase.[116]

V. COMMENT

When does the scope of a consent search exceed its authorized limits so as to impermissibly infringe on an individual's constitutional rights? This seems to be a simple question. Unfortunately, the consenter seldom precisely specifies various aspects of the search, such as the permissible area or duration.[117] As a result, disputes often arise as to whether consent to search was in fact given and, if given, its intended scope. All too often in suppression hearings, judges must ponder both expressed and implied limitations that arguably were attached to the consent given. Quite frequently, judges must make ad hoc determinations as to consent by weighing the two competing interests involved: the state's interest in effective law enforcement and the consenting individual's privacy rights.

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114. *Id.* at 1805.

115. *Id.* (quoting *Ross*, 456 U.S. at 822). The Court in *Ross* stated:

> Even though such a distinction perhaps could evolve in a series of cases in which paper bags, locked trunks, lunch buckets, and orange crates were placed on one side of the line or the other, the central purpose of the Fourth Amendment forecloses such a distinction. For just as the most frail cottage in the kingdom is absolutely entitled to the same guarantees of privacy as the most majestic mansion, so also may a traveler who carries a toothbrush and a few articles of clothing in a paper bag or a knotted scarf claim an equal right to conceal his possessions from official inspection as the sophisticated executive with the locked attache case.

Id. (quoting *Ross*, 456 U.S. at 822).

116. *Jimeno*, 111 S. Ct. at 1805.

117. Daniel L. Rotenberg, *An Essay on Consent(less) Police Searches*, 69 WASH. U.L.Q. 175, 185 (1991). Some of the aspects of the search which the consenter usually does not specify precisely include:

> (1) coverage; the entire living area—basement, garage, attic, vehicles—privacy areas of family members or guests, closed containers, the body of the consenter and others who may be present—including strip and cavity searches; (2) duration; from brief to eternal; (3) intensity; if a postage stamp is the search object, whether wallpaper, paneling, and carpeting may be removed; (4) frequency; whether a single consent includes multiple searches; and (5) seizures; whether consent to search also includes consent to seize without the usual probable cause?

Id.

A. *The* Jimeno *"Rule"*

In *Jimeno*, the Supreme Court selected an objective reasonableness standard—what a typical reasonable person would have understood the exchange between the consenter and the searching officer to have meant—to define the permissible scope of a consent search.[118] Thus, if *C* is the alleged consenter, *O* is the investigating officer to whom consent is allegedly given, and *X* is a typical reasonable person, the scope of the permitted search is determined by what permission *X*, the typical reasonable person, would have understood to have been given to the officer, *O*, by the consenting individual, *C*, from their actions and words. An important factor in evaluating reasonableness is whether the officer has expressed the purpose or object of the search.[119] In *Jimeno*, the Supreme Court concluded that a reasonable person would believe Jimeno's consent to search his car for narcotics would extend to a brown paper bag, but stated that the result might have been different if the police officer would have been required to pry open a locked briefcase.[120] Thus, the Supreme Court indicated that the permissible scope of the search might, in some instances, ultimately depend on the privacy expectations a reasonable person would attach to the item or area to be searched.[121]

In *Jimeno*, the Supreme Court apparently concluded that the value of consent searches to law enforcement officials outweighed any concerns over additional intrusions into the individual's privacy expectations.[122] To support its decision, the Supreme Court noted that the community has a strong interest in encouraging consent searches because they provide evidence needed to solve and prosecute crimes.[123] In addition, they prevent innocent people from being wrongly charged with offenses.[124] The Supreme Court was therefore unwilling to burden law enforcement officials by requiring the police to separately request permission to search each container.[125] As such, the majority saw no need for imposing such a "superstructure" on top of the "Fourth Amendment's basic test of objective reasonableness."[126]

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118. *Jimeno*, 111 S. Ct. at 1803-04.
119. *Id.* at 1804.
120. *Id.*
121. *Id.*
122. *Id.*
123. *Id.*
124. *Id.*
125. *Id.*
126. *Id.*

B. Analysis of Jimeno

The Supreme Court properly chose an objective standard to measure the reasonableness of the search.[127] Using either the consenter's or the officer's subjective beliefs would have been incorrect because these tests are flawed by their subjective nature. An after-the-fact examination of either's subjective beliefs could be intentionally skewed to achieve the result the individual favored. The problem, however, is that the "objective reasonableness" test provides little practical guidance beyond excluding the parties' subjective beliefs from the judge's analysis in the suppression hearing. The *Jimeno* "rule" fails to provide clear guidance to the courts, fails to provide adequate standards to guide police conduct, and as a result, fails to protect legitimate privacy interests in some cases.[128]

