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I. INTRODUCTION

Pretrial drug testing procedures help government authorities determine which arrestees can be safely released and allow them to monitor and treat drug users. Thus, as the use of drugs increases, the desire of governments to implement pretrial drug testing procedures continues to grow. Many state and local governments that have implemented testing procedures believe that mandatory pretrial drug testing, without obtaining the consent of the arrestee, is constitutional. Nonetheless, many officials continue to conduct their programs on a voluntary basis by asking the prisoner to consent to a drug test before obtaining a sample. This comment assumes that consent is required by the constitution and thus focuses solely on the question of whether an arrestee can validly give consent to a pretrial drug test.

Part II will first identify the Fourth Amendment protections afforded to prisoners and will discuss whether these protections can be waived. Part III will identify those situations under which an arrestee can waive his constitutional rights by consenting to participate in a pretrial drug test. This section will also identify those situations when an arrestee's consent is invalid. Part IV will discuss whether an arrestee's consent to participate in a pretrial drug test remains valid when it is subsequently determined that the arrest was illegal.

1. National Drug Control Strategy, 25 WEEKLY COMP. PRES. DOC. 1308, 1309 (Sept. 5, 1989) (calling for expanded drug testing at every stage of the criminal justice system, including the pretrial stage).

2. The basis for the officials’ belief that mandatory pretrial drug testing of prisoners is constitutional stems from past court decisions. In the premier drug testing case of Schneckloth v. Bustamonte, 412 U.S. 218 (1973), the Supreme Court held that “when the subject of a search is not in custody ... the Fourth and Fourteenth Amendments require [the state to] demonstrate that the consent was in fact voluntarily given ...” Id. at 248 (emphasis added); see also Spence v. Farrier, 807 F.2d 753, 755 (8th Cir. 1986) (upholding random drug testing of prisoners because prisoners have a limited expectation of privacy in their prison cells).

3. Because the courts have yet to hold that mandatory pretrial drug testing is legal, the states have proceeded cautiously and have usually sought to obtain the arrestee's consent before conducting drug tests.
Finally, this comment concludes by summarizing the decisions of the courts.

II. WAIVER OF CONSTITUTIONAL PROTECTIONS GUARANTEED BY THE FOURTH AMENDMENT

The United States Constitution protects every citizen from unreasonable searches and seizures:

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. 4

Thus, under the Fourth Amendment, law enforcement officials are generally required to obtain a search warrant before conducting a drug test on an individual. 5

However, the Supreme Court has identified an exception to this general rule: "It is . . . well settled that one of the specifically established exceptions to the requirements of both a warrant and probable cause is a search that is conducted pursuant to consent." 6 Therefore, if a person consents to participate in a drug test, he has effectively waived the protection against unreasonable searches and seizures that was afforded him by the Fourth Amendment. 7

In order for a person's consent to be valid, consent must be "voluntarily given, and not the result of duress or coercion, express or implied." 8 If consent to search is coerced in any fashion, the search will violate the Fourth Amendment and will

4. U.S. CONST. amend. IV.
5. Note that this may not be necessary for individuals who already have been arrested. See supra note 2 and accompanying text.
7. See United States v. Henry, 615 F.2d 1223, 1229 (9th Cir. 1980); United States v. Thompson, 558 F.2d 522, 525 (9th Cir. 1977), cert. denied sub nom. Reeve v United States, 435 U.S. 914 (1978) (holding that a person in custody may voluntarily consent to a search); see also Sally Anne Cooper, Development in the Law—The Constitutional Issues of Drug Testing in the Workplace, 23 WILAMETTE L. REV. 553, 560-61 (1987).
be invalid. Thus, by consenting to an otherwise unreasonable search, a citizen can deprive himself of valuable constitutional protections.

Because of the seriousness of the constitutional protections involved, the courts protect individuals by placing the burden on the state to prove that an individual's consent was in fact voluntarily given. The Supreme Court has stated that "where the validity of a search rests on consent, the State has the burden of proving that the necessary consent was obtained and that it was freely and voluntarily given, a burden that is not satisfied by showing a mere submission to a claim of lawful authority." In addition, many courts seem to require the state to establish the existence of consent by the higher standard of "clear and convincing" evidence.

These rules often prove to be a barrier to a state that is trying to show that an arrestee voluntarily consented to participate in a pretrial drug test. Whether the state will be able to overcome this burden depends on the procedures and circumstances that were in place at the time of the testing. The impact of these different procedures and circumstances on the courts' decisions are discussed in the following section.

