No._____

IN THE SUPREME COURT OF THE UNITED STATES

ARTURO SARLI, PETITIONER

V.

UNITED STATES OF AMERICA

_____

PETITION FOR WRIT OF CERTIORARI
TO THE
UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

_____

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QUESTION PRESENTED FOR REVIEW

Police officers stopped Arturo Sarli as he drove his truck. The officers had received a tip about Sarli and used their traffic-enforcement authority to pull over Sarli and give themselves a chance to investigate the tip. The officers obtained consent to search Sarli's truck. They then arrested Sarli for an outstanding municipal warrant, handcuffed him, and put him in the back of a patrol car. The officers searched the truck, inside and out. They found nothing. They searched twice more, using two different narcotics-detecting dogs. They found nothing. Nearly an hour after consent was obtained, with the officers standing around and Sarli in custody, a detective appeared and conducted a fourth search of the truck. He found drugs hidden in a box of kitty litter in the truck.

The question presented is whether consent to search comes to a natural end after a thorough and fruitless search has been conducted or may officers use the initial consent to search as many times as they wish even when they have placed the owner of the property in a place where he cannot object to searches beyond the first one?

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Arturo Sarli asks that a writ of certiorari issue to review the opinion and judgment that the United States Court of Appeals for the Fifth Circuit entered in this case on January 16, 2019.

PARTIES TO THE PROCEEDING

The caption of the case names all the parties to the proceedings in the court below.

OPINION BELOW

The opinion of the court of appeals is reported at 913 F.3d 491 (5th Cir. 2019) and is attached to this petition as Appendix A.

JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES

The opinion and judgment of the court of appeals were entered on January 16, 2019. This petition is filed within 90 days after entry of judgment. *See* SUP. CT. R. 13.1. The Court has jurisdiction to grant certiorari under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment to the U.S. Constitution provides, in pertinent part, that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated[.]"

STATEMENT

Petitioner Arturo Sarli was indicted for possessing more than 50 grams of methamphetamine with the intent to distribute it, in violation of 21 U.S.C. § 841(b)(1)(A). He moved to suppress evidence, arguing that the search that discovered methamphetamine hidden in a box in his truck was not justified by consent or any other reason and thus violated the Fourth Amendment's ban on unreasonable searches. [1]

[1] The district court exercised jurisdiction under 18 U.S.C. § 3231.

At a hearing on the suppression motion, the evidence established that San Antonio police detective Steven Contreras had received a tip that "Arturo" would be making a drug delivery on the morning of July 3, 2014, in the area near U.S. Highway 90 and Probandt Street. According to the tip, Arturo would be driving a white Chevrolet Avalanche. The police observed a white Avalanche in the parking lot of a Bill Miller's restaurant on Probandt Street. A man and a woman were sitting in the truck. About five minutes after the officers found the Avalanche, it left the restaurant parking lot and drove up Probandt to the Habitat for Humanity store. The woman went into the store; the man drove back to Bill Miller's. While the Avalanche made this trip, the officers learned from a license-plate check that the truck was associated with Arturo Sarli. *See* Appendices B and C; *see also* Fifth Circuit Electronic Record on Appeal (EROA) 247-48.

Back in the Bill Miller's parking lot, Sarli was observed talking on his cell phone before heading back toward the Habitat store. Officers in a marked car followed Sarli and signaled him to stop for a traffic violation. Sarli pulled into the Habitat parking lot. Sarli admitted to the officers that he did not have his driver's license with him, and that he did not have proof the Avalanche was insured. Officer Juan Torres testified that he asked Sarli "for a consent search," and "[Sarli] replied yes." EROA.512. Officer Torres testified that two other officers then arrived, and "I asked [Sarli] again in their presence so they would understand that I asked him again for consent again." EROA.513. As soon as Sarli gave consent to search the truck, the officers arrested him on outstanding municipal warrants.

Sarli was handcuffed and placed in the back of a patrol car. Appendix C; EROA.512-13; EROA.526-27.