Two recent cases illustrate the problems with the *Jimeno* decision. In *United States v. Martinez*,[129] Drug Enforcement Administration (DEA) agents obtained written consent to search a mini-warehouse for narcotics.[130] During the search, the DEA agents pried open the trunk of a 1949 Dodge coupe and found cocaine inside.[131] The consenter moved to suppress the cocaine, contending that prying open the trunk was beyond the scope of the consent given.[132] The district court denied the motion to suppress the drugs and the Eleventh Circuit Court of Appeals affirmed the denial.[133]

In its decision, the Eleventh Circuit acknowledged that under *Jimeno* a consent search is limited by its authorized scope.[134] However, in analyzing whether prying open the trunk exceeded the authorized scope,[135] the court erred by equating the scope of consent searches with the scope of valid search warrants. The court reasoned that since a valid search warrant authorizes government agents to break open a locked container which may contain the

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127. *Id.*

128. These flaws were critical factors justifying the majority's new rule to govern searches of containers in automobiles in a case decided one week after the *Jimeno* decision. *See* California v. Acevedo, 111 S. Ct. 1982 (1991).

129. 949 F.2d 1117 (11th Cir. 1992).

130. *Id.* at 1118.

131. *Id.* The DEA agents removed a board separating the passenger compartment from the trunk in the automobile, but a perforated metal plate still blocked their entry into the trunk. A detective peered through the plate with a flashlight. Inside the trunk, the detective saw a box and a triple-beam scale case. The detective then used a piece of wire to turn the box over and saw that it contained brick-sized packages. *Id.*

132. *Id.* at 1118-19.

133. *Id.* at 1121.

134. *Id.* at 1119-20.

135. *Id.* at 1120.

objects of the search, a consent search would also allow an officer to break open locked containers.[136] The Eleventh Circuit distinguished its decision in *United States v. Strickland*,[137] where the court found officers overstepped the authorized consent by slashing open a spare tire.[138] The court stated that the record in *Martinez* did not show the same kind of damage to the automobile as the "mutilation" of the spare tire in *Strickland*.[139] But, the Eleventh Circuit failed to properly consider under *Jimeno* whether a reasonable person would believe that permission had been given to pry open the trunk to search for narcotics.

In another case, *United States v. Ibarra*,[140] Houston police officers sought and obtained permission to search a house and a garage for evidence of money laundering and drug trafficking.[141] During their search,[142] the officers discovered an entrance to an attic which was boarded up.[143] The police then used the handle of a sledgehammer to knock out the boards.[144] After entering the attic, the police found $1,000,000 in cash, ledgers, and a money counting machine.[145] The consenter moved to suppress the evidence because the scope exceeded that authorized.[146] The district court granted the motion to suppress and found that the consent given could not have included consent to "structurally dismantle the secured closet ceiling" with a sledgehammer.[147] The Fifth Circuit reversed the district court's findings as clearly erroneous and remanded the case for further proceedings.[148]

The Fifth Circuit applied the *Jimeno* "objective reasonableness" test and concluded that the scope of the search was permissible.[149] The Fifth Circuit believed that the consenter no longer held a reasonable expectation of privacy in the attic since a reasonable person would conclude it was within the bounds

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136. *Id.*

137. 902 F.2d 937 (11th Cir. 1990).

138. *Id.* at 942.

139. *Martinez*, 949 F.2d at 1121.

140. 948 F.2d 903 (5th Cir. 1991).

141. *Id.* at 905.

142. Prior to searching the attic the officers found evidence of money laundering in the kitchen and bedroom. *Id.* The district judge concluded the evidence of money laundering established probable cause and the intervention of a magistrate was necessary prior to searching the attic. *Id.*

143. *Id.*

144. *Id.*

145. *Id.*

146. *Id.*

147. *Id.*

148. *Id.* at 907.

149. *Id.* at 906.

of the consent given.[150] The Fifth Circuit distinguished the "locked briefcase" hypothetical in *Jimeno* by stating that the rule for a search of the attic, a compartment, is not the same as for a locked container case.[151] In *Ibarra*, the Fifth Circuit believed the question presented was simply whether a barrier could be forcibly removed from an existing passageway during a consent search.[152] Thus, absent evidence of the police altering the frame of the house, the search was permissible.[153] Presumably, the *Ibarra* court would allow an entire house to be taken apart if no structural damage would be done.

One officer in *Ibarra* testified that the consent given would authorize bringing in fire axes to chop open the walls, disemboweling the appliances to look at the minutia of the air conditioner, stove or refrigerator, and bringing in a backhoe to dig up the backyard or the foundation of the house.[154] This statement indicates the practical problems the police will face in interpreting and applying *Jimeno's* objective reasonableness "test." Granted, the overly-zealous officer's subjective beliefs are not pivotal under *Jimeno*, but how is any officer at the scene of a crime or suspicious of crime able to accurately gauge the scope of consent a typical reasonable person would believe had been given?

