



# Mastering Consent Searches

1.5 Hour Webinar


Course Outline

Blue to Gold Law Enforcement Training  
1818 W. Francis Ave #101, Spokane Washington 99205  
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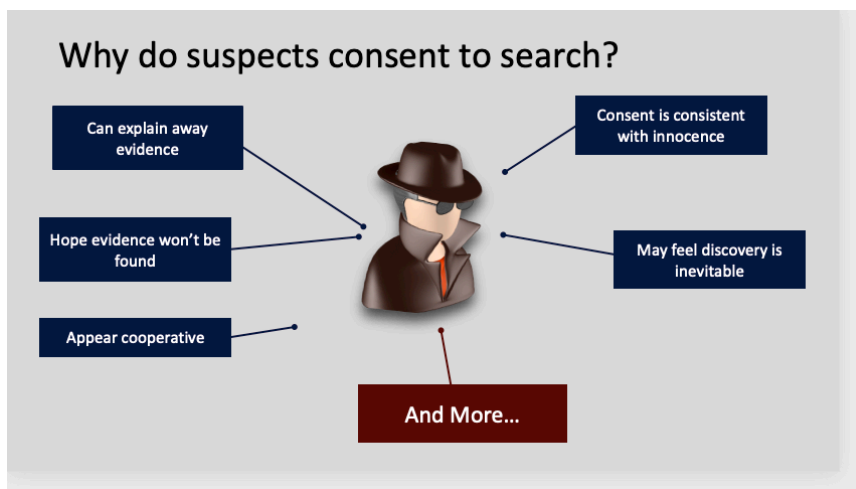
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## Module One: Course Introduction – 10 minutes

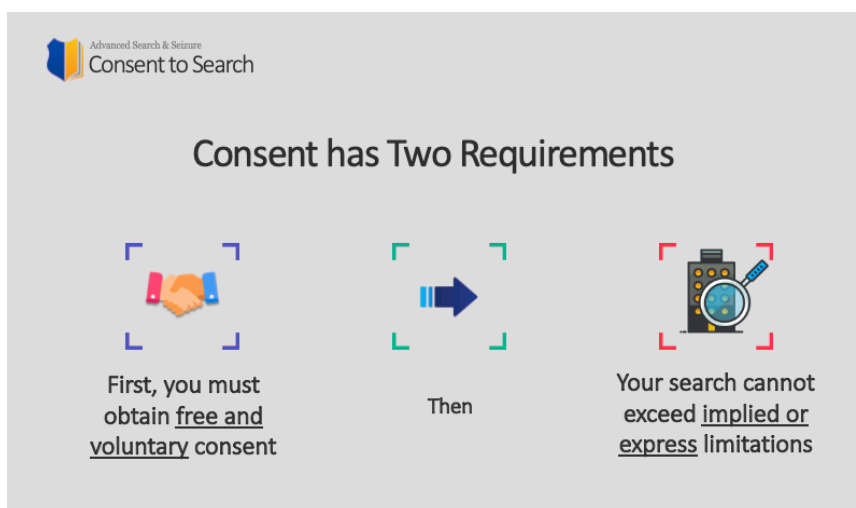
- 1) Instructor introduction.
- 2) Explain the course objective.
- 3) Encourage attendees to ask questions and share feedback with other attendees.
- 4) Explain that certificates will be emailed after the class.
- 5) Go over the three disclaimers:
  - a) Laws and agency standard operating procedures may be more restrictive. Blue to Gold is teaching the federal standard unless otherwise stated. Therefore, students must know their state and local requirements in addition to the federal standard.
  - b) If students have any doubts about their actions, ask a supervisor or legal advisor.
  - c) The course is not legal advice, but legal education. Therefore, nothing we teach should be interpreted as legal advice. Check with your agency's legal advisor for legal advice.

 Agenda	One	A valid consent search has two requirements
	Two	Free and voluntary consent
	Three	Scope issues
	Four	Third-party consent
	Five	Q & A

## Module Two: Consent to Search – 37 minutes



1)



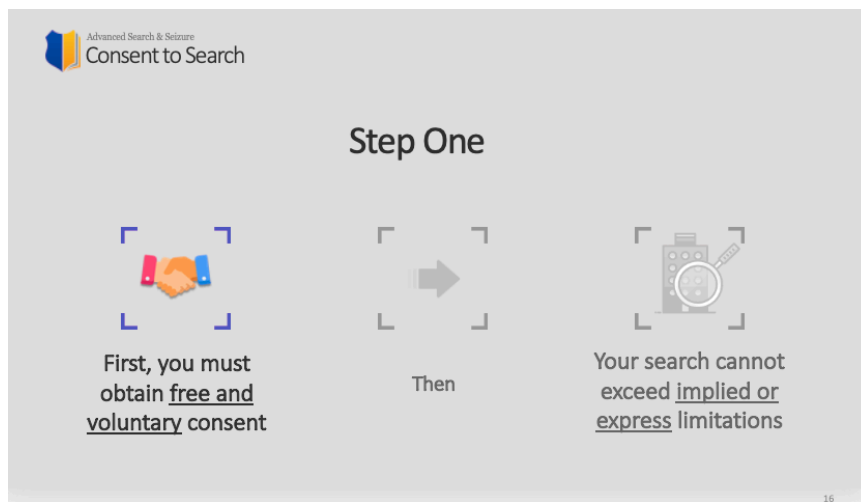
2)

**Content:** The standard of proof for a consensual encounter is different than a consensual search. However, if the encounter itself was unlawful then even any resulting search will be held unlawful, even if voluntarily given.