The officers searched the truck. They found no drugs, and no contraband of any type. Over the next half hour, two narcotics-detecting dogs were brought to the scene and run on the interior and exterior of the truck, including examining a box of kitty litter that was in the truck's bed. Neither dog alerted. Appendices B and C; EROA.501-05; EROA.556-58; EROA.802-08.

After nothing had been discovered three separate times, Detectives Contreras and Tamez appeared on the scene. The patrol officers had informed the detectives that Contreras's tip had not borne out. Tamez began his own search of the Avalanche. He examined the truck bed, and noticed a box of kitty litter. He "grabbed it, picked it up, opened it, and found the narcotics inside of it." Appendix C; EROA.469; EROA.513; EROA.542.

The magistrate judge concluded that the initial stop of Sarli was justified by the traffic violation, and that Sarli's arrest was justified by the outstanding warrants against him. Appendix C. The initial search of Sarli's truck, the magistrate determined, was justified by probable cause. However, probable cause was dispelled after the "officers found no contraband of any sort" and "neither [drug-detecting dog] alerted to the presence of narcotics, despite being allowed into the truck bed where the box of kitty litter was

located." EROA.253 Thus, Detective Tamez's "search of the box was not justified by probable cause." EROA.253; Appendix C.[2]

The magistrate judge concluded, however, that Detective Tamez's search of the box was within the scope of the consent Sarli had given to Officer Torres. Tamez's late search was covered by the consent because "Sarli did not limit the scope of his intent, and so his consent would reasonably be understood to extend to the containers within the vehicle." Appendix C.

Sarli objected to the magistrate judge's report, contending, among other things, that the search was not justified by the consent he had given. The district court agreed with the magistrate judge that the "intensive" searches conducted by the officers and the narcotics-detecting dogs before Detective Tamez arrived had dissipated any probable cause that existed when the encounter began. Appendix C. But the district court, like the magistrate judge, found the Tamez search justified by consent. Appendix B.

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[2] The magistrate judge concluded that the government had failed to show that the methamphetamine would have inevitably been discovered. The government had argued that the methamphetamine would certainly have been found as part of an inventory search following an impoundment of Sarli's vehicle because the box of kitty litter was an open container whose contents had to be accounted for. The magistrate judge concluded that an impoundment was justified, but found that the kitty litter box was not shown to be an open container. The government therefore had failed to carry its "burden of showing, by a preponderance of the evidence, that the drugs would inevitably have been discovered during a post-impoundment inventory search." Appendix C.

The district court rejected Sarli's claim that the "successive searches exceeded the scope of his consent." EROA.312; *see* Appendix B. "The court observed that Detective's Tamez's search had occurred "slightly less than an hour" after "the first search of Defendant's vehicle was underway[.]" EROA.312. The court found that Sarli's failure to object to the search was "an indication that the search was within the scope of the initial consent." EROA.312. The court therefore concluded that Tamez's search did not exceed the scope of the consent Sarli had given before he (and later, when the officers could not find anything, his wife) were detained, placed in handcuffs, and stowed in the back of patrol cars. EROA.314.

At the trial and over objection, the government introduced the tipster's statements implicating Sarli in a methamphetamine offense. The prosecutor relied on the tipster's statements in closing argument. The jury found Sarli guilty, and the district court sentenced him to 324 months' imprisonment.

Sarli appealed, challenging the ruling on the suppression motion and the admission and use of the tipster's statements. The Fifth Circuit rejected Sarli's argument that the consent search he had authorized had reached its natural end after the intensive, unsuccessful searches and before the arrival of Detective Tamez and that therefore Tamez's search fell outside the scope of Sarli's consent. *United States v. Sarli,* 913 F.3d 491, 495-96 (5th Cir. 2019). The court of appeals also ruled that, while the admission of the tipster's statements would be assumed to violate the confrontation clause, the error was harmless. *Id.* at 496-99. It affirmed Sarli's conviction.