III. Determining Whether a Person Under Legitimate State Arrest Voluntarily Consented to Participate in Pretrial Drug Testing

The determination of whether an arrestee voluntarily consented to be tested for drugs is extremely important. However, determining whether the consent was in fact voluntarily given is not an easy task. There are no clear rules to follow. Instead, it "is a question of fact to be determined from the totality of all the circumstances." However, the courts have
identified some of the circumstances that are important to consider when determining whether an arrestee's consent was voluntary.

Circumstances deemed relevant by the courts in determining voluntariness fall into two categories: (1) those affecting an arrestee's ability to consent to drug testing and (2) those suggesting that the arrestee's consent may have been coerced rather than voluntary. Thus, in order to prove voluntary consent, the state must first prove that the arrestee had the ability to consent, after which the state must also prove that the arrestee did consent and that the consent was purely voluntary and not coerced. Those circumstances relevant to a determination under each prong are addressed below.

A. Circumstances Affecting an Arrestee's Ability to Consent

Before a person can voluntarily consent to a search and seizure, he must be capable of giving a valid consent. Thus, the courts will readily consider factors such as the arrestee's knowledge that he can refuse to consent, his ability to speak English, his intelligence and education, his experience and sophistication, and his age. Each of these circumstances are discussed below.

1. Knowledge of right to refuse

In the famous case of Miranda v. Arizona, the Supreme Court held that a person could not waive his constitutional right against self-incrimination until he had been informed of both his right to refuse waiver and the possible consequences of waiver. Because obtaining a voluntary confession is very similar to obtaining a voluntary consent to a search and seizure, it initially appeared that the Miranda rule may have applied to search and seizures as well. If the Miranda rule

U.S. 544, 557 (1980); United States v. Maez, 872 F.2d 1444 (10th Cir. 1989), cert. denied, 111 S. Ct. 1005 (1991); United States v. Marin, 669 F.2d 73 (2d Cir. 1982); Freye, supra note 8, at 83-84.
15. See Schneckloth, 412 U.S. at 238 n.25 (citations omitted) (drawing a distinction between the determination of whether consent was voluntarily given and the determination of whether consent was knowingly given).
18. Id. at 475-79.
19. See State v. Williams, 432 P.2d 679 (Or. 1967) (holding that Miranda warning requirements apply to interrogation aimed at obtaining defendant's consent
did apply to search and seizure cases, no citizen would be able to voluntarily consent to a search and seizure unless he had been informed of his right to refuse to consent to the search.

All doubts as to the applicability of *Miranda* to search and seizure cases were cleared up by the Supreme Court in the case of *Schneckloth v. Bustamonte*. This case rejected the notion that the *Miranda* rule was applicable in any way to search and seizure cases and held that a voluntary consent to a search can be found even in situations where state officials do not advise the subject of the search of his right of refusal. The Court plainly stated that "[k]nowledge of a right to refuse is not a prerequisite of a voluntary consent." Thus, an arrestee's consent to participate in a drug test can still be voluntary, even though he may not have been informed of his right to refuse.

While an arrestee's knowledge of his right to refuse may not be essential, it is nonetheless an important factor considered by the courts in determining whether the arrestee had the capacity to consent. The Supreme Court has stated that "[a]lthough the Constitution does not require 'proof of knowledge of a right to refuse as the *sine qua non* of an effective consent to a search,' such knowledge [is] highly relevant to the determination that there had been consent." Thus, while failing to inform an arrestee of his right to refuse a drug test may not be determinative in and of itself, the failure to inform may operate in conjunction with other circumstances to render the arrestee's consent ineffective. State drug testing officials should therefore give serious consideration to informing arrestees of their right to refuse to participate in pretrial drug tests. By doing so the state will increase the likelihood that its voluntary drug tests will be upheld.

21. *Id.* at 231-34.
22. *Id.* at 234.
23. *See Id.* at 226-27; United States v. Lemon, 550 F.2d 467 (9th Cir. 1977) (stating that warning to defendant is only one factor to consider); United States v. Smith, 543 F.2d 1141 (5th Cir. 1976), cert. denied 429 U.S. 1110 (1977) (warning defendant that he had a right to refuse to consent was only one factor to be considered).
25. *See* United States v. Ritter, 752 F.2d 435 (9th Cir. 1985); United States v. Trombley, 563 F. Supp. 564 (E.D. Mich. 1983) (holding that state's failure to warn the defendant that she could refuse to consent to the search, along with other circumstances such as deceit, rendered the search and seizure invalid).
2. Ability to speak English

The courts will look at an arrestee's language abilities when determining whether the person had the ability to consent to a search. If an arrestee is limited in his ability to speak and understand English, the courts are less likely to find that he has the capacity to voluntarily consent to a search.\textsuperscript{27} In such situations, the court may impose a heavier burden of proof on the state to show voluntary consent.\textsuperscript{28} However, the arrestee's language abilities are only one factor to consider and are not determinative in and of themselves.

