The Future of Vehicle Consent Searches in Minnesota: State V. George, 557 N.W.2D 575 (Minn. 1997)

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I. INTRODUCTION

In its 1997 decision, State v. George, the Minnesota Supreme Court intended to send the message that it is moving beyond the United States Supreme Court's totality of the circumstances test to heightened appellate review of consent searches in an attempt to ensure the voluntariness of consent, particularly in traffic stop situations. The question is whether practitioners are receiving the message. It is in the best interests of prosecutors and law enforcement officers to consider the direction the court is heading in the area of consent searches.

1. 557 N.W.2d 575 (Minn. 1997).

1155
This Note analyzes the future of consent searches in Minnesota. Part II of this Note examines the development of consent searches as an exception to the Fourth Amendment warrant requirement and as an invaluable tool in law enforcement. It also reviews how the United States Supreme Court views consent searches, how other states approach consent searches in light of the Supreme Court's views, and how the Minnesota Supreme Court dealt with consent searches prior to its decision in George. Part III then closely examines the facts and the majority and concurring opinions in George. In Part IV, this Note highlights the currently unclear standard for consent searches. Part IV then argues that George indicates that in the near future the Minnesota Supreme Court is likely to raise the requirements for valid consent searches and advocates that the best option for the court is to require that the subjects of warrantless searches be warned about their right to refuse consent.

II. BACKGROUND

A. Consent Search as an Exception to the Fourth Amendment

The Fourth Amendment of the United States Constitution guarantees that:

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. 3

The Minnesota State Constitution contains an identical provision. 4 The United States Constitution's Fourth Amendment prohibition against unreasonable searches and seizures applies to the states through the Fourteenth Amendment. 5

The Fourth Amendment only protects persons who have a legitimate expectation of privacy in the property being searched or seized. 6

3. U.S. CONST. amend. IV.
4. See MINN. CONST. art. 1, 10.
5. See Wolf v. Colorado, 338 U.S. 25, 27-28 (1949) ("The security of one's privacy against arbitrary intrusion by the police, which is at the core of the Fourth Amendment, is basic to a free society. It is therefore implicit in 'the concept of ordered liberty' and as such enforceable against the States through the Due Process Clause.").
6. See Katz v. United States, 389 U.S. 347 (1967) (reversing a defendant's conviction where the government electronically recorded defendant's telephone conversations because the defendant had a legitimate expectation of privacy and therefore defendant's right against unreasonable search and seizure was violated).
fore, when determining whether there has been a search or seizure, the
initial issues to considered are whether the defendant has a protected ex-
pection of privacy and whether that privacy has been invaded. Courts
consider the surrounding circumstances in determining the reasonableness of alleged expectations of privacy. After the initial determination of
a reasonable expectation of privacy, there is a strong presumption that a
warrant is required for searches or seizures.

Despite this presumption, there is a group of well-established exceptions
to the warrant requirement. "By and large, the majority of the articulated exceptions to the warrant requirement are based upon the conclusion that under certain circumstances, the exigencies of a situation make immediate search and seizure without the benefit of a warrant imperative." The exceptions to the warrant requirement include stop and frisk searches, plain view searches, motor vehicle searches, searches incident to arrest, and searches under exigent circumstances. Consent

7. See id. See also State v. Van Alstine, 305 Minn. 276, 284, 232 N.W.2d 899, 904 (1975) (holding that where a defendant wrote a note in jail and gave it to another inmate to pass to yet another inmate, the defendant had no expectation of privacy because surveillance is expected in jail).
8. See Katz, 389 U.S. at 352-55; Van Alstine, 305 Minn. at 284-85, 232 N.W.2d at 904-05.
9. See Katz, 389 U.S. at 357.
10. See infra notes 12-16 and accompanying text.
12. See Terry v. Ohio, 392 U.S. 1 (1968) (holding that a revolver seized from defendant was admissible evidence where officer grasped defendant and patted down the outer surfaces of defendant’s clothing because the search was reasonable to protect officer safety); see also State v. Gilchrist, 299 N.W.2d 913 (Minn. 1980) (holding an officer’s search beneath the front seat of defendant’s car was reasonable to protect officer safety and was therefore valid as an exception to the probable cause requirement).
13. See Harris v. United States, 390 U.S. 234 (1968) (holding that seizure of automobile registration card was valid); see also State v. Shevchuk, 291 Minn. 365, 191 N.W.2d 557 (1971) (holding that search of defendant’s car was constitutionally permissible where law enforcement officer stopped a vehicle because it was speeding, looked through the vehicle’s open door, and observed a firearm in plain sight).
14. See Carroll v. United States, 267 U.S. 132 (1925) (holding that the search of vehicle for contraband liquor was valid); see also State v. Gutberlet, 346 N.W.2d 639, 644 (Minn. 1984) (holding that search of defendant’s car was constitutionally permissible where police found drugs in his pocket and in his car sitting in plain view).
15. See United States v. Robinson, 414 U.S. 218 (1973) ("[I]n the case of lawful custodial arrest a full search of the person is not only a valid exception to the warrant requirement of the Fourth Amendment, but is also a 'reasonable' search
searches are among this limited group.  

**B. Role of Consent Searches in Law Enforcement**

Consent searches have “obvious utility” for law enforcement, and they are often relied upon by law enforcement officers as a means of investigating suspected criminal conduct. Because there is no probable cause or warrant requirement, consent searches are an attractive alternative as a matter of administrative convenience, especially in cases where the law enforcement officer has to travel some distance to obtain a warrant.

Commentators agree that the majority of situations in which consent searches are utilized involve situations where “probable cause is lacking and thus no search warrant could be obtained.” Additionally, assuming the subject of the search does not place limitations on the consent given, a search based on consent may be broader in scope than a search conducted pursuant to a search warrant. Another benefit of warrantless

under the Fourth Amendment.”; see also State v. Falgren, 176 Minn. 346, 223 N.W. 455 (1929) (holding warrantless seizure of gambling machines was valid where machines were being used and in plain view of officer).

16. See Coolidge v. New Hampshire, 403 U.S. 443 (1971) (holding that the police were not justified in warrantless search where defendant had no access to evidence which was guarded at time of the search); see also State v. Mollberg, 310 Minn. 376, 246 N.W.2d 463 (1976) (holding that warrantless seizure of contraband in plain view was proper where the whereabouts of the defendant were unknown, the closest municipality was miles away from the location, and there was no guarantee that a magistrate would be available).

17. See discussion infra Parts II.C to II.E on consent searches as an exception to the warrant requirement.


20. See id. (citing LAWRENCE P. TIFFANY, ET. AL., DETECTION OF CRIME 159 (1967)).

21. See LAFAVE supra note 19, at 611. Consent searches allow for possibly valuable evidence to be uncovered, where it otherwise might not be discovered. See Lochhead, supra note 11, at 777 (citing Schneckloth, 412 U.S. at 227). “In situations where the police have some evidence of illicit activity, but lack probable cause to arrest or search, a search authorized by a valid consent may be the only means of obtaining important and reliable evidence.” Schneckloth, 412 U.S. at 227.

22. See generally LAFAVE, supra note 19, at 624 (explaining that when law enforcement officers rely on consent as a basis for a search, “they have no more authority than they have apparently been given by the consent.”).

23. See id. at 611. Consent searches are “not subject to challenge simply because what was permitted was ‘a general exploratory search’ beyond what any
consent searches is that when a law enforcement officer finds no evidence of illegal conduct, the officer may focus his or her energy on other endeavors.

C. United States Supreme Court's Approach to Consent Searches

The United States Supreme Court first acknowledged the consent search as a valid exception to the Fourth Amendment in 1946. The Court has articulated two justifications for the consent search exception. First, consent searches promote efficient and effective law enforcement. Second, consent searches are a valid exception to the warrant requirement because it allows "citizens to choose whether or not they wish to exercise their constitutional rights."

In light of this policy, the Supreme Court has held that a search may be conducted in the absence of a warrant with the consent of the subject of the search. In its most important decision on consent searches, Schneckloth v. Bustamonte, the Supreme Court clarified the standards for admissibility of evidence seized as a result of these warrantless searches. The issue before the court in Schneckloth was whether valid consent requires proof that the suspect knew he had the right to refuse to consent.

