Caution—"Do Not Cross": Drawing a Perimeter on Police Deception

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I. Introduction

Imagine you have just become the victim of a second burglary of your home. This time, the burglar tripped your newly installed alarm system and police respond to the scene. After you have spoken with the police about the incident, they leave. Later, two uniformed officers show up on your doorstep claiming they are there to follow up on the investigation into the burglary. In the hope that they will catch the criminal and recover your belongings, you allow them inside your home. Believing that they are there to help you, you allow them access into private areas of your home while they dust multiple places for fingerprints and probe further and further into your house.

Now imagine a similar situation, but instead, one of the two officers identifies himself as a member of the Fraud Task Force there to investigate you for fraud, as well as for the burglary, and the other officer introduces himself as an agent of the Secret Service, also there to investigate possible fraud. Additionally, imagine the officers have informed you that they have apprehended the suspect for the burglary you reported and that he has confessed to the crime. Evidently, these two scenarios present two very different situations. Provided with this additional information, would you still consent to the officers entering your home to conduct a search?

The first scenario is what took place in the case of *United States v Spivey* (*Spivey*).[1] Police officers devised an extravagant ruse designed to induce the defendants to consent to a search of their home. Chenequa Austin led officers on an in-depth search of her house, believing that the officers were there to investigate a burglary of her home and aid her in this time of vulnerability. Instead, it turned out that the

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1 *United States v Spivey* 861 Federal Reporter 3d 1207 (Eleventh Circuit 2017).

officers were chiefly there to investigate Austin and Spivey for possible credit card fraud which the suspect of the burglary, whom they had already caught, had put them on notice of. When officers informed Austin of their real reason for searching the residence, her cooperation in the investigation immediately ceased, as she realised the officers were not there to aid her as a *victim* of a crime but to investigate her as a *suspect* of a crime. Should courts allow this kind of police deception? If so, where do courts draw the line on how much deception is permissible?

Part I of this article explores the constitutional protections provided by the Fourth Amendment and some of the exceptions the courts have carved out over the years. One particularly important exception, and the forefront issue in *Spivey*, is the 'consent exception' to the warrant requirement. This Part will delve into the dynamics of the consent exception and how the courts evaluate the voluntariness of a subject's consent through consideration of the totality of the circumstances. There are multiple factors for the court to consider when determining the voluntariness of consent, such as the use of coercion to induce consent.

Part II lays out the procedural posture of the central case discussed in this article—*Spivey*. It explores the District Court's findings that Austin's consent was voluntary and that any potential problem with the defendant's initial consent was later cured by Spivey's subsequent signing of a written waiver of a search warrant. Next, it examines the Court of Appeals' majority decision to affirm the lower court's finding that Austin's consent was voluntary, as well as the dissenting opinion.

Part III provides an in-depth interpretation of current case law pertaining to the issues at hand in *Spivey* and an insight into how existing case law should be applied to the facts of this case. First, it will explore what constitutes coercion and how its presence may render consent involuntary. The use of blatant misrepresentations may deprive an individual of their ability to accurately assess a situation which, in turn, renders any subsequent consent involuntary, given that the subject is unable to knowingly and voluntarily give consent. Next, it discusses how consent cannot later be 'cured' as the District Court suggested in its ruling. Written consent given after the search has already been conducted is analogous to submission to authority rather than voluntary consent. Lastly, if any evidence is produced through an unlawful, warrantless search, it is considered 'fruit of the poisonous tree' and may be suppressed from being entered into evidence at trial.

Part IV discusses the potential consequences of the precedent set forth in *Spivey*. By upholding this decision, courts are permitting officers to deliberately circumvent the warrant requirement provided in the Fourth Amendment in a manner that undermines the public's trust in law enforcement. Important practical and doctrinal ramifications may result from such a decision. Although police deception is common practice in criminal investigations, "[t]hey raise deep social and ethical problems that provoke concern about the acceptable role of police

behaviour within the parameters of the Fourth Amendment".[2] This Part highlights some of the important policy concerns courts should consider when determining the parameters of acceptable police deception—concerns such as citizens' trust of law enforcement officers and the condoning of police stratagems that contradict the protections intended by the Framers of the Constitution.

Part V suggests three rules the courts should adopt to clarify some of the grey areas of police use of deception to gain consent. These rules are expected to create a more structured analysis on which courts shall base their decisions. The first proposed rule envisages that officers should not be allowed to impersonate, or act under the guise of, another government official in an effort to induce consent. Such a façade is analogous to a fraudulent claim of authority, and prior case law clearly discourages the use of deception by government agents while acting under disclosed official capacity. The second proposed rule requires uniformed officers to disclose all investigations they intend to conduct prior to obtaining consent from a subject. This rule promotes a 'meeting of the minds' regarding the kind of search the suspects are consenting to, and fosters the public's trust in officers by discouraging officers from deceiving subjects into believing they are there to aid them when in reality they are there to investigate the subjects of the search. This rule would require courts to evaluate a number of factors in determining whether the government had intentions of conducting an investigation which had not been disclosed to the subject prior to obtaining their consent. The third proposed rule is offered as an alternative to the second one. It suggests requiring officers to disclose their specific assignments and tasks forces within the agency for which they are acting at the time of the search. Requiring such disclosure prior to obtaining consent promotes transparency between government officials and citizens, while eliminating some of the potential for officers to deceive subjects into consenting.

