The Case for Bright-Line Rules in Fourth Amendment Jurisprudence: Adopting the Tenth Circuit's Bright-Line Test for Determining the Voluntariness of Consent

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NOTE

THE CASE FOR BRIGHT-LINE RULES IN FOURTH AMENDMENT JURISPRUDENCE:
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I. INTRODUCTION

The Fourth Amendment protects the people from “unreasonable” searches and seizures.1 Historically, due to the plain meaning of the Fourth Amendment, there has been a judicial preference for warrants.2 In the past, warrantless searches were only allowed in exceptional circumstances.3 Moreover, probable cause was generally required to justify any search.4 However, in the 1968 case Terry v. Ohio,5 the United States Supreme Court expanded the permissibility of warrantless searches. Under Terry, the probable cause requirement was loosened for less intrusive searches. The Terry Court held that a police officer may conduct a brief investigatory “stop” (a “Terry stop”) if the investigating officer has, given the totality of the circumstances, an articulable and reasonable suspicion that the detainee is engaged in criminal conduct.6 A Terry stop may only be expanded beyond its original purpose if either (1) the officer develops an articulable and reasonable suspicion that the

1. See U.S. CONST. amend. IV. The Fourth Amendment provides:
   The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

3. See id.
4. See id.
5. 392 U.S. 1 (1968).
6. See id. at 30-31.
detainee is involved in criminal activity; or (2) the encounter becomes consensual. A traffic stop is analogous to a Terry stop. Therefore, a traffic stop can only be expanded beyond its purpose if there is an articulable and reasonable suspicion that the detainee is engaged in criminal conduct or the encounter between the motorist and the law enforcement official becomes consensual.

For consent to a search to be considered a legally valid waiver of a citizen's Fourth Amendment rights, it must be "freely and voluntarily" obtained; consent can never be coerced. In determining the voluntariness of consent, the Court has held that consent is not voluntary unless the average reasonable person would feel that he is at liberty to terminate the encounter with law enforcement. In the context of traffic stops, the Court has held that in determining whether or not the motorist would feel free to terminate the encounter, a court should consider the "totality of all the circumstances." Although it appears that informing a suspect of his right to refuse consent would be the sine qua non of voluntariness, law enforcement is not required to obtain informed consent; or explain to the suspect that he has the right to refuse consent.

Today, all of the circuits employ the "totality of the circumstances test" that was articulated by the Supreme Court in Schneckloth v. Bustamonte and Ohio v. Robinette. However, within the framework of the "totality of the circumstances test," the Tenth Circuit has adopted the following bright-line rule: an encounter initiated by a traffic stop may not be deemed consensual unless the driver's documents have been returned to him. No other circuit has adopted this test. Although no circuit has explicitly rejected the Tenth Circuit approach, other circuits

7. See United States v. Ozbirn, 189 F.3d 1194, 1199 (10th Cir. 1999).
8. See United States v. Sharpe, 470 U.S. 675, 682 (1985) (holding that a traffic stop is analogous to a Terry stop because it is a brief investigatory stop).
9. See id.
11. See United States v. McKneely, 6 F.3d 1447, 1451 (10th Cir. 1993).
12. See Schneckloth v. Bustamonte, 412 U.S. 218, 227 (1973) (holding that the totality of the circumstances test was the best test to employ because it gave law enforcement the latitude it needed to deal with real life, in the field of criminal investigation); see also Ohio v. Robinette, 519 U.S. 33, 39 (1996) (endorsing the Schneckloth test and stating "[r]easonableness, in turn, is measured in objective terms by examining the totality of the circumstances").
13. See Schneckloth, 412 U.S. at 234. In Schneckloth, the defendant argued that police should have to obtain informed consent, similar to a Miranda waiver. See id. at 231. However, the Court rejected this argument in fear that it would undermine the efficacy of consent searches as a law enforcement tool and overregulate the police. See id. at 231-32.
16. See McKneely, 6 F.3d at 1451.
have upheld searches based on consent where consent was obtained prior to the return of the driver’s documents. 17

This Note is dedicated to the proposition that there is room for bright-line rules in Fourth Amendment jurisprudence. Therefore, this Note advocates the adoption of the Tenth Circuit’s “bright-line sub-test” under the Schneckloth-Robinette “totality of the circumstances test” for determining the voluntariness of consent. Part II outlines the debate over using bright-line rules in Fourth Amendment jurisprudence. Part III outlines and criticizes the “totality of the circumstances” test for determining the voluntariness of consent that the Supreme Court has mandated in Schneckloth and Robinette. Part IV outlines the development of the Tenth Circuit’s bright-line test, discusses its merits, and explains why it is easily reconcilable with both Schneckloth and Robinette. Part V discusses the approaches of the other circuits and the problems that those approaches present.

II. THE DEBATE OVER BRIGHT-LINE RULES

Before discussing the merits of the Tenth Circuit approach, it must be noted that the subject of bright-line rules in criminal procedure is a controversial subject. The controversy and debate surrounding bright-line rules are at the heart of the Supreme Court decisions in both Schneckloth v. Bustamonte 18 and Ohio v. Robinette. 19 Therefore, this Part will outline the arguments for and against the adoption of bright-line rules in Fourth Amendment jurisprudence.

A. The Case for Bright-Line Rules

Professor Wayne R. LaFave has been the most outspoken advocate of the adoption of bright-line rules in criminal procedure:

My basic premise is that Fourth Amendment doctrine, given force and effect by the exclusionary rule, is primarily intended to regulate the police in their day-to-day activities and thus ought to be expressed in terms that are readily applicable by the police in the context of the law enforcement activities in which they are necessarily engaged. A highly sophisticated set of rules, qualified by all sorts of ifs, ands, and buts and requiring the drawing of subtle nuances and hairline

distinctions, may be the sort of heady stuff upon which the facile minds of lawyers and judges eagerly feed, but they may be “literally impossible of application by the officer in the field.”

The advocates of bright-line rules essentially believe that the rules provide easy to follow guidelines for law enforcement, defense lawyers, prosecutors, and judges alike. Moreover, bright-line rules reduce the number of appeals and subject less “good evidence” to suppression.

In several Fourth Amendment cases, the Court has adopted bright-line rules. The most obvious such case is the landmark decision *Mapp v. Ohio* extending the federal exclusionary rule to state court proceedings. The exclusionary rule makes any evidence obtained in contravention of the Fourth Amendment inadmissible as substantive evidence against a criminal defendant. Another example of a bright-line Supreme Court holding is *Coolidge v. New Hampshire*, where the court held that the warrantless search and seizure of an unoccupied car is a per se violation of the Fourth Amendment.

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22. See Gillespie, supra note 21, at 3.