Search warrant could authorize." Id. (quoting May v. State, 618 S.W.2d 333 (Tex. Crim. App. 1981)).

24. See Lochhead, supra note 11, at 777. It follows that in situations where the search fails to result in the seizure of incriminating evidence, "the amount of time that innocent suspects are detained are minimized." Id.

25. See Davis v. United States, 328 U.S. 582, 593-94 (1946) (holding that defendant's consent validated warrantless search and subsequent seizure of gas rationing coupons); see also Zap v. United States, 328 U.S. 624, 630 (1946) (holding that defendant who agreed to permit inspection of his records and accounts voluntarily waived his claim to privacy, and therefore, seizure of evidence did not violate defendant's Fourth Amendment rights).

26. See Barrio, supra note 18, at 219-21.

27. Id. at 219-20 (citing Schneckloth v. Bustamonte, 412 U.S. 218, 228 (1973)).


29. See id. at 219.

30. 412 U.S. 218 (1973). The case involved a consent search conducted pursuant to a traffic stop, where a friend of the defendant's consented to a search of the car which was unsupported by either probable cause or a search warrant. Id. at 227-28.

31. Prior to Schneckloth, "there existed considerable doubt on the question of whether . . . a consent search is simply a matter of the consenting party having acted voluntarily, or whether instead it involves an actual waiver of Fourth Amendment rights." LAFAVE, supra note 19, at 612.

32. Schneckloth, 412 U.S. at 223. Although the law enforcement officers did
More specifically, given the Court's position that it is impracticable to prove knowledge, the issue in Schneckloth was whether law enforcement officers had to advise suspects of their Fourth Amendment rights prior to requesting consent to search.\(^33\)

The Schneckloth court held that no warning was required under the Fourth Amendment.\(^34\) In reaching this conclusion, the court divided its analysis into two parts.\(^35\) First, the Court interpreted the Fourth Amendment as prohibiting police from abusing their authority in attempting to gain a suspect's consent, but not requiring law enforcement officers to ensure that a suspect has intelligently waived his or her Fourth Amendment rights.\(^36\) Second, the court utilized its Fifth Amendment jurisprudence in determining the meaning of "voluntary consent."\(^37\) In doing so, the Court focused on two principles: one, Miranda warnings only apply to suspects in custody,\(^38\) and two, the due process totality of the circumstances test controls the admissibility of incriminating statements given in response to non-custodial questioning.\(^39\) Additionally, the Court noted that a requirement that law enforcement give all suspects Fourth Amendment warnings before eliciting consent to search would impose too great a burden on law enforcement.

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33. See Barrio, supra note 18, at 231 (citing Schneckloth, 412 U.S. at 230).
34. See Schneckloth, 412 U.S. at 249.
35. See Barrio, supra note 18, at 231.
37. See id. at 247. During the interval between Brown v. Mississippi, 297 U.S. 278 (1936) and Escobedo v. Illinois, 378 U.S. 478 (1964), the Court considered about 30 cases where it was required to make a determination as to whether a confession was made voluntarily. In many of these cases the court based its analysis on the Fifth Amendment. See William N. Mehlhaf, Note, A Valid Consent to Search Does Not Require Knowledge of the Constitutionally Protected Right to Refuse - Schneckloth v. Bustamonte, 412 U.S. 218 (1973), 9 GONZ. L. REV. 845, 847-48 n.13 (1974).
38. Schneckloth, 412 U.S. at 247. The court found that most consent searches occur during noncustodial police-citizen encounters, which normally take place on the highway or in a subject's home or workplace. See id. The Court focused on the difference between the informality of these circumstances and custodial interrogations. See id. at 232. The Court noted that Fourth Amendment Miranda warnings are designed to dispel psychological coercion, and concluded that because psychological coercion cannot be presumed in consent search situations, any Fourth Amendment warnings would be unnecessary. See id. at 232 (citing Miranda v. Arizona, 384 U.S. 436, 477-78 (1966)).
39. See id. at 247.
40. See id. at 232. "Because 'the circumstances that prompt the initial request to search may develop quickly or be a logical extension of investigative police questioning,' the Court decided that Fourth Amendment warnings would interrupt the flow of questioning and frustrate investigative efforts." Barrio, supra note 18, at 232 (quoting Schneckloth, 412 U.S. at 232). Justice Marshall, in his dissenting opinion in Schneckloth, argued that there was nothing impractical in requiring law enforcement not to use force in gaining the suspect's consent, they did not advise him of his right to resist the search by refusing to give consent. Id. at 220-21.
The Schneckloth Court held that consent must be voluntary based on the totality of the circumstances. Under this totality approach, the following factors may be considered: age, experience, intelligence, education, knowledge of ability to refuse, length and conditions of detention, and threats of physical violence. Other factors may include claim of authority, show of force or coercive surroundings, refusal to enforcement to inform subjects that they have a right to refuse consent. He argued that Federal Bureau of Investigation Agents had been informing subjects of this right for some time and had suffered no drawbacks. See Schneckloth, 412 U.S. at 287 (Marshall, J., dissenting).

41. See Schneckloth, 412 U.S. at 226-27 (listing possible factors for trial courts to weigh).

42. See id. Because courts must analyze the facts of each case individually under the totality of the circumstances test, "it is impossible to derive a bright-line legal rule that would resolve the voluntariness issue in every case." Rebecca A. Stack, Note, Airport Drug Searches: Giving Content to the Concept of Free and Voluntary Consent, 77 Va. L. Rev. 183, 184 (1991).

43. See Schneckloth, 412 U.S. at 226; See, e.g., United States v. Mendenhall, 446 U.S. 544, 558 (1980) (holding that a 22 year old defendant with an eleventh-grade education was "plainly capable of knowing consent," even though she might have felt unusually threatened).

44. See, e.g., United States v. Bekoff, 529 F. Supp. 425, 431 (D. Nev. 1982) (holding that the defendant, a "young, attractive female who has had little contact with law enforcement officers," might not have felt free to walk away from three male officers), aff'd, 692 F.2d 765 (9th Cir. 1982).

45. See Schneckloth, 412 U.S. at 226.

46. See id.

47. See, e.g., Mendenhall, 446 U.S. at 558-59. "Although the Constitution does not require 'proof of knowledge if a right to refuse as the sine qua non of an effective consent to a search,' such knowledge was highly relevant to the determination that there had been consent." Id. (citing Schneckloth, 412 U.S. at 234). While most states consider knowledge of the right to refuse consent as a factor in determining the voluntariness of consent, two states—New Jersey and Mississippi—have made knowledge of the right to refuse consent a requirement. See infra notes 62-72 and accompanying text.

48. See, e.g., United States v. Jaramillo, 714 F. Supp. 323, 330 (N.D. Ill. 1989), aff'd, 891 F.2d 620 (7th Cir. 1989), cert. denied, 494 U.S. 1069 (1990) (holding that initial encounter between law enforcement and defendant was consensual because "the exit vestibule, which was open to the public, was not an intimidating or coercive environment").

49. See Schneckloth, 412 U.S. at 226.

50. See Michael E. Postma, Comment, State v. Arroyo: Consent Searches Following Illegal Police Conduct—Removing the Taint from the Fruit of the Poisonous Tree, 18 J. Contemp. L. 107, 109-10 (1992) (citing 3 W. LaFave, Search and Seizure § 8.2 (2d ed. 1987)).

51. See, e.g., Bumper v. North Carolina, 391 U.S. 543, 546-48 (1968) (holding that the search was not based on valid consent where defendant's grandmother allowed the officers to search her house because one of the officers said, "I have a search warrant to search your house.")

52. See, e.g., Harless v. Turner, 456 F.2d 1337, 1338 (10th Cir. 1972) (holding that the search was not based on valid consent where four or five officers went to
consent, confession or cooperation, denial of guilt, right to counsel, and deception. Additionally, the consent must be given freely, without coercion or threats.

D. State Court Approaches to Consent Searches

Nearly every state in the nation follows the Schneckloth totality test. the defendant's home and "routed defendant... out of bed" at 1:45 a.m.).

53. See, e.g., Edwards v. Arizona, 451 U.S. 477, 484 (1981) ("[W]hen an accused has invoked his right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to police-initiated custodial interrogation even if he has been advised of his rights.").

54. See, e.g., United States v. Boukater, 409 F.2d 537 (5th Cir. 1969) (noting that the chances of a consent being found voluntary are enhanced if the consent is preceded by a valid confession).

