

ANDERSON V. STATE: THE CONSENT TO SEARCH DOCTRINE REVISITED

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INTRODUCTION

Picture this: it's the day before Christmas Eve and you just killed a pedestrian in a motor vehicle accident. The police arrive, tell you they have no reason to believe you were at fault, but say they are nonetheless statutorily obligated to obtain blood and urine samples. They take you to the police station where you contact your attorney. He is unsure as to whether you should accede to the police's demand (perhaps because you had a beer an hour before the incident) and requests to speak with the arresting officer to confirm that he in fact has a duty to collect body samples. Both the officer and his supervisor are confident that they do.

In reality, the police may only perform these tests if they have probable cause to believe that the subject was at fault, which, admittedly, the police here do not. However, your attorney, after speaking with the officers, instructs you to comply with their demand. Later, a court finds the search illegal but holds the evidence—which is used to support a conviction for driving under the influence—admissible because you “voluntarily” consented.

The preceding scenario, based on the Alaska Court of Appeals' decision in *Anderson v. State*,¹ highlights substantial shortcomings in the traditional consent to search framework. Because the outcome should probably have differed under both federal and state precedent, the case illustrates the ambiguous nature of the Supreme Court's “totality of circumstances” analysis, which leads to seemingly unpredictable and unjust results.

This Note utilizes *Anderson* to underscore the deficiencies in the current consent doctrine and proposes a more workable, objective standard for Alaska to implement. Rather than requiring judges, as the

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1. 246 P.3d 930, 931 (Alaska Ct. App. 2011).

traditional test demands, to engage in the impossible task of determining a subject's state of mind at the time of accession to a search request, courts should instead examine the police's actions for coercion or deception; the existence of the latter circumstances would render consent involuntary and thus invalid regardless of whether the police acted in good or bad faith.

This proposal more effectively furthers Fourth Amendment interests in that it deters unconstitutional conduct by giving the police an incentive to avoid coercive actions that might undermine the voluntariness of consent. Unlike the current doctrine, it also better protects the State judiciary's integrity by ensuring more foreseeable and fair results.

I. FACTUAL AND PROCEDURAL BACKGROUND

Kevin J. Anderson, a forty-five-year-old lawyer, hit and killed a pedestrian while driving on a snowy Saturday afternoon in December 2006.² Although the police officer investigating the accident did not suspect Anderson of wrongdoing, he mistakenly believed that individuals involved in an accident which resulted in death or serious injury are required to provide blood and urine samples.³ Anderson was consequently transported to a police substation, where he contacted his attorney, Rex Lamont Butler.⁴ Before contacting Butler, Anderson refused to submit body samples, even after the officer informed him that he was statutorily required to do so.⁵ Anderson also admitted to consuming a beer more than an hour before the accident, though the police did not detect any signs of impairment and thus concededly did not have probable cause to collect blood and urine samples.⁶

Butler discussed Alaska's implied consent law with Anchorage Police Officer Thomas Gaulke before requesting to speak with Gaulke's supervisor, Lieutenant Nancy Reeder.⁷ Both law enforcement officials mistakenly informed the attorney that, under Alaska's implied consent law, his client was required to supply body samples; Anderson subsequently obliged.⁸

The state charged Anderson with driving under the influence after tests revealed a blood alcohol level of .08 percent and that he had

2. *Id.* at 931-32.

3. *Id.* at 931.

4. *Id.* at 931-32.

5. *Id.* at 932.

6. *Id.*

7. *Id.* at 936 (Mannheimer, J., dissenting).

8. *Id.* at 932, 936.

consumed marijuana.⁹ Anderson moved to suppress the evidence from his blood and urine samples. The police, he argued, incorrectly advised him of their authority because, under *State v. Blank*,¹⁰ the police may only demand samples if they have probable cause.¹¹

The District Court concluded that Anderson had in fact been illegally detained.¹² Nonetheless, the defendant's consultation with his attorney prior to the illegal conduct rendered Anderson's consent "voluntary."¹³ Anderson was later found guilty of driving under the influence.¹⁴

II. LEGAL BACKGROUND

A. *Schneckloth* and "Voluntary" Consent

The Fourth Amendment to the U.S. Constitution (and Section 1.14 of the Alaska State Constitution, for that matter) guarantees "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures" and that "no Warrants shall issue, but upon probable cause . . ."¹⁵ Under this basic constitutional protection, a search conducted without probable cause is "*per se* unreasonable . . . subject only to a few specifically established and well-delineated exceptions."¹⁶

One of these exceptions applies when individuals voluntarily consent to a search.¹⁷ *Schneckloth v. Bustamonte*, a 1973 Supreme Court case, established the prevailing "voluntariness" doctrine.¹⁸ In *Schneckloth*, a police officer stopped a vehicle after observing several burned-out exterior lights.¹⁹ The driver and all but one of the six individuals in the car did not possess a driver's license.²⁰ When the police officer asked if he could search the vehicle, the men readily

9. *Id.* at 931.

10. 90 P.3d 156 (Alaska 2004).

11. *Anderson*, 246 P.3d at 931.

12. *Id.*

13. *Id.* (stating that the district court found that Anderson's consultation with his attorney insulated Anderson's consent from the police officers' illegal conduct).

14. *Id.*

15. U.S. CONST. amend. IV. Notably, Alaska's constitution contains the exact same language as its federal counterpart. *See* ALASKA CONST., art. I, § 1.14.

16. *Katz v. United States*, 389 U.S. 347, 357 (1967).

17. *See Schneckloth v. Bustamonte*, 412 U.S. 218, 219 (1973).

18. *See id.* at 233 (establishing the 'totality of the circumstances' test).

19. *Id.* at 220.

