No. 21-941

In the Supreme Court of the United States

ALDO DANIEL GASTELUM, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the district court clearly erred in determining that petitioner voluntarily consented to the search of his vehicle's trunk.

ADDITIONAL RELATED PROCEEDINGS

United States District Court (W.D. Ark.):

United States v. *Gastelum*, No. 18-CR-40020 (Nov. 13, 2020)

United States Court of Appeals (8th Cir.):

United States v. *Gastelum*, No. 20-3451 (Sept. 1, 2021)

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Cases—Continued: Page

Constitution, statutes, and rule:

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-20) is reported at 11 F.4th 898. The order of the district court (Pet. App. 21-38) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 1, 2021. A petition for rehearing was denied on October 5, 2021 (Pet. App. 39). The petition for a writ of certiorari was filed on December 21, 2021. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a guilty plea in the United States District Court for the Western District of Arkansas, petitioner was convicted of possessing five or more kilograms of cocaine with intent to distribute, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(A)(ii)(II) (2012). Pet. App. 4.

He was sentenced to 30 months of imprisonment, to be followed by three years of supervised release. *Ibid.* The court of appeals affirmed. *Id.* at 1-20.

1. In April 2018, Arkansas State Trooper Bernard Pettit stopped petitioner on Interstate 30 for making an unsafe lane change. Pet. App. 2, 22. Petitioner told Trooper Pettit that the car was rented and provided the rental information. *Id.* at 2. In a "conversational and friendly" tone, Trooper Pettit asked petitioner where he was going. *Ibid.* Petitioner said that he was a military veteran who had left the service in 2012 and that he was driving from Houston to Chicago. *Ibid.*

Petitioner claimed that the purpose of his trip was to visit Army Reserve facilities in hopes of becoming a reservist. Pet. App. 2. Petitioner also said that he was now a college student in California and had broken his leg in an accident. *Ibid.* When Trooper Pettit asked how petitioner had gotten to Houston, petitioner did not respond but instead discussed reserve units in Houston before eventually saying he planned to fly back to California from Chicago. *Id.* at 3. When Trooper Pettit asked about reserve units in California, petitioner said he was interested in medical units in Houston and San Antonio. *Ibid.*

Trooper Pettit returned to his patrol car and confirmed petitioner's license and identification information. Pet. App. 3. He found petitioner's itinerary suspicious because petitioner's rental agreement was for a one-day, single-way rental at a cost of $734.39, which was far more expensive than flying, and the rental term would leave petitioner little time to visit reserve units in the locations he mentioned. *Id.* at 3, 6-7.

Trooper Pettit printed a warning ticket and returned to petitioner's car, saying, "Okay, we're about done

here." Pet. App. 3. Still in a "friendly" tone, Trooper Pettit asked petitioner whether he had any luggage in the trunk. *Ibid.* When petitioner said that he did, Trooper Pettit said, "Quick check of that and then we'll be done. Alright, come on out for me and pop that trunk on your way out." *Ibid.* While waiting for petitioner to find the trunk release, Trooper Pettit turned away, whistled for a moment, and "joked about how hard trunk releases are to find." *Id.* at 11, 24.

Before petitioner had opened the trunk, Trooper Pettit asked, "You don't mind if I look back there, do you? You don't care, huh? That's fine?" Pet. App. 3-4. Petitioner "gave affirmative responses to each question." *Id.* at 12. Petitioner then opened the trunk and got out of the car. *Id.* at 4. In the trunk, Trooper Pettit discovered a duffel bag containing more than 15 kilograms of cocaine. *Ibid.*