55. See, e.g., Higgins v. United States, 209 F.2d 819 (D.C. Cir. 1954) (noting that consent is inherently voluntary if it was given by a person denying his guilt).

56. See, e.g., United States v. Fisher, 329 F. Supp. 650, 654 (D. Minn. 1971) (holding that defendant who had asked for counsel was entitled to advice of counsel as to his legal rights and what would be required to obtain a search warrant).

57. See, e.g., On Lee v. United States, 343 U.S. 747 (1952) (stating that defendant's incriminating statements to undercover agent were admissible evidence).


Indeed, only two states have deviated from the *Schneckloth* totality test, requiring stricter standards in consent search cases. In *State v. Johnson*, the New Jersey Supreme Court elected to impose a higher standard than *Schneckloth*, based on the New Jersey Constitution. Similarly, in *Penick v. State*, the Mississippi Supreme Court added to the requirements set forth by *Schneckloth*. Both the *Penick* and *Johnson* courts decided that the extra protection needed in consent search situations was that the subject of the search have the knowledge of the right to refuse consent.

In *Schneckloth*, the Supreme Court expressly rejected the proposition that the Fourth Amendment to the United States Constitution requires that a law enforcement officer inform the subject of the search that he or she has the right to refuse to consent to the search. The majority of other states have expressly followed this holding. Despite this, in *Johnson*, the New Jersey Supreme Court held that "where the State seeks to justify a search on the basis of consent it has the burden of showing that the consent was voluntary, an essential element of which is knowledge of the right to refuse consent."
Like the New Jersey Supreme Court in Johnson, the Mississippi Supreme Court in Penick also held that a subject must be informed of the right to refuse:

We accord to the U.S. Supreme Court the utmost respect in its interpretation of the U.S. Constitution. We must, however, reserve for this Court the sole and absolute right to make the final interpretation of our state Constitution and, while of great persuasion, we will not concede that simply because the U.S. Supreme Court may interpret a U.S. Constitutional provision that we must give the same interpretation to essentially the same words in a provision of our state Constitution. 70

The Mississippi Supreme Court further explained that consent is only valid where there was a knowledgeable and voluntary waiver of the subject’s constitutional right not to be searched. 71 According to the Penick court, in order for consent to knowledgeable the subject must know of his or her right to refuse consent. 72

Although New Jersey and Mississippi are the only states to require that the subject of the search must have knowledge of the right to refuse consent, 73 several states have considered notification of this right via written consent forms. 74 However, these states have considered the use of written consent forms to be only one of the factors to weigh in consideration of the totality of the circumstances. 75

None of the states have held that consent searches in traffic stop situations require any more attention than other consent search situations. 76 Moreover, no other jurisdiction has required that law enforcement attempts in obtaining consent need to be tape recorded. 77 In sum,

70. Penick v. State, 440 So. 2d 547, 551 (Miss. 1983).
71. See id. at 550-51.
72. See id. at 550.
73. See supra notes 62-72 and accompanying text.
75. See supra notes 68 & 74 and authority cited therein.
76. But see Jones v. State, 607 So. 2d 23, 28 (Miss. 1991). Mississippi, which requires that consent be “voluntary” as well as “knowledgeable” in that “the defendant knows that he/she has a right to refuse” consent, has expanded its knowledge requirement to all consent search situations, including traffic stops. See id.
77. At the time the Minnesota Supreme Court held that all custodial interrogations must be tape recorded, only one other state had done so. See Stephan v. State, 711 P.2d 1164, 1164 (Alaska 1985) (requiring electronic recording of custo-
only two of the fifty states, in addition to Minnesota,78 have expanded a defendant’s rights in consent search situations.79

E. Minnesota Case Law on Consent Searches Prior to 1997

The Minnesota Supreme Court first acknowledged no search warrant is needed when the subject consents to a search in its 1948 decision, City of St. Paul v. Stovall.80 In this early case, the court noted the importance of upholding the Fourth Amendment,81 but also recognized the necessity of consent searches:

The police courts of our large cities are often daily confronted with large numbers of petty offenders, and it would be intolerable to require that their proceedings be in form those prescribed for higher courts and higher offenses. Their proceedings must of necessity be more or less summary and informal, and so long as the substantial or constitutional rights of persons charged are not infringed or violated, convictions cannot be reversed for mere irregularity.82

In State v. Armstrong,83 the court clearly established that the burden of admitting evidence gained as a result of a consent search is on the State.84 “The prosecutor has the burden of proving the consent was freely and voluntarily given.”85 The court explained that “[i]t is not enough that the suspect yields to color of police authority. Had the officer’s request been accompanied by force or threat of force, obviously the articles defendant revealed would not be admissible in evidence.”86

dial interrogations conducted in places of detention under Alaska Constitution’s due process clause).

78. In George, the Minnesota Supreme Court has increased the level of review of consent search cases. See infra note 149 and accompanying text. Additionally, the concurrence in George warns practitioners of other requirements to come. See infra note 158 and accompanying text.

79. See supra notes 62-72 and accompanying text.

80. 225 Minn. 309, 312, 30 N.W.2d 638, 641 (1948) (holding that seized evidence was admissible where “defendant waived any rights which he might have had when he permitted the officers to enter his home and ‘look around’ without a search warrant, as he admits himself that he did not try to stop them in any way”).

81. See Stovall, 225 Minn. at 313, 30 N.W.2d at 641. “We do not approve or condone any laxity on the part of public officers in making arrests or searches without warrants when the facts and circumstances make it possible for them to be equipped with the proper legal documents.” Id.

82. Id. (citing State v. Olson, 115 Minn. 153, 155, 131 N.W. 1084, 1085 (1911)).

83. 292 Minn. 471, 194 N.W.2d 293 (1972).

84. See Armstrong, 292 Minn. at 473, 194 N.W.2d at 294.

85. Id. (citing State v. Mitchell, 285 Minn. 153, 158, 172 N.W.2d 66, 69 (1969)).

86. Id. (citation omitted). The court considered the entire picture in determining that this was a voluntary consent. See id. “Here, however, by defendant’s
In *State v. O'Neill*, the Minnesota Supreme Court first adopted the *Schneckloth* totality of the circumstances test. The *O'Neill* court held that a "warrantless search may be conducted when the subject of the search voluntarily consents to it, the voluntariness to be determined from the totality of the surrounding circumstances." In weighing the totality of the circumstances, the court found that a vehicle stop, which resulted in defendant's consent to search the car, was valid.

When the court next considered the consent search exception in a vehicle stop situation, in *State v. Hoven*, the court found that because the stop of the vehicle was improper, the consent was invalid as well. The court explained that the "defendant's consent to the vehicle search was 'come at by exploitation' of his illegal arrest," and therefore the defendant's conviction was set aside. In so holding, the court was again following the United States Supreme Court's position, this time from *Wong Sun v. United States*.

In *State v. Hanley*, the court established that consent to search may be given by a third party. In adopting the United States Supreme Court's test on third party consents, the *Hanley* court held that the State has the burden of proving that the third party who is giving consent must possess "common authority" over the subject of the search. The *Hanley* own testimony, although he was 'adamant and uncooperative,' he acquiesced with minimum protest. Under these circumstances, the trial court was justified in not suppressing the evidence." *Id.*

87. 299 Minn. 60, 216 N.W.2d 822 (1974).
88. *See O'Neill*, 299 Minn. at 69, 216 N.W.2d at 828. In *O'Neill*, after enforcement officers had stopped defendant's car and after defendant had gotten out of the car, defendant said, "If you are looking for the guns, they are in the car." *Id.* at 62, 216 N.W.2d at 824. Thus, the court concluded that the defendant consented to the search. *Id.* at 69, 216 N.W.2d at 828.
89. *Id.* at 69, 216 N.W.2d at 828 (citing *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973)).
90. *See O'Neill*, 299 Minn. at 70, 216 N.W.2d at 828.
91. 269 N.W.2d 849 (Minn. 1978).
92. *See Hoven*, 269 N.W.2d at 854. The defendant had been stopped for minor traffic violations, which the state conceded were "fatally deficient in their lack of a statement of probable cause." *Id.* at 851. Therefore, the arrest of defendant was illegal. *See id.* at 852. Additionally, the court found that even if the arrest had been legal, it would have invalidated the arrest as a pretext, which "cannot be used to justify an legitimate otherwise illegal searches and seizures." *Id.* at 852.
93. *Id.* at 854.
95. 363 N.W.2d 735 (Minn. 1985).
96. *See Hanley*, 363 N.W.2d at 738 (holding that defendant's girlfriend gave valid consent to search defendant's apartment).
98. *Hanley*, 363 N.W.2d at 738 (citing *Matlock*, 415 U.S. at 171). If common authority does not exist, the third party may possess "other sufficient relationship to the premises or effects sought to be inspected." *Id.*
court also adopted the Supreme Court's definition of "common authority" in relation to the right to give consent to search. 99 A third party has common authority over the property if there is "mutual use of the property by persons having joint access or control for most purposes.... 100 Since Hanley, the Minnesota Supreme Court has not deviated from the Supreme Court's direction in third party consents. 101