3. Education and intelligence

Other factors the courts consider are the arrestee's education and intelligence.\textsuperscript{29} If the arrestee has had little education or has low intelligence, the courts are less likely to find that the arrestee was capable of giving voluntary consent.\textsuperscript{30} Apparently, the policy underlying this consideration is that a person cannot voluntarily consent to waive a right if he does not know that the right exists or cannot fully comprehend the right.

4. Experience and sophistication

The experience and sophistication of an arrestee are also important to consider when determining whether the arrestee search was valid when the party on whom the search was imposed consented to the search after being informed that he had the right to refuse to consent; United States \textit{v.} Watson, 423 U.S. 411, 424-25 (1976) (holding that consent was valid when defendant was informed that he had a right to refuse to consent).\textsuperscript{27} United States \textit{v.} Gallego-Zapata, 630 F. Supp. 665 (D. Mass. 1986) (holding that the fact that searchee had limited abilities with the English language, along with the fact that he was unfamiliar with his rights, rendered consent to search involuntary).\textsuperscript{29} United States \textit{v.} Wai Lau, 329 F.2d 310 (2d Cir.), \textit{cert. denied}, 379 U.S. 856 (1964)\textsuperscript{28} See \textit{Tukes}, 911 F.2d at 516; United States \textit{v.} Gallego-Zapata, 630 F. Supp. 665 (D. Mass. 1986) (holding that searchee's lack of familiarity with the constitution and its rights, among other factors, showed that his consent to the search was not voluntary); cf. United States \textit{v.} Mendenhall, 446 U.S. 544 (1980) (holding that arrestee with 11th grade education had sufficient understanding to consent to a search).
can voluntarily submit to a drug test. The greater the arrestee's sophistication or the more experience the arrestee has had with the legal system, the more likely it is that the court will find the arrestee capable of giving a valid consent.  

5. Age

When determining whether an arrestee consented to participate in a drug test, the courts may also consider the age of the arrestee. The younger the arrestee, the less likely it is that the arrestee is capable of giving a voluntary consent.  

B. Circumstances Affecting the Voluntarism of an Arrestee’s Consent

In order for an arrestee to validly consent to a search and seizure (such as a drug test), the arrestee's consent must be completely voluntary. Coercion or duress can play no part in the arrestee’s decision. Otherwise, the courts will find that the consent was not voluntary and will invalidate the search and seizure.  

The courts look at a wide variety of facts and circumstances in order to determine whether consent to a search was given voluntarily. These factors are considered below.

1. Consenting while under arrest

While some people may argue that consent given behind bars cannot be truly voluntary, the courts have ruled otherwise. Consent to search may be voluntary, even though it is given by a person in police custody. Thus, the fact that a

31. See United States v. Ehlebracht, 693 F.2d 333 (5th Cir. Unit B 1982) (holding that sophistication of middle-aged businessman helped to render his consent valid); United States v. Watson, 423 U.S. 411, 424-25 (1976) (indicating that searchee’s prior arrest for mail fraud evidenced his familiarity with the law and thus was a factor in establishing that his consent to search was voluntary and valid).
32. See United States v. Mendenhall, 446 U.S. 544 (1980) (indicating that the age of 22-year-old searchee was a factor in showing that consent was voluntary).
33. See People v. Kincaid, 367 N.E.2d 456 (Ill. App. Ct. 1977) (indicating that age of 16-year-old girl was a factor in establishing that she did not voluntarily consent to search).
34. See supra note 8 and accompanying text.
36. See infra notes 41-46 and accompanying text.
37. See supra note 14 and accompanying text.
38. United States v. Perez, 644 F.2d 1299 (9th Cir. 1981); see also United
person has been arrested does not mean that he cannot consent to a drug test.

However, the courts have stated that the act of obtaining consent from a person in custody is inherently suspect.\(^{39}\) Many courts have accordingly held that the government is under a heavier burden of proof when it is trying to show that an arrestee voluntarily consented to a search.\(^{40}\) Government officials should therefore be aware that it will be harder to show voluntary consent when the consenting person was under arrest.