24. See id. at 657. Note also that *Mapp* has been somewhat limited by the “good faith” exception established in *United States v. Leon*, 468 U.S. 897 (1984). *Leon* held that a search conducted by an officer based on a warrant that turns out to be legally invalid will not result in suppression of the evidence, so long as the officer’s reliance on the invalid warrant was objectively reasonable and in good faith. See *Leon*, 468 U.S. at 926. The *Leon* decision shows the Court’s uneasiness with bright-line, judge-made rules. See id. I would submit its basis is the Court’s uneasiness with the rule fashioned in *Mapp*; therefore, the impact of that rule was slightly diminished by the holding in *Leon*.


27. See id. at 454. *Coolidge* is mentioned for illustration only and is not meant to suggest that it is the only other “bright-line” example in Fourth Amendment jurisprudence. See also *New York v. Belton*, 453 U.S. 454, 457, 460 (1981) (holding that a search incident to the arrest of an automobile occupant extends to the entire passenger area of the automobile and any containers, open or closed, therein).
1. The Development of the Exclusionary Rule: The Seminal Bright-Line Rule in Fourth Amendment Jurisprudence

Throughout the eighteenth, nineteenth, and early twentieth centuries, the remedy for a person searched in violation of the Fourth Amendment was to sue the violating officer in a tort action. The rationale behind this practice was that regardless of how the evidence was obtained, it was still competent. However, by the early twentieth century courts began to contemplate whether the exclusion of illegally obtained evidence was a better remedy. The Supreme Court adopted such a rule in the 1914 Weeks v. United States decision:

The tendency of those who execute the criminal laws of the country to obtain conviction by means of unlawful seizures and enforced confessions . . . after subjecting accused persons to unwarranted practices destructive of rights secured by the Federal Constitution, should find no sanction in the judgments of the courts which are charged at all times with the support of the Constitution and to which people of all conditions have a right to appeal for the maintenance of such fundamental rights.

The Weeks decision marked the genesis of the exclusionary rule; however, it only applied to the federal government and not to the states. In fact, by 1926, thirty states had expressly rejected the exclusionary rule. Noted Judge Cardozo: "[t]here has been no blinking the consequences. The criminal is to go free because the constable has blundered." The pettiest officer would have the power through "overzeal or indiscretion, to confer immunity upon an offender for crimes the most flagitious." Cardozo's criticisms of the rule express his concern over the overregulation of the police.

In 1949, the Supreme Court held in Wolf v. Colorado that although the Fourth Amendment applies to state law enforcement officers, the states were not required to adopt the exclusionary rule.

28. See Miller & Wright, supra note 2, at 133.
29. Noted Justice Joseph Story in the nineteenth century: "The law deliberates not on the mode, by which [the evidence] has come into the possession of the party, but on its value in establishing itself as satisfactory proof." Id. (quoting Justice Story).
31. Id. at 392.
32. See Miller & Wright, supra note 2, at 386.
33. See id. at 387; see also People v. Defore, 150 N.E. 585, 587 (N.Y. 1926).
34. Defore, 150 N.E. at 587.
35. Id. at 588.
37. See id. at 28, 33.
Throughout the 1950s, judges and commentators began to view the then available remedies for breach of the Fourth Amendment more skeptically and, as a result, more states began to adopt the exclusionary rule. 38

Finally, in *Mapp v. Ohio*, 39 the United States Supreme Court mandated that the states adopt the exclusionary rule. 40 The Court reasoned that the exclusionary rule must be strictly followed; otherwise the Fourth Amendment would be rendered meaningless. 41 It held that the exclusionary rule was constitutionally required even if it was not expressly provided for in the text of the Fourth Amendment. 42 Furthermore, the Court held that the mandatory adoption of the rule by the states was a logical extension of the Fourteenth Amendment and made good functional sense. 43

The exclusionary rule is the seminal bright-line rule in Fourth Amendment jurisprudence. Since its adoption, the debate has continued about the competence and power of the court to fashion such judge-made rules in order to give force and effect to Fourth Amendment protections.

2. *Coolidge v. New Hampshire*

In *Coolidge v. New Hampshire*, 44 Edward Coolidge was convicted of the murder of a young girl and sentenced to life in prison. 45 During the investigation of the murder, Coolidge was cooperative and had agreed to take a lie detector test and to show his firearms to the police. 46 However, as the investigation progressed and evidence was gathered, the police became convinced that they had enough evidence to obtain an arrest warrant for Coolidge, and search warrants for his home and cars. 47 The warrants were issued by the Attorney General, the "chief 'government enforcement agent,'" who was coordinating the investigation and who would later prosecute Coolidge. 48

38. *See Miller & Wright, supra* note 2, at 386; *see also* *People v. Cahan*, 282 P.2d 905, 908 (Cal. 1955) (holding that California would adopt the exclusionary rule).
40. *See id.* at 660.
41. *See id.* at 655.
42. *See id.* at 648.
43. *See id.* at 655.
44. 403 U.S. 443 (1971).
45. *See id.* at 448.
46. *See id.* at 445-46.
47. *See id.* at 446-47.
48. *See id.* at 450.
The New Hampshire Supreme Court affirmed Coolidge’s conviction, and the United States Supreme Court subsequently granted certiorari. The Supreme Court adopted two bright-line rules in this case: (1) a search conducted pursuant to a warrant not issued by a neutral and detached magistrate and outside the purview of the judicial process is per se unreasonable; and (2) a search of an automobile requires a warrant and cannot be considered a search incident to arrest unless the suspect was arrested in his car pursuant to Carroll v. United States.

The Court reasoned its adoption of the first bright-line rule on well-established case law. The rationale behind the Court’s second bright-line rule, requiring the warrant for the unoccupied car, was based on three factors: (1) the ease of obtaining the warrant because of apparent probable cause; (2) the immobility of the car after the arrest; and (3) the ease of preserving the evidence in the car after the arrest.

The State argued that under Carroll it did not have to obtain a warrant, therefore, the search should have been upheld. However, Carroll’s allowance of warrantless searches was based on the mobility of the car and evanescent evidence. The Court was unwilling to extend Carroll to this case. Interestingly, Justice Stewart, who would chastise bright-line rules in criminal procedure just two years later in Schneckloth v. Bustamonte, wrote the majority opinion in Coolidge.

51. See Coolidge, 403 U.S. at 449. The Court noted the underlying policy of the Fourth Amendment warrant requirement:

“The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime. Any assumption that evidence sufficient to support a magistrate’s disinterested determination to issue a search warrant will justify the officers in making a search without a warrant would reduce the Amendment to a nullity and leave the people’s homes secure only in the discretion of police officers.”