It was not until State v. Dezso, 102 however, that the Minnesota Supreme Court performed an independent, in-depth analysis into consent searches. 103 In Dezso, the court considered consent to search in a traffic stop situation and made clear that "[f]ailure to object [to a request for consent] is not the same as consent," and that "[c]onsent must be received, not extracted." 104 The court tried to balance the need for preserving the safety of the community and preserving individuals' liberty interests. 105 In doing so, the court examined whether the defendant voluntarily consented based upon the totality of the circumstances, "including the nature of the encounter, the kind of person the defendant [was], and

100. Id. at 739 (quoting Matlock, 415 U.S. at 171 n.7). Additionally, it must be "reasonable to recognize that any of the co-habitants has the right to permit the inspection in his own right and that the others have assumed the risk that one of their number might permit the common area to be searched." Id.
101. See State v. Hummel, 483 N.W.2d 68, 73 (Minn. 1992) (holding that defendant's parents had common authority over defendant's home and could therefore give third party consent to search home).
102. 512 N.W.2d 877 (Minn. 1994).
103. In past cases where the Minnesota Supreme Court has considered consent searches, the court gave the issue a brief look, doing no more analysis than required by Schneckloth. See, e.g., State v. Armstrong, 292 Minn. 471, 473, 194 N.W.2d 293, 294 (1972) (holding that defendant consented to search of his pockets because defendant "acquiesced with minimum protest"); State v. Alayon, 459 N.W.2d 325, 330-31 (Minn. 1990) (holding that defendant consented to search of his home where officers had put away their guns, defendant was not handcuffed, and defendant cooperated in the search).
104. Dezso, 512 N.W.2d at 880. "Mere acquiescence on a claim of police authority or submission in the face of a show of force is, of course, not enough." Id. (citing State v. Howard, 373 N.W.2d 596, 599 (Minn. 1985)).
105. See Dezso, 512 N.W.2d at 880. "The police must be able to seek the cooperation and ask questions of individuals if the safety and security of the community is to be preserved. At the same time, individuals have a liberty interest, constitutionally protected, against unreasonable prying into their personal affairs." Id. (citing Schneckloth, 412 U.S. at 224-25). The Dezso court went on to explain:

So it is that an officer has a right to ask to search and an individual has a right to say no. Questioning by the police, for the innocent as well as the criminally implicated, even under benign circumstances, can be an intimidating experience; but reasonable persons understand that this is part of the "accommodation of the complex values" involved.

Id.
what was said and how it was said."\(^{106}\)

Beginning its analysis of the circumstances, the court noted that "[i]t would seem there was apparent consent."\(^{107}\) Despite this apparent consent, the court continued its analysis. The court considered the surroundings of the stop, including that it occurred at nighttime, on a highway, and in a squad car.\(^{108}\) The court also considered the nature of the request for consent: the officer, in a "respectful and matter-of-fact" tone, asked if he could "take a look" at defendant's wallet two times and asked about a paper in defendant's hand two times.\(^{109}\) Additionally, the court explained how the officer leaned towards the defendant, trying to look in the defendant's wallet.\(^{110}\) The Dezso court found that the state had not sustained its burden of proof that there was voluntary consent.\(^{111}\)

### III. THE STATE V. GEORGE DECISION

#### A. The Facts

Thomas Otto George was driving a motorcycle on Interstate 90,\(^{112}\) on

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106. *Id.* at 880. This "totality of the circumstances" test is what the Supreme Court has outlined as the correct test. *[See supra* notes 41-58 and accompanying text. Additionally, the vast majority of the states follow this standard as well. *[See supra* note 59 and accompanying text.]

107. *Dezso*, 512 N.W.2d at 880. The trial court did not find the defendant's testimony convincing that the officer had grabbed the wallet from him. *[See id.* Instead, the trial court found that the defendant handed over the wallet without verbal protest. *[See id.*

108. *[See id.* The court also noted that there was "nothing unusual about the defendant," who was simply a driver stopped for speeding. *[Id.*

109. *Id.* at 880-81. The court noted the way in which the officer asked his questions. "The request to search the wallet ("Mind if I take a look?") was couched in terms of whether the defendant had any objection to the search." *[Id.* at 880.

110. *[See id.* The officer had turned on a video camera with audio capabilities prior to the conversation. *[See id.* at 878-79. However, the camera points forward and did not videotape the exchange. *[See id.* at 879.

111. *[See id.* at 881. In considering the totality of the circumstances, in which no one factor is controlling, the court explained why the defendant's consent was not voluntary:

The officer's questions, though couched in nonauthoritative language, were official and persistent, and were accompanied by the officer's body movement in leaning over towards the defendant seated next to him. There is no indication that defendant was aware that he could refuse to let the officer see the wallet. From the nature of the questions asked and the answers given, it is not at all clear that defendant was voluntarily consenting to a search of his wallet.

*Id.*

112. *[See State v. George*, 557 N.W.2d 575, 576 (Minn. 1997). The stop occurred on the stretch of Interstate 90 which is in Nobles County, Minnesota. *[See id.*
his way to a motorcycle rally in Sturgis, South Dakota. While on routine patrol, Minnesota State Trooper Eric Vaselaar stopped George’s motorcycle because of its lighting configuration. After some discussion about why George had been stopped, the trooper issued George two warnings for traffic violations.

The trooper then inquired whether George “had any objections if [the trooper] wanted to take a couple of moments and take a look through the bike looking for the things [they’d] talked about,” such as weapons, alcohol, or controlled substances. The parties dispute George’s answer to this question. Trooper Vaselaar testified that George said that he had “no objections” to the search of his bike, whereas George testified that he responded with a “yes,” adding that the search would be “a waste of time.” George explained that Vaselaar stated that it was his time and he was “gonna search it anyway.” According to George’s testimony, Vaselaar did not explain that George had an option to deny the search. Additionally, George testified that he did not feel that he had given consent to the search of his motorcycle.

Pursuant to the search, Vaselaar uncovered a box of .22 magnum ammunition, a .22 magnum revolver for which George did not have a permit, three homemade cigarettes which smelled of marijuana, a nine

113. See id. The Sturgis Motorcycle rally is an annual motorcycle rally that takes place in Sturgis, South Dakota. It attracts motorcyclists from all over the country. See Ann Grauvogl, Telling Stories of the Hills, STAR TRIB. (Mpls.), Oct. 12, 1997, at 8G.

114. See George, 557 N.W.2d at 576. Trooper Vaselaar testified that the motorcycle appeared to have three headlights, a configuration which Vaselaar believed was in violation of Minnesota traffic laws. See id.

115. See id. After stopping the motorcycle, Vaselaar told George that he had been pulled over because of the lighting configuration on his motorcycle, and asked for George’s driver’s license and that George sit in Vaselaar’s squad car. See id. at 576-77. Vaselaar also requested that George remove the folding knife he had attached to his belt, and leave it and his jacket on his motorcycle. See id. at 577. While in the squad car, and after Vaselaar asked, George explained that his address was incorrect on his license. See id.

116. See id. at 577. Vaselaar issued warnings “for not having the correct address on his license and for the motorcycle’s lighting configuration.” Id.

117. Id. (alterations in original). Prior to this question, the trooper had inquired whether George had any weapons, open containers of alcohol, or controlled substances in his possession; George replied that he did not. See id.