II. The Consent Exception to the Fourth Amendment

The Fourth Amendment of the Constitution provides "[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, and no warrants shall issue, but upon probable cause".[3] Courts have emphasised the importance of protecting the heightened expectation of privacy that citizens have in their homes.[4] The Fourth Amendment generally presumes that warrantless searches of a person's home

[2] Elizabeth N Jones, 'Professional Article: The Good and (Breaking) Bad of Deceptive Police Practices' (2015) 45 New Mexico L Rev 523, 523.

[3] US Constitution Amendment 4 (emphasis added).

[4] *Welsh v Wisconsin* 466 US 740 (WI 1984) 748 ("It is axiomatic that the physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed.").

are unlawful.[5] Courts, however, have carved out some exceptions to the warrant requirement employed by the Fourth Amendment. One well recognised exception to the warrant requirement is when a person voluntarily gives consent for an officer to conduct a search—the consent exception.[6]

A lynchpin of the consent exception is that the subject's consent must be given *voluntarily*. The government bears the burden of proving this by a preponderance of the evidence.[7] For consent to be voluntary, it must first be "the product of an 'essentially free and unconstrained choice'".[8] Secondly, courts must evaluate each case individually based on the totality of the circumstances.[9] In evaluating the totality of the circumstances, there is no single factor that controls the analysis.[10] Instead, there are a number of factors the court must consider.[11] The Court in *Purcell* enumerated some of these factors: (a) coercive police procedures; (b) the defendant's cooperation with officers; (c) the defendant's understanding of his right to refuse; (d) the defendant's education level and intelligence; and (e) the defendant's belief that officers will not find incriminating evidence.[12]

The Court in *Schneckloth v Bustamonte* determined that consent is not voluntary when it is "the result of duress or coercion, express or implied".[13] The term 'coercion' is not restricted to physical coercive measures. In the case of *Blackburn v Alabama*, the Court recognised that coercion may be both physical and mental, and that certain refined methods of persuasion may be tantamount to coercion.[14] In other words, depending on the surrounding circumstances, consent given through sophisticated means of persuasion—such as deception—may render a person's consent involuntary.

One facet of voluntary consent that remains uncertain is the degree of deception that law enforcement is permitted to use to induce consent. Deception is not only commonplace in law enforcement, but is also encouraged in law

5 *Payton v New York*, 445 US 573 (NY 1980) 586 ("[S]earches and seizures inside a home without a warrant are presumptively unreasonable."). See also *Kyllo v US*, 553 US 27 (2001) 31 ("We know that with few exceptions, the question whether a warrantless search of a home is reasonable and hence constitutional must be answered no.").

6 *United States v Garcia* 890 Federal Reporter 2d 355 (Eleventh Circuit 1989) 360. See also *Illinois v Rodriguez* 497 US 177 (1990) 181.

7 *US v Yeary* 740 Federal Reporter 3d 569 (Eleventh Circuit 2014) 581.

8 *US v Purcell* 236 Federal Reporter 3d 1274 (Eleventh Circuit 2001) 1281 (citing *Schneckloth v Bustamonte* 412 US 218 (1973) 225).

9 *Yeary* (n 7) 581.

10 *Schneckloth* (n 8) 226.

11 *Purcell* (n 8) 1281.

12 ibid.

13 *Schneckloth* (n 8) 227, 248.

14 *Blackburn v Alabama* 361 US 199 (1960) 206.

enforcement training manuals,[15] and is routinely accepted by the courts.[16] In fact, the United States Supreme Court, when presented with the opportunity to craft a bright-line rule on the use of police deception to induce consent, refused to do so in fear that it would hamper the government's ability to carry out criminal investigations.[17] Courts must, however, evaluate each case on its own merits to determine whether the police deception involved is extreme enough to render the individual's consent involuntary under the Fourteenth Amendment's Due Process Clause.[18]

Often discussed in relation to the voluntary consent exception is the 'plain view' doctrine. In *Horton v California*, the court outlined a three-part analysis which police officers must satisfy before a seizure is deemed constitutional under the plain view doctrine.[19] First, an officer must be lawfully present at the place where the evidence was observed in plain sight.[20] Secondly, the officer must have a lawful right of access to the evidence.[21] In other words, the officer must not be required to do any further intrusion to retrieve the evidence. Lastly, the incriminating character of the evidence must be "immediately apparent".[22]

The first prong of the analysis is important for cases involving the issue of police deception because, if the initial consent to a search is rendered involuntary due to the degree of deception, then any evidence procured by the search is considered 'fruit of the poisonous tree'. In 1914, the Court in *Weeks v United States* held that evidence obtained in violation of the Fourth Amendment must be excluded from federal courts.[23] The dual rationale behind this exclusionary rule was to deter police misconduct and preserve judicial integrity which required that courts do not sanction these illegal searches by admitting the fruits of illegality into evidence.[24] Nonetheless, one issue with this decision was that it applied only to federal cases. It was not until 1961, in *Mapp v Ohio*, when the Court finally held

[15] Fred E Inbau, John E Reid, Joseph P Buckley and Brian C Jayne, *Criminal Interrogation and Confessions* (5th edn, Jones & Bartlett Learning 2011) for descriptions of interrogation techniques taught to officers to use when interrogating suspects.

[16] Jones (n 2) 523.

[17] *Lewis v US* 385 US 206 (1966) 210 (refusing to craft a *per se* rule holding that deception by law enforcement agents is unconstitutional because "[s]uch a rule would, for example, severely hamper the Government in ferreting out those organised criminal activities that are characterized by covert dealings with victims who either cannot or do not protest").

[18] ibid 212 ("[I]n this area, each case must be judged on its own particular facts.").