Id. (quoting Johnson v. United States, 333 U.S. 10, 13-14 (1948)).
52. See id. at 458 (citing Carroll v. United States, 267 U.S. 132, 138, 162 (1925), which held that the police could conduct a warrantless search of a moving vehicle or a vehicle that had temporarily stopped if probable cause existed to support the belief that the vehicle contained contraband or the fruits or instrumentalities of a crime).
53. See MILLER & WRIGHT, supra note 2, at 383 (discussing the history of the “neutral and detached magistrate” requirement for a valid search warrant).
54. See Coolidge, 403 U.S. at 460-61.
55. See id. at 458.
56. See Carroll, 267 U.S. at 149.
57. See Coolidge, 403 U.S. at 460-61.
Justice Black dissented, expressing his concerns about the overregulation of the police and the ability of the Court to establish police procedure.\(^5\) Black questioned both the constitutional power and competence of judges in fashioning police procedures:

I readily concede that there is much recent precedent for the majority’s present announcement of yet another new set of police operating procedures. By invoking this rulemaking power found not in the words but somewhere in the “spirit” of the Fourth Amendment, the Court has expanded that Amendment beyond recognition. And each new step is justified as merely a logical extension of the step before.\(^6\)

Justice Black’s opposition to bright-line rules is best characterized as a power/competence argument.

**B. The Case Against Bright-Line Rules**

Bright-line rules are not without their critics. There are two basic arguments against bright-line rules. One argument is the argument that Justice Black made in *Coolidge*; judges do not have the constitutional power to make such rules.\(^6\) The other argument centers on the policy effects of the rules. Opponents of bright-line rules generally believe that the rules result in the overregulation of police.\(^6\) Moreover, they believe that individual cases cannot be analyzed by any single, “infallible touchstone,” such as a bright-line rule, and that only a “case by case” analysis is effective.\(^6\) Critics also fear that a proliferation in rules will only exacerbate the complexity of Fourth Amendment jurisprudence.\(^6\)

Professor Alschuler stated:

What renders substantive [F]ourth [A]mendment law incomprehensible, however, is not the lack of categorical rules but too many of them. The application of different principles to seizures of persons than to seizures of things, the development of differing rules for arrests in restaurants than for arrests in houses, the attempt to articulate two tiers of justification for a thousand kinds of seizures, the proliferation of distinctions between and among containers—all of these and more have rendered the [F]ourth [A]mendment a Ptolemaic  

\(^{59}\) See *Coolidge*, 403 U.S. at 499 (Black, J., dissenting).  
\(^{60}\) Id. (Black, J., dissenting).  
\(^{61}\) See id. (Black, J., dissenting).  
\(^{64}\) See Alschuler, *supra* note 62, at 231.
system. Only a police officer who studies Professor LaFave’s three-volume treatise on evenings and weekends can master the epicycles. . . . The phrase “unreasonable searches and seizures” can rarely be reduced much further. Abandoning the judging of categories, courts should resume the judging of cases. In that way, they might make the law of search and seizure substantially more comprehensible to the police and to the rest of us.  

Bright-line rules have also been criticized for shifting the focus of judicial inquiry from whether or not an individual has a reasonable expectation of privacy to whether the state has a legitimate interest and probable cause; thereby eroding the protection of individual liberties.

In several cases, the Court has agreed with Professor Alschuler and has adopted a more flexible case-by-case approach rather than adopting a bright-line rule. Two such cases central to this Note are Schneckloth v. Bustamonte and Ohio v. Robinette, which will be discussed in depth in Part III.

C. Some Observations About the Court and Bright-Line Rules

Specifically in the area of determining the voluntariness of consent, the Court has eschewed bright-line rules in favor of a “totality of the circumstances” case-by-case analysis. As is demonstrated by the above case law, in some Fourth Amendment cases the Court will choose to adopt a bright-line rule, while in other cases it will adopt a case-by-case approach. This begs the question: why does the court choose to adopt a bright-line rule in some cases while in other cases it will not? There appears to be a lack of doctrinal coherence. In Coolidge, Justice Stewart

65. Id. at 287-88.
66. See Gillespie, supra note 21, at 3 (discussing the author’s fear that the benefits of bright-line rules would be eclipsed by their cost because the development of bright-line rules diverts attention away from the question of an individual’s reasonable expectation of privacy and, therefore, threatens individual rights).
67. See Schneckloth, 412 U.S. at 229 (holding that the totality of the circumstances test was the best test to employ because it gave law enforcement the latitude it needed to deal with real life, in the field of criminal investigation); see also Ohio v. Robinette, 519 U.S. 33, 39-40 (1996) (endorsing Schneckloth).
68. The Court has adopted a case-by-case analysis in other areas of Fourth Amendment law. For example, in Illinois v. Gates, 462 U.S. 213 (1983), the Court held that probable cause is to be determined by the totality of the circumstances. See id. at 230-31.
69. See Schneckloth, 412 U.S. at 227; see also Robinette, 519 U.S. at 39-40.
was willing to establish bright-line rules. Yet, in *Schneckloth* he was not.

When the courts have been reluctant to demand any bright-line protections in certain areas of Fourth Amendment jurisprudence, such as determining the voluntariness of consent, that reluctance appears to be attributable to the judges' fear that, if they overregulate police, they will hamstring the police's ability to investigate crime in the field. Judges also appear to be concerned with their power and competence to establish such rules. Therefore, in these cases the rules that have been articulated by the courts focus on "reasonableness." The rationale behind governing police conduct by reasonableness and not bright-line rules is that the reasonableness inquiry will allow the flexibility that law enforcement needs to deal with real life problems in the field.

However, governing police conduct based on reasonableness allows latitude that is undesirable for two reasons: (1) it does not always give citizens the concrete constitutional protections they are entitled to; (2) it does not offer sufficient guidelines to law enforcement in their interactions with citizens to ensure that they protect rights and that "good evidence" is not suppressed. Ultimately, it is the Court who ensures that Fourth Amendment rights are protected, and it ought to be able to formulate rules to that end.

III. THE *SCHNECKLOTH/ROBINETTE* REGIME

In both *Schneckloth v. Bustamonte* and *Ohio v. Robinette*, the Court eschewed bright-line rules in favor of the "totality of the circumstances" test's case-by-case analysis as the appropriate way to determine the voluntariness of consent.

A. Schneckloth v. Bustamonte

At 2:40 A.M. in Sunnyvale, California, while on routine patrol, Officer James Rand observed a vehicle with one headlight and its license plate light out. He stopped the car. Officer Rand asked the driver of

70. See *Coolidge v. New Hampshire*, 403 U.S. 443, 460 (1971); see also *supra* text accompanying notes 51-52.
71. See *Schneckloth*, 412 U.S. at 227.
72. See *Alschuler, supra* note 62, at 230.
73. See *id*.
75. 519 U.S. 33 (1996).
76. See *Schneckloth*, 412 U.S. at 220.
77. See *id*.
the car, Joe Gonzales, for his driver’s license. When he could not produce a license Officer Rand asked the other people in the car to show him identification. Only one of the six other occupants, Joe Alcala, could produce a license. Alcala explained to the officer that the car belonged to his brother, Robert Bustamonte. Two other officers arrived on the scene in order to assist Officer Rand.