20. *Id.*

acquiesced.²¹ A brief search revealed three stolen checks, which were later admitted as evidence against Robert Bustamonte, a passenger in the vehicle.²²

Rejecting the Ninth Circuit's argument that the State must prove knowledge of the right to refuse consent, the Supreme Court concluded that "it is only by analyzing all the circumstances of an individual consent that it can be ascertained whether . . . it was voluntary or coerced."²³ A survey of "voluntariness," as defined in confession cases, revealed "no talismanic definition."²⁴ Instead, the term reflects "an accommodation of the complex of values implicated in police questioning of a suspect."²⁵ Broadly defined, the term accounts for the legitimate need for searches in law enforcement and, at the same time, "society's deeply felt belief that the criminal law cannot be used as an instrument of unfairness."²⁶

Under *Schneckloth*, courts attempting to determine whether a particular instance of consent was voluntary may consider knowledge of the right to refuse, but "the government need not establish such knowledge as the *sine qua non* of an effective consent."²⁷ To mandate proof of a subject's mental state would risk undermining the admissibility of legitimate evidence in instances where the defendant, who was in fact aware of his right to refuse consent, simply fails to testify.²⁸ Nevertheless, the concept of voluntariness contemplates "evidence of minimal schooling, low intelligence, and the lack of any effective warnings to a person of his rights."²⁹

Schneckloth also explicitly noted that consent "granted only in submission to a claim of lawful authority" is invalid.³⁰ In so doing, the Court affirmed its earlier holding in *Bumper v. North Carolina*.³¹ *Bumper* involved an elderly woman who, after being told by police that they possessed a warrant, permitted them to search her house.³² After the

21. *Id.*

22. *Id.*

23. *Id.* at 233.

24. *Id.* at 224.

25. *Id.* at 224-25.

26. *Id.* at 225, 227.

27. *Id.* at 227; *see also* United States v. Mendenhall, 446 U.S. 544, 558-59 (1980) (stating that "[a]lthough the Constitution does not require 'proof of knowledge of a right to refuse as the *sine qua non* of an effective consent to a search,' such knowledge [is] highly relevant to the determination that there had been consent.") (quoting *Schneckloth*, 412 U.S. at 227).

28. *Schneckloth*, 412 U.S. at 230.

29. *Id.* at 248.

30. *Id.* at 233.

31. 391 U.S. 543 (1968).

32. *Id.* at 546-47.

officers discovered a .22 caliber rifle that was allegedly used in a crime, the woman's grandson, who was charged with committing the offense, moved to suppress the evidence, arguing that the search violated his Fourth Amendment rights.³³ The Court held that "[a] search conducted in reliance upon a warrant cannot later be justified on the basis of consent if it turns out that the warrant was invalid."³⁴ The same is true "when it turns out that the State does not even attempt to rely upon the validity of the warrant, or fails to show that there was, in fact, any warrant at all."³⁵

Schneckloth v. Bustamonte further underscored that consent may not be coerced "by explicit or implicit means, by implied threat or covert force."³⁶ The Court emphasized that:

illegitimate and unconstitutional practices get their first footing . . . by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance.³⁷

Account must be taken, therefore, of even the most "subtly coercive police questions."³⁸

Schneckloth's holding was specifically limited to cases where "the subject of a search is not in custody and the State attempts to justify a search on the basis of his consent."³⁹ Unlike the "inherently coercive" custodial situations "that informed the Court's holding in *Miranda*,"⁴⁰ consent searches generally take place in public, "under informal and unstructured conditions."⁴¹ As a result, safeguards to protect persons suspected or accused of a crime, which would include proof of knowledge of the right to refuse consent, are unnecessary.⁴²

33. *Id.* at 544-45.

34. *Id.* at 549.

35. *Id.* at 549-50.

36. 412 U.S. 218, 228 (1973).

37. *Id.* at 228-29 (emphasis added) (quoting *Boyd v. United States*, 116 U.S. 616, 635 (1886)).

38. *Id.* at 229.

39. *Id.* at 248.

40. *Id.* at 246-47 (citing *Miranda v. Arizona*, 384 U.S. 436, 458 (1966)).

41. *See id.* at 232 (stating that consent searches generally occur on a highway or in a person's home or workplace, under informal, unstructured conditions).

42. *See id.* at 247 (stating that the traditional test for determining voluntariness, which does not include knowledge of the right to refuse consent, should not be rejected in situations where a person is not in custody).

Accordingly, the *Schneckloth* Court had no reason to believe that, under the circumstances of a routine traffic stop, a driver's response to a policeman's question is presumptively coerced.⁴³

The Supreme Court further elucidated the *Schneckloth* standard three years later in *United States v. Watson*.⁴⁴ In *Watson*, postal inspectors arrested Henry Watson for possession of stolen credit cards based on information provided by an informant.⁴⁵ Officers removed the suspect from a restaurant to the street and read him the warnings required by *Miranda v. Arizona*.⁴⁶ A search of Watson's person revealed no stolen credit cards.⁴⁷ The police, after warning that anything found could be used against him, asked if they could search his vehicle.⁴⁸

Watson, arguing that "his consent to search the car was involuntary and ineffective because he had not been told that he could withhold consent,"⁴⁹ moved to suppress the evidence of stolen cards found in his car. Applying *Schneckloth*, the Court found that the totality of circumstances failed to demonstrate that Watson's consent "was not his own 'essentially free and unconstrained choice' because his 'will ha[d] been overborne and his capacity for self-determination critically impaired.'"⁵⁰ Among other things, Watson gave consent in a public street as opposed to "the confines of a police station."⁵¹ Also, he consented only after being read his *Miranda* rights, and there was no evidence that Watson was "unable in the face of a custodial arrest to exercise a free choice."⁵²

Finally, the Supreme Court explicitly disqualified consent in two pre-*Schneckloth* cases where individuals assented in mere acquiescence to assertions of lawful authority. The Court's first disqualification occurred in the context of a prohibition-era liquor law violation.⁵³ Federal officers came to the defendant's home without a warrant, where they informed his wife that they had come to search the premises for violations of revenues law; the wife granted the men access to the home.⁵⁴ In overturning the admission of evidence obtained as a result of

43. *Id.*

44. 423 U.S. 411, 425 (1976).

45. *Id.* at 412-13.

46. *Id.* at 413 (citing *Miranda v. Arizona*, 384 U.S. 436 (1966)).

47. *Id.*

48. *Id.*

49. *Id.*

50. *Id.* (quoting *Schneckloth v. Bustamonte*, 412 U.S. 218, 225 (1973)).

51. *Id.*

52. *Id.* at 425.

