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THE FOURTH AMENDMENT AND TRAFFIC STOPS: BRIGHT-LINE RULES IN CONJUNCTION WITH THE TOTALITY OF THE CIRCUMSTANCES TEST

Ohio v. Robinette, 117 S. Ct. 417 (1996)

I. INTRODUCTION

In *Ohio v. Robinette*,¹ the United States Supreme Court addressed whether a law enforcement officer must advise a detained motorist that he is "free to go" before the motorist's consent to search will be recognized as voluntary.² The Court held that the Fourth Amendment does not require the application of any such bright-line rule, but rather is based on a fact-specific reasonableness inquiry.³ In so deciding, the Court further expanded the power of law enforcement officers to detain motorists as defined in *Whren v. United States*⁴ and *Schneckloth v. Bustamonte*.⁵ The *Robinette* Court held that the Ohio Supreme Court's application of a bright-line rule, requiring police officers to inform detained motorists that they are "free to go" before a consent to search may be deemed voluntary, is unrealistic and "thoroughly impractical."⁶

This Note argues that, although 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.⁷ Therefore, the additional application of a bright-line rule

¹ 117 S. Ct. 417 (1996).

² *Id.* at 421.

³ *Id.* Chief Justice Rehnquist defined the reasonableness inquiry as "measured in objective terms by examining the totality of the circumstances." *Id.*

⁴ 116 S. Ct. 1769 (1996). In *Whren*, the Court held that an officer's subjective intentions do not make continued detention of a motorist illegal, so long as an objective view of the totality of the circumstances justifies the detention. *Id.* at 1774.

⁵ 412 U.S. 218 (1973). In *Schneckloth*, the Court rejected the application of a *per se* rule regarding the officer-motorist encounter, holding that the voluntariness of a consent to search is a question of fact to be determined with regard to all the circumstances. *Id.* at 248-49.

⁶ *Robinette*, 117 S. Ct. at 421 (quoting *Schneckloth*, 412 U.S. at 231).

⁷ See *infra* notes 163-72 and accompanying text.

to the officer-motorist encounter is necessary to delineate the constitutional boundaries of traffic stops and to check the substantial discretion afforded police officers in traffic detentions.⁸ This Note concludes that, in the wake of *Ohio v. Robinette*, individual states should be encouraged to promulgate bright-line rules similar to Ohio's "free to go" advisory rule, based on their state constitutions, rather than on the Fourth Amendment of the United States Constitution.⁹

II. BACKGROUND

A. ORIGINS AND APPLICATIONS OF THE FOURTH AMENDMENT

The Fourth Amendment of the United States Constitution 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 person or things to be seized.¹⁰

The Fourth Amendment was adopted in response to the abusive search and seizure practices used by the British government during the American colonial period.¹¹ Accordingly, its enactment guaranteed to each individual "[t]he security of one's privacy against arbitrary intrusion by the police."¹²

In *Wolf v. Colorado*,¹³ the Supreme Court held that the Fourth Amendment is enforceable against the states.¹⁴ In *Wolf*,

⁸ See *infra* notes 173-90 and accompanying text.

⁹ See *infra* notes 191-203 and accompanying text.

¹⁰ U.S. CONST. amend. IV.

¹¹ See generally *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 311 (1978) (noting that the Fourth Amendment was adopted in reaction to the "general warrants" used in England, which allowed British officers to capriciously search colonial homes and workplaces for criminal evidence, seditious literature, or illegally imported goods); *Frank v. Maryland*, 359 U.S. 360, 363-65 (1959) (stating that "[t]he vivid memory by the newly independent Americans of these abuses produced the Fourth Amendment as a safeguard against such arbitrary official action by officers of the new Union").

¹² *Coolidge v. New Hampshire*, 403 U.S. 443, 453 (1971). For an excellent commentary on the history of the Fourth Amendment, see WAYNE R. LAFAVE, *SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT* (3d ed. 1996).

¹³ 338 U.S. 25 (1949). In *Wolf*, the Court held that in a state court prosecution for the state crime of conspiring to perform abortions, the Fourteenth Amendment does not forbid the admission of evidence obtained by unreasonable search and seizure, though the evidence would be inadmissible in a prosecution for violation of federal law in a federal court because of a violation of the Fourth Amendment. *Id.* at 33.

¹⁴ *Id.* at 27.

the Court recognized that Fourth Amendment rights are "basic to a free society" and, thus, are implicit in "the concept of ordered liberty."¹⁵ Therefore, the Court held that the Fourth Amendment applies to the states through the Due Process Clause of the Fourteenth Amendment.¹⁶ The Ohio counterpart to the Fourth Amendment, which likewise secures an individual's right to be free from unreasonable searches and seizures, is found in Article I, § 14 of the Ohio Constitution.¹⁷

As indicated by the wording of the Fourth Amendment and mirrored by the language of the Ohio Constitution, "reasonableness" is the defining measure of the constitutionality of a government search or seizure.¹⁸ Courts generally find that a person has been "seized" within the meaning of the Fourth Amendment "only if, in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave."¹⁹ The Supreme Court determines the constitutionality of law enforcement practices by weighing the practice's intrusion on a citizen's Fourth Amendment interests against its promotion of legitimate governmental interests.²⁰

B. ENCOUNTERS BETWEEN POLICE OFFICERS AND PEDESTRIANS

Fourth Amendment interests are not triggered unless a "search" or "seizure" has occurred.²¹ But not every encounter

¹⁵ *Id.*

¹⁶ *Id.* The Due Process Clause of the Fourteenth Amendment provides that no state shall "deprive a person of life, liberty, or property, without due process of law . . ." U.S. CONST. amend. XIV.

¹⁷ The Ohio Constitution states:

The right of the people to be secure in their persons, houses, papers, and possessions, against unreasonable searches and seizures shall not be violated; and no warrant shall issue, but upon probable cause, supported by oath or affirmation, particularly describing the place to be searched and the person or thing to be seized.

OHIO CONST. art. I, § 14.

¹⁸ *Ohio v. Robinette*, 117 S. Ct. 417, 421 (1996).

¹⁹ *United States v. Mendenhall*, 446 U.S. 544, 554 (1980). See also *Florida v. Bostick*, 501 U.S. 429 (1991); *Michigan v. Chesternut*, 486 U.S. 567 (1988); *Florida v. Royer*, 460 U.S. 491 (1983).

²⁰ *Delaware v. Prouse*, 440 U.S. 648, 653-55 (1979). The weighing of interests is the "key principle" of the Fourth Amendment. *Michigan v. Summers*, 452 U.S. 692, 700 n.12 (1981). The Fourth Amendment protects a citizen's "privacy, dignity, and security" interests against "certain arbitrary and invasive acts by officers of the Government or those acting at their direction." *Skinner v. Railway Labor Exec. Ass'n*, 489 U.S. 602, 613-14 (1989).

²¹ *Mendenhall*, 446 U.S. at 554.

between an officer and a pedestrian is a seizure.²² If a reasonable person would "feel free to decline the officer's requests or otherwise terminate the encounter," no seizure has occurred and no reasonable suspicion is required to justify the officer's conduct.²³ For example, a police officer may approach a pedestrian and ask questions;²⁴ seek to examine a person's identification or passport;²⁵ pursue a pedestrian as he runs down the street;²⁶ and request to search a person's baggage.²⁷ None of these encounters triggers Fourth Amendment scrutiny so long as "the police do not convey a message that compliance with their requests is *required*."²⁸ These decisions reflect the Court's philosophy that the typical police officer-pedestrian encounter does not constitute a seizure where the pedestrians involved are at liberty to come and go as they please.²⁹

C. ENCOUNTERS BETWEEN POLICE OFFICERS AND MOTORISTS

In contrast to the officer-pedestrian encounter case law, the Supreme Court has recognized that the objective intrusion, authority of the police, and potential for abuse of discretionary power in the context of the officer-motorist encounter raise distinct Fourth Amendment issues.³⁰ For instance, the Supreme

²² *Id.* As the Court explained, "[t]here is nothing in the Constitution which prevents a policeman from addressing questions to anyone on the streets." *Id.* at 553 (quoting *Terry v. Ohio*, 392 U.S. 1, 34 (1968) (White, J., concurring)). See also *Bostick*, 501 U.S. at 434; *Royer*, 460 U.S. at 497.

²³ *Bostick*, 501 U.S. at 436.