After the arrival of the other two officers, Officer Rand asked Alcala if he could search the car. Alcala replied, "[s]ure, go ahead." Prior to this search, no one was arrested or threatened with arrest. Officer Rand testified that the mood was "very congenial at this time." Officer Rand then asked Alcala if the trunk opened. Alcala replied that it did, and opened the trunk for Officer Rand.

In his search of the car, Officer Rand found three checks, previously stolen from a car wash, wadded up under the left rear seat. Bustamonte was subsequently tried and convicted in California state court for possessing a check with the intent to defraud. The trial judge denied the motion to suppress the checks. After exhausting his appeals in the California state courts, Bustamonte filed for a writ of habeas corpus in federal court.

On appeal, Bustamonte contended that his brother’s consent to the search was not a valid waiver of his Fourth Amendment rights because the waiver was not a knowing waiver. Bustamonte urged the court to adopt a bright-line rule that would invalidate any search based on

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78. See id.
79. See id.
80. See id.
81. See id.
82. See id.
83. See id.
84. Id. (quoting Alcala’s testimony).
85. See id.
86. Id. (quoting Rand’s testimony).
87. See id.
88. See id.
89. See id.
90. See id. at 220-21.
91. See id. at 220.
92. See id. at 221. A writ of habeas corpus is a civil action that may be commenced by a convicted prisoner against a prison warden to demand his freedom on the ground that he was unlawfully deprived of his liberty. The literal translation of the term is: “You have the body.” Black’s Law Dictionary 709 (6th ed. 1990).
93. See Schneckloth, 412 U.S. at 222.
consent where the officer failed to inform the detainee of his constitutional right to refuse consent.  

The Court, per Justice Stewart, refused to adopt such a bright-line rule.  Justice Stewart analogized the voluntariness of consent to search to the voluntariness of a confession.  In the context of a confession, voluntariness could not be taken to mean a knowing choice. Voluntariness meant only the absence of coercion.

Justice Stewart’s opinion also posited a slippery slope argument. He reasoned that if a bright-line test requiring informed consent were adopted, “virtually no statement would be voluntary because very few people give incriminating statements in the absence of official action of some kind.” He feared that such a rule would eliminate the consent search’s efficacy as an effective law enforcement tool.

Moreover, Justice Stewart believed that a case-by-case analysis was more appropriate than trying to reduce the standard of judgment to “a single controlling criterion” because of the unique nature of each case.

The following excerpt from Justice Stewart’s opinion summarizes his reasoning:

The problem of reconciling the recognized legitimacy of consent searches with the requirement that they be free from any aspect of official coercion cannot be resolved by any infallible touchstone. To approve such searches without the most careful scrutiny would sanction the possibility of official coercion; to place artificial restrictions upon such searches would jeopardize their basic validity. Just as was true with confessions, the requirement of a “voluntary” consent reflects a fair accommodation of the constitutional requirements involved . . . . In sum, there is no reason for us to depart in the area of consent searches, from the traditional definition of “voluntariness.”

Therefore, the Court adopted the “totality of the circumstances” test in order to determine the voluntariness of consent.

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94. See id. at 223.
95. See id. at 223-30.
96. See id. at 223-24.
97. See id. at 224.
98. See id.
99. Id.
100. See id. at 225.
101. Id. at 226.
102. Id. at 229.
Justice Marshall dissented and advocated for a bright-line rule as a needed constitutional protection. Justice Marshall found Justice Stewart’s reliance on the confession analogy misplaced. Justice Marshall reasoned that, in the case of a confession, knowledge is irrelevant in the sense that there is no choice, because no “sane” person would give up his right to be free from compulsion. Therefore, the legitimacy of the confession turns directly on the issue of compulsion, not choice.

Moreover, Justice Marshall noted that the government interest and the needs of law enforcement in conducting a consent search are “significantly more attenuated, for probable cause to search may be lacking.” Therefore, Justice Marshall reasoned, consent searches are not allowed for any compelling government need, rather they are permitted because “we permit our citizens to choose whether or not they wish to exercise their constitutional rights.” Thus, Justice Marshall believed that since the legitimacy of the government action was based on a citizen’s choice not to exercise his or her rights, the government should bear the burden of proving that the citizen’s waiver was a knowing one.

Justice Marshall also attacked the majority’s slippery slope argument that a bright-line rule would undermine the consent search as a law enforcement tool. He noted that the FBI has required knowing waivers for many years. Justice Marshall also criticized the majority’s emphasis on practicality:

I must conclude, with some reluctance, that when the Court speaks of practicality, what it really is talking of is the continued ability of the police to capitalize on the ignorance of citizens so as to accomplish by subterfuge what they could not achieve by relying only on the knowing relinquishment of constitutional rights. Of course it would be “practical” for the police to ignore the commands of the Fourth Amendment.

103. See id. at 277 (Marshall, J., dissenting).
104. See id. at 280-81 (Marshall, J., dissenting).
105. See id. at 281 (Marshall, J., dissenting).
106. See id. (Marshall, J., dissenting).
107. Id. at 283 (Marshall, J., dissenting).
108. Id. (Marshall, J., dissenting).
110. See id. at 287 (Marshall, J., dissenting).
111. See id. (Marshall, J., dissenting).
112. Id. at 288 (Marshall, J., dissenting) (emphasis added).
B. Ohio v. Robinette

In Ohio v. Robinette, the Court revisited the issue of bright-line rules regarding the voluntariness of consent. However, the Court reaffirmed its position that the "totality of the circumstances test" is the test that ought to be employed by law enforcement.

Robert Robinette was traveling at sixty-nine miles per hour on a stretch of Interstate 70 in Ohio where the posted speed limit was forty-five because of construction. Robinette was pulled over by Deputy Roger Newsome of the Montgomery County Sheriff's office. Newsome asked for and received Robinette's license and registration. Newsome ran a National Crime Investigation Center ("NCIC") computer check, which revealed that Robinette had no previous violations. Newsome then asked Robinette to step out of the car and turned on his mounted video camera, issued a verbal warning and returned Robinette's documents.

Newsome asked one more question: "[B]efore you get gone: [A]re you carrying any illegal contraband in your car? Any weapons of any kind, drugs, anything like that?" Robinette replied in the negative. Newsome then asked for and obtained Robinette's consent to search. The search resulted in Newsome's finding of a small amount of marijuana and methamphetamine.