[19] *Horton v California* 496 US 128 (1990) 136.

[20] ibid ("It is, of course, an essential predicate to any valid warrantless seizure of incriminating evidence that the officer did not violate the Fourth Amendment in arriving at the place from which the evidence could be plainly viewed.").

[21] ibid 137.

[22] ibid 136.

[23] *Weeks v United States* 232 US 383 (1914) 398.

[24] ibid.

that the exclusionary rule applies to the states as well as to the federal jurisdiction.[25] This case set the precedent that an officer—state or federal—making an initial unreasonable intrusion is not in a valid position to make an observation regarding the incriminating evidence and, therefore, the evidence must be suppressed.[26]

III. Laying the Foundation

The case presented in the introduction of this article, *Spivey*,[27] introduces a perfect avenue for courts to unravel this messy and sensitive area of unsettled law—police deception to induce consent. It is important that, before delving into the fundamentals of the case, the following aspects are reviewed in detail: (a) the facts of the case; (b) its procedural history; and (c) the approaches that other courts have taken on this issue.

A. Facts

Austin and Spivey were the victims of two burglaries by Caleb Hunt. During the second burglary, Hunt tripped a newly installed alarm system and the police responded. Austin spoke with the responding officers about the burglar. Police were able to apprehend the suspect, who confessed to the burglaries and further informed the officer that there was considerable evidence of credit card fraud and a lot of high-end merchandise in their house. The police department that had detained Hunt then closed the case.

Upon receiving this tip, a team of ten law enforcement officers methodically devised a plan which would allow them to avoid obtaining a search warrant to search Austin and Spivey's residence.[28] The contrived plan consisted of sending two members of the South Florida Organised Fraud Task Force to the residence[29]—Detective Alex Iwaskewycz and Agent Lanfersiek. The plan was for these two

[25] *Mapp v Ohio* 367 US 643 (1961) 655 ("Since the Fourth Amendment's right of privacy has been declared enforceable against the States through the Due Process Clause of the Fourteenth, it is enforceable against them by the same sanction of exclusion as is used against the Federal Government.").

[26] Thomas K Clancy, *The Fourth Amendment: Its History and Interpretation* (2nd edn, Carolina Academic Press 2014) s 7.4.4.4.1.

[27] *Spivey* (n 1).

[28] ibid 1219 (Agent Lanfersiek testified that rather than getting a warrant, he and about ten other officers gathered for a planning meeting during which they "made a decision to come up with the methodology of employing the ruse".).

[29] ibid 1221 ("The task force pairs Secret Service agents with local detectives to combat financial crimes in the Southern District of Florida.").

fraud-specialised officers to go to the residence of Austin and Spivey under the pretence of following up on the burglary investigation.

Upon arrival at the residence, officers told Austin they were there to follow up on the burglary investigation. The officers testified that Austin was "genuinely excited" and "relieved" to have the police there to follow up on the burglary[30] and consented for them to enter the residence. To keep up the ruse and avoid suspicion of their fraud investigation, Agent Lanfersiek dressed up as a crime-scene technician for the police department, and pretended to dust for fingerprints as Austin led him through different rooms of the home. Well aware that the suspect had been caught and arrested, both officers chose not to disclose this fact to Austin as they continued to request permission to probe further into private areas of the home. In some of these areas, Agent Lanfersiek saw evidence of credit card fraud in plain view.

Officers then decided to separate Austin and Spivey and speak to each of them one-on-one. This is when the façade ended and the officers disclosed the true nature of their investigation. Detective Iwaskewycz asked Austin about the evidence he saw in the bedroom. Austin immediately became reluctant to cooperate with the detective. Detective Iwaskewycz became aware that Austin was not likely to provide the consent for a full search that he was seeking so he phoned a co-worker to run a name check on Austin. The colleague informed him there was an unrelated outstanding warrant on Austin and the detective arrested her.

While Austin was being questioned outside, Spivey remained inside with Agent Lanfersiek. Spivey continued to cooperate with officers and signed two consent forms that granted the officers permission to conduct a full search of their home, computers, and cell phones. The subsequent search revealed high-end merchandise, MDMA, a loaded handgun, an embossing machine, a card reader-writer, and at least seventy-five counterfeit credit cards.

B. Procedural posture

The case first appeared in the United States District Court for the Southern District. After a federal grand jury returned an indictment against Austin and Spivey, the defendants moved to suppress all evidence obtained as a result of the officers' "entry into the Austins' residence… by fraud… which vitiated any consent".[31] The district court denied the defendants' motion to suppress and rejected a "[b]right line rule that any deception or ruse vitiates the voluntariness of a consent to search".[32] In its reasoning, the district court focused on the evidence that Austin wanted to cooperate with the officers in solving the burglaries because

[30] ibid 1219.
[31] ibid 1212.
[32] ibid.

expensive shoes had been stolen.[33] The court also found that any issue with Austin's initial consent was "cured" by Spivey's subsequent signing of a written waiver for a search warrant.[34] The district court further determined the government proved its burden, by clear and positive testimony, that the defendants' consents were "[v]oluntary, unequivocal, specific, intelligently given, and uncontaminated by duress or coercion".[35] Following this denial of the defendants' motion to suppress, Austin and Spivey conditionally pleaded guilty.