- Not required to tell person they can refuse, but if they were told, consent will likely be found consensual;
- Search practices must be reasonable
- Search must not exceed scope of consent
- Subject must be able to stop search at any time








- Consent can be given during temporary detention or even arrest, but voluntariness will be more scrutinized
- Must not further detain subject in order to seek consent, they must reasonably feel free to go before granting consensual encounter consent
- Any claim of authority that the search can be conducted, even without consent, will usually find the search coerced.

**Key points:** Articulate these three points in your reports.



- 4) **Legal Rule:** Voluntary consent means the person **had a choice** in the matter.

### Various state-specific restrictions

-  KS: RS required for vehicles
-  MA: RS required for vehicles
-  MN: RS required for vehicles
-  NH: RS required for vehicles
-  NJ: RS required for vehicles
-  OR: RS required or ask during “downtime”\*
-  PA: Consent must “relate to the stop”

5)



- 6) **Video:** "Consent to Search: Voluntary?"
- 7) **Example:** At least three criminal cases involving illegal gun possession have been dismissed from Jefferson Circuit Court over the past six months, each following a stern order by the judge to suppress evidence obtained in what was ruled to be an illegal search by officers of the Louisville Metro Police Department's Ninth Mobile Division. The two most recent cases in the past month both involved orders by Circuit Judge Annie O'Connell ruling that guns found in searches performed by Detective William Mayo must be excluded from evidence, as the officer violated the defendants' constitutional rights in those searches last year. Suppression orders filed by O'Connell in March and Circuit Judge Brian Edwards in December both made a point of stating that just because someone happens to be in a part of west Louisville that has a higher crime rate does not mean that they have fewer rights protecting them from illegal search and seizures as residents in other parts of the city. LMPD spokesman Dwight Mitchell informed Insider Louisville that all three of these arrests made by the Ninth Mobile Division — the geographically shifting unit primarily focused on gangs and drugs — are now under internal investigation from the department's Professional Standards Unit. The dismissals of these three cases of African-American defendants arrested in the West End comes amid increased scrutiny and criticism of LMPD policies involving the detaining and searching of drivers in this part of the city, which largely stemmed from the widely publicized traffic stops of Simmons College President [Rev. Kevin Cosby](#) and 18-year old [Tae-Ahn Lea](#) last year. Last month, LMPD Chief Steve Conrad unveiled a [new set of policies for traffic stops](#) that would go into effect Aug. 1, limiting the circumstances in which officers can remove an individual from a car, handcuff them and search the vehicle. The Louisville FOP has [criticized those new rules](#), saying they will endanger the safety of officers and prevent the arrest of criminals. Chief Conrad answering questions after a May 2015 news conference introducing police officer body cameras | Photo by Joe Sonka. The most recent case to have evidence suppressed by a judge is that of Miguel Ballard Jr., who was arrested last June after being pulled over by Mayo for not properly wearing his seatbelt. Mayo and other Ninth Mobile officers told Ballard to exit the car and searched his van — predicated on him appearing "nervous

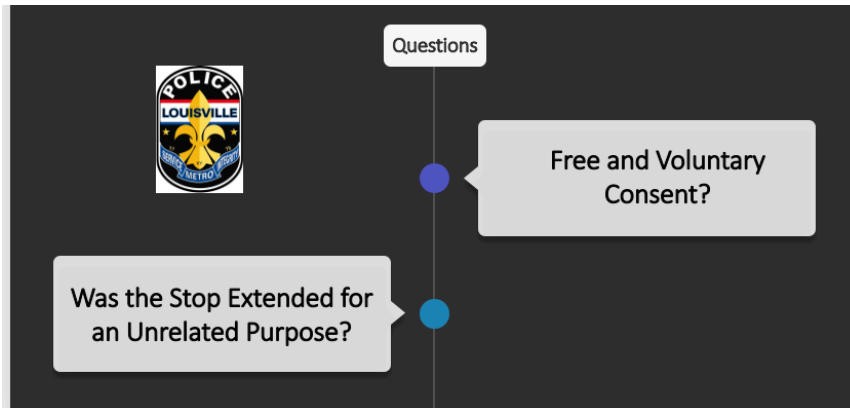
and sweaty” and smelling marijuana — finding a concealed gun and charging him with possession of a handgun by a convicted felon. However, Judge O’Connell granted a defense motion to suppress that gun from the evidence on May 29, determining that Mayo coerced Ballard into agreeing to a search of his van after asking several times, citing his extended detention, a large number of officers present and the manner in which he was questioned. Noting that Mayo told Ballard there were only two types of people who did not consent to a search — “assholes and people who have something to hide” — O’Connell stated in her order that “this Court can think of another kind of person who might wish to deny consent to search: citizens exercising their Constitutional rights.” O’Connell went on to cite the *Moberly v. Commonwealth* decision of the Kentucky Supreme Court last April, which threw out the drug and weapon convictions of a man whose vehicle was searched by police because he appeared nervous and sweaty and had previous criminal charges, though not convictions. “We render this opinion for the untold number of innocent Kentucky citizens who have had ‘criminal charges’ and may become nervous and sweaty and look around when confronted by police at a traffic stop at night,” wrote Justice Daniel Venters in his 6-1 *Moberly* opinion. “They have the right to live their lives unfettered by police having no reasonable articulable suspicion to interfere.” A video of the hearing on the defense’s suppression motion in February shows Ballard’s public defender Aaron Dyke repeatedly questioning Mayo on what he would have done if Ballard kept refusing to concede to a search, to which the detective replied three times that he would have just asked him again. Pressed on why he considered Ballard to be suspiciously nervous, Mayo answered that he is able to see things that his body cam can’t see, citing a bulging artery in Ballard’s neck. Mayo’s body cam video of the search and arrest shows him explaining to Ballard that the Ninth Mobile Division is “the gun police” that only cared about taking guns off the street, adding he didn’t care if Ballard’s car contained methamphetamine, heroin or a dead body. Assistant Commonwealth’s Attorney Jeff Cooke told Insider Louisville on Wednesday morning that with the suppression of the gun as evidence in the case his office will not be proceeding further with Ballard’s prosecution, adding that “we do not intend to appeal the judge’s ruling.” The [Courier Journal](#) first reported on O’Connell’s suppression of the evidence against Ballard later that evening. Asked how often evidence has been suppressed from a search based on a driver’s