2. A grand jury indicted petitioner for possessing five or more kilograms of a mixture or substance containing cocaine with intent to distribute, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(A)(ii)(II) (2012). Pet. App. 4. The district court denied petitioner's motion to suppress, finding (*inter alia*) that petitioner had consented to the search. *Id.* at 33-38. The court acknowledged that, "taken in isolation," Trooper Pettit's statements that the stop would be over after "a 'quick check of the trunk'" and to "'come on out for me and pop that trunk on your way out'" might "appear to be a command." *Id.* at 36 (citation omitted). But the court observed that "it was only after Trooper Pettit explicitly asked for permission to search that [petitioner] actually popped the trunk and exited the vehicle." *Ibid.* And the court explained that, "[e]ven if Trooper Pettit had impermissibly directed [petitioner] to consent to a search,

he quickly retracted that directive and instead asked for permission, which [petitioner] was free to refuse." *Ibid.* The court found that petitioner's course of conduct—including his stepping out of the car and opening the trunk only after the trooper sought permission—"clearly appear[ed] to show" that his consent was voluntary. *Ibid.* The court observed that petitioner was an "intelligent adult" with three years of college and military service; the stop was neither overly lengthy nor conducted in a threatening or intimidating manner; and that "consistent with consent," petitioner "stood patiently on the side of the road while Trooper Pettit conducted the search and did not otherwise protest or hesitate in allowing Trooper Pettit to conduct the search." *Id.* at 37. And the court determined that, "under the totality of the circumstances," petitioner "comprehended the choice that he was making" and "gave consent that was the result of a free, unrestrained choice." *Id.* at 37-38.

Petitioner pleaded guilty conditionally, preserving his right to appeal the denial of the motion to suppress. Pet. App. 4. The district court sentenced him to 30 months of imprisonment, to be followed by three years of supervised release. *Ibid.*

3. The court of appeals affirmed. Pet. App. 1-20.

The court observed that the district court's finding of voluntariness was subject to review only for clear error, and it found none. Pet. App. 9-13. Noting that Trooper Pettit's initial comment could not be "view[ed] * * * in isolation," *id.* at 11, the court of appeals determined that the totality of the circumstances—including Trooper Pettit's "expressly" seeking petitioner's "consent by asking three times whether he could search the trunk" before doing so, and petitioner's "affirmative

responses to each question"—supported the district court's findings. *Id.* at 11-12. The court of appeals also emphasized "the friendly atmosphere" and petitioner's "characteristics, demeanor, and responses throughout the encounter." *Id.* at 12. And it found that, in these circumstances, "the district court did not clearly err in finding [petitioner] voluntarily consented to the search." *Id.* at 12-13.

Judge Kelly dissented. Pet. App. 14-20. In her view, Trooper Pettit had initially "conveyed to [petitioner] that he could not refuse to open his trunk," and Trooper Pettit's follow-up "did nothing to * * * correct" that impression. *Id.* at 16-18.

ARGUMENT

Petitioner renews his contention (Pet. 8-12) that he did not voluntarily consent to the search of his car's trunk. The court of appeals correctly determined that the district court did not clearly err in finding consent; its decision does not conflict with the precedent of this Court or other courts of appeals or state courts of last resort; and the lower courts' fact-specific finding of voluntary consent does not warrant this Court's review.

1. This Court has long recognized that "a search that is conducted pursuant to consent" is lawful under the Fourth Amendment. *Schneckloth* v. *Bustamonte*, 412 U.S. 218, 219 (1973). Such a search is valid so long as "consent was 'voluntarily' given," *id.* at 223, meaning that it was "the product of an essentially free and unconstrained choice," *id.* at 225. Whether an individual's consent was voluntary, or instead was "the product of duress or coercion," is a "question of fact to be determined from the totality of all the circumstances." *Id.* at 227; see *Ohio* v. *Robinette*, 519 U.S. 33, 40 (1996). A factual finding of voluntariness is reviewed for clear error.

See *Pierce* v. *Underwood*, 487 U.S. 552, 558 (1988) (factual determinations are subject to review only for clear error). And this Court has made clear that, where the "totality of the evidence" is "adequate to support the District Court's finding" of consent, a court of appeals should not "substitut[e] for that finding its view of the evidence." *United States* v. *Mendenhall*, 446 U.S. 544, 557-558 (1980).