At trial, Robinette sought to suppress the evidence and lost. However, on appeal the Ohio Court of Appeals reversed the conviction, and the Ohio Supreme Court affirmed the Court of Appeals, holding that the Ohio Constitution required the adoption of a bright-line rule of informed consent. Chief Justice Rehnquist wrote the opinion of the Court. Before deciding on the issue of Ohio's bright-line rule, the Court first concluded that it had jurisdiction to hear the case. Then, Chief

114. See id. at 35 (summarizing the underlying facts).
115. See id.
116. See id.
117. See id.
118. See id.
119. Id. at 35-36 (second alteration in original) (quoting Deputy Roger Newsome).
120. See id. at 36.
121. See id.
122. See id.
123. See id.
124. See id.
125. See id. at 37. The Court concluded that it had jurisdiction because although the Ohio Supreme Court purported to have rested its decision on separate and independent grounds of state law (which would have precluded federal jurisdiction under Michigan v. Long, 463 U.S. 1032, 1036
Justice Rehnquist addressed the bright-line rule in an opinion that rested solely on precedent:

In applying this test we have consistently eschewed bright-line rules, instead emphasizing the fact-specific nature of the reasonableness inquiry. Thus, in Florida v. Royer, ... we expressly disavowed any “litmus-paper test” or single “sentence or ... paragraph ... rule,” in recognition of the “endless variations in the facts and circumstances” implicating the Fourth Amendment. ... [We have] reiterated[ed] that the proper inquiry necessitates a consideration of “all the circumstances surrounding the encounter.”

Again, the court rejected a bright-line rule in Robinette and elected to remain with the case-by-case approach of the “totality of the circumstances” test.

C. Critique

Many have rightly criticized Ohio v. Robinette. Although it is the position of this Note that bright-line rules are desirable in Fourth Amendment jurisprudence, we are confined to the “Schneckloth-Robinette box.” This begs the question; is there a way to work within the “totality of the circumstances” rubric and still find a way to develop bright-line rules to give guidance to law enforcement and ensure protections to citizens? It is the position of this Note that the Tenth Circuit’s bright-line rule for determining the voluntariness of consent offers such an alternative.

(1983), the state supreme court’s decision in fact relied heavily on federal law. But see Robinette, 519 U.S. at 46 (Stevens, J., dissenting) (noting that the Ohio Supreme Court’s decision rested on separate and independent grounds of state law).

In his dissent in Robinette, Justice Stevens noted that the United States Constitution provides a floor, not a ceiling, for individual rights and that it would be permissible for the Ohio Supreme Court to demand more protection under the state constitution by adopting a bright-line rule requiring informed consent. See Robinette, 519 U.S. at 46. (Stevens, J., dissenting).

126. Robinette, 519 U.S. at 39 (citations omitted) (second and third omissions in original).


[A]lthough the totality of the circumstances test is the appropriate test to apply to consensual officer-pedestrian encounters, that test alone may not be adequate to determine the legality of the officer’s conduct in the instant case. Therefore, the additional application of a bright-line rule to the officer-motorist encounter is necessary to delineate the constitutional boundaries of traffic stops and check the substantial discretion afforded police officers in traffic detentions.

Id. at 930-31.
IV. THE TENTH CIRCUIT APPROACH

As mentioned earlier, the Tenth Circuit has adopted a bright-line rule to help determine the voluntariness of consent: "This Circuit follows the bright-line rule that an encounter initiated by a traffic stop may not be deemed consensual unless the driver’s documents have been returned to him." Therefore, evidence obtained during a consent search in violation of this rule would be suppressed.\(^2\) Part IV.A discusses the development of the bright-line rule including the case that was the seminal point in its development, United States v. Recalde.\(^{129}\) Part IV.B examines United States v. Gonzalez-Lerma,\(^{131}\) which is the most often cited case articulating the rule. Part IV.C reconciles the rule with Schneckloth and Robinette. Part IV.D argues that the Tenth Circuit’s rule should be adopted by every circuit.

A. The Development of the Tenth Circuit’s Bright-Line Rule

The Tenth Circuit expressly follows the totality of the circumstances test that the Supreme Court mandated in both Schneckloth and Robinette.\(^{132}\) However, it has carved out the bright-line rule that, "an encounter initiated by a traffic stop may not be deemed consensual unless the driver’s documents have been returned to him."\(^{133}\)

1. United States v. Recalde

The genesis of this bright-line rule can be traced to United States v. Recalde.\(^{134}\) In this case, Officer Thomas Christian of the New Mexico State Police pulled over Miguel Recalde, an Argentine citizen, for speeding on Interstate 40 outside Moriarty, New Mexico.\(^{135}\) Upon Officer Christian’s request, Recalde produced a Virginia driver’s license and registration listing the owner as Robert Sosa.\(^{136}\) Officer Christian told

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\(^{128}\) United States v. Gonzalez-Lerma, 14 F.3d 1479, 1483 (10th Cir. 1994) (citing United States v. McKneely, 6 F.3d 1447, 1451 (10th Cir 1993)).

\(^{129}\) See Gonzalez-Lerma, 14 F.3d at 1484; see also Mapp v. Ohio, 367 U.S. 643, 670 (1961) (holding that the exclusionary rule applies in state criminal proceedings).

\(^{130}\) 761 F.2d 1448 (10th Cir. 1985).

\(^{131}\) See Recalde, 761 F.2d at 1453 (citing Schneckloth v. Bustamonte, 412 U.S. 218, 227-28 (1973)) ("Whether consent is in fact voluntary, or is the product of duress or coercion, express or implied, is a question of fact to be determined from the totality of all the circumstances.").

\(^{132}\) Gonzalez-Lerma, 14 F.3d at 1483 (citing McKneely, 6 F.3d at 1451).

\(^{133}\) 761 F.2d 1448 (10th Cir. 1985). In Recalde, the Tenth Circuit articulated the rule for the first time, although only implicitly as a bright-line rule. See id. at 1459.

\(^{134}\) See id. at 1451.

\(^{135}\) See id.
Recalde that he was going to give him a speeding ticket and returned to
the car to conduct a NCIC check. Officer Christian radioed for back-
up, explaining to the assisting officer he had a "gut instinct" that Recalde
was engaged in drug trafficking, although he had no objectively
reasonable or articulable basis for this belief. Officer Armijo of the Moriarty Police Department arrived on the
scene to assist Officer Christian. Officer Christian proceeded to obtain
consent from Recalde. Officer Christian retained possession of the
driver's license, ticket, and registration. The search yielded a large
quantity of cocaine. Recalde was subsequently tried and convicted for
possession with intent to distribute.