nervousness since the Moberly decision last April, Cooke said that county prosecutors do not keep such statistics, “but it is not very common.” “We seldom prosecute cases where an officer relies solely on a suspect appearing ‘nervous and sweaty’ as the basis for his believing he had reasonable suspicion for a ‘pat down’ or probable cause for a search,” stated Cooke. “Usually the defendant’s appearance or behavior is just one of several circumstances upon which an officer might rely on in conducting a warrantless search.” Cooke added that Mayo relied on other factors beyond just nervousness to justify his search, noting that Ballard eventually gave his consent and the officer smelled marijuana — though no drugs were found in the car and Mayor did not perform a field sobriety test. Ballard’s attorney Dyke declined to comment on the case until prosecutors formally dismissed the criminal charges. Mitchell told Insider that a PSU internal investigation of the arrest and search by Mayo was initiated on Tuesday, and therefore the department would not provide further comment as the investigation goes forward. LMPD Chief Steve Conrad (podium) at a 2017 news conference announcing the arrests of five gang members on gun charges by the joint task force of the FBI and LMPD. | Photo by Joe Sonka This is the second PSU investigation of an arrest and search of an individual by Mayo that has been initiated this month, as Judge O’Connell also dismissed the gun possession charges against Tyrelle Henderson in an order two weeks before she suppressed the evidence in the Ballard case. In May of 2018 — a month before Ballard’s arrest — Mayo stopped his vehicle when he saw Henderson and his brother walking at 11th and Broadway in the Russell neighborhood with what he thought looked like concealed guns or extended magazines in their pockets. The officer immediately patted down Henderson without his consent and found a gun and extended magazine, charging him with possession of a handgun by a convicted felon. Mayo testified in court that the decision to stop and pat down Henderson was “based off where we were — in the projects; based on where we were directed to patrol — because of the violence, the things we observed, the brother and the things that were on Mr. Henderson, we decided to stop and investigate.” He also suspected that the two may have been trespassing at the Park Hill housing project, though this property was nearly two miles away. However, in her order to suppress the evidence of the gun in March of this year, O’Connell ruled that Mayo was not justified in searching Henderson “without reasonable suspicion that criminal activity