53. See *Amos v. United States*, 255 U.S. 313, 314 (1921).

54. *Id.* at 315.

their subsequent search, the Supreme Court held that “it is perfectly clear that under the implied coercion here presented” the defendant did not waive his Fourth Amendment rights.⁵⁵ The facts demonstrated “clearly the unconstitutional character of the seizure by which the property which [the government] introduced was obtained.”⁵⁶

In *Johnson v. United States*, the Court also suppressed evidence obtained by mere submission to authority.⁵⁷ The police, acting on a tip by an informant that people were smoking opium at a hotel, followed the smell of burning opium in the hallways.⁵⁸ They knocked on the defendant’s door, and she denied any smell of opium emanating from her room.⁵⁹ The officers subsequently stated that the defendant should consider herself “under arrest because we are going to search your room.”⁶⁰ In suppressing the evidence subsequently obtained, the Supreme Court found that “[e]ntry to [the] defendant’s living quarters, which was the beginning of the search, was demanded under color of office. It was granted in submission to authority rather than as an understanding and intentional waiver of a constitutional right.”⁶¹ Thus, because the defendant consented under the belief that she had no choice in the matter, the consent to search was not voluntary.

B. Voluntary Consent and Prior Illegalities

Even if consent to search is voluntarily given, that consent is invalid if obtained by exploiting a prior illegal act.⁶² *Wong Sun v. United States* confronted the issue of whether declarations made immediately after an arrest without probable cause are admissible as evidence or must be excluded.⁶³ Rejecting the government’s argument that the subject’s statements resulted from “an intervening independent act of free will,” the Supreme Court found that under the circumstances, where the police broke through the defendant’s door, promptly and unjustifiably handcuffed and arrested him, “it is unreasonable to infer that [the subject’s] response was sufficiently an act of free will to purge the primary taint of the unlawful invasion.”⁶⁴

55. *Id.* at 317.

56. *Id.* at 316.

57. *See* 333 U.S. 10 (1948).

58. *Id.* at 12.

59. *Id.*

60. *Id.*

61. *Id.* at 13.

62. *See* *Wong Sun v. United States*, 371 U.S. 471, 488 (1963).

63. *See id.* at 484 (holding subsequent declarations inadmissible when obtained through an agent’s unlawful action).

64. *Id.* at 486.

Wong Sun also rejected the government's alternative contention that the defendant's statements should be admitted because they were "ostensibly exculpatory rather than incriminating."⁶⁵ Instead, the Court found "no substantial reason" to preclude the defendant's statements from the exclusionary rule,⁶⁶ which bars evidence "obtained either during or as a direct result of an unlawful invasion."⁶⁷ The circumstances were coercive, and the statements were in fact incriminating, not exculpatory, as "they led directly to evidence which implicated [the defendant];" the motion to suppress was granted.⁶⁸

After emphasizing that "knowledge gained by the Government's own wrong cannot be used by it in the way proposed,"⁶⁹ the Supreme Court formulated a test: the question, in cases where the issue is whether evidence is 'fruit of the poisonous tree,' is "whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint."⁷⁰

A decade later the Supreme Court reaffirmed *Wong Sun*'s requirement that statements made subsequent to an illegal arrest, in order to be admissible at trial, must be voluntary and made on a defendant's own volition.⁷¹ *Brown v. Illinois* held that if the causal chain between the prior illegality and the statements made is not sufficiently broken, the evidence falls short of constitutional requirements.⁷²

Brown also underlined that *Wong Sun* "mandates consideration of a statement's admissibility in light of the distinct policies and interests of the Fourth Amendment."⁷³ *Miranda* warnings alone, while sufficient to effectuate Fifth Amendment interests, are insufficient to deter unlawful searches and seizures.⁷⁴ Unequivocally permitting the use of evidence obtained by virtue of a search that, though without probable cause was preceded by *Miranda* warning, would effectively eliminate "[a]ny incentive to avoid Fourth Amendment violations" and would reduce an

65. *Id.* at 487 (internal citations omitted).

66. *Id.*

67. *Id.* at 485.

68. *Id.* at 487.

69. *Id.* at 485 (quoting *Silverthorne Lumber Co. v. United States*, 251 U.S. 385, 392 (1920)).

70. *Id.* at 488 (quoting JOHN MACARTHUR, MAGUIRE, EVIDENCE OF GUILT 221 (1959)).

71. See *Brown v. Illinois*, 422 U.S. 590, 602 (1975).

72. See *id.* (discussing requirements for the causal chain to be broken).

73. *Id.*

74. *Id.* at 601-02.

essential constitutional protection to “a form of words.”⁷⁵

Florida v. Royer presents an additional case where the Supreme Court held that consent, while arguably voluntary, was insufficiently removed from an illegal arrest to prove that it would otherwise have been given.⁷⁶ Royer, who was flying out of Miami International Airport, was identified by two narcotics detectives as a suspicious individual.⁷⁷ The police officers took the young man to a storage closet, retrieved his luggage, informed Royer that they had reason to suspect him of transporting narcotics, and asked if he would consent to a search of his luggage.⁷⁸ In affirming the appellate court’s suppression of the drugs found in Royer’s suitcases, the Supreme Court highlighted that the officers’ primary purpose in moving to the interrogation from the concourse was to search the luggage.⁷⁹ Had police requested consent to search in the airport terminal, any evidence obtained would have been admissible.⁸⁰ Under the circumstances, however, where the suspect was effectively in custody, it was unreasonable to infer that consent was voluntary.⁸¹

C. Alaska Cases

Alaska case law follows U.S. Supreme Court precedent and actually evinces greater protection of individual privacy, a state privilege that has been repeatedly affirmed.⁸² In *Erickson v. State*,⁸³ for example, a case decided two months before *Schneckloth*, Alaska’s highest court noted that “consent to a search, in order to be voluntary, must be unequivocal, specific and intelligently given, uncontaminated by any duress or coercion, and is not lightly to be inferred.”⁸⁴ Moreover, “any new

75. *Id.* at 602–03 (internal citations omitted).

76. 460 U.S. 491, 502–03 (1983).

77. *Id.* at 493.

78. *Id.* at 494.

79. *Id.* at 505.

80. *Id.*

81. *See id.* (“[The] primary interest of the officers [in moving from the airport concourse to a closet-sized interrogation room] was not in having an extended conversation with Royer but in the contents of his luggage. . . .”).

82. *See* Aaron H. Mendelsohn, *The Fourth Amendment and Traffic Stops: Bright-Line Rules in Conjunction with the Totality of Circumstances Test*, 88 J. CRIM. L. & CRIMINOLOGY 930, 954 (1998) (“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. 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.”).