Here, the court of appeals correctly applied the clear-error standard—whose applicability petitioner does not dispute—in determining that the district court's finding of consent was "not clearly erroneous." Pet. App. 11. As the court explained, Trooper Pettit "expressly sought [petitioner's] consent" before any search occurred, "by asking three times whether he could search the trunk—'You don't mind if I look back there, do you? You don't care, huh? That's fine?'" *Id.* at 11-12. And petitioner "gave affirmative responses to each question." *Id.* at 12. Additionally, as the court of appeals observed, the "conversation's tone remained relaxed"; petitioner is "an intelligent adult with a college education and military experience"; the search occurred "on a busy interstate in broad daylight"; Trooper Pettit did not handcuff petitioner; and petitioner never objected to the search. *Id.* at 11-12.

The court of appeals' fact-specific determination does not warrant review. This Court "do[es] not grant * * * certiorari to review evidence and discuss specific facts." *United States* v. *Johnston*, 268 U.S. 220, 227 (1925); see Sup. Ct. R. 10. And "under what [the Court] ha[s] called the 'two-court rule,' th[at] policy has been applied with particular rigor when district court and court of appeals are in agreement as to what conclusion the record requires." *Kyles* v. *Whitley*, 514 U.S. 419,

456-457 (1995) (Scalia, J., dissenting) (citing *Graver Tank & Mfg. Co.* v. *Linde Air Prods. Co.*, 336 U.S. 271, 275 (1949)). Petitioner provides no reason to depart from that usual practice here.

Contrary to petitioner's suggestion (Pet. 6, 8), the decision below does not conflict with *Bumper* v. *North Carolina*, 391 U.S. 543 (1968). In *Bumper*, this Court found no voluntary consent in a homeowner's statement to police officers to "[g]o ahead" and search her house, where the statement was given only in response to a police officer's approaching her and telling her that he had "a search warrant to search [her] house." *Id.* at 546. As the Court explained, "[w]hen a law enforcement officer claims authority to search a home under a warrant, he announces in effect that the occupant has no right to resist the search." *Id.* at 550. In such circumstances, the prosecution's burden of showing that consent was voluntarily given "cannot be discharged by showing no more than acquiescence to a claim of lawful authority." *Id.* at 548-549.

In this case, by contrast, Trooper Pettit never claimed to have a warrant, never asserted that he had authority to search regardless of consent, and specifically asked—before initiating the search—whether petitioner "mind[ed]," "care[d]," and was "fine" with Trooper Pettit searching the trunk, receiving an affirmative answer each time. Pet. App. 3-4. This case accordingly does not present a circumstance like *Bumper*, involving mere "acquiescence to a claim of lawful authority" that might be insufficient to show voluntary consent. See *Bumper*, 391 U.S. at 549. Although Trooper Pettit initially suggested the traffic stop would "be done" after a "[q]uick check" of the trunk, Pet. App. 3, the lower courts found that petitioner had consented to

the search in his affirmative answers to each of the follow-up clarifying questions, which had no analogue in *Bumper*, see *id.* at 10-12.

Petitioner errs in contending (Pet. 7) that the decision below establishes a rule under which officers may simply "order" a driver to open his vehicle's trunk without probable cause. To the contrary, the court of appeals expressly recognized that Trooper Pettit's initial statement to petitioner to open the trunk would have been "problematic" had it occurred "in isolation." Pet. App. 11. The court never suggested that the search would have been valid in the absence of Trooper Pettit's subsequent requests for consent or petitioner's repeated, affirmative responses.

Petitioner similarly errs in asserting (Pet. 7) that, based on the court of appeals' decision, drivers facing an order to open their trunk must either "submit to the order and thus give up their Fourth Amendment rights" or "physically resist the order (because the Eighth Circuit's rule is that a 'relaxed' interaction with 'calm' compliance and no 'threats or force' will be deemed evidence of consent)." The court never suggested that a verbal refusal of a request to search is insufficient or that a driver must "physically resist" (*ibid.*) an order to avoid consenting. Instead, the court simply considered the friendly and relaxed atmosphere relevant to whether the encounter was so infected by "threats, physical intimidation, [and] punishment" that petitioner's consent could not be said to be voluntary. Pet. App. 11 (citation omitted; brackets in original); see *Schneckloth*, 412 U.S. at 233 (noting relevance of whether consent was "coerced by threats or force").