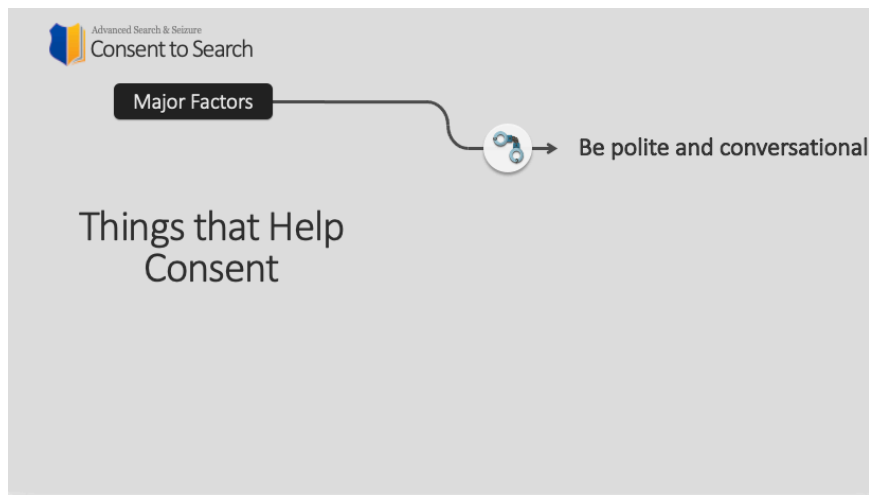
was afoot," as carrying a gun of itself is not illegal and the officer did not know that he was a convicted felon or had a concealed carry permit. Additionally, O'Connell cited a Kentucky Supreme Court case indicating that the mere presence of a person in a high crime area at night is not sufficient to justify an investigatory stop and seizure. "Merely walking through a high-crime area does not amount reasonable, articulable suspicion necessary to justify a warrantless search of a pedestrian," wrote O'Connell, who on May 15 issued an order to formally dismiss the charges against Henderson. Mitchell of LMPD informed Insider on Friday that Chief Conrad had just been made aware of the Henderson case and as a result had begun a review of it. Similar reasons were given by Judge Brian Edwards in his December order to suppress evidence in an illegal gun case against Garrett Johnson-Trumbo, whose vehicle was searched by Ninth Mobile officers in late 2016. In this case, the rental car of Johnson-Trumbo was pulled over in the Park DuValle neighborhood for disregarding a stop sign, with the officers calling in a K-9 unit to search the car after he could not produce a rental car agreement. Edwards ruled that the officers did not have reasonable suspicion to extend the traffic stop by calling in the K-9 unit, ordering that the gun found in the search be suppressed from the evidence in the case, leading to the dismissal of the charge a week later. While noting that the court "appreciates the challenges that the 9th Mobile Unit faces in its efforts to curtail gun crimes and violence in west Louisville," Edwards added in his suppression order that such considerations did not override the unconstitutional nature of the search, as those driving in Park DuValle have the same rights as those driving elsewhere in the city. "As stated above, this Court is well aware of the troubling levels of gun and drug-related violence in west Louisville," wrote Edwards. "However, this does not mean that citizens driving in west Louisville should be subjected to a lesser degree of constitutional protection than citizens driving in other parts of our community." Edwards continued: "For Americans, regardless of what part of town they may find themselves driving, the Constitution and the protections it affords is one size fits all. What is protected on one side of town must be deemed protected activity on all sides of town." LMPD initiated a PSU investigation of this arrest in April [following questioning from the Courier Journal](#), which Mitchell told Insider has not yet concluded.

In August of last year, a teenager, Tae-Ahn Lea, was pulled over by Ninth Mobile detectives in the West End for making a wide

turn, then handcuffed while his car was searched by a K-9 unit, which did not result in an arrest. A video of the incident from the officer's body cam was posted onto YouTube in February and picked up nearly one million views before the Courier Journal wrote about it in April, sparking an outcry from the community and pointed criticism of LMPD from Metro Council members. This followed similar criticism after Rev. Cosby was pulled over by officers in September of 2018.



- 9) **Legal Rule:** There are legal advantages to ending traffic stop, converting into consensual encounter, then seeking consent to search.



- 11) **Video:** "Telling Suspect" Not Under Arrest"

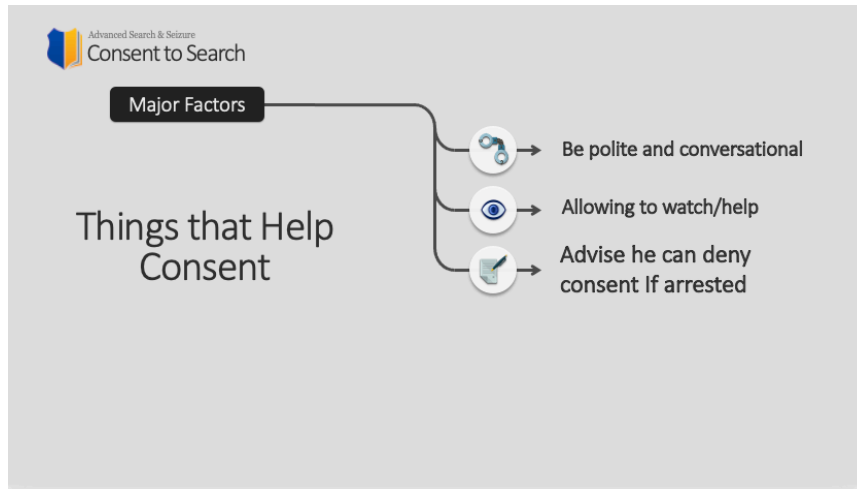




- 13) **Pro Tip:** If the suspect is detained in a police car, establish a line of communication to any officer.



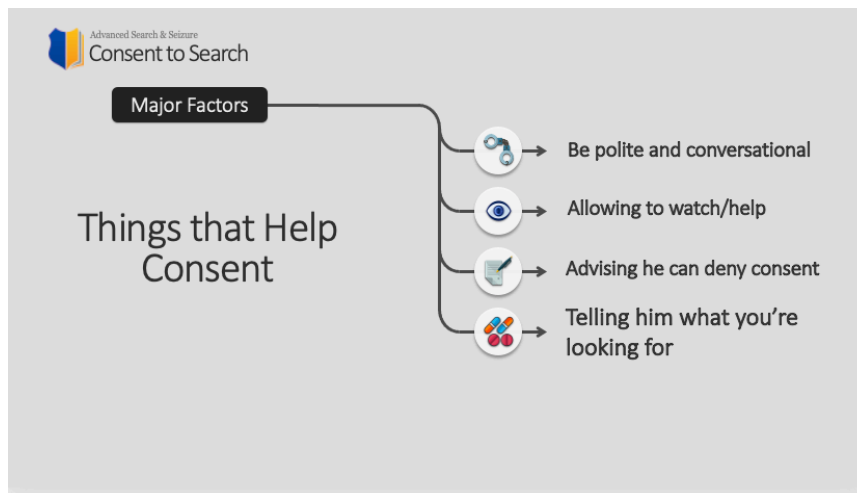
If the suspect is in the back of the car while the search is ongoing or if he doesn't have the ability to modify or terminate the consent, he may argue that he was about to modify the search but couldn't.