84.507 P.2d 508 (Alaska 1973).

84. *Id.* at 515 (internal citations omitted).

exception to the warrant requirement, no matter how reasonable in terms of its purpose, is viewed with caution."⁸⁵

The Alaska Court of Appeals followed *Erickson's* reasoning in a more recent decision, where it found that mere acquiescence to lawful authority does not constitute consent, even where a subject expressly assents to a search.⁸⁶ The court found, in the context of a supposedly voluntary consent during an airport security screening, that express assent is not always sufficient.⁸⁷ When confronted with an authority's supposed lawful right to perform a search, an individual's decision lacks the requisite voluntariness to pass constitutional muster.⁸⁸

Frink v. State,⁸⁹ another post-*Schneckloth* decision, also supports the proposition that Alaska law favors a standard that requires at least some knowledge of a right to refuse consent. After discussing *Erickson*, the court found the defendant's consent voluntary because he "was a person who knew what his rights were . . . at the time he allowed [the police] to search his car."⁹⁰ Although law enforcement officials "did not specifically tell Frink that he had the right to refuse their request, *they did nothing to indicate that he had to comply with their request* and the totality of circumstances surrounding the search does not suggest Frink consented because his will was overborne."⁹¹

Sleziak v. State,⁹² also a pre-*Schneckloth* case, further highlights Alaska's generally more stringent protections against involuntary search and seizure. Acknowledging that search and seizure issues are adjudicated based on the unique "facts and circumstances,"⁹³ the State Supreme Court held that "when the accused is directly asked whether he objects to the search, there must be at least some suggestion that his objection is significant or that the search waits upon his consent."⁹⁴ Only when "combined with a warning of his right to be silent, and his right to

85. *Id.* (citing *Ferguson v. State*, 488 P.2d 1032, 1035-36 (Alaska 1971)).

86. *See Schaffer v. State*, 988 P.2d 610, 615-16 (1999) (stating that "express assent is not sufficient. . . . Schaffer's assent to the search of her belongings was 'nothing more than acquiescence to apparent lawful authority.'").

87. *Id.* at 615.

88. *See id.* at 614 ("[E]ven if [the express] assent [of the passenger] were obtained, the choices with which the passenger is confronted are such that voluntariness will ordinarily be lacking" (quoting WAYNE R. LEFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT, § 10.6(g) at 644-45 (3d ed. 1996))).

89. 597 P.2d 154 (Alaska 1979).

90. *Id.* at 167 (quoting *Frink v. State*, 1990 WL 10567997 at *1 (Alaska Ct. App. Nov. 14, 1990)).

91. *Id.* at 167-68 (emphasis added).

92. 454 P.2d 252 (Alaska 1969).

93. *Id.* at 256.

94. *Id.* at 257.

counsel” is it “fair to infer that his purported consent is in fact voluntary.”⁹⁵ This implies that consent, in order to be voluntary, must not only be given freely, the subject must also be given the option to refuse consent.

The Court of Appeals has also recently indicated a more stringent approach to interpreting voluntariness than is required by federal law. In *Brown v. State*,⁹⁶ the court confronted the issue of when a routine traffic stop becomes unreasonable and unconstitutional, thus invalidating any subsequent consent to search.⁹⁷ Concluding that federal law does not adequately protect motorists, the court joined “state courts that have decided that their state constitutions require greater restrictions on police authority in this situation than the restrictions imposed by the Fourth Amendment to the United States Constitution.”⁹⁸ *Brown* found that the psychological pressures inherent in a police request to search, combined with ignorance of rights, causes “large numbers of motorists – guilty and innocent alike – [to] accede to these requests.”⁹⁹

III. HOLDING

In *Anderson*, the Alaska Court of Appeals affirmed the District Court’s Driving Under the Influence conviction and denied the motion to suppress the blood test evidence. The majority found it was reasonable for the trial judge to conclude that Anderson’s consent was voluntary because the defendant had the chance to consult with his attorney and there was a forty-minute interval between the police’s initial incorrect assertion of authority and Anderson’s consent to provide body samples.¹⁰⁰

In reaching its conclusion that the consent was not tainted by the prior illegality, the Court relied mostly on Anderson’s opportunity to consult with his attorney.¹⁰¹ Writing for the majority, Judge Coates argued that, had Anderson been unimpaired at the time of the accident, it would have been in his best interest to unequivocally exonerate himself by submitting to a blood test.¹⁰²

The majority further speculated as to what Butler, Anderson’s

95. *Id.*

96. 182 P.3d 624 (Alaska Ct. App. 2008).

97. *Id.* at 624–25.

98. *Id.* at 626.

99. *Id.*

100. *Anderson v. State*, 246 P.3d 930, 932 (Alaska Ct. App. 2011).

101. *Id.* at 931.

102. *Id.* at 933.

attorney, may have advised his client after speaking with the arresting officer and Lieutenant Reeder. Butler may have made the same mistake as law enforcement; or perhaps he believed, based on Anderson's claim that he had only had one beer, that the blood samples would prove exculpatory.¹⁰³

Judge Bolger wrote separately to analyze the case in accordance with three factors "suggested" by the U.S. Supreme Court in *Brown v. Illinois* "for determining whether a confession is tainted: (1) the temporal proximity of the arrest and the confession, (2) the presence of intervening circumstances, and (3) the purpose or flagrancy of the official misconduct."¹⁰⁴ With regard to the first factor, he found that the forty-minute interval weighed in favor of suppression.¹⁰⁵ However, the opportunity to consult with counsel, the fact that police officers relied on a statute on good-faith, and their "patient[]" and "polite[]" treatment of Anderson weighed against suppression on both the second and third factors.¹⁰⁶

In his dissent, Judge Mannheimer emphasized that the police officers explicitly asserted their right to demand blood samples, and that this was their stated justification for taking Anderson into custody.¹⁰⁷ That they made their demand politely and in good faith, he argued, "does nothing to alter the involuntariness of Anderson's decision."¹⁰⁸

Judge Mannheimer also attacked the applicability of the cases on which Judge Bolger relied to justify Anderson's consultation with his attorney as an intervening event.¹⁰⁹ They involved situations where "a defendant, after consultation with his counsel, made a post-arrest decision to submit to a police interview, or to consent to a search, with full understanding that the defendant had no obligation to cooperate with the police investigation."¹¹⁰ Under such circumstances, courts may naturally assume that the attorney advised his or her client of their right to refuse a search.¹¹¹ Given that both Anderson and his attorney were repeatedly told that there was no choice but to consent, the latter assumption does not apply in the instant case.¹¹²

Mannheimer also rejected as implausible the possibility that

103. *Id.*

104. *Id.* (internal citations omitted) (Bolger, J., concurring).

