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Open the Door and Let Me In (Please)! A New Jersey Supreme Court Ruling Approves
Suspicionless "Consent" Searches of Homes

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Last month, [the Supreme Court of New Jersey ruled](#) that police may lawfully knock at the door of any home and request the answering resident's consent to search inside -- as long as police inform the resident of her right to refuse.

In so deciding, the state's high court declined to extend an earlier decision limiting lawful "consent searches" of automobiles to those where police had reasonable suspicion to believe criminal activity was occurring inside the car. The failure to extend the earlier ruling demonstrates an unfortunate insensitivity to the realities of "consent searches," whether they take place in a private home or in an automobile.

The Earlier Ruling: Limiting "Consent" Searches of Cars

In *State v. Carty*, decided in 2002, the New Jersey Supreme Court confronted a problem that has plagued drivers in New Jersey and elsewhere for some time: that police frequently (but not always) request a driver's consent to search a car they have pulled over for minor traffic infractions.

These requests pose a problem because of the confluence of two realities: First, people do not seem to feel entirely free to say "no" to such requests, even when they are told that they may. Second, virtually everyone who drives for an extended period of time will unavoidably find herself in regular violation of one or more traffic laws. The result is that police can pressure almost anyone who drives into allowing them to search her car. One might conceive of this authority as "universal car-search authority."

Compounding the vulnerability of every driver on the road is the tendency of police to use the inevitable discretion that follows from such universal car-search authority in arbitrary ways. If police have unsubstantiated "hunches" that a particular driver - perhaps because of his race, age, sex, or bumper stickers - is smuggling drugs, then they can (and often do) follow the driver, wait until he commits a minor traffic infraction, and immediately pull him over and ask for permission to search the car. Such permission is routinely granted, even when the driver subjectively would prefer to decline.

In response to this problem, the highest court of New Jersey has held that under its own state constitutional analogue to [the federal Fourth Amendment](#), which prohibits unreasonable searches and seizures, police may not even ask a stopped driver for consent to search her car without reasonable suspicion, based on objective and articulable facts, that criminal activity is occurring in the car. In general, moreover, such suspicion does not follow from the mere fact of a minor traffic infraction (such as driving a few miles per hour over the speed limit).

In *New Jersey v. Domicz*, respondent Keith R. Domicz invited the New Jersey Supreme Court to extend this limit on consent search requests from the automobile to the home. The court declined the invitation, finding that requests for consent to search stopped cars implicate concerns that have no evident application to the home-

search context. The court accordingly held that police may ask for consent to search a person's home without having any basis for suspecting that criminal wrongdoing is occurring there.

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Differences Between the Two Contexts

The New Jersey court explained that it was refusing to extend the reasonable suspicion requirement because of several distinctions between cars and homes. One difference, the majority claimed, is that there is no evidence of racial profiling by police in choosing homes to search. By contrast, we know that racial profiling takes place when police decide which cars to stop on the road (with the evident intention of obtaining consent to search). It is therefore unnecessary, the court reasoned, to design special obstacles to prevent discriminatory requests for consent.

A second difference, according to the court, is that a resident is likely to feel freer to refuse consent to a search of his home than he would to a search of his car, because he is on his own territory in the former situation. In contrast, a driver asked for consent in a vehicle has already been stopped and is therefore - to some extent - at the mercy of the officer who has pulled him over and who can issue a summons or a warning, at her discretion.

Let us examine each of these distinctions, in turn. First consider the racial-profiling point. Even in the absence of specific evidence of racial profiling, there is no reason to expect that police officers who - consciously or not - concededly use race as a factor in selecting which cars to stop and search would suddenly abandon that factor when selecting houses to search. Common sense tells us that if a stereotype about drug dealers' race contributes to police decisions on the road, it will do so in homes as well. In the absence of evidence to the contrary, then, it seems sensible to take across-the-board measures against hunch-based requests for consent, rather than artificially limiting these measures to the roads.

Next, consider the argument that people at home would tend to feel freer to say no when asked for permission to search than they would on the road, where police can issue a summons in retaliation for a refusal. The majority relies on its own intuition for this argument. One might, however, just as plausibly claim that a person would tend to feel less free to refuse consent to a search of her home than she would to a search of her car.

When police knock on the door and ask for permission to look around, they have entered a very private place, a place where people tend to let their guard down and feel vulnerable. In such a place, people might not have access to the assertive self they show the world when they are out in public. Thus, if people tend to agree to car searches, despite their internal feeling that they would prefer to say no, it might follow a fortiori that they would agree to a house search, feeling less able to stand their ground in a bathrobe and slippers. Though they might not fear a summons (or hope for a warning) when at home, they could reasonably worry about the plans of police officers who have - apparently for no reason - shown up at their door asking for permission to search.

Reasonable Suspicion and Coerciveness

After drawing these faulty distinctions between car searches and home searches, the New Jersey court makes one additional argument: It says that requiring reasonable suspicion in a home as a prerequisite for requests for consent "will not dispel whatever compulsion a person might feel when confronted by authority figures at his door; certainly the same compulsion would be felt by the person if the officers had reasonable suspicion."

In other words, limiting consent searches to occasions on which police have reasonable suspicion will not serve to ensure that every consent to search is truly voluntary.

This would be a fair point, if the objective of a reasonable suspicion requirement here were to ensure that consent searches are meaningfully consensual. That is not, however, the basis for a reasonable suspicion requirement. Instead, the goal is to limit the number of occasions on which police have discretion to ask for

something that they are not entitled to receive, something that the targets of their requests are nonetheless likely to feel pressure to grant. The reasonable suspicion requirement, then, takes as given that consent for a search is not entirely voluntary and attempts, accordingly, to limit the occasions on which police may ask for it to situations in which there is at least a reasonable basis for expecting that the search will be fruitful.

One might think of the reasonable suspicion requirement as a compromise between prohibiting consent searches altogether - a sure way to guard against the inherent coerciveness of requests for consent - and permitting consent searches under all circumstances. The compromise manages to spare the people most likely to be innocent, against whom there is no articulable suspicion at all, the indignity of a search that they may feel powerless to stop, despite the formal requirement of knowing and voluntary consent. At the same time, however, it allows police some freedom to ask people for consent when there is something approaching probable cause to believe that a search is warranted.

In New Jersey, the state constitution - as interpreted by the courts - offers more protection than the federal (and more than almost any other state's) constitution to guard against the pressure people feel to "consent" to search requests. It mandates, for example, that people be told that they have a right to refuse consent, and it requires that - at least in the context of car searches - police have an objectively reasonable basis for seeking consent in the first place. It is therefore a pity that the state's high court, in this case, was unable to see the potential for abuse inherent in the authority of armed and uniformed officials to knock on people's doors and ask for permission to look around.

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