15) A suspect who helps with the search is almost never found to be involuntary, even in a coercive environment:

- Don't read Miranda!
- Tell suspect he's not under arrest
- Advise he can deny consent
- Treat him as witness, not suspect
- Be friendly, not overbearing
- Allow him to watch search
- Advise he can modify or cancel search at any time

16)



17)

18) **Legal Rule:** What you **ask to search** for defines the **scope** of search.

## Step Two



First, you must obtain free and voluntary consent



Then



Your search cannot exceed implied or express limitations

19)

The standard of proof for a consensual encounter is different than a consensual search. However, if the encounter itself was unlawful then even any resulting search will be held unlawful, even if voluntarily given.

- Not required to tell person they can refuse, but if they were told, consent will likely be found consensual
- Search practices must be reasonable
- Search must not exceed scope of consent
- Subject must be able to stop search at any time
- Consent can be given during temporary detention or even arrest, but voluntariness will be more scrutinized
- Must not further detain subject in order to seek consent, they must reasonably feel free to go before granting consensual encounter consent
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**Key points:** Articulate these three points in your reports.

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Mastering Consent Searches

**PART ONE**  
View scope of consent from eyes of typical person

**PART TWO**  
Not where officers may think contraband may be hidden!

**PART THREE**  
Ultimate question: Would a reasonable person think you would search where you searched?

20) The standard for measuring the scope of a suspect's consent to a warrantless search under the Fourth Amendment is that of a typical reasonable person, not a typical reasonable police officer; therefore, the focus is solely on what a typical reasonable person would understand the scope of the consent to be, based on the words spoken and the context in which they are spoken, not on what a police officer may understand as the places in a vehicle where narcotics or firearms may be hidden.

21) **Video:** "Consent to Search: Scope Issue"

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Advanced Traffic Stops

**Words Matter!**

**Search:** "Looking for something carefully and thoroughly"

**Peek:** "Look quickly"

22)

23) **Video:** "Consent to Search: You Decide"



24)



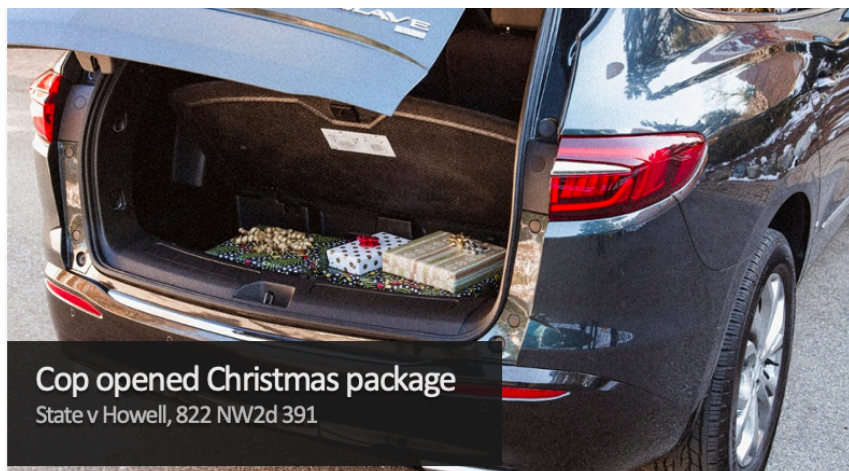
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26) **Legal Rule:** A destructive search requires **express consent** or **automobile exception**.