These cases demonstrate the difficulties both the courts and the police face in applying the ad hoc "rule" developed in *Jimeno*. Since numerous situations will arise that fall somewhere between opening a folded paper bag and prying open a locked briefcase, a more explicit rule is needed. For example, would the search in *Jimeno* have been reasonable if the brown bag had been taped rather than simply folded? Where would the boundaries of the search lie if there were no expressed object? Should the principles of an automobile consent search apply to a consent search of an office or a home? These are difficult questions with no clear answers under *Jimeno*.

C. Proposed Alternatives

Perhaps a more palatable and workable rule would be to break the types of consent searches into three categories: (1) a general consent search, (2) a consent search with an expressed object, and (3) a consent search with an expressed object that focuses on containers. Under this approach, the specificity of the request determines the permissible scope of the search.

Therefore, an officer who simply asks "may I search your car" would only be allowed to make minimal intrusions into the interior of the car,

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150. *Id.* at 906-07.
151. *Id.* at 907.
152. *Id.*
153. *Id.* at 906.
154. *Id.* at 909.

because no permission has been given for a detailed exploratory search. No separate acts of entry or opening would be allowed. Furthermore, if the officer expresses an object for the search such as "may I search your car for narcotics" the officer could search the passenger compartment and trunk of the car and could look through open containers that might reasonably contain the object of the search, but could not open locked or closed containers. Finally, if the officer expresses an object and asks to search containers, such as "may I search your car and your luggage for narcotics," the officer would be allowed to search the car and the luggage if no physical damage resulted from the search.

A Missouri case and variations are useful in comparing and contrasting the *Jimeno* approach with the proposed alternatives. In *State v. Hyland*,[155] a state highway patrolman stopped a car for speeding.[156] During the stop, the officer became suspicious[157] and asked the driver "if it would be okay if I looked in the trunk" to which the driver agreed.[158] Once the suspect had unlocked and opened the trunk, the patrolman saw a suitcase sealed with gray duct tape, so the trooper asked the driver if he could "see inside [the suitcase] to verify if there were clothes inside."[159] After the driver had opened the suitcase, the trooper felt through the clothing and discovered a package containing marijuana.[160] The driver, after being charged with possession of marijuana, moved to suppress the evidence.[161] The Circuit Court of Greene County denied the motion, finding that the driver had voluntarily opened the suitcase.[162] Although the conversation alone would not have authorized the patrolman's search of the suitcase, the conversation plus the driver's conduct—holding the suitcase open—indicated the driver's implied consent to the search.[163] The Southern District of the Missouri Court of Appeals, in an "excruciatingly close" decision, reversed the trial court and suppressed the marijuana due to insufficient evidence that the driver's permission "to look

155. State v. Hyland, No. 17131, 1991 WL 238599 (Mo. Ct. App. Nov. 18, 1991). *Hyland* was transferred to the Missouri Supreme Court, and oral arguments were heard on September 3, 1992.

156. *Id.* at *1.

157. The driver became "nervous and uneasy" with the trooper's questioning and had no belongings in the car which the officer found odd because the driver said he was moving across the country. *Id.*

158. *Id.*

159. *Id.* at *2.

160. *Id.*

161. *Id.* at *1. The driver was found guilty after a bench trial and sentenced to 1 year in prison. *Id.*

162. *Id.* at *3.

163. *Id.* at *3.

inside" the suitcase carried with it "permission to reach inside, grope beneath the surface clothing, and remove anything that felt suspicious."[164] The majority in *Hyland* limited the grant of permission to "look inside" the suitcase to a simple visual inspection without a more intrusive search.[165] In addition, the *Hyland* majority believed *Jimeno* was not applicable because there had been no request to search and there was no expressed object for the search.[166]

It is possible to interpret *Hyland* as a consent search case with an expressed object. Courts have allowed the request "to look in" when combined with additional assistance by the consenter to be construed as a consent to search.[167] The officer's request to verify that the suitcase contained clothing can be construed as expressing the object of the search.[168] If so, under *Jimeno* it is likely that the reasonable person would conclude that permission had been granted to search through the clothing, given the minimal additional intrusion required to make sure that clothing was all that the suitcase contained. Finally, some courts, perhaps improperly,[169] would draw support from the language in *United States v. Ross*,[170] stating that "a lawful search of fixed premises generally extends to the entire area in which the object of the 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."[171] In this case, the result under *Jimeno* would likely be the same as that reached under the third (expressed object, specific container) proposed alternative. The result would depend on the reviewing court's determination of what a reasonable person would believe.