105. *Id.*

106. *Id.*

107. *Id.* at 935 (Mannheimer, J., dissenting).

108. *Id.*

109. *Id.* at 936.

110. *Id.*

111. *Id.*

112. *Id.*

Anderson acted on accurate legal advice. Instead, the facts indicate “that Anderson’s attorney acquiesced in the officer’s assertions of authority and *directed* his client to provide the body samples.”¹¹³

IV. ANALYSIS

The Court of Appeals’ decision in *Anderson v. State* departs from established federal and Alaska state precedent. In doing so, it undermines the fundamental guarantee against unreasonable search and seizure. The outcome also seemingly falls short of reason: how could consent, given only in the face of repeated insistence of absolute authority to compel compliance, be deemed voluntary, especially when the subject initially refused to consent?

The answer lies in the amorphous nature of the “voluntariness” doctrine itself, as well as an underlying institutional bias toward furthering society’s interest in effective law enforcement, particularly because the evidence sought suppressed is inevitably incriminating. To prevent future injustice, Alaska should move toward a more objective test that, instead of relying on a court’s ability to discern an individual’s state of mind at the time of the alleged consent, would examine the actions of law enforcement for coercive or deceptive behavior.

A. Anderson’s Consent Was Not Voluntary

Anderson, in direct contradiction to *Schneckloth* and *Bumper*, validates the voluntariness of consent despite coercive and deceptive circumstances. In *Bumper*, the Supreme Court held that an express or implied claim of authority by the police weighs heavily in favor of voiding consent.¹¹⁴ Here, both the arresting and supervising police officers expressly asserted, both to Anderson and his attorney, their statutory duty to collect blood and urine samples from individuals involved in serious traffic accidents.¹¹⁵ Anderson refused to oblige until his attorney, who had no time to conduct independent research, instructed him to do so.¹¹⁶

While *Schneckloth* rejected the Ninth Circuit’s argument that the government must establish knowledge of the right to refuse to prove the validity of consent, it held that this factor is “to be taken into account.”¹¹⁷

113. *Id.*

114. 391 U.S. 543, 549 (1968).

115. *Anderson*, 246 P.3d at 936.

116. *Id.*

117. *Schneckloth v. Bustamonte*, 412 U.S. 218, 227 (1973).

In the case at issue, it is clear that neither Anderson nor the two police officers were aware of *State v. Blank*, at the time a relatively recent Alaska Supreme Court decision holding that the implied consent statute, to pass constitutional muster, requires police officers to have probable cause that a crime has occurred before they demand blood and urine samples.¹¹⁸ The general ignorance of the applicable law by all parties involved should have factored more heavily in favor of suppression.

In its analysis, the Court of Appeals implied that Anderson's opportunity to consult with his attorney, who presumably had knowledge of basic criminal procedure, conclusively supported a finding of voluntary consent.¹¹⁹ Given the circumstances of the case, however, it seems unreasonable to assume that Butler was apprised of the current state of the law.¹²⁰ It is implausible, as the majority's opinion suggests, that an experienced attorney, whose client admitted to consuming alcohol before a serious car accident but was not under suspicion by the police, would instruct his client to voluntarily consent to a test that could prove incriminating.¹²¹ More realistically, the facts suggest that Butler was as ignorant of the relevant law as everyone else.

Consequently, Anderson's status as a qualified lawyer, though used by the majority to support the voluntariness of the defendant's consent, also weighs in favor of suppressing the evidence. Anderson obviously knew how much he had to drink, and must have suspected that his blood alcohol level exceeded the legal limit. If he had known of his right to refuse the test in the absence of probable cause, why would he voluntarily consent to provide body samples?

The Court of Appeals also neglected to acknowledge that the traditional "voluntariness" analysis is confined to instances where the defendant is not in custody.¹²² Custodial situations are inherently more coercive, as people are more likely to succumb to police pressure. Granted, Anderson had the opportunity to contact his attorney by phone. However, the court should have at the very least considered the custodial situation as an additional factor weighing in Anderson's favor.

Alaska's appellate court also failed to consider Anderson's initial

118. 90 P.3d 156, 158 (2004).

119. See *Anderson v. State*, 246 P.3d 930, 932-33 (Alaska Ct. App. 2011) (explaining that even if his attorney had been aware of the law he may have advised Anderson to provide body samples).

120. *Id.* ("[D]etermining whether Anderson was required by law to submit blood and urine samples required knowledge of the supreme court's decision in *State v. Blank*").

121. *Id.* at 932.

122. See *Schneckloth*, 412 U.S. at 248 (holding that the traditional 'totality of circumstances' test applies only where "the subject of a search is not in custody").

unwillingness to submit to testing; if, when the events at issue took place, he did not have reservations about providing body samples, Anderson presumably would not have felt the need to contact his attorney. Although the Supreme Court has not said so explicitly, Professor Wayne LaFave, a Fourth Amendment authority, believes that a “suspect’s earlier refusal to give consent is a factor which is properly taken into account as a part of the ‘totality of the circumstances’ in judging the later consent under the [*Bustamonte*] formula.”¹²³ The *Anderson* majority made no mention of this crucial circumstance.

The totality of the circumstances thus strongly suggests that, as in *Amos* and *Johnson*, Anderson merely acquiesced to a claim of lawful authority. The police repeatedly asserted their statutory duty to test for alcohol and drug impairment. The facts do not suggest that Anderson knowingly and intelligently chose to waive his constitutional rights. True, the evidence obtained as a result of the illegal search proved that Anderson was in fact impaired when he killed the pedestrian. But, like in *Amos* and *Johnson*, Anderson’s guilt is irrelevant; the Constitution does not serve to solely protect the innocent.