2. **Presence of coercive factors**

When determining whether an arrestee's consent was voluntary, the court will search for any circumstance that suggests that there may have been coercion.\(^{41}\) The existence of a coercive condition will weigh in the court's consideration, although it will probably not be determinative by itself. However, the existence of multiple coercive factors may be enough to tip the scales against a finding of voluntary consent.

The courts have identified a number of actions that will be considered to be coercive when made by government officers. These actions include brandishing weapons,\(^{42}\) handcuffing the searchee,\(^{43}\) interrogating the searchee,\(^{44}\) making threats,\(^{45}\)

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\(^{39}\) United States v. Griffin, 530 F.2d 739 (7th Cir. 1976)


\(^{42}\) See United States v. Al-Azzawy, 784 F.2d 890 (9th Cir. 1985), cert. denied, 476 U.S. 1144 (1986) (holding that searchee did not voluntarily consent to search where police officers stood over him with drawn guns); United States v. Perez, 644 F.2d 1299 (9th Cir. 1981) (concluding that consent was coerced where government officials approached with drawn guns); United States v. Kimball, 555 F. Supp. 1366 (D. Me. 1983), aff'd, 741 F.2d 471 (1st Cir. 1984) (holding that the display of weapons in the course of an arrest may constitute a significant indicator of a coerced consent to a search); United States v. Whitlock, 418 F. Supp. 138 (E.D. Mich. 1976), aff'd without opinion, 556 F.2d 583 (6th Cir. 1977) (holding that consent to search was involuntary when defendant was approached at gunpoint and handcuffed).

and acting deceitfully.46

3. Denial of guilt by arrestee

Many courts hold that after a person denies guilt, he cannot voluntarily consent to a search that produces incriminating evidence.47 The rationale behind this view is that "no sane man who denies his guilt would actually be willing [to have] policemen search his room for contraband which is certain to be discovered."48 Thus, under this rule an arrestee would not be able to voluntarily consent to a drug test if he had denied using drugs.

Not all courts adopt this view. A few courts take the opposite approach and hold that a denial of guilt supports a finding of voluntary consent.49 There does not appear to be a majority rule on this issue. Thus, the effect of an arrestee's denial of guilt on his ability to consent to drug testing remains uncertain.

4. Evasive and uncooperative behavior of arrestee

If an arrestee continuously refuses to cooperate with the efforts of government officers, the courts will view this as evidence that the arrestee did not voluntarily consent to participate in the drug test.50 When consent is nonetheless obtained

that consent was involuntary when defendant was approached at gunpoint and handcuffed; cf. United States v. Crespo, 834 F.2d 267 (2d Cir. 1987), cert. denied, 485 U.S. 1007 (1988) (handcuffing of defendant does not require the court to find coercion).
44. United States v. Bolin, 514 F.2d 554 (7th Cir. 1975) (indicating that consent was invalid when defendant was interrogated and threatened); United States v. Perez, 644 F.2d 1299 (9th Cir. 1981) (holding that consent was coerced when weapons were drawn and defendants were separated for interrogation).
45. See United States v. Ocheltree, 622 F.2d 992 (9th Cir. 1980) (holding that consent was coerced when officer threatened to obtain a search warrant); United States v. Bolin, 514 F.2d 554 (7th Cir. 1975) (concluding that consent was invalid when defendant was interrogated and threatened); United States v. Blakeney, 579 F. Supp. 1197 (D.D.C. 1983) (threatening that a search warrant could be obtained immediately constituted coercion).
46. See United States v. Reckis, 119 F. Supp. 687 (D. Mass. 1954) (indicating that consent was invalid when agent pretended to be on premises for business purpose).
47. See Higgins v. United States, 269 F.2d 819 (D.C. Cir. 1954).
48. Id. at 820.
50. See United States v. Yan, 704 F. Supp. 1207 (S.D.N.Y. 1989) (holding that when arrestee manifested a desire not to cooperate with authorities, his consent to search was not valid).
from such a reluctant prisoner, the courts often tend to think that the consent may have been coerced. Thus, governments should be aware that when an arrestee attempts to avoid participation in a drug test but later consents, the courts may not be willing to find that the consent was voluntary.