Will the result almost always be the same? It will not unless the officer is explicit in requesting the consent. For example, what if in *Hyland* the request had simply been "may I search your car?" May the closed suitcase in the trunk be lawfully searched? Under *Jimeno*, the scope of the search would be measured by the objective reasonableness standard, but since no express object has been given, the officer on the scene must make his best estimate

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164. *Id.* at *6-7.

165. *Id.* at *7.

166. *Id.*

167. *See* United States v. Berke, 930 F.2d 1219, 1222 (7th Cir. 1991); United States v. Chaidez, 906 F.2d 377, 383 (8th Cir. 1990).

168. Problems may arise, however, if the officer uses deception to obtain the consent to search. *See* Alexander v. United States, 390 F.2d 101 (5th Cir. 1968); People v. Jefferson, 350 N.Y.S.2d 3 (1973).

169. It is questionable whether the scope of the automobile exception in *Ross* is equivalent to the scope of consent searches.

170. 456 U.S. 798 (1982).

171. *Id.* at 820-21.

of what consent a reasonable person would believe had been given and hope the estimate is right. The real answer may be that only the state's highest appellate court will know. Under the first proposed alternative, the general consent would only allow a minimal intrusion. The suitcase could not be searched. No moving of packages or separate acts of entry would be permitted.

What if the officer had asked "may I search your car for drugs?" May the closed suitcase in the trunk be searched here? This is similar to *Jimeno* since there is an expressed object for the search, but different because in *Hyland* the suitcase had been taped shut, unlike the folded paper bag in *Jimeno*. Is this example more like the facts in *Jimeno* or the locked briefcase hypothetical? Perhaps this is another case to put on the docket of the state's highest appellate court. Under the second proposed alternative, the closed suitcase could not be searched. Only open containers can be searched unless specific consent is obtained. Despite suggestions by some law enforcement officials[172] that the police should not be required to engage in "mother, may I" games, the proposed alternative approach would best protect the individual's privacy rights, encourage well-informed consent searches, and provide guidance to the police and courts, perhaps avoiding arbitrary decisions.

At a minimum, common analytical errors should be avoided in deciding consent cases. First, *Jimeno* did not construe the scope of a consent search to be automatically equivalent to the scope of a search authorized by a warrant. Though there is language in *Schneckloth* indicating that "[t]he actual conduct of a [consent] search may be precisely the same as if the police had obtained a warrant,"[173] under *Jimeno* the scope is only equivalent to a search authorized by a warrant if an objective third party would believe it is so intended.[174] For example, although a search warrant can authorize breaking into locked containers, *Jimeno* indicated that this would not be permitted with consent searches if an objective third party would consider it unreasonable.[175] As such, the permissible scope might be more intrusive than permitted by a search warrant or it might be less invasive. If the principles of consent searches and warrant-based searches are the same, then arguably

172. The Attorney General of Florida stated in his brief, "the court has turned the search of the vehicle for narcotics into a game of 'Mother may I' which the police would have to ask for new permission to search each item that could reasonably contain the illegal drugs." Petitioner's Brief of the Merits on Writ of Certiorari to the Supreme Court of Florida, State v. Jimeno, 564 So. 2d 1083 (Fla. 1990) (No. 90-622), *rev'd*, 111 S. Ct. 1801 (1991) (available on LEXIS).

173. Schneckloth v. Bustamonte, 412 U.S. 218, 243 (1973).

174. *Jimeno*, 111 S. Ct. at 1803.

175. *Id.*

under the United States and Missouri Constitutions the description of the consent search requested should also "particularly describe" or describe "as nearly as may be" the item or area to be searched.[176] Secondly, the scope of all consent searches should not be equated to the scope of an automobile search. Unlike the automobile exception, no probable cause is required for a consent search, and the exigency and reduced privacy rationales supporting the automobile exception will not apply to all consent searches. Finally, considerations such as the degree of suspicion, the consenter's knowledge of the right to refuse to consent,[177] and the factors used in determining whether a reasonable expectation of privacy exists should be carefully evaluated when analyzing the scope of the consent given.

VI. CONCLUSION

The state should not be allowed to intrude on an individual's Fourth Amendment rights without substantial justification. The scourge of illegal drug sales and usage has claimed too many innocent victims already. We must not let the next casualty in the "war on drugs" be our right to be free from unreasonable searches and seizures. The end desired—stopping illegal drug use and drug trafficking—does not justify using all means to accomplish that objective. In *Florida v. Jimeno*, the Supreme Court established an objective reasonableness standard to govern the scope of consent searches. The problem with this test is that it provides little practical guidance to either the courts or law enforcement officials. As such, ad hoc decisions often are made producing arbitrary results. A better solution for suspects, law enforcement officials, and our courts is to minimize discretion by developing more explicit standards to regulate consent searches.

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176. *See* U.S. CONST. amend IV; MO. CONST. art. I, § 15.
177. *Jimeno*, 111 S. Ct. at 1803.