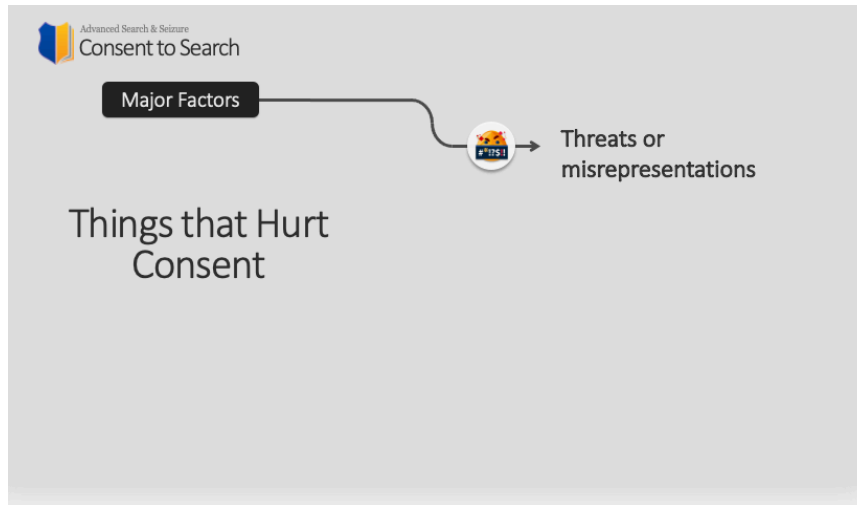




- 27) United States v. Osage, 235 F.3d 518 (10th Cir.2000) (consent to search bag did not permit opening of sealed cans labeled "tamales in gravy"; disagreeing with Kim, *infra*, court holds "that the opening of a sealed can, thereby rendering it useless and incapable of performing its designated function, is more like breaking open a locked briefcase than opening the folds of a paper bag")



- 28) State v. Howell, 284 Neb. 559, 822 N.W.2d 391 (2012) (opening "gift-wrapped box" within scope of consent to search vehicle, as any damage to box and wrapping paper "could be fixed with a piece of tape")



29)

- 30) **Legal Rule:** You may tell someone a **justified legal truth**, and provide options, but never make coercive threats.
- 31) **PRACTICAL SUGGESTION:** If the officer fairly presents the defendant with a choice whether to consent, the mere fact that defendant, for reasons that are particular to him or her, subjectively may feel that he or she has no realistic choice under the circumstances does not render the consent invalid as “mere acquiescence.” Accordingly, when requesting consent, the officer should ask in a question format (rather than direct or command) and avoid using words or phrases that fairly could be understood by the suspect as requiring compliance. Although an officer is not obliged to inform the person explicitly that he or she has a right to refuse, the officer should avoid acts or words that fairly could convey to the suspect that a search will occur regardless of whether he or she consents.
- 32) **Case Sample:** Officer had R.S. for narcotics and asked for consent to search which driver denied. Officer then told her that he would call a K9 and driver changed mind and gave consent. Coerced? *State v. Baum* **Held:** No. Truthfully telling person a K9 may be called is not per se coercive.



33)



34)



35)

### Module Three: Third Party Consent - 37 minutes

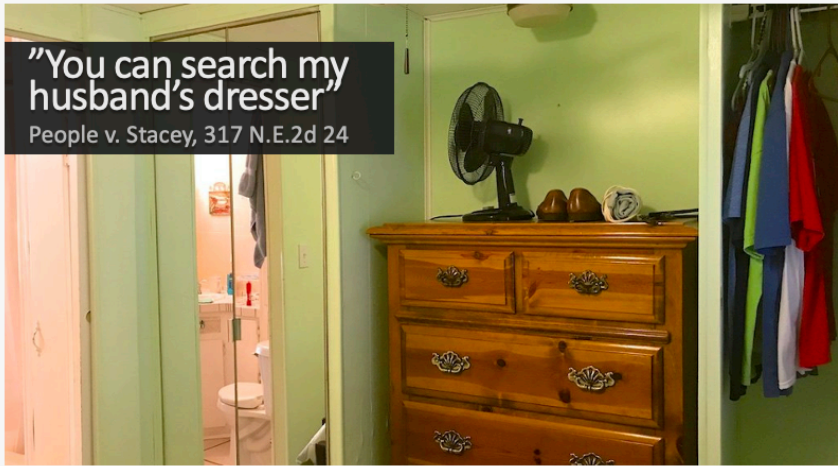
- 1) **Legal Rule:** A person with **common authority** over an area or item can allow you to perform the **same search** they could.
- 2) **Pro Tip: Common authority means you reasonably believe they have either: Joint ownership; Joint access; or Control.**



OR: The person must have **actual authority** – so you cannot be wrong

- 3)
- 4) **Pro Tip:** There is an easy test to **apply in the field!**





A useful illustration is provided by *People v. Stacey*,<sup>28</sup> upholding the wife's consent to the search of a dresser drawer in which the husband kept his clothing:

- 6) Although the evidence shows that the bottom dresser drawer from which the shirt was taken was used by the defendant alone, the dresser was located in the bedroom mutually used by the



defendant and his wife. Instead of establishing limited access to and control of the bedroom, the dresser, or the bottom drawer of the dresser, the evidence establishes a mutual use and control of the room and its equipment and the wife's right to access to the bottom dresser drawer. The dresser was not locked and the wife was not instructed not to look into the drawer.... The mere fact that the defendant alone may have used this dresser drawer while his wife may have used another or another dresser does not indicate that the wife was denied the mutual use, access to or control of the drawer.



Under certain circumstances, parents can consent to the search of their child’s property, even where child is an adult or pays rent (very fact specific).



3<sup>rd</sup> party consent valid where D is absent due to lawful detention; 3<sup>rd</sup> party consent not valid if police remove D from scene to prevent D from objecting.



7)

Officer got consent to search vehicle, but said suitcases in trunk were passenger's. Officer got passenger out of vehicle and said driver consented to search – passenger did not object to search of his suitcase.


Did driver have apparent authority?

Did passenger impliedly consent?


No, driver did not have authority and no implied consent.