5. Manner and intonation of arrestee’s consent

The manner in which the arrestee consented to a search may play a big role in the determination of whether the consent was voluntary. If the court determines that the arrestee’s acquiescence to the search was in the nature of resignation rather than voluntary waiver, the court will be more likely to invalidate the consent. On the other hand, if the arrestee assisted authorities in conducting the search, courts are more willing to find that the consent was voluntarily made.

IV. Determining Whether a Person Who Was Arrested Illegally Can Voluntarily Consent to Participate in Pretrial Drug Testing

Occasionally, situations may arise where a consenting arrestee turns out to be illegally detained. These situations raise an issue as to whether the arrestee’s consent can still be effective. Many courts have held that an arrestee’s consent to a search is invalid when it is subsequently determined that the arrest was illegal. This holding is apparently intended to protect illegally detained citizens who consent to a search while

51. See id. But see State v. Hauser, 125 S.E.2d 389 (N.C. 1962) (holding that consent was valid even though defendant initially denied having possession to the key to his trunk); Longo v. State, 26 So.2d 818 (Fla. 1946) (consenting to search was voluntary even though the arrestee attempted to elude the police in his car).


53. See United States v. Allison, 616 F.2d 779, 783 (5th Cir. 1980) (consenting to search was valid when arrestee opened the trunk of his car for inspection by government officers).

54. See Railway Labor Executives’ Ass’n v. Burnley, 839 F.2d 575, 589 (9th Cir. 1988) (indicating that when a search has been determined to be constitutionally unreasonable, the consent feature cannot save it); National Fed’n of Fed. Employees v. Weinberger, 818 F.2d 935, 943 (D.C. Cir. 1987) (holding that a search otherwise unreasonable cannot be redeemed by an exaction of consent); United States v. Moreno, 742 F.2d 532 (9th Cir. 1984) (holding that illegally detained consent to search was tainted by illegality and was ineffective); United States v. Berryman, 717 F.2d 651 (1st Cir. 1983) (holding that arrestee could not consent to a search after he had been illegally detained).
under the false belief that they are lawfully held. This protection is important because many people may be willing to consent to a search while in custody although they would not have consented under normal conditions.

When an illegally detained person consents to a search after learning of the illegal detention, the courts are not so strict. Many courts will allow an illegally detained person to voluntarily consent to a search in this type of situation. However, the courts usually hold that the consent becomes tainted by the illegal detention. Thus, in order to show valid consent in instances where a suspect has been illegally detained, the government must establish not only that the consent was voluntarily given, but also "that there were intervening circumstances sufficient to dissipate the taint of illegal detention." This is a significantly heavier burden.

Thus, the validity of a consent to search obtained from an illegally-held detainee depends on when the detainee's consent was given. If the consent was given while the detainee believed that he was lawfully held, the consent was involuntary and is invalid. On the other hand, if the consent was given after the arrestee learned of the illegal detention, the consent may be valid if the government is able to overcome the taint of the illegality.

V. CONCLUSION

The Fourth Amendment protects every citizen from unreasonable searches and seizures. However, citizens may waive this protection if they do so voluntarily. The government has the burden of proving that an arrestee's consent to participate in pretrial drug testing was voluntary. For this determination, the courts will consider both the arrestee's ability to consent and the presence of any coercive circumstances.

Relevant to the courts consideration of the arrestee's abili-

55. See United States v. Wells, 654 F.2d 550 (9th Cir. 1981) (indicating that the fact that defendant was subject of an illegal arrest and search did not render invalid his consent to a subsequent search).
57. Id. at 933; see also United States v. Edmondson, 791 F.2d 1512 (11th Cir. 1986); United States v. Foster, 566 F. Supp. 1403 (D.D.C. 1983).
59. Id.
ty to consent are: (1) the arrestee's knowledge of his right to refuse to consent; (2) the arrestee's ability to speak and understand English; (3) the arrestee's education and intelligence; (4) the arrestee's experience and sophistication; and (5) the arrestee's age.

When looking for coercive circumstances, the courts will consider whether (1) the consenting person was under arrest; (2) the government officials used weapons, handcuffs, interrogation, threats, and deceit; (3) the arrestee denied guilt; and (4) the arrestee's behavior was evasive and uncooperative. While none of these factors are likely to be determinative by themselves, they are all circumstances that the courts will consider when determining whether there was voluntary consent.

When a person has been illegally arrested, his ability to consent to a search depends on when the consent was given. If the consent was given before the arrestee learned of the illegal arrest, the consent is invalid. If the consent is given afterwards, the consent may be valid if the government can overcome the taint of the illegality by introducing evidence of intervening circumstances.

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