On appeal, the majority affirmed the lower court's ruling that the consents were voluntary and the evidence procured as a result of the search was not to be suppressed. The majority opinion seemed to centre around the notion that, by seeking the help of law enforcement, the defendants had voluntarily exposed themselves to the risk that officers would discover evidence of their own illegal activities.[36] According to the majority, a warning of the right to refuse consent is less relevant in this context, as it is easier to refuse consent when police are there to help than when they are there for adversarial reasons.[37] The majority also downplayed the deceptive effects the ruse may have had on the defendants' consent by brushing the ploy off as "perhaps silly".[38]

The dissenting opinion on appeal focused on three main aspects of the case to evaluate the totality of the circumstances, ultimately determining that the deceptive ruse employed by the officers rendered the defendants' consent involuntary. The first feature of the case on which the dissent focuses is the fact that officers only obtained the defendants' consent to enter their home through deliberate misrepresentation of their authority. The second important aspect of the case was that the officers not only engaged in a misleading ruse, but methodically planned it to circumvent the warrant requirement provided in the Fourth Amendment. Finally, the dissent points out Spivey's refusal to cooperate with law enforcement officers upon learning the true nature of their investigation, showing that she

[33] ibid.
[34] ibid 1212.
[35] ibid.
[36] ibid 1216 (stating that voluntary consent can carry with it the risk that officers may discover evidence of criminal behaviour).
[37] ibid.
[38] ibid 1215.

would not have allowed them into her home if she had known the real intentions behind their investigation.

C. Standard of review

If this case reaches review by the Florida Supreme Court, the Court must review the District Court's legal conclusion on voluntariness *de novo*.[39] When a court reviews a case *de novo*, it uses the trial court's record but reviews the questions of law without deference to the lower court's ruling. In other words, on appeal, the Florida Supreme Court would review the finding of voluntariness regarding Spivey's consent without taking the lower court's decision into consideration.

IV. Unraveling Deception with Case Law

As the dissent points out, litigation in this case could have been completely avoided if the officers had simply obtained a warrant to search Spivey's residence. Courts presume that searches and seizures inside a home without a warrant are unreasonable.[40] This presumption of unreasonableness is also why the Supreme Court has long encouraged law enforcement to obtain a warrant, rather than resorting to the alternative method of warrantless entries.[41] Although the consent exception to the warrant requirement provides an avenue for officers to avoid having to obtain a warrant, this exception is strictly scrutinised in its application as it involves the circumvention of a constitutional right.

As mentioned previously, the consent exception to the warrant requirement is valid only when consent is given voluntarily,[42] and consent is considered voluntary if it is the result of an "essentially free and unconstrained choice".[43] The factors to be considered by courts to determine the nature of the consent have been discussed in Part II above.

Courts have made it clear that consent cannot be considered voluntary when it is the product of coercion.[44] Physical interaction is not required for coercion to

[39] *US v Simmons* 172 F.3d 775 (Eleventh Circuit 1999) 778; *US v Valdez* 931 F.2d 1448 (Eleventh Circuit 1991) 1451–1452; *US v Garcia* 890 F.2d 355 (Eleventh Circuit 1989) 359–360 n 5; *Spivey* (n 1) 1219 ("Although voluntariness is usually a question of fact, the parties do not dispute the facts and both rely on the testimony of the government's witnesses.").

[40] *Kentucky v King* 563 US 452 (2011) 459; *Kyllo* (n 5) 31.

[41] *Ornelas v US* 517 US 690 (1996) 699.

[42] *Illinois v Rodriguez* 497 US 177 (1990) 181.

[43] *Schneckloth* (n 8) 225.

[44] *Bumper v North Carolina* 391 US 543 (1968) 550 ("Where there is coercion there cannot be consent."). See also *Schneckloth* (n 8) 227, 248 (stating that consent may not be "the result of duress or coercion, express or implied").

be present; mental coercion may also satisfy the threshold in certain situations.[45] As will be shown in this Part, there is considerable precedent supporting the notion that some instances of deception by law enforcement officers may amount to mental coercion. The Supreme Court has made it clear that when coercion is present there cannot be consent.[46] What remains unclear, however, is what degree of deception is necessary to constitute coercion.[47]

The exclusionary rule embraces the principle that the government must sometimes forfeit illegally obtained evidence, however incriminating it may be, to uphold the public's right to be free from unreasonable searches and seizures. In other words, although evidence may clearly incriminate a person, the rights of the guilty are upheld over the detriment of the evidence if it was illegally obtained. The rationale for the exclusionary rule is rooted in protecting the innocent from unreasonable intrusion when it is not certain that a person is guilty prior to the invasion. As Judge Cardozo (as he then was) said, under our exclusionary doctrine "the criminal is to go free because the constable has blundered".[48]

In the case of *Spivey*, there were two major misrepresentations that may have hindered Austin's ability to grant police the voluntary consent required to conduct a warrantless search. The first major misrepresentation used by the police to induce Austin's consent involved deceit of authority. It is clear the officers deceived Austin of their actual positions within the government organisations and, in doing so, misrepresented their authority while still acting under the colour of a government official. This case must be evaluated under the rules that govern officials acting under disclosure of their governmental authority. In other words, although Agent Lanfersiek disguised himself as a police officer, he was not considered to have been working 'undercover' given that the police are government employees in which the public places a heightened level of trust. The second critical misrepresentation conveyed by the officers in *Spivey* was deceit regarding the true purpose of their investigation. For subjects to give knowing and voluntary consent, they must understand the extent of what they are consenting to. This includes knowledge

[45] *Blackburn* (n 14) 206 ("the efficiency of the rack and thumbscrew can be matched, given the proper subject, by more sophisticated modes of 'persuasion'").

[46] *Bumper* (n 44). See also Schneckloth (n 8) 228 ("For, no matter how subtly the coercion was applied, the resulting 'consent' would be no more than a pretext for the unjustified police intrusion against which the Fourth Amendment is directed.").