REASONS FOR GRANTING THE WRIT

THE COURT SHOULD GRANT CERTIORARI TO PROVIDE GUIDANCE AS TO WHETHER CONSENT TO SEARCH, ONCE GIVEN, AUTHORIZES POLICE OFFICES TO SEARCH REPEATEDLY OR WHETHER CONSENT SEARCHES REACH A NATURAL END WHEN THE SEARCH TURNS UP NOTHING.

This case presents the Court with an opportunity to clarify how its test for measuring the objectively reasonable scope of a person's consent to a search applies when police officers use a single consent to perform multiple searches, and to consider how that objective scope is measured when the officers place the defendant in a position where he cannot object that multiple searches exceed the consent he gave. Multiple searches upon single consent appear contrary to the interests and reasoning underpinning the Court's consent jurisprudence.

The Fourth Amendment reflects the founders "response to the reviled 'general warrants' and 'writs of assistance' of the colonial era, which allowed British officers to rummage through homes in an unrestrained search for evidence of criminal activity." *Carpenter v. United States*, 138 S. Ct. 2206, 2213 (2018) (quoting *Riley v. California*, 573 U.S. 373, 403 (2014)). To prevent unrestrained rummaging, the founders set out standards requiring that searches be reasonable and that search warrants issue only upon a showing of probable cause made under oath to a neutral magistrate. U.S. CONST. amend. IV; *Groh v. Ramirez*, 540 U.S. 551, 557 (2004) (describing warrant requirement). Reasonableness is the "ultimate touchtone" of the validity of a search. *City of Los Angeles v. Patel*, 135 S. Ct. 2443, 2458 (2015).

One way in which a warrantless search may be reasonable is when it is conducted with the consent of the individual whose person or effects are searched. *See, e.g.*, *Fernandez v. California*, 571 U.S. 292, 298 (2014). As the Court has explained, consent searches can provide benefits to both law enforcement officers and individuals. For law enforcement officers "[c]onsent searches are part of the standard investigatory techniques" that constitute "permissible and wholly legitimate aspect[s] of effective police activity." *Fernandez*, 571 U.S. at 298 (quoting *Schneckloth v. Bustamonte*, 412 U.S. 218, 228, 231-32 (1973)). For the individual, consent searches can be a quick and efficient method to dispel suspicion. *Fernandez*, 571 U.S. at 298. Consent searches can avoid "needlessly inconvenienc[ing] everyone involved—not only the officers and the magistrate but also the occupant of the premises, who would generally [if a warrant had to be sought] either be compelled or would feel a need to stay until the search was completed." *Fernandez*, 571 U.S. at 298 (citing *Michigan v. Summers*, 452 U.S. 692, 701 (1981)). *Schneckloth* observed that, properly conducted, a consent search may also benefit an individual when it is fruitless by "convince[ing] the police that an arrest with its possible stigma and embarrassment is unnecessary, or that a far more extensive search pursuant to a warrant is not justified." 412 U.S. at 228.

The interests the Court has identified in its consent cases show the potential for convenience and reasonableness that consent searches provide. Of course, that potential is not always realized, and in some instances, the balance may tip so far in favor of the interests of law enforcement and against the interests of the individual that reasonableness

analysis requires limits on police conduct. This case presents such an instance and thus provides a good vehicle for the Court to clarify the objective scope test applied to consent cases.

The police in this case interpreted a consent to search a truck as a license to search and search and search again. They found nothing. So they searched again. When they finally found contraband on their fourth try, a case was brought against Sarli. The government argued that Sarli's consent to search his truck authorized the officers' repeated searches. That argument, which the courts below accepted, runs contrary to the reasons identified by this Court for approving consent searches. It also appears contrary to the objectively reasonable test that this Court has established for determining the scope of the consent given by an individual. A single consent would not reasonably be understood by an objective observer to allow repeated searches, after a first fruitless search. *Cf. Schneckloth*, 412 U.S. at 228. Repeated searches after a fruitless consent search instead resemble the type of general rummaging the Fourth Amendment was designed to prevent, and thus appear to violate the Fourth Amendment's reasonableness command. *Riley*, 573 U.S. at 403 (Fourth Amendment prohibits general rummaging); *Whren v. United States*, 517 U.S. 806, 811 (1996) (officers are not to use otherwise authorized authority for general rummaging)