²⁴ See *INS v. Delgado*, 466 U.S. 210, 216 (1984).

²⁵ See *Bostick*, 501 U.S. at 437; *Delgado*, 466 U.S. at 216; *Royer*, 460 U.S. at 501; *Mendenhall*, 446 U.S. at 557-58.

²⁶ See *Michigan v. Chesternut*, 486 U.S. 567, 569 (1988).

²⁷ See *Bostick*, 501 U.S. at 437; *Royer*, 460 U.S. at 501.

²⁸ *Bostick*, 501 U.S. at 435 (emphasis added).

²⁹ *Mendenhall*, 446 U.S. at 555. Given the great number and diversity of police officer-pedestrian encounters, the Supreme Court's test to distinguish consensual encounters from seizures is whether, "in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was free to leave." *Chesternut*, 486 U.S. at 573 (quoting *Mendenhall*, 446 U.S. at 554). Thus, a seizure occurs at the point that a reasonable person would think he is not free to terminate a conversation and walk away from the police. *Mendenhall*, 446 U.S. at 554. Circumstances that "might indicate a seizure . . . [include] the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled." *Id.*

³⁰ See, e.g., *Delaware v. Prouse*, 440 U.S. 648, 653-54 (1979); *United States v. Brignoni-Ponce*, 422 U.S. 873, 880-84 (1975) (holding that border patrol agents may

Court stated in *Delaware v. Prouse*³¹ that people are not stripped of their Fourth Amendment rights "when they step from the sidewalks into their automobiles."³² In *Prouse*, the Court held that a discretionary spot-check by police officers to verify a motorist's driver's license and registration was unconstitutional.³³ Although the *Prouse* Court recognized that the purpose of a traffic stop is limited and the subsequent detention is brief, the Court ruled that the act of stopping a vehicle and detaining its occupants constitutes a seizure under the Fourth Amendment.³⁴

1. Legality of a Traffic Stop Depends on Objective Standards

When considering challenges to police intrusions that occur in the context of a motorist detention, the Court looks to the reasonableness component of the Fourth Amendment.³⁵ While motorists enjoy significant interests in automobile travel which are protected by the Fourth Amendment,³⁶ a traffic stop lawfully may be initiated based on an officer's articulable and reasonable belief that a motorist is in violation of the traffic laws.³⁷

stop a vehicle near the border and question its occupants only if there is reason to suspect that the car may contain illegal aliens).

³¹ 440 U.S. 648 (1979).

³² *Id.* at 668. The Supreme Court remains mindful of the proscriptions contained in the Fourth Amendment which "impose a standard of reasonableness upon the exercise of discretion by government officials" within the context of a traffic stop. *Id.* at 653-54.

³³ *Id.* at 663.

³⁴ *Id.* at 653. See also *Berkemer v. McCarty*, 468 U.S. 420, 436 (1984) ("Certainly few motorists would feel free either to disobey a directive to pull over or to leave the scene of a traffic stop without being told they might do so.").

³⁵ See *Brignoni-Ponce*, 422 U.S. at 880-84; *Terry v. Ohio*, 392 U.S. 1 (1968). Traditionally, the reasonableness standard demands, "at a minimum," that intrusions by the police "be capable of measurement against 'an objective standard.'" *Prouse*, 440 U.S. at 654.

³⁶ See *supra* notes 30-32 and accompanying text. While acknowledging that a traffic stop "significantly curtails" the "freedom of action" of a motorist, the Court has cautioned that a motorist typically is not "completely at the mercy of the police." *Berkemer*, 468 U.S. at 436-38.

³⁷ *Prouse*, 440 U.S. at 663. The Supreme Court has held that such a traffic stop may be initiated upon a showing of reasonable suspicion, based on specific and articulable facts, to believe that an offense has been committed. *Id.* Moreover, the Court held that where an officer has observed a traffic violation, the higher standard of probable cause has been met. See, e.g., *New York v. Class*, 475 U.S. 106, 117-18 (1986) (stop of car for speeding and cracked windshield); *Pennsylvania v. Mimms*, 434 U.S. 106, 109 (1977) (stop of car bearing expired license tags).

The law regarding an officer's intentions during traffic stops developed from the Supreme Court's holding in *Terry v. Ohio*.³⁸ *Terry* represented a departure from the Court's prior requirement that a police officer needed probable cause to suspect criminal activity when detaining an individual.³⁹ The central tenet of *Terry* provides that, "[in] justifying the particular intrusion the police officer must be able to point to specific and articulable facts which, taken together with the rational inferences from those facts, reasonably warrant that intrusion."⁴⁰ The *Terry* Court employed a two-prong analysis to determine whether the step was reasonable: (1) whether the police officer was justified at the beginning of the stop; and (2) whether the officer's actions were reasonably related to the circumstances that triggered the initial interference.⁴¹

Having thus established a framework for judging police behavior during traffic stops by objective criteria, the Supreme Court thereafter consistently held that an officer's subjective intentions do not invalidate reasonably—i.e., objectively—justifiable behavior under the Fourth Amendment.⁴² For example, in *United States v. Robinson*,⁴³ the Court held that a traffic-violation arrest is not invalidated by the fact that it was "a mere pretext for a narcotics search."⁴⁴ Five years later, the Court characterized *Robinson* as having established that an officer's actions are legally justifiable, regardless of his state of mind, "as long as the circumstances, viewed objectively, justify that action."⁴⁵ The

³⁸ 392 U.S. 1 (1968) (holding that a "stop" and "frisk" of two pedestrians on a street corner was constitutional).

³⁹ See *Dunaway v. New York*, 442 U.S. 200, 207-09 (1979) (noting that prior to *Terry*, any restraint of a person amounting to a seizure was invalid unless justified by probable cause). The majority in *Terry* recognized that some departure was necessary in order to safeguard law enforcement personnel in carrying out their functions. See *Terry*, 392 U.S. at 23-24.

⁴⁰ *Terry*, 392 U.S. at 21.

⁴¹ *Id.* at 19-20.

⁴² See *infra* text accompanying notes 43-52.

⁴³ 414 U.S. 218 (1973).

⁴⁴ *Id.* at 221 n.1. In *Robinson*, an officer stopped and arrested a motorist for driving a car without a license. In the subsequent search, the officer found heroin in the motorist's possession. *Id.* at 220-23.

⁴⁵ *Scott v. United States*, 436 U.S. 128, 138 (1978). *Scott*, though not a traffic stop case, involved the admission of wiretap evidence at trial despite the fact that the agents conducting the tap had failed to make any effort to comply with the statutory requirement that unauthorized acquisitions of evidence be minimized. *Id.* at 132.

Court further expanded this concept in *Pennsylvania v. Mimms*,⁴⁶ holding that, under the Fourth Amendment, an officer may order a motorist who has been validly stopped for a traffic violation to exit his vehicle.⁴⁷

Most recently, in *Whren v. United States*,⁴⁸ the Court foreclosed any argument that the "constitutional reasonableness of traffic stops depends on the actual motivations of the individual officers involved."⁴⁹ In *Whren*, the officers used traffic violations as a pretext to stop a car and investigate possible narcotics offenses.⁵⁰ The police officers had neither probable cause nor reasonable suspicion to detain the motorist for a drug search after the traffic stop.⁵¹ Therefore, within the context of an officer-motorist encounter, the *Whren* Court explicitly stated that "subjective intentions play no role in ordinary, probable cause Fourth Amendment analysis."⁵²

2. *The Totality of the Circumstances Test Governs Determination of Consensual Encounter vs. Seizure*

A person is "seized" by the police within the meaning of the Fourth Amendment only if, in view of the "*totality of the circumstances*"⁵³ surrounding the incident, a reasonable person would have believed that he was not free to leave.⁵⁴ Otherwise, any en-

⁴⁶ 434 U.S. 106 (1977).

⁴⁷ *Id.* at 110-11. In *Mimms*, the Court held that the stop of a car bearing expired license tags met the higher standard of probable cause. This enabled an officer to exercise discretion to order a driver, validly stopped for a traffic violation, to exit his vehicle even absent any particularized suspicion that the driver was presently armed and dangerous. *Id.*

⁴⁸ 116 S. Ct. 1769 (1996).

⁴⁹ *Id.* at 1774.