118. See George, 557 N.W.2d at 577. This testimony occurred at an omnibus hearing. See id.

119. Id. at 577.

120. Id.

121. Id.

122. See id.

123. See id.

124. See George, 557 N.W.2d at 577. The ammunition was found in a plastic bag, inside George’s jacket. See id. After finding this, Vaselaar asked George
millimeter handgun and ammunition, a pipe, and a canister containing
marijuana. George contested the basis for the stop and the validity of
the search, seeking suppression of the items seized. The trial court de-
nied this motion and found that the stop was valid, as was the search.
George pleaded guilty to illegal possession of a handgun, and preserved
the search and seizure issues for appeal. The court of appeals held that
both the stop and the search were valid.

B. The Majority’s Decision

With Justice Gardebring writing for the majority, the supreme court
reversed the decisions of both lower courts and vacated George’s convic-
tion. The court divided its decision by the two main issues in the case,
the basis for the stop and the consent search.

On the issue of the stop, the court held that “Vaselaar did not have
an objective legal basis for suspecting that the [sic] George was driving his
motorcycle in violation of any motor vehicle law.” The court focused its
analysis on the fact that George’s front lights were standard, factory-
where the gun was located. See id. George replied that he had forgotten about the
gun and that it was also in his jacket. See id. When Vaselaar learned that George
did not have a permit for the weapon, Vaselaar arrested him. See id.

125. See id. After George was arrested, Vaselaar searched him incident to ar-
rest, at which time he found a cigarette case containing three homemade ciga-
rettes, which smelled of marijuana. See id. Vaselaar once again asked George if he
had any weapons or controlled substances in his possession. See id. This time,
George admitted that the nine millimeter handgun, ammunition, a pipe, and can-
ister containing marijuana were in his motorcycle’s travel pack, which Vaselaar re-
trieved. See id.

126. See id. George claimed that there was simply no probable cause for the
traffic stop because Vaselaar knew the headlight configuration was not illegal and
also that Vaselaar’s asserted “objective legal basis’ for the stop . . . was only a pre-
text for his real intention of obtaining consent to search for evidence of other ille-
gal activity.” Id.

127. See id. Noting that it was aware that the state patrol had initiated a pro-
gram targeting motorcycle riders on their way to or from the Sturgis Rally, the trial
court said that the stop was “no doubt . . . a pretext stop in that the officer’s inten-
tion was to seek a consensual search of [George’s] motorcycle and belongings.”
Id. Despite this, the trial court concluded that the stop was valid, based on
Vaselaar’s belief that the lighting configuration violated Minnesota Statutes sec-
tion 169.49. See George, 557 N.W.2d at 577-78.

128. See id. at 576. George pleaded guilty to illegal possession of a handgun
pursuant to Minnesota Statutes section 624.714. See George, 557 N.W.2d at 576.
George preserved his omnibus issues pursuant to State v. Lothenbach, 296 N.W.2d
854 (Minn. 1980). See George, 557 N.W.2d at 576.

129. See id. at 578.

130. See id. at 575.

131. See id.

132. Id. at 578.
installed equipment, the configuration of which did not violate any law. The court explained that a law enforcement officer must have a "particularized and objective basis" for suspecting criminal activity. Although not much is required for an objective basis to justify a valid traffic stop, it must be more than a "mere hunch."

Vaselaar testified that he believed George's lighting configuration on his motorcycle was in violation of the traffic code, and therefore, effectuated a traffic stop. But because the lighting configuration in question was in fact not a violation of the traffic code, and the trooper observed no other laws being violated, the court held that the basis for the stop was invalid.

After holding that the stop was invalid for lack of an objective legal basis, the court specifically noted that this holding alone "would be sufficient to resolve this case." The court chose, however, to address the consent search issue "in order to provide further guidance to the trial courts in considering such matters." The court began its analysis of the consent search by briefly noting that consent is a lawful means of a search, so long as the consent is given voluntarily.

The court proceeded to consider the problems inherent in establishing the voluntariness of the consent obtained. The court noted that it had "serious concerns" about the "pretext problem" of traffic stops for two reasons. First, the court emphasized that "very few drivers can trav-

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133. See id. at 578-79. Vaselaar thought that George had more than two headlights on his motorcycle, a configuration which is in violation of Minnesota Statutes section 169.49. See George, 557 N.W.2d at 578. Actually, the motorcycle had one headlight and two auxiliary passing lamps, which is a valid lighting configuration pursuant to Minnesota Rule 7425.0110, subdivisions 6, 7, 33. See George, 557 N.W.2d at 578.

134. Id. (citing Berge v. Commissioner of Pub. Safety, 374 N.W.2d 730, 732 (Minn. 1985)).

135. See George, 557 N.W.2d at 578 (citing State v. Johnson, 444 N.W.2d 824, 825-25 (Minn. 1989)).

136. See George, 557 N.W.2d at 578.

137. See id.

138. Id. at 579.

139. Id. This statement and choice by the court is significant on its own; it demonstrates the importance the court finds in this issue.

140. See id. at 579.

141. Id. (citing State v. Dezso, 512 N.W.2d 877, 880 (Minn. 1994)).

142. See infra notes 143 & 144 and accompanying text.

143. George, 557 N.W.2d at 579. The court notes that the pretext problem arises from the United States Supreme Court's recent holding that "the constitutional reasonableness of a traffic stop does not turn on the actual motivations of the officer involved." Id. (citing Whren v. United States, 116 S. Ct. 1769, 1774 (1996)).
In George, the majority announced that it would apply a careful review of the totality of the circumstances in determining whether the defendant voluntarily consented to the search. The court concluded that George was unaware of his right to refuse to give consent. The court also noted the presence of two officers at the scene for a minor traffic offense. These circumstances led to the court's conclusion that "[e]quivocation as to consent in such intimidating circumstances is not enough to meet the constitutional test of Schneckloth and Bumper." As a result of the court's careful review, George's conviction for possession of a handgun without a permit was vacated.

144. George, 557 N.W.2d at 579 (citing B. James George, Jr., Constitutional Limitations on Evidence in Criminal Cases 65 (1969 ed.)).
145. George, 557 N.W.2d at 579. The court further emphasizes that the members of such groups are "identified by factors that are totally impermissible as a basis for law enforcement activity." Id. at 579-80 (citing United States v. Scopo, 19 F.3d 777, 785-86 (2d Cir. 1994) (Newman, J., concurring)).
146. See George, 557 N.W.2d at 580 (citing Stack, supra note 42, at 202). "[T]he concept of voluntary consent ought to be deemed meaningless in the context of a so-called consensual encounter between police and a citizen at an airport or in the context of other police-citizen contacts, e.g., when an officer is effecting a routine traffic stop." George, 557 N.W.2d at 580.
147. Id.
148. Id.
149. See id. at 557 N.W.2d at 580-81. The Dezso court never announced a heightened review of the totality of the circumstances. Only in George did the court begin to analyze the circumstances with a careful review. See infra notes 171 & 172 and accompanying text.
150. See George, 557 N.W.2d at 581.
151. See id.
152. Id.
153. See id.
C. The Concurrence

In a special concurrence, Justice Tomljanovich expounded on the consent search issue, emphasizing two aspects in particular:

The first is whether it is legitimate for a police officer as part of a routine traffic stop, and in the absence of probable cause to search, to ask the stopped driver for consent to search and to search pursuant to that consent. The second aspect of the issue is whether, if it is legitimate to ask for consent in this situation, under what circumstances will the driver's response be sufficient to constitute voluntary consent. 154

The concurrence explained that the majority opinions in both the George and Dezso cases were attempting to deal with increasing law enforcement techniques aimed at obtaining consent from motorists and others. 155 The concurrence noted that the court's obligation is "to do what we can, in our limited role as a court of last resort, to provide reasonable protection to those [liberty and privacy] interests." 157

The concurrence warned further that in its role as protector of citizens' constitutional interests, the court should provide reasonable protections against involuntary consent searches in the future, but could not articulate exactly how this would be accomplished. 158 For the time being,