[47] William E Underwood, '*A Little White Lie: The Dangers of Allowing Police Officers to Stretch the Truth As a Means to Gain a Suspect's Consent to Search*' (2011) 18 Washington & Lee J Civil Rts & Soc Just 167, 179 ("It is undisputed that valid consent must be freely and voluntarily given, but it is decidedly unclear what degree of falsehood is necessary to constitute outright coercion.").

[48] *People v Defore* 242 New York 13 (NY 1926) 21. See also Arnold H Loewy, 'The Fourth Amendment as a Device for Protecting the Innocent' (1983) 81 Michigan L Rev 1229 (Fourth Amendment can be invoked by the guilty "when necessary to protect the innocent").

of whether they are being aided by the investigation; constitute the targets of it; or both.

A. Deceit of authority

Prior to Spivey, the Eleventh Circuit had addressed the issue of police deception to induce consent. In *US v Tweel*, the Court held that consent searches are generally unreasonable when government agents acting under the colour of authority induce consent by "deceit, trickery, or misrepresentation".[49] The Court in *Tweel* went on to say that the Internal Revenue Service's (IRS) failure to disclose that they were investigating the defendant on the behalf of the Organised Crime and Racketeering Section of the Department of Justice, when asked if there was a special agent involved in the investigation, made the investigation "a sneaky deliberate deception" which rendered the defendant's consent involuntary.[50] *Tweel* demonstrates that deliberate omissions to disclose authority are deceptive and cannot be tolerated because they are an abuse of the public's trust in law enforcement that violates the protections of the Fourth Amendment. In *Spivey*, the police devised a sly and deliberate deception by misrepresenting Agent Lanfersiek's real authority. Disguising Agent Lanfersiek as a police officer was deliberately done to prevent Austin from knowing his true position of authority as a Secret Service agent. Just as in *Tweel*, Austin was not aware she was under investigation because the officers chose to deliberately hide their authority in an effort to deceive Austin into consenting to a search.

Securities and Exchange Commission (SEC) v ESM Government Securities, another Eleventh Circuit case that addressed the issue of police deception, specifically details the heightened duty of government officers acting in an official capacity to behave in a manner that will maintain public trust and cooperation:[51]

> We believe that a private person has the right to expect that the government, when acting in its own name, will behave honorably. When a government agent presents himself to a private individual, and seeks that individual's cooperation based on his status as a government agent, the individual should be able to rely on the agent's representations. We think it clearly improper for a government agent to gain access to [evidence] which would otherwise be unavailable to

[49] *US v Tweel* 550 Federal Reporter 2d 297 (Fifth Circuit 1977) 299. In *Bonner v City of Prichard* 661 Federal Reporter 2d 1206 (Eleventh Circuit 1981) (*en banc*) 1209, the Eleventh Circuit adopted as binding precedent all decisions of the former Fifth Circuit handed down before 1 October 1981.

[50] *Tweel* (n 49) 299.

[51] *Securities and Exchange Commission (SEC) v ESM Government Securities* 645 Federal Reporter 2d 310 (Fifth Circuit 1981) 316. In *Bonner* (n 49) 1209, the Eleventh Circuit adopted as binding precedent all decisions of the former Fifth Circuit handed down before 1 October 1981.

> him by invoking the private individual's trust in his government, only to betray that trust. When that government agency then invokes the power of a court to gather the fruits of its deception, we hold that there is an abuse of process.[52]

It is clear then, under the precedent set forth in *SEC v ESM Government Securities*, the officers in *Spivey* acted inappropriately to induce consent from Austin. The government did not act honourably by disguising a special agent of the Secret Service as a police officer. They created an elaborate ruse to make Austin believe they were there to investigate a burglary that she was the victim of, thereby seeking her cooperation and consent through misrepresentation. Austin placed her trust in officers acting under their official capacity only to learn that her trust had been betrayed and she was no longer the victim but instead the target. The consent given to officers by Austin was clearly the product of manipulative police deception and any fruits procured from the subsequent search should be suppressed.

Consent obtained by a fraudulent or mistaken claim of authority is not taken as lightly by the Supreme Court as the *Spivey* Court of Appeals majority may lead one to believe. In *Bumper v North Carolina*, the Court held that a consent obtained through deceit of lawful authority to conduct the search is considered so coercive that it is determined to be involuntary and will usually lead to suppression of the fruits of the search.[53] Furthermore, if a person does affirmatively respond to the fraudulent or mistaken claim of authority, a court that interprets this affirmative response as consent will generally hold that it was coerced.[54] Although Agent Lanfersiek represented himself as a local police officer to 'dust' for fingerprints needed to catch a perpetrator who was already in custody, he had no legal authority to investigate a burglary. Agent Lanfersiek was a member of the United States Secret Service whose federal jurisdiction does not extend to the investigation of a state claim such as burglary of a home. Unlike Agent Lanfersiek, Detective Iwaskewycz did technically have the legal authority to investigate a state claim. Detective Iwaskewycz, however, was not there to investigate for burglary, but instead was a member of a task force especially trained to investigate for fraud. Additionally, the case had already been closed by the neighbouring police department. For

[52] ibid.

[53] *Bumper* (n 44) 548–550.

[54] William E Ringel, Justin D Franklin and Steven C Bell, *Searches & Seizures, Arrests and Confessions* (2nd edn, Clark Boardman Company 1979) s 9:21.

the officers to act in their official capacity and pretend to continue the burglary investigation was a clear misrepresentation in the context of an already closed case.