⁵⁰ *Id.* at 1772. The officers temporarily detained the motorist, Brown, and his passenger, Whren, for obstructing traffic and for failing to use a traffic signal when turning. *Id.*

⁵¹ *Id.* Both the motorist and his passenger were young African-American males. *Id.*

⁵² *Id.* For an excellent discussion of the implications of the *Whren* decision, see David A. Harris, "Driving While Black" and All Other Traffic Offenses: The Supreme Court and Pretextual Traffic Stops, 87 J. CRIM. L. & CRIMINOLOGY 544 (1997). See also Craig M. Glantz, Note, "Could" This Be the End of Fourth Amendment Protections for Motorists?, 87 J. CRIM. L. & CRIMINOLOGY 864 (1997).

⁵³ See *Schneckloth v. Bustamonte*, 412 U.S. 218, 227 (1973) (where the Court first used this phrase in holding that, after stopping a motorist for a traffic violation, a police officer's search of the car was constitutional) (emphasis added).

⁵⁴ *United States v. Mendenhall*, 446 U.S. 544, 554 (1980). In *Mendenhall*, the Court held that the police officers' examination of a person's identification and travel documents in an airport was constitutional. The Court noted that the ticket and

counter between a police officer and a person is deemed consensual.⁵⁵

Since its decision in *United States v. Mendenhall*, the Court has rejected efforts to replace the totality of the circumstances test with bright-line rules based on the United States Constitution.⁵⁶ In *Florida v. Royer*, the Court rejected the idea that a distinct dividing-line could be drawn between consensual encounters and Fourth Amendment seizures.⁵⁷ The Court stated:

We do not suggest that there is a litmus-paper test for distinguishing a consensual encounter from a seizure or for determining when a seizure exceed the bounds of an investigative stop. . . . [As] *there will be endless variations in the facts and circumstances, so much variation that it is unlikely that the courts can reduce to a sentence or a paragraph a rule that will provide unarguable answers . . .*⁵⁸

The Supreme Court also applied this reasoning in *Michigan v. Chesternut*,⁵⁹ reversing the Michigan Supreme Court's holding that any investigatory pursuit of a motorist constitutes a Fourth Amendment seizure.⁶⁰ More recently, in *Bostick*, the Court rejected the Florida Supreme Court's presumption that every encounter between a police officer and a citizen occurring on a bus is a seizure.⁶¹ The Court held that if the reasonable person would "feel free to decline the officers' requests or otherwise terminate the encounter," no seizure has occurred and no rea-

identification were immediately returned, and the police officers were careful to advise the suspect that he could decline to be searched. *Id.* at 558-59.

⁵⁵ *Id.* at 555.

⁵⁶ See, e.g., *Florida v. Bostick*, 501 U.S. 429 (1991); *Florida v. Royer*, 460 U.S. 491 (1983); *United States v. Schneckloth*, 412 U.S. 218 (1973).

⁵⁷ *Royer*, 460 U.S. at 506-07. The Court found that, similar to *Mendenhall*, the police may approach a traveler and ask to see that person's identification and airline ticket. *Id.* at 501.

⁵⁸ *Id.* at 506-07 (emphasis added).

⁵⁹ 486 U.S. 567, 574-76 (1988) (holding that a police chase of a pedestrian running down the street is not a seizure because it "would not have communicated to the reasonable person an attempt to capture or otherwise intrude upon [Chesternut's] freedom of movement").

⁶⁰ *Id.* at 570-72. The Court stated that "any assessment as to whether police conduct amounts to a seizure implicating the Fourth Amendment must take into account 'all of the circumstances surrounding the incident' in each individual case." *Id.* at 572 (quoting *INS v. Delgado*, 466 U.S. 210, 215 (1984)).

⁶¹ *Florida v. Bostick*, 501 U.S. 429 (1991). The Court stated again that "a court must consider all the circumstances surrounding the encounter" to determine what constitutes a seizure. *Id.* at 439.

sonable suspicion is required to justify the officer's conduct.⁶² Therefore, the Court concluded that whether a person has been seized depends upon the totality of the circumstances surrounding the encounter.⁶³

Furthermore, in determining the validity of a consent to search, the Supreme Court in *Schneckloth* refused to hold that the giving of a cautionary warning is a defining characteristic of a consensual encounter.⁶⁴ The Court held that a consent search was constitutional even though the police officer did not inform a person of his right to refuse a search.⁶⁵ The Court concluded that "[w]hile knowledge of the right to refuse consent is one factor to be taken into account, the government need not establish such knowledge as the *sine qua non* of an effective consent."⁶⁶

In sum, for the past three decades, the Supreme Court has not countenanced the substitution of a bright-line rule for the totality of the circumstances test in determining the constitutionality of encounters between police officers and motorists.

III. FACTS AND PROCEDURAL HISTORY

On August 3, 1992, Robert D. Robinette was stopped for speeding in a construction zone on Interstate 70, just outside of Dayton, Ohio.⁶⁷ Deputy Roger Newsome of the Montgomery County Sheriff's Office, who was on drug interdiction patrol at the time, clocked Robinette driving his vehicle at sixty-nine-miles-per-hour in a posted forty-five-mile-per-hour zone.⁶⁸ Newsome acknowledged that the sole purpose for the stop was to issue Robinette a warning for speeding.⁶⁹ He did not suspect

⁶² *Id.* at 436.

⁶³ *Id.* at 439-40.

⁶⁴ *Schneckloth v. Bustamonte*, 412 U.S. 218, 248-49 (1973) (holding that the police officer's search of the car after stopping a motorist for a traffic violation was constitutional).

⁶⁵ *Id.*

⁶⁶ *Id.* at 227.

⁶⁷ Brief for Petitioner at 6, *Ohio v. Robinette*, 117 S. Ct. 417 (1996) (No. 95-891). Robinette was accompanied by a passenger. *Id.*

⁶⁸ *State v. Robinette*, 653 N.E.2d 695, 696 (Ohio 1995), *rev'd*, *Ohio v. Robinette*, 117 S. Ct. 417 (1996).

⁶⁹ *State v. Robinette*, No. 14074, 1994 WL 147806, at *1 (Ohio Ct. App. Apr. 15, 1994), *aff'd*, *Robinette*, 653 N.E.2d at 696.

Robinette of any other wrongdoing,⁷⁰ nor did he intend to issue Robinette a speeding ticket.⁷¹

Newsome approached Robinette's vehicle and asked for his driver's license.⁷² Robinette complied with the deputy's request, and Newsome returned to his patrol car to check the license while Robinette remained seated in his vehicle.⁷³ After determining that Robinette's license was valid, Newsome returned to Robinette's vehicle and asked him to step out and to go to the rear of his vehicle.⁷⁴ While Robinette stepped out of his car, Newsome activated a video camera in his patrol car to record his conversation with Robinette.⁷⁵ Newsome then handed Robinette his license, and issued him a verbal warning for speeding.⁷⁶

Immediately thereafter Newsome asked Robinette, "One question before you get gone: are you carrying any illegal contraband in your car? Any weapons of any kind, drugs, anything like that?"⁷⁷ When Robinette answered "no," Newsome requested to search Robinette's vehicle.⁷⁸ Robinette testified that he was "shocked" at the question and "automatically" answered "yes" to Newsome's request.⁷⁹

Deputy Newsome's initial search of Robinette's vehicle turned up a small quantity of marijuana.⁸⁰ Newsome then placed Robinette and his passenger in the back seat of the police car and told them that they were under investigative detention.⁸¹ Newsome returned to the vehicle and continued his search of the vehicle.⁸² He eventually found a methamphet-

⁷⁰ *Robinette*, 653 N.E.2d at 696.

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.*

⁷⁴ Brief for Respondent at 11, *Ohio v. Robinette*, 117 S. Ct. 417 (1996) (No. 95-891).

⁷⁵ *Robinette*, 653 N.E.2d at 696.

⁷⁶ *Id.*

⁷⁷ *Id.* Newsome testified that he routinely asked permission to search the cars he stopped for speeding violations as part of the drug interdiction process. *Id.*

⁷⁸ Brief for Respondent at 12-13, *Robinette* (No. 95-891).

⁷⁹ *Robinette*, 653 N.E.2d at 696. Robinette testified that he consented only because he felt he had no choice but to comply with Deputy Newsome's request. *Id.*

⁸⁰ Brief for Respondent at 13, *Robinette* (No. 95-891).