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154. George, 557 N.W.2d at 581 (Tomljanovich, J., concurring)).
155. See id. One such technique is to inquire: "You wouldn't mind if I looked in the truck, would you?" Id. If the subject responds with a "no" the officer will conduct the search. See id.
156. See id. (Tomljanovich, J., concurring). Justice Tomljanovich expressed concern that the training that law enforcement officers receive enables them to obtain consent to search. See id. Justice Tomljanovich explained that such training is "similar to the training sales people receive in getting people to agree to buy things they do not want." Id. And there are consumer protection laws, Justice Tomljanovich noted, which protect consumers who give consent for items they don't really want, such as vacuum cleaners. See id. at 581-82.
157. Id. at 582. The concurrence noted two other contexts in which the court has offered such protections in the past. See id. (citing Ascher v. Commissioner of Pub. Safety, 519 N.W.2d 183, 187 (Minn. 1994) (concluding that temporary roadblocks violate the Minnesota Constitution which requires that the police have articulable suspicion of wrongdoing before stopping a motorist) and Matter of Welfare of E.D.J., 502 N.W.2d 779, 783 (Minn. 1993) (rejecting the Unites States Supreme Court's test for determining when a person has been seized)).
158. See id. at 582. The concurrence suggests three ways this goal could be accomplished. See id. First, the court could reject altogether the concept of consent to search in traffic stops and voluntary street encounters. See id. Second, the court could require that all attempts by officers to obtain consent be tape recorded. See id. Third, the court could require the officer to inform the subject that he or she has the option of refusing to give consent to the search. See id. The concurrence noted that the second option is the most plausible because it would merely extend the court's decision in State v. Scales, 518 N.W.2d 587, 592 (Minn. 1994). See id. See also infra notes 188-203 and accompanying text for a discussion of the Scales deci-
the concurrence reasoned, the majority's heightened review of voluntary consent issues was satisfactory.\footnote{See George, 557 N.W.2d at 582.}

IV. ANALYSIS

A. The Need for Assurance of Voluntariness

In George, the Minnesota Supreme Court asserted that more assurance of the voluntariness of consent is needed to validate a warrantless search,\footnote{See generally Schneckloth v. Bustamonte, 412 U.S. 218, 277 (1973) (Marshall, J., dissenting) (arguing that the capacity to chose to relinquish the right to be free from unreasonable searches necessarily depends upon the knowledge that there is a choice to be made); William N. Mehlhaf, Note, A Valid Consent To Search Does Not Require Knowledge of the Constitutionally Protected Right to Refuse, 9 GONZ. L. REV. 845, 857 (1974) (suggesting that officers be required to apprise individual of their constitutional right to refuse consent and of the consequences of waiving that right); William A. Kerr, Fourth Amendment Held Not To Require That One Giving Permission For a Consent Search Be Informed That He Has the Right To Withhold his Consent, 7 IND. L. REV. 592, 595 (1974) (questioning whether consent to a warrantless search can be truly voluntary if the suspect does not know he can refuse the search); William R. Sage, Note, Standards for Valid Consent to Search, 52 N.C. L. REV. 644, 653 (1974) (noting that it is difficult to conceive of how a defendant who has no knowledge of his Fourth Amendment right can be said to have chosen to forgo these rights by consenting to a search); Eugene E. Smary, Note, The Doctrine of Waiver and Consent Searches, 49 NOTRE DAME LAW. 891, 902-03 (1974) (suggesting that the right to a fair trial, which is protected in other waiver situations, is lost when items are seized following unintelligent and unknowing waiver of the right to refuse consent to a search). See State v. Johnson, 346 A.2d 66, 68 (N.J. 1975) (requiring the state to prove consent was voluntary, an essential element of which is the knowledge of the right to refuse consent); Penick v. State, 440 So. 2d 547 (Miss. 1983) (holding that the State failed to prove there was a voluntary waiver of the defendant's right to refuse to be searched); see also supra note 59 and accompanying text for list of states which continue to follow the Schneckloth totality test. See supra note 161 and accompanying text.} and that subjects of consent searches need more protection than is offered by the Schneckloth totality test. While the Minnesota Supreme Court is not alone in this position,\footnote{See supra note 161 and accompanying text.} only two other states have decided to act upon this proposal.\footnote{See infra note 166 and accompanying text.} Despite the lack of support in state and federal courts, commentators have long been concerned about the issue of voluntariness in connection with consent.\footnote{See supra note 161 and accompanying text.} There are commentators that agree with the Minnesota Supreme Court that subjects of consent searches need more protection.\footnote{See infra note 166 and accompanying text.} The general consensus among commentators, however, is not that consent searches should be prohibited altogether or...
that police should record all attempts to gain consent. Rather, the main thrust of commentaries is toward notifying subjects of their rights in regard to consent searches.

B. The Majority's Move Toward Assurance

Prior to George, the Minnesota Supreme Court already had enhanced the protections afforded to subjects of consent searches, although in a subtle way. In the majority opinion in George, the court explained that "[s]hort of rejecting the concept of consent to search in the context of routine traffic stops," trial and appellate courts "can and should demand sufficient proof in any individual case that the consent to search was truly express, clear and voluntary." While this may sound like the Schneckloth totality test, this test requires more proof than suggested by Schneckloth. In support of this requirement, George noted that Dezso demonstrates an appropriate review: "Our opinion in State v. Dezso... illustrates one way of doing just that, by subjecting claims of voluntary consent in this context to careful appellate review." In actuality, the Dezso court analyzed the case using the Schneckloth totality test, as it has since State v. O'Neill. On its face, nothing changed in the court's analysis in Dezso. Evidently, between its decisions in Dezso, where the court used the Schneckloth standard, and George, where the court again used the totality test but relabeled the Dezso test a "careful appellate review," the court determined that subjects of consent searches need greater protection.

What this means for practitioners is unclear. The standard for consent to validate warrantless searches is currently in a state of flux. George, 557 N.W.2d at 581 (Tomljanovich, J., concurring).

165. See infra note 166 for commentary that suggests warnings be given to subjects of consent searches; but see Stack, supra note 42, at 202-08 (suggesting that all airport consent searches should be prohibited).


167. See infra notes 169-71 and accompanying text.

168. State v. George, 557 N.W.2d 575, 580 (Minn. 1997).

169. Id. (citation omitted) (emphasis added).

170. See supra notes 102-11 and accompanying text for a discussion of the Dezso decision. See also supra notes 87-90 and accompanying text for explanation of how the court adopted Schneckloth in O'Neill.

171. The Dezso decision does not address the concerns raised in George, yet the George concurrence states: "Our decisions in this case and in Dezso represent what I believe will be an ongoing attempt to come to grips with the increasing use... of subtle tactics to get motorists and others to 'consent' to searches." George, 557 N.W.2d at 581 (Tomljanovich, J., concurring).

172. Prior to George, it was clear that the test for consent searches was voluntariness, determined from the totality of the circumstances.
through its analysis of the *Dezso* decision, stands for the idea that Minnesota courts now require something more than is required under the *Schneckloth* totality of circumstances. Instead, Minnesota courts now require a careful appellate review. Unfortunately, practitioners do not have a clear picture of what more is required to satisfy this new heightened appellate review.

**C. The Concurrence’s Indication of the Future of Consent Search**

The only way to protect consent searches, then, is to provide the reviewing court with something more than voluntariness demonstrated by mere totality of the circumstances. 173 Justice Tomljanovich’s concurrence in *George* suggests three ways to accomplish this goal and thereby reaffirms that the court is indeed heading down the road to change in the consent searches. 174 The concurrence lays a roadmap to that change and provides three avenues: one, prohibit consent searches in traffic stops altogether; two, expand *Scales* and require that consent inquiries be recorded; and three, inform subjects of their right to refuse consent. 175 Of the three, the first is completely unrealistic, and the second is unnecessary and will not be a panacea for the court’s concerns. The third option is the most practical and appropriate.

1. **Prohibiting Consent Searches in Traffic Stops**

The majority’s approach makes it sound as if the court is actually considering rejecting consent searches altogether in traffic stops; the concurrence solidifies this concern. Realistically, this should not even be a consideration before the court.

When the majority mentions the possibility of prohibiting consent searches in vehicle stop situations, it does so in reliance on an article written about consent searches in airport stops. 176 The article posits the theory that because of the nature of airport searches, law enforcement should be required to have probable cause for airport searches. 177 Reliance on this authority alone for the proposition that consent searches be banned

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173. The focus of the analysis here is not to debate whether the Minnesota Supreme Court should add more protections to consent searches. The court has already indicated that it plans to do so. Rather, the goal of this Note is to notify practitioners that the status of consent searches is changing and to consider the options the court has suggested.