While the facts generally weigh in favor of voiding consent under the federal “voluntariness” standard, Anderson’s consent is more definitively unconstitutional under Alaska precedent. As indicated above, *Frink* implies that a valid consent requires knowledge of the right to refuse.¹²⁴ *Sleziak* suggests that, to uphold consent, there must be clear evidence the police did not create the impression that they have the right to conduct a search regardless of the subject’s wishes.¹²⁵ Here, the facts imply that Anderson was unaware of his right to refuse and the police continually asserted their obligation to conduct the search in question. These facts, in conjunction with the Court of Appeals’ effort to apply “greater restrictions on police authority in this situation than the restrictions imposed by the Fourth Amendment to the United States Constitution,”¹²⁶ should have made *Anderson* a relatively straightforward consent-voiding decision.

123. 4 WAYNE R. LEFAVE, *SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT* § 8.2(f) (4th ed. 2004).

124. See *Frink v. State*, 597 P.2d 154, 167 (Alaska 1979) (finding consent voluntary because the defendant “knew what his rights were . . . at the time he allowed [the police] to search his car”).

125. 454 P.2d 252, 267 (Alaska 1969) (stating that there must be some suggestion by the police that an objection to search is significant or that it awaits consent).

126. *Brown v. State*, 182 P.3d 624, 626 (Alaska Ct. App. 2008).

B. Anderson's Consent, Even if Voluntary, is Invalid

Even if Anderson's consent was arguably voluntary, it is nonetheless invalid, because the consent came at the exploitation of, and was not properly insulated from, an illegal arrest. The appellate court's reliance on Anderson's opportunity to consult with his attorney fails to appreciate the purpose of the exclusionary rule: to deter unconstitutional conduct. In direct contradiction, the court incidentally creates a means for the police to circumvent Fourth Amendment protections by permitting the use of illegally obtained information as long as the suspect was afforded the opportunity to consult with counsel.

The Court of Appeals and District Court relied primarily on the fact that Anderson had the opportunity to consult with his attorney in justifying the consent as untainted by the illegal conduct.¹²⁷ In *Brown v. Illinois*, however, the Supreme Court stated clearly that *Miranda*-type safeguards, which include the right to consult an attorney, are insufficient to protect Fourth Amendment interests.¹²⁸ *Anderson* presents the type of scenario that the Court presumably contemplated in making this assertion.

In the context of the Fifth Amendment, *Miranda* warnings serve to deter an individual in custody from making incriminating statements under the "the compulsion inherent in custodial surroundings."¹²⁹ With regard to the Fourth Amendment, however, allowing law enforcement to make admissible statements that would otherwise be inadmissible by simply giving *Miranda* warnings would, as the Supreme Court highlighted, undermine the purpose of the exclusionary rule: to deter unlawful conduct "and compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it."¹³⁰ Although the police did not act maliciously in *Anderson*, the case also creates an incentive for police to improperly extract admissible evidence by simply claiming ignorance of what the law actually requires.

Finally, the Court of Appeals neglected to consider the effect of Anderson's custodial situation in finding his consent sufficiently removed from the prior illegality. *Royer*, as discussed above, implied that an illegal detention almost invariably taints consent to search.¹³¹

127. *Anderson v. State*, 246 P.3d 930, 931 (Alaska Ct. App. 2011).

128. 422 U.S. 590, 601-02 (1975).

129. *Id.* at 600 (quoting *Miranda v. Arizona*, 384 U.S. 436, 458 (1973)).

130. *Id.* at 599-600 (quoting *Elkins v. United States*, 364 U.S. 206, 217 (1960)).

131. See *Florida v. Royer*, 460 U.S. 491, 507 (1983) ("[B]ecause we affirm the Florida Court of Appeal's conclusion that Royer was being illegally detained

Thus, irrespective of policy concerns, Anderson's consent should have been found invalid.

C. Problems with the Consent Doctrine

Anderson exemplifies the "voluntariness" doctrine's inherent ambiguity. The test demands that courts engage in the task of discerning a defendant's inner thoughts at the time he or she gave consent. Given the difficulty of doing so, courts rarely do more, as Professor Marcy Strauss has highlighted, than recite factual information followed by conclusory statements about whether the consent was voluntary.¹³² Thus, the problem with regard to the doctrine's application is twofold: (1) the "voluntariness" test is too vague to provide any real guidance to courts, litigants, or the police; and (2) it fails to account for the fact that most people inevitably feel coerced by a police "request" to search.¹³³ These problems, in turn, undermine the integrity of both law enforcement and the judicial process.

1. *Consent Is Rarely Found Involuntary*

Although often invoked, the traditional "voluntariness" test rarely leads to an invalidated consent. Judges seldom attempt to analyze the numerous subjective *Schneckloth* factors related to the individual's mental state or character.¹³⁴ In reading every published federal and state level consent case within a three-year time span, Strauss discovered that courts overwhelmingly included merely a paragraph on the concept of "voluntariness," followed by a statement regarding the state's burden to prove that the consent was voluntary.¹³⁵ Out of hundreds of decisions, only a handful of cases actually analyzed the defendant's subjective mental state at the time of the alleged consent; and even fewer found these factors sufficiently compelling.¹³⁶

Consent was invalidated only in instances where, for example, the defendant spoke no English and received a mistranslated statement indicating that the police had a permit to search when, in fact, they had merely requested consent.¹³⁷ Conversely, consent was validated in cases

when he consented to the search of his luggage, we agree that the consent was tainted by the illegality and was ineffective to justify the search.").

132. Marcy Strauss, *Reconstructing Consent*, 92 J. CRIM. L. & CRIMINOLOGY 211, 213 (2001).

133. *Id.* at 221.

134. *Id.* at 222.