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### Silence and Consent Searches



Silence after a claim of authority to search is never "implied consent"



However, after consent is received, "silence" may help prove driver consented to particular search

8)

United States v. Mayo, 627 F.3d 709 (8th Cir.2010) (in holding defendant's consent to search vehicle for drugs allowed officer to search "behind the door's interior panels," court stresses defendant observing such search "at no time objected or attempted to withdraw his consent"); United States v. Pena, 920 F.2d 1509 (10th Cir.1990) (after defendant consented to search of car, officer removed vent panel; this within scope of consent, as at no time did defendant "object to or express any concern about the officer's activities" and "never attempted to limit or retract his consent"); United States v. Gonzalez-Basulto, 898 F.2d 1011 (5th Cir.1990) (defendant's consent to inspection of inside of his tractor-trailer rig covered agent's conduct in hoisting

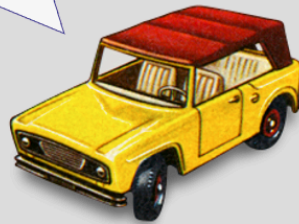
drug-sniffing dog and handler into the trailer; court stresses defendant knew "that agents were using drug-sniffing dogs to examine vehicles" and "stood silent" during hoisting); *People v. Olivas*, 859 P.2d 211 (Colo.1993) (consent to "complete search of [the] vehicle and [its] contents" allowed officer to search area behind loose door panel where "defendant was standing only a short distance away at the time [but never] made any attempt to limit the scope of the search").

**Cop:** "Can I search the entire car?"  
**Driver:** "Yes" and was silent while cop searched behind loose behind door panel



*People v. Olivas*, 859 P.2d 211

**Cop:** "Can I search the car?"  
**Driver:** It's not my car, I'm being paid to drive it to NY. But I guess you can search it.





9)

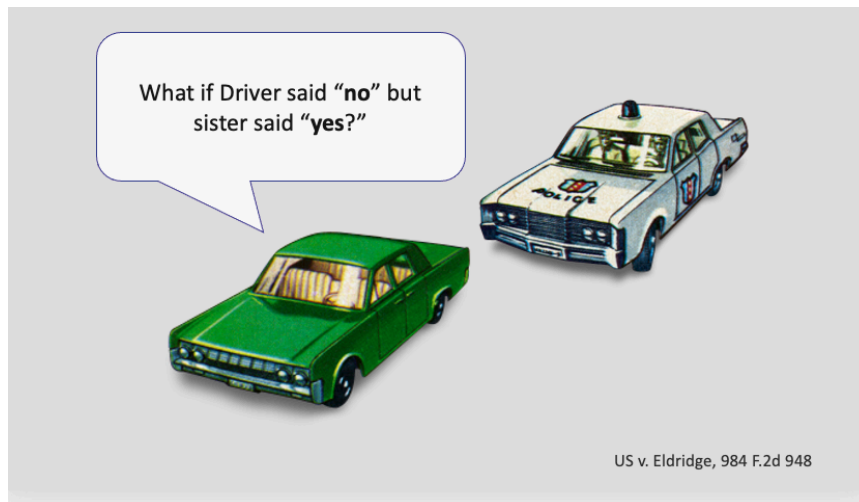
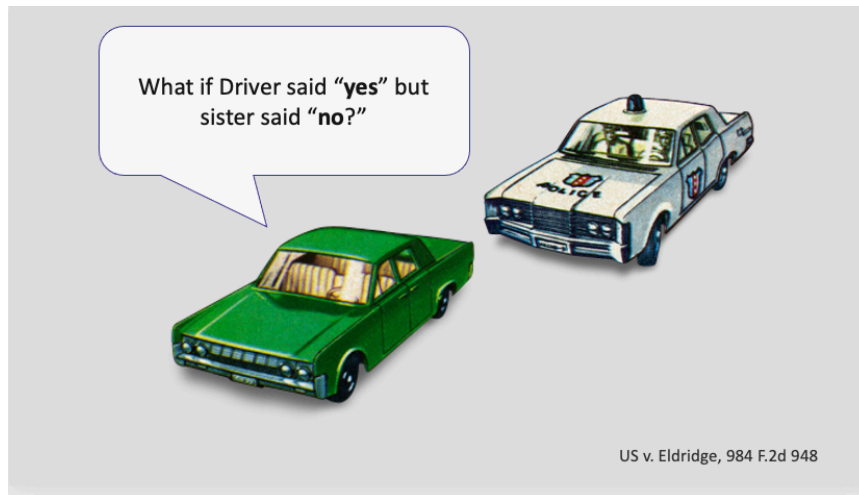
It is also well settled that consent to a search may be given not only by the owner of the property to be searched but also by “a third party who possesses common authority over or other sufficient relationship to the premises ... sought to be inspected.” *United States v. Matlock*, 415 U.S. 164, 171, 94 S.Ct. 988, 993, 39 L.Ed.2d 242 (1974). The driver of a car has the authority to consent to a search of that vehicle. As the driver, he is the person having immediate possession of and control over the vehicle. The “driver may consent to a full search of the vehicle, including its trunk, glove box and other components.” *United States v. Morales*, 861 F.2d 396, 399 (3d Cir.1988); see also *United States v. Dunkley*, 911 F.2d 522, 525–26 (11th Cir.1990) (per curiam), cert. denied, 498 U.S. 1052, 111 S.Ct. 766, 112 L.Ed.2d 785, 498 U.S. 1052, 111 S.Ct. 987, 112 L.Ed.2d 1071 (1991). This is true even when some other person who also has control over the car is present, if the other person remains silent when the driver consents and does not object to the search. See, e.g., *Dunkley*, 911 F.2d at 526; *Morales*, 861 F.2d at 400; and *United States v. Varona–Algos*, 819 F.2d 81, 83 (5th Cir.1987), cert. denied, 484 U.S. 929, 108 S.Ct. 296, 98 L.Ed.2d 255 (1987). The undisputed evidence is that Fuget gave permission for the officers to search the car’s interior and trunk. Eldridge was present when permission was requested and he did not object; instead he choose to remain silent. As a result, the officer’s warrantless search of the car was valid. *United States v. Eldridge*, 984 F.2d 943, 948 (8th Cir. 1993)