174. See supra note 158 and accompanying text.

175. See State v. George, 557 N.W.2d 575, 582 (Minn. 1997) (Tomljanovich, J., concurring).

176. See id. at 580 (citing Stack, supra note 42).

177. See Stack, supra note 42.
defies the significant benefits of consent searches in a variety of situations beyond airport searches. 178

Consent searches are important to the administration of justice. 179 Cases that involve traffic stops demonstrate the practicality of consent searches. Often, there is no opportunity to get a warrant and no guarantee that a judge will automatically be available if needed. 180 Additionally, if the results of the search come back clean, and there is no further need to detain the motorist, that person can continue on his way, and the officer on her’s. 181 Because the basis underlying the request for the consent to search often comes up at the last minute, were the officer required to obtain a warrant, the evidence could be lost. 182

Obviously, consent searches are an integral part of law enforcement, not merely traffic enforcement. If the court is going to throw out consent searches in traffic stops because of the intimidating and discretionary nature of consent searches, 183 then the court should prepare to prohibit all consent searches for difficulty in securing voluntary consent.

Researchers theorize a “social phenomenon” whereby most people “reflexively obey authority figures.” 184 The discretionary and intimidating aspects of law enforcement apply to all citizen encounters, not only those that take place on a highway. The court cannot remove this unfortunate but integral part of law enforcement by prohibiting consent searches in traffic stops. Even commentators that support the reflex theory, as it relates to consent searches, do not propose that the prohibition of consent

178. See Section II.B on the role of consent searches in law enforcement for an explanation of the benefits of consent searches as an exception to the warrant requirement of the Fourth Amendment.

179. See supra note 18 to 24 and accompanying text. Even the article the court relies on for support in criticizing consent searches admits this notion.

Despite their theoretical problems, consent searches have played a large role in law enforcement for over forty years and are not likely to fade from the scene in the near future. Recognizing this, the next best step . . . is to demand that law enforcement officers advise a suspect of his rights before eliciting his consent.

Stack, supra note 42, at 205.

180. See LAFAVE, supra note 19, at 611-12 (citing LAWRENCE P. TIFFANY ET AL., DETECTION OF CRIME 159 (1967)).

181. See Lochhead, supra note 11, at 777; see also supra note 24 and accompanying text.

182. See, e.g., State v. Dezso, 512 N.W.2d 877, 879 (Minn. 1994) (stating that the motorist “seemed to tilt his wallet away from the officer’s view,” which made the officer suspect that the defendant was “trying to hide something”). In such a situation, the officer may lose the opportunity to investigate suspicious activity if required to get a warrant or establish probable cause.

183. See supra note 145 and accompanying text.

184. See generally Barrio, supra note 18 (discussing how “obedience theory” relates to consent searches).
searches is an appropriate response to such concerns.\textsuperscript{185} Clearly, the first suggestion made by the George concurrence is unrealistic.

2. Expanding Scales to Consent Searches

The second option that the concurrence suggests is expanding the court's decision in \textit{Scales} to consent search situations.\textsuperscript{186} Considering the fact that Justice Tomljanovich labels this option as the most plausible, it is important to consider how the court arrived at \textit{Scales}.\textsuperscript{187} Minnesota practitioners are still adjusting to the court's decision in \textit{State v. Scales},\textsuperscript{188} where the court, under its supervisory power, required that all custodial interrogations be tape recorded.\textsuperscript{189} Although the effect of \textit{Scales} is still being felt by law enforcement across the state, practitioners should hardly have been surprised at the decision. The court did its best to spell out the direction in which it was headed in cases preceding \textit{Scales}.

In \textit{State v. Robinson},\textsuperscript{190} one of the cases predating \textit{Scales}, the court addressed the validity of a statement obtained after the defendant had stated he wanted an attorney.\textsuperscript{191} In a footnote, the court observed that such issues “could be obviated if police interrogators would record all conversations with the accused relative to the accused’s constitutional rights . . . .”\textsuperscript{192} The court further explained that this “would afford the reviewing court an objective record upon which to rule, rather than one based upon self-serving or subjective assertions of the principals involved.”\textsuperscript{193}

In \textit{State v. Pilcher},\textsuperscript{194} the second case predating \textit{Scales}, the court reinforced its observation from \textit{Robinson}, and explained that “[t]he present case provides a stellar example of a dispute that could have been avoided had the law enforcement officers followed our recommendation in \textit{Robinson}.”\textsuperscript{195} The court's kinder, gentler suggestion in \textit{Robinson} disappeared

\textsuperscript{185} See id. at 215. Barrio suggests that given people's tendency to obey authority figures, the appropriate change in consent search law is not banning consent searches, but requiring law enforcement “to inform suspects of their right to withhold consent upon requesting their permission to search.” Id.

\textsuperscript{186} See State v. George, 557 N.W.2d 575, 582 (Minn. 1997) (Tomljanovich, J., concurring).

\textsuperscript{187} Id.

\textsuperscript{188} 518 N.W.2d 587 (Minn. 1994).

\textsuperscript{189} See \textit{Scales}, 518 N.W.2d at 592. “The recording requirement is intended 'to avoid factual disputes underlying an accused's claims that the police violated his constitutional rights.'” State v. Schroeder, 560 N.W.2d 739, 740 (Minn. Ct. App. 1997) (citing State v. Williams, 535 N.W.2d 277, 289 (Minn. 1995)).

\textsuperscript{190} 427 N.W.2d 217 (Minn. 1988).

\textsuperscript{191} See id. at 221.

\textsuperscript{192} See id. at 224 n.5.

\textsuperscript{193} Id.

\textsuperscript{194} 472 N.W.2d 327 (Minn. 1991).

\textsuperscript{195} Pilcher, 472 N.W.2d at 333.
with Pilcher, where the court blatantly warned practitioners: "In the future, we urge that law enforcement professionals use those technological means at their disposal to fully preserve the actual interrogation. Law enforcement personnel and prosecutors may expect that this court will look with great disfavor upon any further refusal to heed these admonitions."\textsuperscript{196}

Finally, in Scales, the court stated that it was "disturbed by the fact that law enforcement officials have ignored our warnings in Pilcher and Robinson."\textsuperscript{197} The court held that "all custodial interrogation including any information about rights, any waiver of those rights, and all questioning shall be electronically recorded where feasible and must be recorded when questioning occurs at a place of detention."\textsuperscript{198}

The decisions leading up to Scales are very important and applicable to the issue of consent searches. In Robinson and Pilcher, the court made obvious attempts to encourage law enforcement officers to begin tape recording custodial interrogations.\textsuperscript{199} Because practitioners were unwilling to listen to the court independently, the court forced practitioners to hear their message by requiring custodial interrogations be tape recorded.\textsuperscript{200}

This is similar to the current situation surrounding consent searches. The George majority announced a subtle new approach to consent searches: a heightened appellate review.\textsuperscript{201} Moreover, the concurrence noted the court's "ongoing attempt to come to grips with the increasing use by state troopers and police officers of subtle tactics to get motorists and others to 'consent' to searches."\textsuperscript{202} In drawing practitioners' attention to this issue, the court is doing the same thing as it did in Scales: attempting to warn practitioners from bringing any other cases similar to George and Dezso before them.

The Scales requirement was a change, but not an impossible task, considering the requirement was to tape custodial interrogations. Were this court to extend Scales to traffic stops, it would require law enforcement organizations to equip their officers with recorders; all squads would need tape recorders as well. The nature of consent searches in vehicle stop cases makes it impossible for officers to predict when they will find it necessary to ask a subject for consent to search. The consent inquiry may take place along the road, in the subject's car, in the officer's squad car, or somewhere in between. Essentially, the court would be requiring that officers record every contact they have with motorists. This is not nearly the custodial situation outlined in Scales.

\textsuperscript{196} 472 N.W.2d at 333 (emphasis added).
\textsuperscript{197} State v. Scales, 518 N.W.2d 587, 592 (Minn. 1994).
\textsuperscript{198} Id.
\textsuperscript{199} See supra notes 190-98 and accompanying text.
\textsuperscript{200} See supra notes 197-98 and accompanying text.
\textsuperscript{201} State v. George, 557 N.W.2d 575, 580 (Minn. 1997).
\textsuperscript{202} Id. at 581 (Tomljanovich, J., concurring) (emphasis added).
Additionally, a *Scales* recording requirement is not a panacea to the court’s concerns about the voluntariness of consent. In *Dezso*, the officer had the ability to both videotape and audiotape the encounter. The video equipment was not able to record the activity within the squad car, and so could not provide any helpful information. Further, the audio tape was not helpful because it could not provide any clarity on the physical interaction of the defendant and officer. The parties body language is often a consideration and cannot be caught on audiotape. In its decision, the court focused largely on the officer’s body movement.