This Court has recognized that searches purportedly authorized by consent may turn into unauthorized searches. For that reason it has placed limits on consent searches. "The standard for measuring the scope of a suspect's consent under the Fourth Amendment is

that of objective reasonableness—what would the typical reasonable person have understood by the exchange between the officer and the suspect?" *Florida v. Jimeno*, 500 U.S. 248, 251 (1991). One aspect of the scope question is spatial; that is, one part of the scope question is what place or places does the consent authorize a search of. Police may look only in places the consent authorizes. *See Jimeno*, 500 U.S. at 251-52. Thus, "[c]onsent at a traffic stop to an officer's checking out an anonymous tip that there is a body in the trunk does not permit the officer to rummage through the trunk for narcotics." *Florida v. Jardines*, 569 U.S. 1, 9 (2013).

The objective-scope test that limits consent searches does not raise only a spatial question; it raises as well the question of whether a single consent authorizes more than a single search. *Fernandez* and *Schneckloth* suggest the answer is that a single consent authorizes only a single search. Both cases approved of a properly conducted consent search, in part, because consent searches can provide benefits both to law enforcement and to the individual. *Fernandez*, 571 U.S. at 298; *Schneckloth*, 412 U.S. at 228. The balance the Court struck, and the benefits to the individual of minimizing intrusiveness of the police presence and availing himself of the opportunity to dispel suspicion, disappear if a single consent grants officers the right to stay as long as they please and search as often as they like.

Another consideration identified by this Court in evaluating the reasonableness of police actions under the Fourth Amendment also suggests that a single consent authorizes but a single search. In determining whether an action is reasonable, "background social

norms must be considered." *Jardines*, 569 U.S. at 9. Social norms do not favor construing consent-to-search authorizations as justifying repeated searches. If one grants permission to one's neighbor to borrow one's car to run to the corner store, one does not expect that, when he returns and reports the store is closed, the neighbor will keep the car keys and use the car for further errands of his choosing. *Cf. Jardines*, 569 U.S. at 8-9 (discussing how police conduct had violated social norms understood by reasonable members of general public). Interpreting a single consent to authorize as many searches as the police wish to conduct similarly violates objectively reasonable expectations.

Professor Lafave in his treatise agrees that an initial consent should not "be viewed as authorizing a second search at some future time if the first search is not fruitful." 4 Wayne R. Lafave, *Search and Seizure* § 8.1(c) (5th ed. 2012)). He favors a rule that, "when the facts and circumstances surrounding a person's consent suggest a natural end to the consensual exchange with law enforcement, officers should not view the earlier consent as `authorizing a second search at some future time if the first search is not fruitful.'" Id. One basic reason for this rule is that consent to search is likely to be given "upon the understanding that the search will be conducted forthwith and that only a single search will be made." *Id.*; *see also Shamaeizadeh v. Cunigan*, 338 F.3d 535, 548 (6th Cir. 2003) (officers who obtained consent only for initial search could not have had an objectively reasonable belief that the second and third searches were within the course of consent, especially because they did not seek approval for subsequent searches).

. A reasonable person, citizen or officer, would not think that a consent to search permitted the police to search a location over and over. A reasonable person would understand that consent to search contained an implied condition that the scope of the search authorized permitted a single search. A reasonable person would not believe that consent was permission for officers to root and rummage as often as they liked. *Cf. Whren v. United States*, 517 U.S. 806, 811 (1996) (officers are not to use authorized authority for general rummaging).