⁸¹ *Id.*

⁸² *Robinette*, 653 N.E.2d at 696.

amine (MDMA) pill in a plastic film container in the car.⁸³ Newsome then arrested Robinette.⁸⁴

On December 18, 1992, Robinette was indicted and charged with possession of a controlled substance under Ohio Revised Code § 2925.11(A)—felony drug abuse.⁸⁵ On February 19, 1993, Robinette moved to suppress all evidence seized from his vehicle, contending that it was obtained pursuant to an illegal detention and search of his vehicle.⁸⁶ The trial court denied Robinette's motion, noting that Robinette's consent to the search was free and voluntary and was not the product of duress or coercion.⁸⁷ The trial court considered the videotape to be demonstrative evidence of Newsome's clear communication to Robinette that the traffic matter had concluded before Newsome asked to search Robinette's vehicle.⁸⁸ Subsequently, Robinette entered a plea of no contest, was found guilty, and was sentenced accordingly.⁸⁹

Robinette appealed his conviction to the Ohio Court of Appeals, contending that once he was given a warning for speeding the justification for the stop no longer existed.⁹⁰ Specifically, Robinette argued that at the moment the purpose of the stop was satisfied, there was no reason to suspect him or further detain him.⁹¹ The State countered that Robinette was free to leave and, therefore, there was no detention when he consented to the search of his vehicle.⁹²

The appellate court reversed the trial court, concluding that a "reasonable person in Robinette's position would not believe that the investigative stop had been concluded, and that he or she was free to go, so long as the police officer was continuing to ask investigative questions."⁹³ Accordingly, the search re-

⁸³ Brief for Respondent at 13, *Robinette* (No. 95-891).

⁸⁴ *Id.*

⁸⁵ *Id.* This statute states in part: "No person shall knowingly obtain, possess, or use a controlled substance." OHIO REV. CODE ANN. § 2925.11(A) (Anderson 1993).

⁸⁶ See *State v. Robinette*, No. 14074, 1994 WL 147806, at *1 (Ohio Ct. App. Apr. 15, 1994).

⁸⁷ *Id.*

⁸⁸ *State v. Robinette*, 653 N.E.2d 695, 696 (Ohio 1995).

⁸⁹ *Robinette*, 1994 WL 147806, at *1.

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.* at *2.

sulted from an illegal detention "and the fact that Robinette, during the unlawful detention, may have consented to the search is immaterial."⁹⁴

The State of Ohio appealed.⁹⁵ Affirming the Court of Appeals, the Ohio Supreme Court held that detaining Robinette after issuing him the warning and returning his driver's license was an illegal seizure.⁹⁶ In addition, the court recognized the need to establish a clear demarcation between the end of a valid seizure and the start of a consensual exchange.⁹⁷ The court ruled that a police officer must state that the justified stop is over before seeking to engage in a consensual interrogation: "Any attempt at consensual interrogation must be preceded by the phrase 'At this time you legally are free to go' or by words of similar import."⁹⁸

The Supreme Court of the United States granted certiorari⁹⁹ to determine: (1) if jurisdiction existed to review the decision of the Ohio Supreme Court, given that its decision relied in part upon the Ohio Constitution; (2) whether a police officer's subjective intentions make continued detention illegal when the detention is otherwise justified by the totality of the circumstances; and (3) whether the Fourth Amendment requires that a lawfully seized defendant be advised that he is "free to go" before his consent to a search will be recognized as free and voluntary.¹⁰⁰

IV. SUMMARY OF OPINIONS

A. MAJORITY OPINION

Writing for the majority,¹⁰¹ Chief Justice Rehnquist reversed the Ohio Supreme Court.¹⁰² As a threshold matter, Chief Justice Rehnquist determined that the Court had jurisdiction to review

⁹⁴ *Id.*

⁹⁵ *See* State v. Robinette, 653 N.E.2d 697 (Ohio 1995).

⁹⁶ *Id.* at 698.

⁹⁷ *Id.*

⁹⁸ *Id.* at 699.

⁹⁹ Ohio v. Robinette, 116 S. Ct. 1040 (1996).

¹⁰⁰ Ohio v. Robinette, 117 S. Ct. 417, 421 (1996).

¹⁰¹ In an 8-1 decision, Justices O'Connor, Scalia, Kennedy, Souter, Thomas, and Breyer joined the Chief Justice's opinion. Justice Ginsburg concurred in the opinion, and Justice Stevens dissented.

¹⁰² *Robinette*, 117 S. Ct. at 421.

the decision of the Ohio Supreme Court because that court relied almost exclusively on federal law, mentioning the Ohio Constitution only in passing.¹⁰³ Next, Chief Justice Rehnquist held that a police officer's subjective intentions do not make continued detention of a person stopped for a traffic violation illegal, so long as the detention is objectively justified by all of the surrounding circumstances.¹⁰⁴ Finally, the Chief Justice argued that the Fourth Amendment does not require that a lawfully seized defendant be advised explicitly that he is "free to go" before his consent to a search of his vehicle qualifies as voluntary.¹⁰⁵ Chief Justice Rehnquist eschewed the application of any bright-line rules and stated instead that the Fourth Amendment's "'touchstone . . . is reasonableness' . . . [which is] measured in objective terms by examining the totality of the circumstances."¹⁰⁶

1. Subjective Intentions vs. Objective Circumstances

Chief Justice Rehnquist determined that Deputy Newsome's subjective intentions did not make the continued detention of Robinette illegal under the Fourth Amendment.¹⁰⁷ The Chief Justice relied primarily on the Court's contemporaneous decision in *Whren v. United States* for the proposition that:

[T]he fact that [an] officer does not have the state of mind which is hypothesized by the reasons which provide the legal justification for the officer's action does not invalidate the action taken as long as the circumstances, viewed objectively, justify that action. . . . Subjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis.¹⁰⁸

¹⁰³ *Id.* at 420. Chief Justice Rehnquist rejected Robinette's argument that the Ohio Supreme Court's decision rested primarily upon the Ohio Constitution. *Id.* The Chief Justice cited *Michigan v. Long* for this proposition:

[When] a state court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion, we will accept as the most reasonable explanation that the state court decided the way it did because it believed that federal law required it to do so.

Id. (quoting *Michigan v. Long*, 463 U.S. 1032, 1040-41 (1983)).

¹⁰⁴ *Id.* at 420-21.

¹⁰⁵ *Id.* at 421.

¹⁰⁶ *Id.* (quoting *Florida v. Jimeno*, 500 U.S. 248, 250 (1991)).

¹⁰⁷ *Id.* at 420.

¹⁰⁸ *Id.* at 420-21 (quoting *Whren v. United States*, 116 S. Ct. 1769, 1774 (1996)) (emphasis added) (internal quotations omitted).

Chief Justice Rehnquist concluded that "subjective thoughts notwithstanding," Deputy Newsome was objectively justified in asking Robinette to get out of his vehicle, in light of the admitted probable cause to stop Robinette for speeding.¹⁰⁹

2. *Bright-Line vs. Reasonableness Inquiry*

The Chief Justice determined that the Court consistently had rejected the use of bright-line rules in its Fourth Amendment analysis, "instead emphasizing the fact-specific nature of the reasonableness inquiry."¹¹⁰ Thus, the Court rejected the *per se* rule of the Ohio Supreme Court in determining the validity of a consent to search.¹¹¹ According to the Chief Justice, it would be "unrealistic to require officers to always inform detainees that they are free to go before a consent to a search may be deemed voluntary."¹¹²

Chief Justice Rehnquist concluded that the Fourth Amendment test for the voluntariness of a consent to search is to be determined from the totality of the circumstances.¹¹³ Because the Supreme Court of Ohio held otherwise, its judgment was reversed and the case was remanded for further proceedings.¹¹⁴

B. JUSTICE GINSBURG'S CONCURRENCE

Justice Ginsburg wrote separately to emphasize her understanding of the Ohio Supreme Court's decision.¹¹⁵ According to Justice Ginsburg, the Ohio Supreme Court contemplated its bright-line rule to apply only as a "prophylactic measure" in the State of Ohio, designed to reinforce the people's right to be

¹⁰⁹ *Id.* at 421 (citing *Pennsylvania v. Mimms*, 434 U.S. 106, 111 n.6 (1977)) ("We hold . . . that once a motor vehicle has been lawfully detained for a traffic violation, the police officers may order the driver out of the vehicle without violating the Fourth Amendment's proscription of unreasonable searches and seizures.").