An expansion of *Scales*, which the court purports to be the most plausible option, will not clarify the voluntariness of every consent search. It will not remove the necessity for a finder of fact to consider the totality of the circumstances. In *Dezso*, the audiotape was available for both the trial and appellate court’s review. The trial court established there was voluntary consent based on testimony from both the officer and the defendant. The Minnesota Supreme Court found the consent was not given voluntarily because of officer’s actions and discredited the trial court’s findings. In this situation, the audiotape was not a clarifying factor in and of itself. Therefore, a *Scales* requirement is not the best option to ensure the voluntariness of consent.

3. Informing Subjects of their Right to Refuse Consent

The third option presented by the *George* concurrence is to require that law enforcement officers inform subjects of their right to refuse consent. Although the concurrence states that the *Scales* extension is the more plausible possibility, the court should consider this third option instead as the most plausible, because it is more practical and appropriate.

The Minnesota Supreme Court would not be alone in this decision. Two other state supreme courts, the only two which have strayed from the *Schneckloth* totality of the circumstances test, found that the solution to their similar concerns was to require that law enforcement officers inform subjects of their right to refuse consent. The Mississippi and New Jersey Supreme Courts resolved the issue raised in *George* by taking this next

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203. See State v. Dezso, 512 N.W.2d 877, 878-79 (Minn. 1994).
204. See id. at 879.
205. See id.
206. See supra note 110 and accompanying text.
207. See *Dezso*, 512 N.W.2d at 880-81.
208. See id. at 880.
209. See id. at 881.
210. *George*, 557 N.W.2d at 582 (Tomljanovich, J., concurring).
211. See id.
212. See supra notes 62-72 and accompanying text.
natural step from Schneckloth. In Penick, the Mississippi Supreme Court held that the waiver had to be knowledgeable.\footnote{213} In Johnson, the New Jersey Supreme Court held that knowledge must be an element of waiver of the right to refuse consent.\footnote{214} Commentators have also cited the need for extra protection in consent search cases, and have found the needed protection in warning subjects of the right to refuse.\footnote{215} A common criticism of the consent search doctrine is that “[t]he voluntariness standard for consent searches cannot be squared with a fourth amendment that aims to protect all privacy, whether law-abiding or not.”\footnote{216} One commentator suggests that “[i]t would be a simple matter to require police to give a standard warning before asking consent to search, in order to ensure that suspects know that the request to search really is a request and not a command.”\footnote{217}

Assuming that the Minnesota Supreme Court is going to follow the concurrence in George and add some kind of additional protection to consent searches, an appropriate response to the court’s concerns would be requiring that officers give warnings before attempting to gain consent to search. This option is very practicable and feasible. Providing a warning would alleviate the court’s concerns in protecting individuals, as well as the need for law enforcement to operate efficiently.

Many Minnesota law enforcement officers are already informing subjects of their rights by way of a consent to search form.\footnote{218} Additionally, there is no indication that a warning of the right to refuse consent would significantly decrease the use of consent searches. Finally, providing the warnings will most likely result in more valid search results because the

\footnote{213} See Penick v. State, 440 So. 2d 547, 551 (Miss. 1983); see also supra Section II.D for a discussion of Penick.

\footnote{214} See State v. Johnson, 346 A.2d 66, 68 (N.J. 1975); see also supra Section II.D for a discussion of Johnson.

\footnote{215} See supra note 166 and accompanying text.

\footnote{216} Stuntz, supra note 166, at 787. A common distinction is made between waiver of rights in consent searches and other waivers because in consent searches, the waiver need not be knowing, intelligent, or intentional. Compare Schneckloth v. Bustamonte, 412 U.S. 218, 231-32 (1973) (holding that in consent search situations, the waiver of the right to be free from unreasonable searches need not be made with knowledge of the right to refuse consent) with Johnson v. Zerbst, 304 U.S. 458, 464 (1938) (holding that a waiver of the right to counsel must be made competently and intelligently).

\footnote{217} Stuntz, supra note 166, at 787 (emphasis in original).

\footnote{218} See State v. Hummel, 483 N.W.2d 68, 73 (Minn. 1992) (determining the search to be invalid where defendant’s mother signed a consent to search form for the search of their home); State v. Hanley, 365 N.W.2d 735, 739 (Minn. 1985) (concluding that the search was invalid where defendant’s girlfriend signed a consent to search form for the search of their home); State v. Schweich, 414 N.W.2d 227, 229 (Minn. Ct. App. 1987) (holding search of defendant’s home was invalid where the search exceeded the scope of the consent form signed by the defendant).
voluntariness of the search would not be as questionable as it is now.

D. The Court's Ability to Provide Extra Protection

There is no question that the court is ready to provide extra protections to subjects of consent searches. Moreover, there is also no question as to the court's judicial ability to provide the extra protection. The court has two distinct options at its disposal.

First, the court can utilize its supervisory power in extending the protections in consent searches. In *Scales*, the court did not make the recording requirement under an express constitutional provision, but rather under its "supervisory power to insure the fair administration of justice." The court has used this function in other cases as well, so there is no indication that the court would hesitate in using it in consent searches.

Second, in addition to its supervisory power, the court can act under the Fourth Amendment. When it deems necessary, the Minnesota Supreme Court has the ability to provide broader individual rights under the Minnesota Constitution than are permitted under the Federal Constitution. More importantly, the Minnesota Supreme Court has already demonstrated its willingness to expand a defendant's rights beyond the requirements set forth by the United States Supreme Court. Under ei-

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220. See, e.g., State v. Borst, 278 Minn. 388, 397, 154 N.W.2d 888, 894 (1967) (basing its decision on its "supervisory power to insure the fair administration of justice" and holding "that counsel should be provided in any case, whether it be a misdemeanor or not, which may lead to incarceration in a penal institution").
221. See State v. Murphy, 380 N.W.2d 766, 770 (Minn. 1986) ("[T]his court has the power to provide broader individual rights under the Minnesota Constitution than are permitted under the United States Constitution. . ."); see also Cooper v. California, 386 U.S. 58, 62 (1967) (holding that each state has the ability to impose higher standards on searches and seizures under state law than that required by the United States Constitution).
222. See State v. Scales, 518 N.W.2d 587, 592 (Minn. 1994) (holding that a defendant is entitled to the protection of a recorded custodial interrogation); State v. Murphy, 380 N.W.2d 766, 770 (Minn. 1986) (acknowledging that the court had the power to provide broader rights than those permitted under the United States Constitution if it wished to do so).

State courts are bound by the United States Supreme Court in matters of federal constitutional law. Not only may they not construe a federal constitutional right more narrowly than mandated by the highest court, they may not construe their own law, constitutional or otherwise, in a manner inconsistent with federal constitutional standards. They are not precluded, however, from interpreting their own law in a manner which recognizes a broader protection than that minimally mandated for federal constitutional purposes. Such rulings would fall be-
ther of the paths available, the court could and seems willing to expand the protection offered to subjects of consent searches in traffic stops.

V. CONCLUSION

At this point, practitioners are beyond the point of debating whether subjects of consent searches need extra protection. The majority in George has already suggested that the totality of the circumstances test is not enough to ensure the voluntariness of consent. The court has indicated that it will now review consent searches under a heightened standard of appellate review. The issue presently facing practitioners, then, is how to satisfy this heightened review, and what more will have to be offered the court in response to the court’s concerns. Practitioners should keep Scales in mind. The court makes its concerns about the voluntariness of consent, particularly in traffic stops, very clear to practitioners. A Scales requirement would not be the best solution to the consent search problems the court has identified. However, if practitioners give the court the assurance it is looking for by informing subjects of their right to refuse consent, perhaps the court’s concerns will be alleviated without the necessity of attaching a Scales requirement to consent searches or prohibiting consent searches in traffic stops altogether.

Catherine Twitero