B. Deceit of purpose

The second significant misrepresentation by officers that affected Austin's ability to give knowing and voluntary consent is the deceit of purpose. The Supreme Court has held that blatantly false statements by officers acting under official capacity are analogous to coercion.[55] For example, in *Bumper v North Carolina*, the Court held when a law enforcement officer claims that he has the authority of a warrant to search a home, when in fact he does not, he is essentially stating that the suspect has no right to resist.[56] Not all lies, however, are as blatant and clear cut as the one in *Bumper*. At what point does a misrepresentation to a suspect become so potent that it renders a suspect's consent involuntary? Professor LaFave, a criminal procedure scholar known for his work regarding the Fourth Amendment search and seizure, attempted to add some measure to this elusive issue. According to LaFave, when a misrepresentation is so extreme that it deprives an individual of his ability to accurately evaluate the situation, the subsequent consent is considered involuntary.[57] How could a misrepresentation as to the purpose of the officers' entry into a person's private home not be considered an extreme misrepresentation? Clearly, the purpose of an officer's request to enter a home plays a significant role in the calculation by the suspect as to whether to consent to the officer's entry.

An entry into a home that is the product of a ruse where the suspect is informed that the person seeking entry is a government agent, but is misinformed as to the real purpose for which the agent is seeking entrance, cannot be justified by consent obtained through such circumstances. There is ample case law that supports this notion. The Ninth Circuit addressed a set of facts similar to those in *Spivey* in which federal narcotics agents, along with local law enforcement officers, knocked on a suspect's door and asked permission to investigate a fictitious robbery in order to gain access into the residence.[58] The court in that case noted the differences between undercover officers and officers acting under the colour of office.[59] While deception is permissible in undercover work, the court expressed its disapproval of the latter misrepresenting their purpose while seeking entrance into a residence.[60] *Spivey* is comparable to *Bosse* in that federal agents accompanied

[55] *Bumper* (n 44) 550.

[56] ibid.

[57] Wayne R LaFave, Jerold H Israel & Nancy J King, *Criminal Procedure* (3rd edn, 2000) s 3.10(c) (stating that when consent is induced by extreme misrepresentations made by law enforcement officers acting in their official capacity, then the consent is rendered invalid).

[58] *US v Bosse*, 898 Federal Reporter 2d 113 (Ninth Circuit 1990) 115 (*per curiam*).

[59] ibid 116.

[60] ibid.

local law enforcement to Austin's home. Although they did not fabricate a robbery like the officers in *Bosse*, the officers did create an elaborate ruse to dress up and pretend to investigate a real burglary case, even though the case had been closed by the neighboring police department prior to their arrival at the residence. Agent Lanfersiek testified that he was not at the defendant's home to investigate a burglary. Instead, he was there to investigate them for fraud, a purpose which the officers clearly chose not to divulge to Austin and furthermore, officers created an elaborate ruse to avoid any disclosure of their real purpose for seeking entrance. Although Agent Lanfersiek was dressed as a local officer rather than wearing his normal uniform, both officers were acting under colour of their office, and not in an undercover capacity.

According to the Supreme Court in *Florida v Jardines*, the scope of a license to search—whether express or implicit—is limited to a particular area as well as *a specific purpose*.[61] At times, officers use deception to probe into situations where an ambiguity related to the crime still exists.[62] In *Jardines*, officers walked drug-sniffing dogs around a house to see if drugs were being grown in the house. When the dogs alerted the officers to the presence of drugs, the officers used that information to obtain a warrant to search the house. The Supreme Court suppressed the fruits of that search because the curtilage of a house is a constitutionally protected area in which the owner must give officers leave to be there. Although a front porch may concede an implied license for people to come knock, it does not grant officers permission to use a police dog to gather information through means beyond those expected of a person who enters the porch to knock on the door. According to the Court, so long as officers entered the constitutionally protected area for a purpose beyond the implied license, the physical intrusion constituted an unlicensed search of the premises. Similar to *Jardines*, the officers in *Spivey* went beyond the scope of Austin's license to search. If officers portrayed to Austin that the purpose of their entry was to further investigate the robbery, then they exceeded the scope of her license when they deliberately entered the home for the purpose of probing for evidence of credit card fraud.

When officers misrepresent their purpose for seeking entry into a residence, they capture that person's trust in law enforcement, only to subsequently betray it. The nature of the investigation that officers are there to conduct is a key ingredient of a subject's consent. When officers actively misrepresent the purpose of their investigation while acting in official capacity, they introduce an element of coercion

[61] *Florida v Jardines* 133 Supreme Court 1409 (2013) 1417.

[62] Elizabeth E Joh, 'Bait, Mask, and Ruse: Technology and Police Deception' (2015) 128 Harvard L Rev 246, 251.

that renders the consent involuntary.[63] As discussed above, there is ample case law aimed at discouraging such exploitation of a citizen's trust in the government in an effort to induce consent to search. The decision in *Spivey*, however, sanctions the use of such widely discouraged police deception to conceal the nature of an investigation. As will be observed, such a holding may give rise to policy concerns and consequential effects on the public's trust in law enforcement, and in the government, to protect their constitutional rights.