Police do not need to search for potential objecting co-occupants

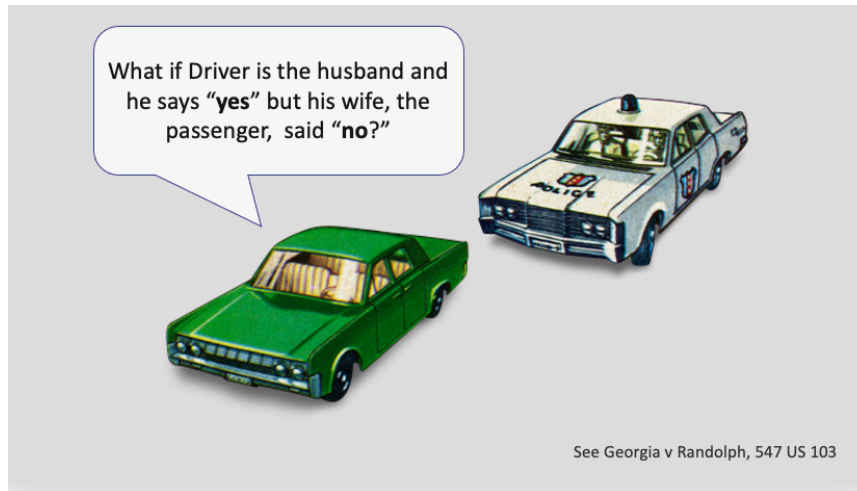
The U.S. Supreme Court, in a surprising decision in the development of the law of consent searches, ruled that where one co-owner consents to a search, but another co-owner who

is present objects, the consent is invalid as to the co-owner who objects. Justice Souter, writing for a 6-2 majority, held that "a physically present inhabitant's express refusal to consent to a police search is dispositive as to him." Although the Court in its opinion did not specifically discuss consent to a vehicle search, this principle likely holds true for a vehicle consent search where one co-owner consents, but the other present objects. The Court noted that its holding is limited: as long as police do not remove a co-owner from the scene to prevent his objection to the consent search, they are under no obligation to search for potentially objecting co-owners. § 3:4. Authority to consent, Vehicle Search Law Deskbook § 3:4

10)  
11)







12)

However, keeping in mind the *Matlock* assertion that third party consent rests "upon mutual use of the property by persons generally having joint access or control for most purposes," it would seem that if the car is the family vehicle, in the sense that the wife has rather regular access to the car, then the wife should be recognized as being in a position to give effective consent without regard to whether she is a registered co-owner or even whether she uses it as a driver rather than a passenger. In a somewhat reverse situation, where the wife is the owner of a car used exclusively by the husband and the wife had no access to it, the wife cannot meet the "joint access or control" test unless the circumstances change in such a way as to allow her to reassert her authority over the vehicle.

A harder case, perhaps, than *Jaras* and *James* is where the passenger knows that the police are aware that the purse is hers but leaves the purse in the car notwithstanding her knowledge that the driver has just consented to a search of the car, as in *State v. Daniels*, 2014 ND 124, 848 N.W.2d 670 (2014). The court wisely concluded: "In situations where a constitutional protection applies and consent alone serves as the basis for conducting a search, the onus is on the officer to ensure that he has received valid consent; it is not on the individual to make sure her rights are upheld."



13)

On the other hand, if the passenger does not remain silent but instead asserts ownership of certain luggage in the vehicle, then reliance on the driver's consent is unreasonable. *State v. Suazo*, 133 N.J. 315, 627 A.2d 1074 (1993). The same is true if the passenger *does* remain silent but this is attributable to the passenger's unawareness the effects were about to be searched. *United States v. Jaras*, 86 F.3d 383 (5th Cir.1996) (no "implied consent" from passenger's silence; court notes passenger not present when driver gave consent and officer never asked passenger for consent); *People v. James*, 163 Ill.2d 302, 206 Ill.Dec. 190, 645 N.E.2d 195 (1994).

Significance of reasonable but mistaken belief by police that third party has authority over place searched, 4 Search & Seizure § 8.3(g) (5th ed.)



**Module Four: Takeaways – 2 minutes**

End of class.