2. Petitioner identifies no division of authority that might warrant this Court's review. The decisions that

petitioner cites (Pet. 12-23) do not conflict with the court of appeals' fact-bound decision in this case.

In various cases, including some of those cited by petitioner, courts have found that the circumstances of a police encounter ultimately rendered consent involuntary. But those differences in outcome simply reflect application of the "totality of all the circumstances" analysis to the particular facts of each individual case. *Schneckloth*, 412 U.S. at 227. And the cases cited by petitioner involve facts significantly different from those here, including circumstances where police officers failed to request or receive any form of consent to conduct the relevant search,[1] indicated that they had or could obtain a warrant and therefore that the search

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[1] *United States* v. *Neely*, 564 F.3d 346, 350 (4th Cir. 2009) (per curiam) (officer did not "request to search" defendant's car but rather "instructed him to get out of the vehicle"); *United States* v. *Bautista*, 362 F.3d 584, 591-592 (9th Cir. 2004) (defendant's wife opened a hotel-room door to a police demand and stepped back without saying anything); *United States* v. *Jaras*, 86 F.3d 383, 390 (5th Cir. 1996) (officer "did not expressly or impliedly ask for [the defendant's] consent to search"); *Bolden* v. *Southeastern Penn. Transp. Auth.*, 953 F.2d 807, 824 (3d Cir. 1991) (en banc) (Section 1983 plaintiff did not "verbally consent[]" to a body-fluid test, and his mere "silent submission to an otherwise unconstitutional search" was not consent), cert. denied, 504 U.S. 943 (1992); *United States* v. *Shaibu*, 920 F.2d 1423, 1424 (9th Cir. 1990) ("The officers did not ask permission to enter Shaibu's apartment nor state their intention to do so, but simply followed Shaibu through the open door."); *United States* v. *Most*, 876 F.2d 191, 199 (D.C. Cir. 1989) (police never "requested or received" permission from store employees to open a bag left in the employees' possession); *United States* v. *Winsor*, 846 F.2d 1569, 1571, 1573 & n.3 (9th Cir. 1988) (en banc) (defendant did not consent to a visual search of his hotel room by merely opening door in response to a police command).

would occur even without consent,[2] or engaged in additional coercive behavior.[3] Of the remaining federal decisions, one in fact upheld a consent-based search,

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[2] *United States* v. *Shrum*, 908 F.3d 1219, 1238 (10th Cir. 2018) (officer "offered Defendant no choice" regarding the unlawful seizure of his home, which occurred two hours after the initial seizure, but rather "was telling Defendant how it was"); *United States* v. *Barnes*, 506 F.3d 58, 63 n.6 (1st Cir. 2007) (defendant produced drugs from his buttocks only when he was told he had to submit to a body cavity search); *Trulock* v. *Freeh*, 275 F.3d 391, 398-402 (4th Cir. 2001) (plaintiff's boss had told her that the FBI already had a search warrant), cert. denied, 537 U.S. 1045 (2002); *United States* v. *Tovar-Rico*, 61 F.3d 1529, 1535-1536 (11th Cir. 1995) (officers had already conducted a protective sweep of the whole house with guns drawn and said they would obtain a warrant if defendant did not consent); *United States* v. *Nafzger*, 965 F.2d 213, 216-217 (7th Cir. 1992) (per curiam) (officers showed defendant a defective search warrant).

[3] *Harris* v. *Klare*, 902 F.3d 630, 639-641 (6th Cir. 2018) (plaintiff was "seized for over an hour and in the presence of numerous armed police officers, with her arms secured behind her back and facing the choice of consenting to a search or being kept from the restroom"); *Liberal* v. *Estrada*, 632 F.3d 1064, 1083 (9th Cir. 2011) (plaintiff was handcuffed, surrounded by seven officers, had been "verbally berated" by an officer, and "still had not been told why he was pulled over"); *Bolden*, 953 F.2d at 825 (plaintiff submitted to a drug test "because he understood that the test was compulsory and that the alternative to submission was loss of his job"). Moreover, both *Liberal* and *Harris* involved civil appeals on summary judgment and therefore considered only whether, viewing the evidence in the light most favorable to the subject of the search, a reasonable factfinder could find that the consent was involuntary—leaving open the possibility that the factfinder would find voluntary consent, as the district court did here. See *Harris*, 902 F.3d at 640 (noting that "even if a reasonable jury could conclude that" officer's statement conveyed that the subject "had the right to refuse to be searched * * * , it could also find the opposite"); *Liberal*, 632 F.3d at 1084.