The court held that this consent could not be deemed free and
voluntary given the totality of the circumstances:

[Recalde] was never told he was free to leave. To the contrary, he was
handed a blank consent form by an officer who held his ticket, his
driver's license, and his registration. The officers never indicated that
they had concluded any aspect of their investigation and Recalde was
not, by any objective standard, free to go. These coercive
circumstances . . . . surrounding his execution of the consent form were
not sufficiently free of duress and coercion so as to remove the taint of
the illegal detention.

2. The Rationale Behind the Rule

The rationale behind the bright-line rule seems grounded in both
holdings and dicta from the Supreme Court's decisions in Florida v.
Royer and United States v. Mendenhall, as well as Schneckloth v.
Bustamonte's totality analysis.

In Mendenhall, the Court held that in order for consent to be
considered voluntary the average reasonable person must feel that he is
at liberty to terminate the encounter. As was discussed at length

137. See id.
138. See id.
139. See id.
140. See id.
141. See id. at 1452.
142. See id.
143. See id. at 1451.
144. Id. at 1459.
146. 446 U.S. 544 (1980).
148. See Mendenhall, 446 U.S. at 558.
earlier, the appropriate test in order to determine whether the consent was voluntary is "the totality of all the circumstances." The Recalde court concluded that no reasonable person could feel that he is at liberty to terminate the encounter and proceed on his way when all of his documents were in the possession of the police.

The Supreme Court held in Florida v. Royer that valid consent could never be coerced. Thus, the Recalde court appeared to be strongly influenced by this holding when it articulated the bright-line rule. It found the officer's retention of a driver's documents to be inherently coercive. Although the Recalde court did not explicitly articulate its holding as a bright-line rule, the Tenth Circuit has since cited Recalde as the precedent establishing its bright-line rule.

B. United States v. Gonzalez-Lerma

There are many cases in the Tenth Circuit that discuss this bright-line rule; however, the one most often cited is United States v. Gonzalez-Lerma. Therefore, a discussion of this case is the logical starting point for a discussion of the Tenth Circuit's approach.

Rene Gonzalez-Lerma was pulled over on Interstate 70 in Utah for driving a truck at seventy-one miles per hour in a sixty-five mile per hour zone. There were Michigan license plates on the truck. When the deputy asked Gonzalez-Lerma for his license and registration he produced a temporary California driver's license and the title to the car rather than the registration. The deputy then asked for additional identification and Gonzalez-Lerma produced a union card. The title of the car was not in the name of Gonzalez-Lerma. When asked why he had possession of the vehicle, Gonzalez-Lerma explained that he worked in construction and that he had driven the vehicle from Detroit to Los

150. See United States v. Recalde, 761 F.2d 1448, 1459 (10th Cir. 1985).
152. See Recalde, 761 F.2d at 1456-57 (stating that "[t]he crucial facts present in . . . Royer are also present here").
153. See id. at 1459.
154. See United States v. Gonzalez-Lerma, 14 F.3d 1479, 1483 (10th Cir. 1994) (citing United States v. McKneely, 6 F.3d 1447, 1451 (10th Cir. 1993)).
155. 14 F.3d 1479 (10th Cir. 1994).
156. See id. at 1481.
157. See id.
158. See id.
159. See id.
160. See id.
Angeles to pick up some parts for construction. There was a discrepancy between the date of birth on the driver's license and the date of birth on the union card.

The deputy was suspicious but told Gonzalez-Lerma he was going to issue him a written warning. The deputy returned to his cruiser and ran a NCIC check on the vehicle that came up negative. The deputy returned to the vehicle and questioned Gonzalez-Lerma about the lack of construction materials in the truck and other inconsistencies in his story. He then asked Gonzalez-Lerma for consent to search the vehicle to which he assented. The search revealed a secret compartment between the bed of the pick-up truck and the lining of the bed. This heightened the deputy's suspicion that Gonzalez-Lerma was running drugs and thus he obtained a warrant. The search of the hidden compartment revealed twenty-seven kilograms of cocaine. Although the deputy said he was going to issue a warning, he did not; no warning was issued nor were Gonzalez-Lerma's documents returned to him prior to the deputy obtaining consent to search the vehicle.

The court quickly dealt with Mr. Gonzalez-Lerma's motion to suppress on the basis of involuntary consent. The court held that the deputy's testimony indicated that the consent was clearly involuntary. The court based its decision entirely on precedent, choosing to cite United States v. McKneely from the myriad of Tenth Circuit cases that articulate the bright-line test.

The deputy's uncontroverted testimony establishes that his detention of Mr. Gonzalez-Lerma had not become a consensual encounter. This Circuit follows the bright-line rule that an encounter initiated by a traffic stop may not be deemed consensual unless the

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161. See id.
162. See id.
163. See id.
164. See id. (explaining that the officer's National Crime Investigation Center ("NCIC") check revealed that the vehicle was not reported stolen, although the lack of a theft report did not conclusively establish that the vehicle was not stolen).
165. See id.
166. See id.
167. See id.
168. See id.
169. See id.
170. See id.
171. See id. at 1480.
172. See id. at 1483.
173. 6 F.3d 1447 (10th Cir. 1993), cited in Gonzalez-Lerma, 14 F.3d at 1483.
174. See Gonzalez-Lerma, 14 F.3d at 1483.
driver's documents have been returned to him. . . . In this case, the
deputy retained Mr. Gonzalez-Lerma's license, identification, and title
to the vehicle during the entire time at issue. Therefore, the Defendant
was not free to leave and any questions asked were not part of a
consensual encounter. 175

United States v. Gonzalez-Lerma illustrates the operation of the
Tenth Circuit's bright-line rule and the basic rationale behind it. Consent
cannot be voluntary if an officer retains a document because one is
literally not free to go without his or her documents. 176 Furthermore,
United States v. Gonzalez-Lerma illustrates how limited this rule is in
scope and how easily it can be applied. Here the lack of consent was
cured by the fact that, under Terry v. Ohio, 177 the deputy had reasonable
suspicion and, therefore, the search was upheld. 178

C. Reconciling the Bright-Line Rule with Schneckloth and Robinette

Many people might be quick to point out that the Tenth Circuit's
bright-line rule seems to be in direct conflict with the case by case/fact
sensitive method of analysis that the Supreme Court demanded be
applied in both Schneckloth and Robinette. Moreover, it could be argued
it is the exact type of "infallible touchstone" that Justice Stewart warned
was unworkable and undesirable because it may overregulate the
police. 179

However, it is the position of this Note that the Tenth Circuit's
bright-line rule is entirely consistent with Schneckloth. It is noteworthy
that the Tenth Circuit expressly follows the totality of the circumstances
test mandated by Schneckloth. 180 "Whether consent is in fact voluntary,
or is the product of duress or coercion, express or implied, is a question
of fact to be determined from the totality of all the circumstances." 181