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Id.* (citing *Schneckloth v. Bustamonte*, 412 U.S. 218, 227-31 (1973)). In *Schneckloth*, the Court stated that "[w]hile knowledge of the right to refuse consent is one factor to be taken into account, the government need not establish such knowledge as the *sine qua non* of an effective consent. . . . [It] would be thoroughly impractical to impose on the normal consent search the detailed requirements of an effective warning." *Schneckloth*, 412 U.S. at 227-31.

¹¹³ *Robinette*, 117 S. Ct. at 421.

¹¹⁴ *Id.*

¹¹⁵ *Id.* at 421-24 (Ginsburg, J., concurring).

free from unreasonable searches and seizures within that state.¹¹⁶ She did not view the Ohio Supreme Court's decision as intending to impose a federal constitutional mandate on the nation as a whole.¹¹⁷ Nevertheless, Justice Ginsburg concurred in the Court's judgment because the Ohio Supreme Court appeared to base its rule on the Federal Constitution, "thereby signal[ing] it[s] view that the Nation's Constitution would require the rule in all 50 States."¹¹⁸

Justice Ginsburg acknowledged that a state may impose greater restrictions on police activity than is required under federal law.¹¹⁹ However, she pointed out that the Ohio Supreme Court's reliance on state law rather than, or independent of, federal law was unclear.¹²⁰ Therefore, the Ohio Supreme Court should clarify on remand whether "its instructions to law enforcement officers in Ohio find adequate and independent support" in the laws of the State of Ohio.¹²¹

C. JUSTICE STEVENS' DISSENT

Justice Stevens would have affirmed the Ohio Supreme Court because he believed it correctly held that Robinette's consent to the search of his vehicle was the product of an unlawful detention.¹²² Justice Stevens felt that several factors supported the Ohio court's conclusion that a reasonable person in Robinette's position would have believed that he had an obligation to answer Deputy Newsome's questions and that he was not free to leave the scene.¹²³ First, Justice Stevens cited as an example the phrasing of Deputy Newsome's "one question," which required an answer "before you get gone."¹²⁴ Second, Justice Stevens mentioned that Robinette was detained and had not received any notice that he was free to go.¹²⁵ Finally, Justice Stevens stated that all of these factors, including the fact that Robinette was standing in front of a video camera answering the

¹¹⁶ *Id.* at 423 (Ginsburg, J., concurring).

¹¹⁷ *Id.* (Ginsburg, J., concurring).

¹¹⁸ *Id.* (Ginsburg, J., concurring).

¹¹⁹ *Id.* at 422 (Ginsburg, J., concurring).

¹²⁰ *Id.* at 423 (Ginsburg, J., concurring).

¹²¹ *Id.* at 424 (Ginsburg, J., concurring).

¹²² *Id.* (Stevens, J., dissenting).

¹²³ *Id.* at 425 (Stevens, J., dissenting).

¹²⁴ *Id.* (Stevens, J., dissenting).

¹²⁵ *Id.* (Stevens, J., dissenting).

police officer's questions, "are all inconsistent with an assumption that he could reasonably believe that he had no duty to respond."¹²⁶ Therefore, the Ohio Supreme Court and the Ohio Court of Appeals were correct in presuming that a "continued detention" was at issue.¹²⁷

Furthermore, Justice Stevens believed, by the time Deputy Newsome asked Robinette for consent to search his vehicle, the lawful traffic stop had ended because Robinette had been issued a warning.¹²⁸ Thus, the speeding violation provided no justification for continued detention.¹²⁹ Moreover, there existed no additional facts to trigger a reasonable suspicion of a separate illegal activity to justify further detainment.¹³⁰ As such, Justice Stevens argued, Newsome's continued detention of Robinette constituted an illegal seizure and the resultant consent to search was invalid.¹³¹

Finally, Justice Stevens emphasized that nothing in the United States Constitution prevents a state from requiring its police officers to advise detained motorists as mandated by the Ohio Supreme Court.¹³² Justice Stevens reiterated Justice Ginsburg's point that the federal Constitution neither mandates nor precludes a state from enforcing a warning rule and requiring its police officers to advise its motorists that a traffic stop is complete and they are "free to go."¹³³ Therefore, Justice Stevens would have allowed the State of Ohio to enforce its warning rule as a matter of Ohio law.¹³⁴

V. ANALYSIS

The Supreme Court's decision in *Ohio v. Robinette*¹³⁵ upsets the balance of constitutional interests protected by the Fourth Amendment.¹³⁶ The Court's holding impermissibly expands the

¹²⁶ *Id.* (Stevens, J., dissenting).

¹²⁷ *Id.* at 425-26 (Stevens, J., dissenting).

¹²⁸ *Id.* at 426 (Stevens, J., dissenting).

¹²⁹ *Id.* (Stevens, J., dissenting).

¹³⁰ *Id.* (Stevens, J., dissenting).

¹³¹ *Id.* at 427 (Stevens, J., dissenting) (citing *Florida v. Royer*, 460 U.S. 491, 507-08 (1983)).

¹³² *Id.* (Stevens, J., dissenting).

¹³³ *Id.* (Stevens, J., dissenting).

¹³⁴ *Id.* at 428 (Stevens, J., dissenting).

¹³⁵ 117 S. Ct. 417 (1996).

¹³⁶ See *supra* text accompanying note 10 for the text of the Fourth Amendment.

power of law enforcement officials and grants great discretion to police officers in their interactions with motorists. In strictly adhering to the totality of the circumstances test in police officer-citizen encounters,¹³⁷ the Court ignored the distinct Fourth Amendment issues raised in the police officer-motorist context. Moreover, by rejecting the application of any bright-line rules,¹³⁸ the Court unfairly tipped the balance of Fourth Amendment interests in favor of the police officer during a traffic stop.

Because of the nature of the intrusions, risks, and interests involved for both the police officer and the motorist during a traffic stop, advisory warning rules should be applied in conjunction with objective tests to control motorist seizures.¹³⁹ As both Justices Ginsburg¹⁴⁰ and Stevens acknowledged,¹⁴¹ the Ohio Supreme Court's "free to leave" rule, as based on the Ohio Constitution, is an appropriate rule to draw the constitutional line between consensual police officer-motorist encounters and unlawful detentions.

A. THE COURT INCORRECTLY EQUATED PEDESTRIAN ENCOUNTERS WITH MOTORIST SEIZURES

In its Fourth Amendment jurisprudence, the Supreme Court has recognized that "[s]treet encounters between citizens and police officers are incredibly rich in diversity."¹⁴² In *Robinette*, however, the Court ignored this "diversity" and treated a situation in which a motorist was stopped for a traffic violation no differently than an encounter between a police officer and a

¹³⁷ *Robinette*, 117 S. Ct. at 421.

¹³⁸ *Id.*

¹³⁹ One Ohio appellate court, reviewing the testimony of Deputy Newsome and other police officers that described how and why the officers request consent to search the vehicles of motorists stopped for routine traffic violations, stated candidly:

What is obviously troubling about these cases is that hundreds, and perhaps thousands of Ohio citizens are being routinely delayed in their travels and asked to relinquish to uniformed police officers their right to privacy in their automobiles and luggage, sometimes for no better reason than to provide an officer the opportunity to "practice" his drug interdiction technique.

While we recognize the importance of drug interdiction, we are shocked by what we believe to be an unjustified and egregious intrusion upon the privacy rights of the citizens of Ohio.

State v. Retherford, 639 N.E.2d 498, 503-04 (Ohio Ct. App. 1994) (footnote omitted).

¹⁴⁰ *Robinette*, 117 S. Ct. at 421-24 (Ginsburg, J., concurring).

¹⁴¹ *Id.* at 424-28 (Stevens, J., dissenting).