United States v. *Gonzales*, 842 F.2d 748, 754-755 (5th Cir. 1988), overruled by *United States* v. *Hurtado*, 905 F.2d 74 (5th Cir. 1990), and the other remanded for reconsideration and additional factfinding because the district court had failed to consider the totality of the circumstances, *United States* v. *Sanchez*, 635 F.2d 47, 61 (2d Cir. 1980). None of those decisions suggests that another court of appeals would have invalidated a search on facts similar to those in this case.

The state-court cases that petitioner cites (Pet. 18-23)—many of which are decisions of state intermediate appellate courts, rather than state courts of last resort[4]—are likewise inapposite. In many of those cases, officers either did not request consent or did not receive sufficient indication of it.[5] In several others, the

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[4] See *State* v. *Jorgensen*, 526 N.E.2d 1004 (Ind. Ct. App. 1988); *State* v. *Freund*, 796 P.2d 656 (Or. Ct. App. 1990); *State* v. *Will*, 885 P.2d 715 (Or. Ct. App. 1994); *State* v. *Lowe*, 926 P.2d 332 (Or. Ct. App. 1996); *State* v. *Guzman*, 990 P.2d 370 (Or. Ct. App. 1999); *Lavigne* v. *Forshee*, 861 N.W.2d 635 (Mich. Ct. App. 2014) (per curiam).

[5] *Commonwealth* v. *Carr*, 936 N.E.2d 883, 886, 890 (Mass. 2010) (officer told college students he wanted to search their room, but they gave no verbal response and failed to sign the consent-to-search section of the forms they were given); *Latta* v. *State*, 88 S.W.3d 833, 840-841 (Ark. 2002) (occupant merely opened the door of the defendant's home and stepped back); *Holmes* v. *State*, 65 S.W.3d 860 (Ark. 2002) (same); *Jorgensen*, 526 N.E.2d at 1005, 1007 (officers announced that they intended to search the defendant after her husband's murder and she simply did not object); *Commonwealth* v. *Rogers*, 827 N.E.2d 669, 675-676 (Mass. 2005) (officer knocked on the door around 5 a.m. and asked where he could find the defendant, at which point the occupant stepped back and pointed toward the kitchen); *State* v. *Boyd*, 156 A.3d 748, 750-752 (Me. 2017) (officers never asked for consent to blood draw and defendant simply did not resist); *Lowe*, 926 P.2d at 334-335 (officer ordered

consent was invalid because it was induced by implicit or explicit representations that consent was not required[6] or other coercive or deceptive conduct by the

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defendant out of the car and began field sobriety tests without asking for consent); *Freund*, 796 P.2d at 657, 659 (officer announced that he "was there to pick up the marijuana plants that [the defendant] was growing"); *State* v. *Gonzalez*, 136 A.3d 1131, 1148 (R.I. 2016) (officer asked where the defendant was, and defendant's mother simply looked up the stairs); *State* v. *Reed*, 920 N.W.2d 56, 68 (Wis. 2018) (occupant allowed officer to walk with him to the apartment door but then tried to shut the door in the officer's face); *Forshee*, 861 N.W.2d at 638 (officer asked if she could follow civil plaintiff inside, but plaintiff did not respond); *Will*, 885 P.2d at 719-720 (officer, who entered the apartment after an eight-year-old child who lacked authority to consent opened the door, informed adult caretaker that he had made contact with the apartment's occupant and would be seizing contents therefrom); *People* v. *Anthony*, 761 N.E.2d 1188, 1193 (Ill. 2001) (defendant gave no verbal consent in response to request, and evidence supported inference that his nonverbal, "ambiguous gesture" was his merely "submit[ing] and surrender[ing] to what he viewed as the intimidating presence of an armed and uniformed police officer who had just asked a series of subtly and increasingly accusatory questions"); *Carr*, 936 N.E.2d at 889-890 (officer demanded that one college student leave the room and "signaled his distrust of the" remaining occupants while armed officers blocked the exit, accompanied by college personnel who "len[t] further institutional presence").