175. Id. (citations omitted) (citing McKneely, 6 F.3d at 1451).
176. See id.; see also Florida v. Royer, 460 U.S. 491, 497 (1983) (plurality opinion) (holding
that for consent to be voluntary the average reasonable person must feel that he is free to go).
177. 392 U.S. 1 (1968).
178. See id. at 30-31. In Gonzalez-Lerma, the court held that the totality of the circumstances
clearly demonstrated that the deputy had an objective reasonable suspicion. See Gonzalez-Lerma, 14
F.3d at 1484. The court considered the discrepancy in the date of births on the two forms of
identification, the lack of registration, the inconsistencies in the suspect's stories, and the suspect's
nervousness sufficient to support a finding that the deputy had a reasonable suspicion. See id. at
1483-84.
180. See United States v. Recalde, 761 F.2d 1448, 1453 (10th Cir. 1985).
181. Id.
Therefore, the Tenth Circuit's bright-line test is really a "sub-test" of the "totality of the circumstances" test mandated by Schneckloth and Robinette. The bright-line test merely identifies one circumstance, the occurrence of which is a per se violation of the totality of the circumstances test. Furthermore, similar to the exclusionary rule needed to give force and effect to the Fourth Amendment, this rule is needed to give force and effect to the requirement that consent be "free and voluntary." Ultimately, it is the judge who ensures that citizens' Fourth Amendment rights are protected and he/she ought to be able to fashion rules toward that end.

V. THE OTHER CIRCUITS

All of the other circuits use the totality of the circumstances test articulated by Schneckloth v. Bustamonte and Ohio v. Robinette to determine the voluntariness of consent. None of the circuits use the Tenth Circuit's bright-line test in conjunction with the totality of the circumstances test to determine the voluntariness of consent. Although the other circuits have not expressly rejected the Tenth Circuit's test, they have upheld searches, under the totality of the circumstances, under factual situations that would have likely been invalidated by the Tenth Circuit's bright-line rule. This section examines case law in the Fourth, Fifth, and Sixth Circuits and demonstrates how the application of the Tenth Circuit rule would have reached the just result and invalidated the search.

A. The Fourth Circuit

In United States v. Grillo, the Fourth Circuit upheld the stop and search of Salvatore Grillo. Grillo was pulled over for speeding on Interstate 85 in Warren County, North Carolina. After the stop, the officers requested a driver's license and registration. Grillo produced a valid Florida driver's license and rental agreement. They asked Grillo what he was doing in North Carolina, and he explained he was checking on a car dealership he owned in Asheboro, North Carolina. He also

185. See id. at *1-2.
186. See id. at *2.
187. See id. at *4.
188. See id.
explained he lived in Baltimore, which was inconsistent with his driver's license.\textsuperscript{189} The officers' suspicions were further aroused when the passenger gave an entirely inconsistent story.\textsuperscript{190} The officers asked for consent to search while they were running checks on his documents.\textsuperscript{191} He asked if he could refuse, to which the officers told him he could but they could probably get a warrant.\textsuperscript{192} Grillo called his lawyer on a phone supplied by the police and then consented, saying "[o]pen it up, you are going to search it anyway."\textsuperscript{193}

Although the process of obtaining Grillo's consent contained many of the indices of coercion, the Fourth Circuit deemed his consent voluntary under the "totality of the circumstances" test.\textsuperscript{194} His documents were retained but he did not feel free to go. However, the court reasoned that the consent was valid because it was conducted during a justified Terry stop.\textsuperscript{195}

This reasoning is flawed because, during a Terry stop, the suspect does not feel that he is at liberty to terminate the encounter.\textsuperscript{196} This is especially true when his documents are retained. The failure of the Fourth Circuit to adopt a bright-line rule similar to the Tenth Circuit's demonstrates how the rule is necessary to give concrete protection against coerced consent. Without the rule, voluntary consent is illusory; the rule gives the protection "bite."\textsuperscript{197}

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\textsuperscript{189} See id. at *4-5.
\textsuperscript{190} See id. at *5.
\textsuperscript{191} See id.
\textsuperscript{192} See id. at *7.
\textsuperscript{193} Id. at *8 (quoting Salvatore Grillo).
\textsuperscript{194} See id. at *7.
\textsuperscript{195} See id. In Grillo, the Fourth Circuit relied on the Fifth Circuit's reasoning in United States v. Shabazz, 993 F.2d 431 (5th Cir. 1993), and quoted this passage:

"The questioning that took place occurred while the officers were waiting for the results of the computer check. Therefore, the questioning did nothing to extend the duration of the initial, valid seizure. Because the officers were still waiting for the computer check at the time that they received consent to search the car, the detention to that point continued to be supported by the facts that justified its initiation."

Grillo, 1994 U.S. App. LEXIS at *6-7 (quoting Shabazz, 993 F.2d at 437).
\textsuperscript{196} See, e.g., Florida v. Royer, 460 U.S. 491, 501-02 (1983) (plurality opinion) ("[W]hen the officers identified themselves as narcotics agents, told [the suspect] that he was suspected of transporting narcotics, and asked him to accompany them to the police room, while retaining his ticket and driver's license and without indicating in any way that he was free to depart, [the suspect] was effectively seized for the purposes of the Fourth Amendment.").
\textsuperscript{197} It should be noted that Grillo's consent could have been justified on other grounds. It is merely the position of this Note that it should not have been based on his "free and voluntary" consent.
\end{flushleft}
B. The Fifth Circuit

In *United States v. Shabazz*, the Fifth Circuit upheld a search where the passenger who owned the car consented to a search while one officer was conducting an NCIC check and holding both persons documents. The court considered six factors set forth in *United States v. Olivier-Becerril* that the Fifth Circuit had previously held should be evaluated in determining the voluntariness of consent:

"(1) the voluntariness of the defendant's custodial status; (2) the presence of coercive police procedures; (3) the extent and level of the defendant's cooperation with the police; (4) the defendant's awareness of his right to refuse to consent; (5) the defendant's education and intelligence; and (6) the defendant's belief that no incriminating evidence will be found."

The Fifth Circuit considers all of these factors relevant but no single factor is dispositive. The trial court in *Shabazz* made findings of fact concerning all six factors and held the findings given the totality of the circumstances warranted a finding that consent was free and voluntary. Concerning the voluntariness of the defendant’s custodial status, the court found that “the defendants ‘were not free to leave until the officers finished their check of the driver’s license or vehicle tag . . . they were checking on the radio,’ and that this ‘militate[d] against the government.’”

This finding would have violated the Tenth Circuit’s bright-line rule. The court seemed to put a lot of weight on the fact that the defendant signed a consent form that informed him of his right to refuse. However, the signing of the form cannot remove the taint of coercion. The consent could hardly be “free and voluntary” if he did not feel he was at liberty to terminate the encounter. Here, the Tenth Circuit rule would have operated to give force and effect to the requirement of “free and voluntary” consent by invalidating the search.