¹⁴² *Terry v. Ohio*, 392 U.S. 1, 13 (1968).

pedestrian.¹⁴³ The particular status of the individual as a motorist or a pedestrian is crucial under Fourth Amendment jurisprudence. The Supreme Court has ruled that the typical police officer-pedestrian encounter does not constitute a seizure under the Fourth Amendment,¹⁴⁴ while stopping a vehicle and detaining its occupants is a Fourth Amendment seizure.¹⁴⁵

There are sound reasons why pedestrian encounters and motorist seizures raise distinct and different Fourth Amendment issues. When a person is approached by a police officer inside an airport terminal,¹⁴⁶ on the street,¹⁴⁷ or while sitting on a bus,¹⁴⁸ the law operates on the assumption that the person remains free to leave and may ignore the officer.¹⁴⁹ The typical police officer-pedestrian encounter as such is a balanced meeting where the officer is free to question the pedestrian, but the pedestrian also is free to walk away from the officer.¹⁵⁰

In contrast, a motorist stopped by a police officer is not in a position to ignore the police officer or his questions. Once a traffic stop has occurred, "[c]ertainly few motorists would feel free . . . to leave the scene . . . without being told they might do so."¹⁵¹ The encounter is no longer balanced: the police officer

¹⁴³ *Robinette*, 117 S. Ct. at 421. The three cases cited by Chief Justice Rehnquist in support of the totality of the circumstances test involved pedestrian encounters rather than motorist seizures. *Id.* (citing *Florida v. Bostick*, 501 U.S. 429 (1991) (passengers on bus); *Michigan v. Chesternut*, 486 U.S. 567 (1988) (confrontation in airport); *Florida v. Royer*, 460 U.S. 491 (1983) (passengers on bus)).

¹⁴⁴ See *United States v. Mendenhall*, 446 U.S. 544, 554 (1980). See also *supra* notes 18-20 and accompanying text.

¹⁴⁵ See *Michigan Dep't of State Police v. Sitz*, 496 U.S. 444, 450 (1990) (holding that when a motorist is stopped at a sobriety checkpoint, a seizure has occurred); *Delaware v. Prouse*, 440 U.S. 648, 653 (1979) (finding that when a motorist is stopped for a discretionary spot-check of his or her driver's license and registration, a seizure has occurred); *United States v. Martinez-Fuerte*, 428 U.S. 543, 556 (1976) (noting that when a motorist is stopped at an official checkpoint, a seizure has occurred). See *supra* notes 21-34 and accompanying text.

¹⁴⁶ See *Royer*, 460 U.S. at 501; see also *supra* notes 25, 27 and accompanying text.

¹⁴⁷ See *Chesternut*, 486 U.S. at 576; see also *supra* note 26 and accompanying text.

¹⁴⁸ See *Bostick*, 501 U.S. at 437; see also *supra* notes 25, 29 and accompanying text.

¹⁴⁹ *Bostick*, 501 U.S. at 435-36. See also *Chesternut*, 486 U.S. at 575 (holding that a police chase is not a seizure because it "would not have communicated to the reasonable person an attempt to capture or otherwise intrude upon [Chesternut's] freedom of movement").

¹⁵⁰ See *supra* notes 27, 29. *Royer*, *Chesternut*, and *Bostick* are examples of balanced meetings between police officers and pedestrians.

¹⁵¹ *Berkemer v. McCarty*, 468 U.S. 420, 436 (1984). In *Berkemer*, the Court found that the motor vehicle stop was a seizure for purposes of the Fourth Amendment. *Id.* at 435-37 (quoting *Delaware v. Prouse*, 440 U.S. 648, 653 (1979)). Though police of-

dictates the pace and circumstances of the confrontation and the motorist is faced with a climate of "substantial anxiety."¹⁵² Hence, unlike a pedestrian who may refuse to answer a police officer's questions, a motorist detained by a police officer is more like a person confronted in his home, i.e., he is not in a position to know the lawful limits of the officer's conduct or the extent of his own right to leave or terminate the seizure.¹⁵³

In his application of the totality of the circumstances test and rejection of any bright-line rules, Chief Justice Rehnquist disregarded the differences between a police officer-pedestrian encounter and a police officer-motorist seizure. Despite the Chief Justice's assertion that the totality of the circumstances test may encompass an "endless variation of facts and circumstances,"¹⁵⁴ that test alone is inapt because it is designed to assess the perspective of pedestrians who are at liberty to come and go as they please.¹⁵⁵

Chief Justice Rehnquist ignored the fact that a police officer-motorist seizure is not an "arm's length" meeting.¹⁵⁶ Rather, a traffic stop significantly interrupts a motorist's "freedom of movement" and is completely controlled by the discretion of the police officer.¹⁵⁷ Nevertheless, the Court adopted a mechanical approach in *Robinette*—ignoring the particular facts of this police officer-motorist seizure in an effort to fit every police officer-citizen encounter within the confines of the totality of the circumstances test.

ficers are permitted to stop and question a motorist, that right is limited: they must have a reasonable and articulable reason for doing so. *Id.*

¹⁵² *Delaware v. Prouse*, 440 U.S. 648, 657 (1979).

¹⁵³ See *Camara v. Municipal Court*, 387 U.S. 523, 532 (1967) (noting that a resident confronted with an official housing inspector demanding a warrantless entry has "no way of knowing the lawful limits of the inspector's power to search").

¹⁵⁴ *Ohio v. Robinette*, 117 S. Ct. 417, 421 (1996) (quoting *Florida v. Royer*, 460 U.S. 491, 506 (1983)).

¹⁵⁵ See *Prouse*, 440 U.S. at 659-61 (finding that because "[v]ehicle stops for traffic violations occur countless times each day," and every motorist is subject to a "multitude of applicable traffic and equipment regulations"—rules which are not applicable to pedestrians—police officers have substantial discretion in deciding which motorists to stop and how to resolve each of those stops).

¹⁵⁶ An "arm's length" meeting is a police officer-citizen encounter which does not restrict the citizen's "freedom of movement." *Michigan v. Chesternut*, 486 U.S. 567, 575 (1988).

¹⁵⁷ *Prouse*, 440 U.S. at 657.

By contrast, Justice Stevens' dissent correctly took these differences into account. Justice Stevens agreed with the majority that the initial stop of Robinette for a speeding violation was justifiable.¹⁵⁸ However, Deputy Newsome's subsequent actions in removing Robinette from his vehicle, inquiring about illegal contraband, and requesting to search Robinette's vehicle constituted an illegal seizure because of the unique power of police officers and powerlessness of motorists during a traffic stop.¹⁵⁹

Deputy Newsome's unique power is evident because the motorist in *Robinette*, unlike the pedestrians in *Bostick*, *Royer*, and *Chesternut*, was not in a position to ignore the officer or his questions.¹⁶⁰ Unlike those pedestrian encounters, the officer in *Robinette* had complete discretion to dictate the pace and circumstances of the motorist seizure.¹⁶¹ Moreover, the motorist in *Robinette* was awaiting the outcome of the traffic stop with "substantial anxiety" in an atmosphere of fear and distress.¹⁶² The Court, however, ignored these disparities between the typical police officer-pedestrian encounter and the unbalanced police officer-motorist seizure.

B. THE INADEQUACY OF THE TOTALITY OF THE CIRCUMSTANCES TEST

In its haste to apply the totality of the circumstances test, the *Robinette* Court also ignored relevant facts about the purportedly consensual encounter between Deputy Newsome and Robinette.¹⁶³ Indeed, the Court failed to describe any of the facts of the case when applying its totality of the circumstances test.¹⁶⁴ Only Justice Stevens acknowledged that the circumstances supported the Ohio Supreme Court's conclusion that "a reasonable

¹⁵⁸ Ohio v. Robinette, 117 S. Ct. 417, 425 (1996) (Stevens, J., dissenting).

¹⁵⁹ *Id.* at 426-27 (Stevens, J., dissenting).

¹⁶⁰ See *Berkemer v. McCarty*, 468 U.S. 420, 436 (1984).

¹⁶¹ See *Robinette*, 117 S. Ct. at 425 (Stevens, J., dissenting); see also *United States v. Martinez-Fuerte*, 428 U.S. 543, 556-59 (1976) (noting that because all motorists approaching a sobriety checkpoint were stopped, the seizure did not afford the police the unchecked discretion inherent in the random stops that were at issue later in *Prouse*); *LAFAVE*, *supra* note 12, § 10.8(d), at 696 (a central theme of *Martinez-Fuerte* is that "a police procedure is less threatening to Fourth Amendment values when the discretionary authority of the police (and thus the risk of arbitrary action) is kept at a minimum").

¹⁶² *Prouse*, 440 U.S. at 657.

¹⁶³ See *Robinette*, 117 S. Ct. at 419-21.