C. Deception material to consent

When officers misrepresent their authority and purpose for seeking entry into a home, they introduce an element of deception that may be critical to a subject's calculation of whether to grant consent. When police deception inhibits a suspect's ability to make a rational choice regarding consent, this deception may amount to coercion that overbears a defendant's free will.[64]

Although the majority downplayed the elaborate ruse concocted by the officers in *Spivey* as 'silly' at most, a further evaluation of the facts and surrounding circumstances of the case suggests that it played a material role in Austin's decision to consent. The majority in *Spivey* suggests that Austin's decision to consent would have been unaffected by the knowledge that Agent Lanfersiek was not a local police officer but a US Secret Service Agent specialising in fraud investigations. According to the majority, this intricate plan concocted by a group of about ten law enforcement officers was nothing more than a trifling detail in the case. However, the majority has significantly moderated the impact that this had on Austin's consent. What could have been more material to Austin than knowing the officers' true identities and the real nature and target of their investigation? If this fact of the case was so trivial, then why would officers have felt the need to devise such an elaborate ploy in the first place?

The answer is simple: this ruse amounted to a material factor in Austin's consent which amounted to coercion. Not only does the complexity of the ploy

[63] The court in *Washington v McCrorey* 851 Pacific Reporter 2d 1234 (WA 1993) 1240 held the following:

> It is improper for a government agent to gain entry by invoking the occupant's trust, then subsequently betraying that trust. Members of the public should be able to safely rely on the representations of government agents acting in their official capacity. We conclude that police acting in their official capacity may not actively misrepresent their purpose to gain entry or exceed the scope of consent given.

US v Turpin 707 Federal Reporter 2d 332 (Eighth Circuit 1983) 332–335 (misrepresentation about nature of investigation may be evidence of coercion).

[64] *US v Rutledge* 900 Federal Reporter 2d 1127 (Seventh Circuit 1990) 1129 (reviewing the voluntariness of a confession based on whether "the government has made it impossible for the defendant to make a rational choice as to whether to confess—has made it in other words impossible for him to weigh the pros and cons of confessing and go with the balance as it appears at the time").

itself indicate the importance it played in inducing Austin's consent, but the facts of the case also lend support to the idea that, absent such misrepresentations, Austin would not have given consent. A suspect's bewilderment upon learning they are the target of an investigation suggests lack of consent.[65] Austin's cooperation immediately shifted when Detective Iwaskewycz informed her of the real reason for their presence at the residence. When Austin became aware that she was no longer the 'victim' and instead was the 'suspect', she ceased to be a willing participant in the investigation, showing that the officers' deception was material to her decision to consent to their entry and cooperate in their investigation.

D. Circumventing the constitution

Allowing officers to arbitrarily circumvent the Fourth Amendment warrant requirement through strategy and deceit contradicts the purpose of the Fourth Amendment protections.[66] The protection of the warrant requirement calls for a neutral magistrate to make the inferences of whether the evidence provided by officers justifies intrusion into a suspect's home.[67] Without requiring a neutral magistrate to make such inferences, the protections provided by such requirement would be nullified, leaving the security of a person's home at the discretion of police officers.[68] In *Johnson v United States*, the Supreme Court made it clear that, as a default, when the right of privacy must reasonably submit to the power of search, a neutral judicial officer should make the determination of a power to search, not an officer who is acting as an interested party in ferreting out crime.[69]

There are, of course, instances where obtaining a warrant from a judicial constable may not always be reasonable or practical; but in such cases officers are required to show that these exceptional circumstances prevented their ability to obtain a warrant.[70] The case of *Spivey* is very similar to *Johnson* in that officers had no valid reason as to why they could not obtain a warrant. Although in *Johnson* the Court held that the suspect never consented to the search, the Court made it clear that the default rule is to obtain a search warrant when it is reasonable to do

[65] *US v Cabrera* 117 Federal Supplement 2d 1152 (KS 2000) 1159.

[66] Rebecca Strauss, 'We Can Do This the Easy Way or the Hard Way: The Use of Deceit to Induce Consent Searches' (2002) 100 Michigan L Rev 868, 875 ("The general intent of the Fourth Amendment was to limit the discretion and abuse of discretion by law enforcement to invade the privacy of citizens.").

[67] *Johnson v United States* 333 US 10 (1948) 14.

[68] ibid.

[69] ibid.

[70] ibid 14–15.

so and to resort to exceptions of the warrant requirement only when extenuating circumstances require such action.

In *Spivey*, there was clear evidence that the officers concocted this elaborate ruse specifically to circumvent the Fourth Amendment's warrant requirement. Furthermore, the officers did not demonstrate any valid reason for not obtaining a search warrant other than the inconvenience to the officers and the lack of evidence necessary to support the probable cause required for obtaining a warrant. As the Court concluded in *Johnson*, such reasons are not enough to justify bypassing the constitutional requirement.

The Supreme Court has warned that courts must be wary of police planning around constitutional protections.[71] The Eleventh Circuit has addressed the issue of police devising premeditated ruses to avoid constitutional requirements by stating that they refuse to "allow the state to secure by stratagem what the Fourth Amendment requires a warrant to produce".[72]

Warrant exceptions were created to provide relief when obtaining a warrant was not reasonable. Officers should not be allowed to exploit these exceptions by manipulating situations so that they may fit into one of the immunities. Out of all the exceptions that courts have carved out of the warrant requirement, the consent search is the most common type of warrantless search utilised by law enforcement.[73] This shows that officers commonly rely on this exception demonstrating the need for courts to establish guidelines to limit this strategic avoidance.