135. *Id.*

136. *Id.*

137. *Id.* (citing *Lobania v. Arkansas*, 959 S.W.2d 72, 74 (2005)).

where the suspect had an IQ of 76 and suffered from psychological problems, because, as in *Anderson*, the police behaved non-threateningly.¹³⁸ Consent was even upheld in instances where the defendant was young and uneducated, surrounded by several “large” officers, and had previously refused police requests to search *four* times.¹³⁹ In another case, consent was found voluntary despite being granted only after the suspect was arrested, handcuffed, and held on the ground at gunpoint.¹⁴⁰ Shockingly, not a single case considered a suspect’s ignorance of his right to refuse or the police’s failure to inform him of his rights as relevant in and of itself.¹⁴¹

While the “voluntariness” analysis, based on “totality of circumstances,” *in theory* allows for a context-specific examination, in practice courts validate consent “in all but the most extreme circumstances.”¹⁴²

2. *The Traditional “Voluntariness” Doctrine’s Shortcomings*

Why is consent, given the government’s burden of proof on the matter, rarely invalidated? For one, courts are ill equipped to make these types of determinations. As Strauss explains, “deciding whether a person’s education, IQ, psychological difficulties, cultural experiences and past interactions with the police render a consent involuntary is difficult under the best of circumstances.”¹⁴³ Thus, when the task is “undertaken by individuals who typically share none of the fear, background or beliefs of the suspects, it is not surprising that little weight is often assigned to these subjective factors.”¹⁴⁴

The amorphous nature of the test itself, which provides little concrete guidance, also leads courts to invariably neglect the doctrine’s more nuanced aspects. At the same time, judges are inherently guided by the need to balance privacy rights with a societal interest in effective law enforcement.

To complicate matters further, courts inevitably consider these issues in the context of suppressing evidence that was discovered during

138. *Id.* at 223 (citing *State v. Hall*, 969 F.2d 1102, 1107–08 (D.C. Cir. 1992)).

139. *Id.* at 223–24 (citing *United States v. Rodney*, 956 F.2d 295, 297 (D.C. Cir. 2008)).

140. *Id.* at 226 (citing *United States v. Barnett*, 989 F.2d 546, 555–56 (1st Cir. 1983)).

141. *See id.* at 224 (stating that not a single case found “a suspect’s testimony that he did not know of his rights and that the police failed to inform him of them significant on its own”).

142. *Id.* at 223 (quoting DAVID COLE, *NO EQUAL JUSTICE: RACE AND CLASS IN THE AMERICAN JUSTICE SYSTEM* 32 (1999)).

143. *Id.* at 227.

144. *Id.*

the search in question. Because, as would have been the case in *Anderson* had the outcome differed, an invalid search causes highly relevant evidence to be suppressed, “it is not surprising judges place a finger on that part of the scale that emphasizes society’s interest in promoting unfettered police investigation.”¹⁴⁵ In addition, unlike in the confession context, the voluntariness of consent does not affect the *reliability* of the evidence obtained as a result of the unconstitutional conduct. Thus, courts are naturally reluctant to find in the defendant’s favor.

The “voluntariness” standard also fails to account for the fact that most individuals are effectively incapable of denying a police officer’s request to search. Numerous studies indicate that even under seemingly non-coercive circumstances, where the police officer is polite without his gun drawn and the request is made in a ‘comfortable’ environment, people consent even though they have nothing to gain by doing so.¹⁴⁶ Obedience to authority is deeply ingrained, and individuals consequently agree to things that are not necessarily in their own best interest; this is especially true when the authority figure in question is dressed in a uniform.¹⁴⁷

Certain minorities, particularly African-Americans, are more likely to perceive a police request as an unequivocal demand, as they are more prone believe that a refusal to comply with law enforcement may lead to serious and deadly consequences.¹⁴⁸ In addition, from a linguistic perspective, a request made by law enforcement effectively communicates the ability to compel compliance notwithstanding a subject’s preference, which further explains the general tendency to interpret a question by the police as a command.¹⁴⁹

In sum, the amorphous nature of the traditional voluntariness doctrine, while intended to allow for context-specific analysis, provides little objective guidance. In practice, in the face of reliable and incriminating evidence, courts shy away from the impossible task of determining a subject’s state of mind at the time he or she gave consent, and instead grasp any sort of concrete fact to support their conclusion. Thus, it is hardly surprising that the *Anderson* majority, perhaps seeking to avoid seemingly nebulous and speculative reasoning, seized on the fact that the defendant had consulted with his attorney as an unambiguous means of justifying its decision to admit the body

145. *Id.* at 228.

146. *Id.* at 236 (citing Tracey Maclin, “Black and Blue Encounters” – Some Preliminary Thoughts about Fourth Amendment Seizures, Should Race Matter? 26 VAL. U. L. REV. 243, 250 (1991)).

147. *Id.* at 236.

148. *Id.* at 242–43.

149. *Id.* at 242.

samples.

They made this decision, given the undeniably accurate test results, knowing that Anderson had with *virtual certainty* violated the law by driving intoxicated, and naturally inferring that he was therefore likely at fault in the pedestrian's death. From their ex-post perspective, it is not surprising the court would place less weight on amorphous facts *suggesting* the defendant's state of mind.

D. The Objective and More Effective Framework

Coercion negates consent.¹⁵⁰ Unfortunately, the "totality of circumstances" test provides courts with little clear guidance for determining when coercion exists. Furthermore, judges tend to examine a case for both coercion and voluntariness without distinguishing between the two concepts.¹⁵¹ A coerced consent, at least at some level, still involves a choice; as a result, courts tend to readily find voluntariness.¹⁵²

This Note proposes that Alaska should employ a more objective test, adopted from the confession context, as part of the established consent analysis. Instead of focusing on the voluntariness of consent, courts should evaluate the actions of the police and, where those actions are coercive or deceptive, invalidate consent regardless of whether the police acted in good or bad faith. The latter framework is more easily applied by courts and furthers the declared purpose of the traditional "totality of circumstances" test—to deter conduct that violates the Fourth Amendment.¹⁵³ Also, because it interprets individual freedoms more broadly than the Federal Constitution, the proposed test does not implicate the Supremacy Clause.¹⁵⁴

As indicated above, the analysis for determining the voluntariness of consent was in large part derived from the confession context.¹⁵⁵ It thus makes sense, in the search for a solution to the issues presented with the traditional consent doctrine, to examine relevant evolutions in the confession framework.

150. See *Schneckloth v. Bustamonte*, 412 U.S. 218, 227 (stating that "two competing concerns must be accommodated in determining the meaning of a 'voluntary' consent—the legitimate need for such searches and the equally important requirement of assuring the absence of coercion.").

151. Rebecca Strauss, *We Can Do This The Easy Way Or The Hard Way: The Use Of Deceit To Induce Consent Searches*, 100 MICH. L. REV. 868, 883 (2002).