¹⁶⁴ See *id.* at 421.

motorist" in Robinette's shoes would not have felt free to leave without answering Newsome's questions and without ultimately allowing Newsome's search of his vehicle.¹⁶⁵

Robinette, who may have believed that he was free to leave when Deputy Newsome issued him a warning and returned his license, was suddenly confronted with—and what Deputy Newsome framed as—a "routine" question and a "routine" request to search his vehicle.¹⁶⁶ Thereafter, the deputy seized upon Robinette's momentary illusion of freedom to justify what subsequently occurred as a consensual encounter.¹⁶⁷ Nevertheless, it is clear that Deputy Newsome retained complete authority and discretion over Robinette throughout the seizure.¹⁶⁸

Despite these relevant facts, Chief Justice Rehnquist argued that the totality of the circumstances test is adequate for any factual inquiry implicating the Fourth Amendment, including the inquiry in *Robinette*.¹⁶⁹ However, as Justice Stevens' analysis confirms, this test *alone* is inadequate when examining the police officer-motorist seizure.¹⁷⁰ Although Robinette's "consent" to Deputy Newsome's search was not unreasonable based on the totality of the circumstances, it nonetheless constituted no more than a submission to the police officer's greater authority.¹⁷¹ Unlike the typical police officer-pedestrian encounter, the police officer-motorist encounter involves much greater police discretion and much less motorist freedom.¹⁷² Therefore, the police officer-motorist encounter must be controlled by something more than the totality of the circumstances test.

¹⁶⁵ *Id.* at 425 (Stevens, J., dissenting). For a discussion of the circumstances considered by Justice Stevens and the Ohio Supreme Court, see *supra* text accompanying notes 123-28.

¹⁶⁶ *State v. Robinette*, 653 N.E.2d 695, 696 (Ohio 1995), *rev'd*, *Ohio v. Robinette*, 117 S. Ct. 417 (1996).

¹⁶⁷ *Id.* at 698.

¹⁶⁸ *Id.*

¹⁶⁹ *Robinette*, 117 S. Ct. at 421.

¹⁷⁰ *See id.* at 424-25.

¹⁷¹ Consent based on a submission to an officer's authority is insufficient as a matter of law to constitute an unequivocal and freely given consent. *See Bumper v. North Carolina*, 391 U.S. 543, 550 (1968); *LAFAVE, supra* note 12, § 9.3(a), at 112 ("Given the fact that [a motorist] quite clearly had been seized when his car was pulled over, the return of [his license] hardly manifests a change in status when it was immediately followed by interrogation concerning other criminal activity.").

¹⁷² *See, e.g., Berkemer v. McCarty*, 468 U.S. 420 (1984); *United States v. Mendenhall*, 446 U.S. 544 (1980); *Delaware v. Prouse*, 440 U.S. 648 (1979).

C. BRIGHT-LINE RULES AND MOTORIST SEIZURES

The United States Supreme Court's cursory rejection of the Ohio Supreme Court's establishment of a bright-line rule was similarly misguided.¹⁷³ Due to the unique nature of the police officer-motorist encounter, the Court should have supported clear rule-making as an additional balancing factor in the Fourth Amendment analysis.¹⁷⁴

The Ohio Supreme Court's requirement that a police officer advise a motorist that he is "free to leave" before a consent to search is valid is neither a single-factor test nor an all-or-nothing proposition of law.¹⁷⁵ Most important, the police officer's advice to the motorist that he is "free to go" was not designed to supplant the totality of the circumstances test of *Schneckloth*¹⁷⁶ with a single bright-line rule for assessing the voluntariness of consent.¹⁷⁷

In addition, unlike the cases cited by Chief Justice Rehnquist,¹⁷⁸ *Robinette* involved a lawful seizure followed by a seamless transition to a search unrelated to the purpose of the seizure.¹⁷⁹ By demarcating a detention from a subsequent con-

¹⁷³ To delineate between the conclusion of a valid seizure and the commencement of a consensual exchange in the context of a traffic stop, the Ohio Supreme Court required a police officer to inform a motorist "at this time you legally are free to go" or "words of similar import." *Robinette*, 653 N.E.2d at 699.

¹⁷⁴ See *Schneckloth v. Bustamonte*, 412 U.S. 218, 277 (1973) (Brennan, J., dissenting) (arguing that citizens cannot "meaningfully be said to have waived something as precious as a constitutional guarantee without ever being aware of its existence"). For a full discussion of bright-line Fourth Amendment rules, see Albert W. Alschuler, *Bright Line Fever and the Fourth Amendment*, 45 U. PITT. L. REV. 227 (1984).

¹⁷⁵ See *Robinette*, 653 N.E.2d at 698-99. This is to be contrasted with the cases in which bright-line rules established by states were all-or-nothing propositions of law. See *Robinette*, 117 S. Ct. at 421 (citing *Bostick* and *Chesternut*). For example, in *Florida v. Bostick*, 501 U.S. 429, 439-40 (1991), the Court struck down the holding of the Florida Supreme Court that all bus searches were unconstitutional seizures under the Fourth Amendment. In *Michigan v. Chesternut*, 486 U.S. 567, 569 (1988), the Court struck down a Michigan Court of Appeal's holding that all "investigatory pursuits" were seizures for purposes of the Fourth Amendment.

¹⁷⁶ 412 U.S. 218 (1973).

¹⁷⁷ The Ohio Supreme Court noted the importance of consensual encounters as a "constitutional, investigative tool." *Robinette*, 653 N.E.2d at 699 (citing *Florida v. Bostick*, 501 U.S. 429 (1991)).

¹⁷⁸ The Chief Justice cited *Bostick*, *Royer*, and *Chesternut*—all police officer-pedestrian encounters. See *Ohio v. Robinette*, 117 S. Ct. 417, 421 (1996).

¹⁷⁹ See *Robinette*, 653 N.E.2d at 698. The underlying rationale for the "free to go" rule was expressed by the Ohio Supreme Court as follows:

The transition between detention and a consensual exchange can be so seamless that the untrained eye may not notice that it has occurred. The undetectability

sensual exchange, the imposition of an advisory requirement on police officers does nothing more than ensure that motorists, who are routinely confronted with requests to search their vehicles, are free from unreasonable searches and seizures.¹⁸⁰ Thus, the advisory requirement comports with the Fourth Amendment criteria advanced by the Supreme Court in its analysis of all police officer-citizen encounters.¹⁸¹

Furthermore, the Court's claim that the advisory requirement is "unrealistic" is groundless.¹⁸² The rule imposed by the Ohio Supreme Court is quite simple; an officer should inform the motorist that "at this time you legally are free to go."¹⁸³ Contrary to Chief Justice Rehnquist's opinion in *Robinette*, this rule is not "unrealistic;" the Fourth Amendment was designed to protect the rights of "the people," not the rights of law enforcement officials.¹⁸⁴ Moreover, as argued by the dissent in *Florida v. Bos-*

of that transition may be used by police officers to coerce citizens into answering questions that they need not answer, or to allow a search of a vehicle that they are not legally obligated to allow. . . . Most people believe that they are validly in a police officer's custody as long as the officer continues to interrogate them. The police officer retains the upper hand and the accouterments of authority. That the officer lacks legal license to continue to detain them is unknown to most citizens, and a reasonable person would not feel free to walk away as the officer continues to address him.

Id.

¹⁸⁰ *Id.* at 698-99. As recognized by Justices Ginsburg and Stevens, the Ohio Supreme Court's ruling was a pragmatic response to a routine procedure used by police officers in Ohio and throughout the country—broadening the scope of valid detentions for traffic stops so that every traffic stop becomes a search for illegal contraband. See *Robinette*, 117 S. Ct. at 421-22 (Ginsburg, J., concurring); *id.* at 424-25 (Stevens, J., dissenting).

¹⁸¹ See, e.g., *Florida v. Jimeno*, 500 U.S. 248, 249 (1991) (officer asked permission to search Jimeno's vehicle and informed him that he did not have to consent to a search); *United States v. Mendenhall*, 446 U.S. 544, 548 (1980) (officers were careful to advise the suspect that she had the right to decline to be searched). It is important to note that Ohio's advisory requirement does not prevent an officer from obtaining the motorist's consent to search his vehicle. The advice does clarify for the citizen that the detention has ended by making the motorist aware that he is free to leave and does not have to endure further questioning by the police officer. *Robinette*, 653 N.E.2d at 698-99.

¹⁸² The Supreme Court, citing *Schneckloth*, stated that it would be "unrealistic" to require police officers to advise motorists that they are free to go before a consent to search is valid. *Robinette*, 117 S. Ct. at 421 (citing *Schneckloth v. Bustamonte*, 412 U.S. 218, 227 (1973) ("[it] would be thoroughly impractical to impose on the normal consent search the detailed requirements of an effective warning")).