This does not mean that there is a set period of time that governs as a "constitutional stopwatch," as the government claimed below. *See* Gov't Fifth Circuit Brief 16 (quoting *United States v. Brigham*, 382 F.3d 500, 511 (5th Cir. 2004) (en banc)). The circumstances of a particular case would determine whether a search took 15 minutes or two hours. But, contrary to the Fifth Circuit's reasoning, 913 F.3d at 495-96, a consent search does reach its natural end when the search authorized has been concluded. The end of the search is an objectively ascertainable fact. The Fifth Circuit ruled that, so long as officers do not "relinquish[ ] control" over the area or effect the consent covered, the officers could search over and over. *Id.* That reasoning cannot be reconciled with the interests underlying this Court's consent-search jurisprudence, *Schneckloth*, 412 U.S. at 228-29, with the background social norms, *Jardines*, 569 U.S. at 8-9, or with the scope of consent to search a reasonable person would understand, *Jimeno*, 500 U.S. at 251. A reasonable person would not think that telling officers they could look in the vehicle consigned the vehicle to the officers until such time as they wished to relinquish it.

The "natural end" to a consent search of one's effects is the conclusion of the search. The Court should clarify that is so, or, if the Fifth Circuit is correct that a consent to search authorization consigns the area or effect to the police until they wish to relinquish control, the Court should grant certiorari to clarify that officers must make clear to individuals from whom they seek consent that a consent to search also authorizes a seizure limited only by an officer's subjective investigation.

Defining consent as reaching its objective and natural end when the search authorized by the consent has been conducted would accord with the rules governing probable cause searches. The general rule is that a search warrant authorizes only one search. *See, e.g., United States v. Keszthelyi,* 308 F.3d 557, 568-59 (6th Cir. 2002); *United States v. Gagnon,* 635 F.2d 766, 769 (10th Cir. 1980). Professor Lafave had explained that "a warrant may be executed only once, and thus where police unsuccessfully searched [the] premises for a gun and departed but then returned an hour later and searched further because in the interim an informant told the police of the precise location of the gun, the second search could not be justified as an additional search under the authority of the warrant." Wayne R. LaFave, 2 Search & Seizure: A Treatise on the Fourth Amendment § 4.10(d) (3d Ed. 1996) (quoted in *Keszthelyi,* 308 F.3d at 569). As one of the benefits of a consent search is to avoid a supposedly more intrusive warrant procedure, Schneckloth, 412 U.S. at 228, it would be odd if consent searches were renewable at an officer's election, though warrants are not.

One other factor favor weighs in favor of a single-search rule. The courts below relied on the fact that Sarli did not object to the subsequent searches of his truck. See Appendices A, B, C. They took this failure to object as implied consent. A person's failure to object to an expansion of the search made after he gave consent can indicate that the search conducted was consented to. *See, e.g., United States v. Mendoza-Gonzalez*, 318 F.3d 663, 667 (5th Cir. 2003). But this rule applies when the defendant is able to object. When "the 'circumstances suggest some other possible reason for [the] defendant's silence,'" implied consent should not be found. *See United States v. Cotton*, 722 F.3d 271, 275 (5th Cir. 2012) (quoting 4 Wayne R. Lafave, *Search and Seizure* § 8.1(c) (5th ed. 2012). This is particularly so in cases in which the officers have exercised their authority to head off objection. Here, for instance, the officers removed Sarli and placed him handcuffed in a back seat of a patrol car. This sent a message that the police, having obtained his consent, were no longer interested in discussion. A handcuffed man in a patrol car could hardly roll down the windows or open the door to express an objection that multiple searches violated the consent he had given. The police may not have an obligation to keep an individual in a place where he can object, as the Fifth Circuit held in this case, 913 F.3d at 495 (citing *United States v. Rich*, 992 F.2d 502, 507 (5th Cir. 1993). That is all the more reason that the objectively reasonable, social-norm conforming single-search consent rule should be clarified. The Court should grant certiorari to consider and provide guidance on these issues.

CONCLUSION

FOR THESE REASONS, Petitioner asks that this Honorable Court grant a writ of certiorari and review the judgment of the court of appeals.

__/s Philip J. Lynch_____
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DATED: March 6, 2019.