152. *Id.*

153. See *Brown v. Illinois*, 422 U.S. 590, 602–03 (1975).

154. See Mendelsohn, *supra* note 82 at 936–37.

155. *Schneckloth*, 412 U.S. at 224.

In *Colorado v. Connelly*, the Supreme Court emphasized that confessions should be scrutinized primarily for coercive police behavior rather than evaluated generally for voluntariness.¹⁵⁶ The Colorado Supreme Court had affirmed the suppression of a confession by a mentally disturbed defendant, because his chronic schizophrenia and psychotic state vitiated his waiver of right to counsel and protection against self-incrimination.¹⁵⁷ In reversing the state court, Justice Rehnquist underscored the difficulty with the “voluntariness” approach in that “it fails to recognize the essential link between coercive activity of the State, on the one hand, and a resulting confession by [the] defendant, on the other.”¹⁵⁸ The latter approach requires courts “to divine a defendant’s motivation for speaking or acting as he did.”¹⁵⁹ A focus on coercion more effectively furthers the Fifth Amendment’s purpose.¹⁶⁰

Importing this approach to the consent context would likewise promote Fourth Amendment interests. An evaluation of coercive or deceptive circumstances surrounding consent is both more objective and straightforward than attempting to understand a defendant’s inner thoughts. Because this framework is more easily applied, courts are more likely to scrutinize consent and, consequently, less inclined, as they do now with the focus on subjective factors, to readily find voluntariness. With its emphasis on *police* conduct, the proposal also concentrates more directly on whether consent was “granted only in submission to a claim of lawful authority”¹⁶¹ and provides a more effective tool to measure whether consent was freely and voluntarily given.

The doctrine modification also deters unconstitutional police action, which, as Joseph Caraccio has underscored, can only be accomplished by denying law enforcement “both the incidental as well as the direct benefits of their misconduct.”¹⁶² The framework precludes police from innocently *or* purposely claiming ignorance of the law as a means of validating an involuntary consent; consent obtained through

156. See 479 U.S. 157, 169 (“[O]f course, a waiver must at a minimum be ‘voluntary’ to be effective against an accused”); see *id.* at 163–64 (“while each confession case has turned on its own set of factors justifying the conclusion that police conduct was oppressive, all have contained a substantial element of coercive police conduct”).

157. *Id.* at 162.

158. *Id.* at 165.

159. See *id.* at 165–66.

160. *Id.* at 170 (noting that *Miranda* protects defendants against government coercion leading them to surrender rights protected by the Fifth Amendment).

161. *Schneekloth v. Bustamonte*, 412 U.S. 218, 233 (1973).

162. Joseph G. Casaccio, *Illegally Acquired Information, Consent Searches, and Tainted Fruit*, 87 COLUM. L. REV. 842, 844 (1987).

coercive or deceptive means, in good or bad faith, is void. Similarly, consent given after a defendant has the opportunity to contact an attorney would not be unequivocally valid (as is effectively the case under the traditional test), because the consent could nonetheless have been the product of coercion or deception.

As applied to *Anderson*, the proposed framework would have led to the opposite outcome. Anderson acceded to the request for body samples only after both he and his attorney were repeatedly and incorrectly told that the police are statutorily obligated to obtain them. By unintentionally deceiving Anderson into believing that he had no choice in the matter, the police coerced his consent. Moreover, because the consent was coerced, it was involuntary.

This clear-cut analysis does not require the kinds of subjective facts and conjecture involved in deciphering a defendant's state of mind. Because it focuses on coercive police conduct, the objective test also incorporates the "fruit of the poisonous tree" doctrine's focus on whether consent was obtained "by exploitation of [a prior] illegality or instead by means sufficiently distinguishable to be purged of the primary taint;"¹⁶³ a consent to search that is given only because the defendant is falsely taken into custody, for example, is presumably coerced. Thus, the proposed standard accounts for both whether consent was voluntary *and* whether it was facilitated by prior illegal conduct.

Finally, the proposed rule, which more effectively protects against unreasonable search and seizure, is in keeping with Alaska's tradition of strong privacy rights. *Ravin v. State*, for example, held that Alaska's constitution, unlike its federal counterpart, confers a protected right for adults to possess marijuana.¹⁶⁴ The case, decided in 1975, was remarkably progressive relative to other states. It emphasized that Alaska "has traditionally been the home of people who prize their individuality and who have chosen to settle or to continue living here in order to achieve a level of control over their lifestyles which is now virtually unattainable in many of our sister states."¹⁶⁵ When a ballot initiative in 1999 repealed a law enacted in accordance with *Ravin*, the Court of Appeals struck down the initiative as unconstitutional.¹⁶⁶ Adopting the proposed amendment to the consent doctrine would thus hardly constitute Alaska's first initiative that went against the prevailing grain in the furtherance of individual rights.¹⁶⁷

163. *Wong Sun v. United States*, 371 U.S. 471, 488 (1963).

164. 537 P.2d 494, 504 (Alaska 1975).

165. *Id.*

166. *Noy v. State*, 83 P.3d 538, 542 (Alaska Ct. App. 2003).

167. *See, e.g., Anchorage Police Dep't. Emps. Ass'n. v. Anchorage*, 24 P.3d

CONCLUSION

The traditional consent doctrine, with its “totality of circumstances” and “voluntariness” approach, fails to effectively further the Fourth Amendment’s purpose. *Anderson v. State* highlights how the framework, while intended to account for any given set of circumstances, provides judges with insufficient guidance. As a result, courts find voluntary consent in all but the most extreme cases. The latter tendency is also explained by the nature of a suppression case, where the court is confronted with a motion to suppress reliable and incriminating evidence, as well as a judicial interest in facilitating effective law enforcement.

To remedy the federal consent doctrine’s shortcomings, Alaska should adopt a more objective test that, instead of requiring courts to telepathically determine whether a defendant’s decision was reached with sufficient free will, focuses on police conduct: where the police exhibit coercive or deceptive behavior, in good or bad faith, consent is involuntary and therefore void. This framework condenses the “voluntariness” and “fruit of the poisonous tree” analysis into a single step. More importantly, it leads to consistently predictable and equitable results.

547, 558 (Alaska 2001) (striking down Anchorage’s random drug testing policy for police and fire fighters because, in the absence of documented history of abuse, the “continuous and unrelenting scrutiny that exposes the employee to unannounced testing at virtually any time” is unconstitutional).