[6] *State* v. *Valenzuela*, 371 P.3d 627, 629-630, 634 (Ariz. 2016) (officer asserted multiple times that defendant was required by law to submit to a blood draw); *State* v. *Ahern*, 227 N.W.2d 164, 165-166 (Iowa 1975) (defendant retrieved drugs only after officers kicked down his door, handcuffed him, and said they were going to search the house); *State* v. *Young*, 425 S.W.2d 177, 179 (Mo. 1968) (defendant initially said that he did not want to open his car's trunk and only did so after officers said they would search it "whether you like it or not"); *Guzman*, 990 P.2d at 377 (officer "represented to the defendant that a search was going to occur because he was under her authority as a probationer"); *State* v. *Medicine*, 865 N.W.2d 492, 496-497 (S.D. 2015) (officer and consent form both indicated that the

officers.[7] Three cases concluded that a preceding unlawful search or seizure tainted the subsequent consent.[8] And the remaining cases relied on state constitutional provisions and inapplicable state-law principles, rather than the Fourth Amendment.[9] The court of

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defendant had already consented to a blood draw by virtue of operating a motor vehicle); *Gonzalez*, 136 A.3d at 1150 (officers arrived with a tactical shield and guns drawn, repeatedly questioned defendant's mother in short succession about his whereabouts, and ten to 15 seconds later entered the apartment and "sprint[ed]" up the stairs to arrest defendant).

[7] *Oliver* v. *United States*, 618 A.2d 705, 709-710 (D.C. 1993) (defendant consented to a pat-down by the same group of five detectives who two months earlier had disregarded his refusal to consent to a search of his bag); *Anthony*, 761 N.E.2d at 1193 (after officers accosted defendant in an alley, questioned him about weapons, and asked to frisk him, he spread his legs and placed his hands on his head); *Krause* v. *Commonwealth*, 206 S.W.3d 922, 924, 926 (Ky. 2006) (officers woke up defendant's roommate at 4 a.m. and falsely claimed that a young girl had just been raped in the house), cert. denied, 551 U.S. 1131 (2007).

[8] *State* v. *Robinette*, 685 N.E.2d 762, 768, 771 (Ohio 1997) (officer unlawfully extended stop to ask for permission to search car); *Penick* v. *State*, 440 So. 2d 547, 548, 558 (Miss. 1983) (narcotics agents unlawfully seized arriving airline passenger and detained him in a police office before he consented to a search of his person); *People* v. *Johnson*, 440 P.2d 921, 923 (Cal. 1968) (stating that "a search or entry made pursuant to consent immediately following an illegal search, involving an improper assertion of authority, is inextricably bound up with the illegal conduct and cannot be segregated therefrom").

[9] *State* v. *Pals*, 805 N.W.2d 767, 782 n.10 (Iowa 2011) ("Our holding is not based upon the Fourth Amendment of the United States Constitution, but on the independent grounds provided by article I, section 8 of the Iowa Constitution."); *State* v. *Trainor*, 925 P.2d 818, 829-830 (Haw. 1996) (relying on state constitutional provision); *State* v. *Johnson*, 346 A.2d 66, 67-68 (N.J. 1975) (holding that the New Jersey constitution "should be interpreted to give the individual

appeals' fact-specific decision therefore does not conflict with any of the cases that petitioner cites, and further review is unwarranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MARCH 2022

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greater protection than is provided by the Fourth Amendment," in that under the "State Constitution the validity of a consent to a search, even in a non-custodial situation, must be measured in terms of waiver").