¹⁸³ *Robinette*, 653 N.E.2d at 699.

¹⁸⁴ See U.S. CONST. amend. IV.

tick, "the effectiveness of a law-enforcement technique is not proof of its constitutionality."¹⁸⁵

As Justice Ginsburg alone recognized, the use of the "free to go" advisory warning was "crafted by the Ohio Supreme Court to reduce the number of violations of textually guaranteed rights."¹⁸⁶ Most motorists are unable either to enumerate their constitutional rights or to state the parameters of those rights.¹⁸⁷ The Fourth Amendment and its counterpart under the Ohio Constitution are designed to protect the people against arbitrary intrusions, not vice versa.¹⁸⁸ Whereas the Ohio Supreme Court's bright-line rule greatly clarifies the parameters of a motorist's right—following detention for a traffic violation—to be free of unreasonable searches and seizures under the Fourth Amendment,¹⁸⁹ the *Robinette* ruling merely flips the purpose of that amendment by forcing the motorist to protect his own rights.¹⁹⁰

D. HOW THE STATE OF OHIO SHOULD PROCEED TO IMPLEMENT ITS BRIGHT-LINE RULE

As the Supreme Court noted in *Robinette*, the Ohio Supreme Court premised its holding upon both the Fourth Amendment and Article I, § 14, of the Ohio Constitution.¹⁹¹ However, as Justice Ginsburg noted, the Ohio Supreme Court's opinion contained some "ambiguity regarding the federal- or state-law basis"

¹⁸⁵ 501 U.S. 429, 440 (1991) (Marshall, J., dissenting).

¹⁸⁶ *Robinette*, 117 S. Ct. at 423 (Ginsburg, J., concurring).

¹⁸⁷ Depending on his level of sophistication, a motorist might be placed in a position of compromise. One motorist might simply decline to consent to a police search and take the risk that he will walk away with no further action taken by the officer. Another motorist, however, might be placed in the position of waiving Fourth Amendment rights, of which he might well be unaware. See, e.g., *Berkemer v. McCarty*, 468 U.S. 420, 436 (1984) (noting while discussing Fourth Amendment rights that a detained individual is unlikely to feel free to ignore an officer and "leave the scene of a traffic stop without being told [he] might do so").

¹⁸⁸ See U.S. CONST. amend. IV; OHIO CONST. art. I, § 14.

¹⁸⁹ *Robinette*, 653 N.E.2d at 698.

¹⁹⁰ See Tracey Maclin, *The Decline of the Right of Locomotion: The Fourth Amendment on the Streets*, 75 CORNELL L. REV. 1258, 1300-01 (1990) (arguing that, "in the real world," the burden of protecting one's Fourth Amendment rights has been shifted to the individual and that it is unrealistic to assume that an individual—when detained by a police officer—will feel free to ignore the officer and walk away).

¹⁹¹ *Robinette*, 117 S. Ct. at 420.

for its decision.¹⁹² Thus, she emphasized that it is "incumbent" upon the state court to be clear about its "ultimate reliance on state law" when announcing a new legal rule.¹⁹³

The Supreme Court has repeatedly advised state courts that they may construe their own constitutions to provide broader individual liberties than those provided under the federal constitution.¹⁹⁴ Likewise, the Court has advised state courts that they may "construe their own constitutions as imposing more stringent constraints on police conduct than does the Federal Constitution."¹⁹⁵ The Ohio Supreme Court has also recognized this premise in the context of individual rights,¹⁹⁶ and the advisory "free to leave" requirement imposed by that court in *Robinette*¹⁹⁷ does nothing more than provide greater protection to the Ohio motorist pursuant to Ohio's state constitution.

The issue addressed by the Ohio Supreme Court, and seemingly overlooked by Chief Justice Rehnquist, was how best to protect the right of motorists in Ohio to be free from unreasonable searches when the search follows an initial detention for a traffic violation.¹⁹⁸ As Justice Ginsburg noted, the Ohio Su-

¹⁹² *Id.* at 423 (Ginsburg, J., concurring) (discussing *Michigan v. Long*, 463 U.S. 1032, 1040-42 (1983)).

¹⁹³ *Id.* (Ginsburg, J., concurring). In his dissent, Justice Stevens also highlighted the point that the Supreme Court's decision did not address the "validity of that rule as a matter of Ohio law." *Id.* at 427 (Stevens, J., dissenting).

¹⁹⁴ See, e.g., *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 293 (1982) (noting that "a state court is entirely free to read its own State's constitutions more broadly than this Court reads the Federal Constitution . . ."). For a comprehensive analysis of state constitutional protections, see Barry Latzer, *Toward the Decentralization of Criminal Procedure: State Constitutional Law and Selective Disincorporation*, 87 J. CRIM. L. & CRIMINOLOGY 63 (1996).

¹⁹⁵ *California v. Greenwood*, 486 U.S. 35, 43 (1988); see also *Michigan v. Long*, 463 U.S. 1032, 1068 (1983) (Stevens, J., dissenting) (arguing that a state may provide "greater protection to one of its citizens than some other State might provide or . . . than [the Supreme] Court might require throughout the country").

¹⁹⁶ See *Arnold v. City of Cleveland*, 616 N.E.2d 163 (Ohio 1993). The Ohio Supreme Court concluded:

The Ohio Constitution is a document of independent force. In the areas of individual rights and civil liberties, the United States Constitution, where applicable to the states, provides a floor below which state court decisions may not fall. As long as state courts provide at least as much protection as the United States Supreme Court has provided in its interpretation of the federal Bill of Rights, state courts are unrestricted in according greater civil liberties and protections to individuals and groups.

Id. at 164.

¹⁹⁷ 653 N.E.2d 695, 699 (Ohio 1995).

¹⁹⁸ Compare *id.* at 697-99, with *Ohio v. Robinette*, 117 S. Ct. 417, 419-21 (1996).

preme Court was fully aware of the widespread practice in Ohio of police officers seeking consent to search without legal basis during the course of a routine traffic stop.¹⁹⁹ The determination of the Ohio Supreme Court was that the motorist is best protected by being informed; thus it imposed a requirement on police officers to advise a motorist, at the conclusion of a traffic stop, that the motorist is legally free to leave.²⁰⁰

The Ohio Supreme Court could have interpreted the Ohio Constitution to provide adequate and independent state grounds for the *Robinette* bright-line rule.²⁰¹ Had the Ohio Supreme Court, as Justice Ginsburg²⁰² and Justice Stevens suggested,²⁰³ clearly based its decision on Ohio law, then it no doubt would have been empowered to interpret its own constitution to overprotect the fundamental right of Ohio motorists to be free of unreasonable searches and seizures.

VI. CONCLUSION

In *Ohio v. Robinette*, the Supreme Court held that the Fourth Amendment does not require the application of a bright-line advisory warning to delineate between a consensual encounter and an unlawful detention in the police officer-motorist context. The Court determined that the totality of the circumstances test *alone* is adequate to control any police officer-citizen encounter. In so deciding, the Court ignored the distinct Fourth Amendment issues raised in the police officer-motorist context and unjustly tilted the balance of constitutional interests during a traffic stop in favor of the police officer. Because of the nature of the intrusions, risks, and interests involved for both the police officer and the motorist, the Court should have applied the Ohio Supreme Court's "free to leave" advisory warning in conjunction with its objective test to control motorist seizures. Nevertheless, given that the Supreme Court consistently has rejected the application of any bright-line rules based on the

¹⁹⁹ *Robinette*, 117 S. Ct. at 422 (Ginsburg, J., concurring) (emphasizing that Deputy Newsome testified in *Robinette*'s case that he "routinely requested permission to search automobiles he stopped for traffic violations," and that in another prosecution Newsome acknowledged that he "requested consent to search in 786 traffic stops in 1992, the year of *Robinette*'s arrest").

²⁰⁰ *Robinette*, 653 N.E.2d at 699.

²⁰¹ See *supra* notes 194-97 and accompanying text.

²⁰² See *Robinette*, 117 S. Ct. at 422-24 (Ginsburg, J., concurring).

²⁰³ *Id.* at 427-28 (Stevens, J., dissenting).

Fourth Amendment, in the future the Ohio Supreme Court should clearly base its decision on state law when determining how best to protect the rights of its motorists.

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