198. 993 F.2d 431 (5th Cir. 1993).
199. See id. at 438-39.
200. 861 F.2d 424 (5th Cir. 1988).
201. *Shabazz*, 993 F.2d at 438 (quoting *Olivier-Becerril*, 861 F.2d at 426).
202. See id.
203. See id.
204. Id. (alterations and omission in original) (quoting the district court’s specific findings).
205. See id.
C. The Sixth Circuit

The case law that has developed in the Sixth Circuit seems to be most adverse to the Supreme Court’s mandate that consent must be “free and voluntary.” A discussion of several salient cases that illustrate this proposition is set forth below.

1. United States v. Jarquin

In United States v. Jarquin, the defendant Jarquin was pulled over by a deputy sheriff on Interstate 40, in Shelby County, Tennessee for driving between forty-five and fifty-five miles per hour in a sixty-five mile per hour zone. The deputy suspected that Jarquin was intoxicated. After pulling him over, the deputy asked for his license and registration and engaged Jarquin in conversation. The deputy was satisfied that Jarquin was not drunk and asked him to accompany him to his cruiser so he could issue a “courtesy citation.” While the two were in the cruiser, the deputy asked Jarquin to sign the citation. Before Jarquin returned the citation, the deputy asked for consent to search the vehicle. Jarquin assented to the request, and signed a consent form. The search yielded 420 kilograms of cocaine.

Jarquin sought to suppress the evidence on the basis of involuntary consent, and cited Tenth Circuit case law, including United States v. McSwain. The Court distinguished the Tenth Circuit cases on the basis of the purpose behind the searches and the completion of the traffic stop. In the Tenth Circuit cases, the purposes of the traffic stops were complete and the officers “intentionally prolonged the traffic stop in order to question the defendant about [unrelated] matters.” Here, the stop was incomplete and the officer did not intentionally prolong the

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207. See id. at *2.
208. See id.
209. See id.
210. Id. at *3.
211. See id.
212. See id.
213. See id. at *4.
214. See id.
215. See id. at *8 (citing United States v. McSwain, 29 F.3d 558, 562 (10th Cir. 1994) (holding that continued detention after the purpose of the stop was completed was an unlawful detention and that any consent obtained thereafter was not valid)).
216. See id. at *9.
217. Id.
stop, but spent only the time necessary to check the defendant's license and registration.\textsuperscript{218}

Even if the court is correct that in \textit{Jarquin} the purpose of the stop was not complete, it does not cure the problem of involuntary consent. If the stop was not complete and the driver's documents were retained, then the suspect was not free to terminate the encounter. This stop has all of the indicia of coercion that the Tenth Circuit's bright-line rule seeks to prevent. Therefore, the Tenth Circuit rule should operate to invalidate this search.

2. \textit{United States v. Wellman}

In \textit{United States v. Wellman},\textsuperscript{219} the Sixth Circuit upheld a search, where consent was obtained during the computer check of the driver's license and registration.\textsuperscript{220} Wellman was pulled over in a motor home in Shelby County, Tennessee for traveling at sixty-three miles per hour in a fifty-five mile per hour zone.\textsuperscript{221} After he was pulled over, Defendant Wellman exited the vehicle.\textsuperscript{222} He then approached the officer, arousing the officer's suspicion.\textsuperscript{223} The officer then asked for and obtained Wellman's driver's license and registration papers.\textsuperscript{224} While the check was being run, another officer arrived on the scene.\textsuperscript{225} About eight minutes into the stop, before his documents were returned, the officers asked for and obtained consent to search Wellman's car.\textsuperscript{226} Wellman signed a consent form that informed him of his right to refuse.\textsuperscript{227} However, at the hearing on the motion to suppress, Wellman insisted that he signed the form after the search occurred.\textsuperscript{228} The search of the motor home yielded a large quantity of marijuana.\textsuperscript{229}

The court held that Wellman's consent was free and voluntary in light of the totality of the circumstances.\textsuperscript{230} The court reasoned that the evidence showed nothing to suggest the consent was involuntary.\textsuperscript{231} The

\textsuperscript{218} See \textit{id}.
\textsuperscript{219} 185 F.3d 651 (6th Cir. 1999).
\textsuperscript{220} See \textit{id}. at 657.
\textsuperscript{221} See \textit{id}. at 653.
\textsuperscript{222} See \textit{id}.
\textsuperscript{223} See \textit{id}.
\textsuperscript{224} See \textit{id}.
\textsuperscript{225} See \textit{id}. at 654.
\textsuperscript{226} See \textit{id}.
\textsuperscript{227} See \textit{id}.
\textsuperscript{228} See \textit{id}.
\textsuperscript{229} See \textit{id}.
\textsuperscript{230} See \textit{id}. at 657.
\textsuperscript{231} See \textit{id}.
court believed this was demonstrated by three factors: (1) the fact that the defendant was a truck driver familiar with the police regarding traffic citations; (2) had a personality that would not allow him to be intimidated; and (3) appeared intelligent.  

The court's reasoning in this case was flawed. No matter how familiar citizens are with the police or how intelligent they are, they will not feel that they are free to terminate an encounter with law enforcement officers that retain their documents. In such a case a citizen cannot freely and voluntarily consent to a search. Therefore, the Tenth Circuit's bright-line rule should have operated in this case to invalidate the search.  

D. Critique of the Approaches in the Other Circuits  

The other circuits have used the totality of the circumstances test mandated by the United States Supreme Court in Schneckloth and Robinette. Their application of this test demonstrates why it fails to ensure that the requirement of “free and voluntary” consent is followed. This also shows that without the Tenth Circuit's bright-line test, the requirement is meaningless. All of the circuits should adopt the Tenth Circuit's bright-line rule in order to give concrete constitutional protections to citizens and guidance to law enforcement.  

VI. CONCLUSION  

Although law enforcement may not endorse its adoption, the Tenth Circuit's bright-line test for determining the voluntariness of consent is an appropriate test to apply in conjunction with the totality of the circumstances test. The bright-line rule offers a way to work within the framework of the Schneckloth-Robinette scheme and provides more concrete protection to citizens from overly intrusive government action. It also gives better guidance to law enforcement in their interactions with citizens.  

The Tenth Circuit's approach is a remedy that gives force and effect to the “free and voluntary” consent requirement. Ultimately, it is the judge who must protect a citizen's Fourth Amendment rights and he or she needs to be able to promulgate rules toward that end. Therefore,

232. See id.  
the Tenth Circuit’s bright-line rule should be adopted by all of the circuits.

Andrew McLetchie*

* I would like to thank Lyndall Schuster, my parents, and Dean David Yellen.