E. 'Curing' consent

The District Court in *Spivey* suggests that consent can later be 'cured' by the signing of a waiver to search the premises. However, there is abundant case law that rebuts this notion. For consent after an illegal seizure to be valid, the government must establish both the voluntariness of the consent to search and that the consent was not the product of illegal seizure.[74] Furthermore, a defendant's consent does not by itself cure the taint of an unlawful search. [75] An after-the-fact written consent may lead to an atmosphere of obligatory cooperation, as it is akin to a submission to authority. This is because the officers have already conducted the search and subjects are made aware that officers have likely already found any

[71] *Missouri v Seibert*, 542 US 600 (2004) 617 (holding that "[s]trategists dedicated to draining the substance out of constitutional protections cannot accomplish by planning around these protections because it 'effectively threatens to thwart [their] purpose'").

[72] *Graves v Beto* 424 Federal Reporter 524 (Fifth Circuit 1970) 525.

[73] Jones (n 2).

[74] US Constitution Amendment 4; *US v Hernandez-Penazola* 899 Federal Supplement 2d 1269 (Middle District of Florida 2012), appeal dismissed (Eleventh Circuit 2012).

[75] *US v Roberts* 888 Federal Supplement 2d 1316 (Northern District of Georgia 2012) 1324.

incriminating evidence that may be in the suspect's home.[76] The suspect's further cooperation may be an effort to show good faith. Cooperation that may lead to sympathetic prosecution rather than serve as evidence shows that the subject would have consented anyway prior to the search.

The officers' entry into the home was made for the purpose of conducting an undisclosed search aimed at exploiting the illegal activity of Austin and Spivey. The written waiver for a search warrant, which officers obtained from Spivey after a search of the home had already been done and incriminating evidence of their wrongdoing had already been procured, is not considered voluntary waiver. The officers deliberately exploited the evidence attained in the initial illegal search when they made the defendants aware of the evidence they already saw prior to obtaining the written waiver. In *Wong Sun*, the Supreme Court noted that evidence obtained through a lawless search in which officers then exploit to induce an after-the-fact consent of the search, does not dissipate the illegal taint of the initial search and the evidence remains 'fruit of the poisonous tree' and may not to be used in court.[77] As the warrantless search of the defendants' residence violates the Fourth Amendment, subsequent consents and subsequent statements are all 'fruit of the poisonous tree'. Officers used the contraband found in the initial search to exploit Spivey's consent to conduct a full-scale search.

F. Too vulnerable to be voluntary?

Another element that courts may consider when evaluating Austin's voluntariness based on the totality of the circumstances is vulnerability.[78] Austin and Spivey's residence had recently been burgled twice: a complete stranger had entered a place of sanctity and privacy for the defendants, had rummaged through their belongings and personal effects, and had taken things of value from them. A burglary not only deprives a victim of objects of value, but also robs them of their sense of security and privacy in their home. When Hunt burgled Austin and Spivey's residence twice, he left them feeling violated and vulnerable to outsiders.

When officers arrived at Austin's residence, her excitement in cooperating with the officers to help catch the burglar shows that she was in a position of vulnerability and was desperate to catch the person who had twice violated their sense of security in their home. She viewed the officers as authorities she could trust to aid her in restoring the sanctity of her home; but the officers betrayed this

[76] *US v Bushay* 859 Federal Supplement 2d 1335 (Northern District of Georgia 2012) 1346, 1353.

[77] *Wong Sun v US* 371 US 471 (1963) 488.

[78] *US v Parsons* 599 Federal Supplement 2d 592, 607 (noting that Parson's advanced age, poor physical and mental condition, and current living situation left him in a particularly vulnerable state).

trust and exploited her vulnerable state by using her desperation to induce consent to a search completely unrelated to catching the burglar.

V. Potential Policy Consequences

The courts have left a grey area between how much deception is permissible by government officials and how much deception constitutes coercion. Public policy considerations expose the ramifications that may result if courts sanction the level of police deception officers used in *Spivey*.

A. Sanctioning abuse of the consent exception

The Fourth Amendment is meant to be a safeguard to protect citizens from warrantless searches. Nevertheless, as the courts continue to carve out exceptions to the warrant requirement, they chisel away at the protective barrier the Amendment guarantees. The exceptions delineated by the courts are meant to be used in cases where extenuating circumstances make it impractical or impossible to obtain a warrant but not in cases where obtaining a warrant is merely burdensome for officers. The consent exception has become the most common type of warrantless search used by law enforcement and therefore should be evaluated with strict scrutiny as to the necessity of employing it.[79] The constitutional protection against unreasonable searches and seizures widens or narrows depending on the difficulty or ease with which the prosecution is required to establish consent.[80]

The decision in *Spivey* teaches police that they do not need to procure a warrant as long as they are able to formulate a plan to strategically circumvent the warrant requirement through the abuse of the consent exception. By sanctioning this practice, the courts are allowing officers to strategically circumvent the two key limits and protections provided by warrants: the existence of probable cause and the scope of the actual search. Courts are essentially giving officers the discretion of whether to obtain a warrant to conduct a search and exposing the public to the dangers of consent searches that may be almost limitless in scope.[81] When faced with the option, many officers will attempt to conduct the search without having

[79] Richard Van Duizend, L Paul Sutton and Charlotte A Carter, '*The Search Warrant Process: Preconceptions, Perceptions, and Practices*' (National Center for State Courts 1984) 21 (finding that "some ninety-eight percent of searches police conduct without a warrant they conduct pursuant to consent").

[80] Wayne R LaFave, *Search and Seizure: A Treatise on the Fourth Amendment* (2nd edn, West Pub Co 1986) s 8.1 ("Because of the frequent reliance upon consent searches, it is apparent that the constitutional protection against unreasonable searches and seizures widens or narrows, depending upon the difficulty or ease with which the prosecution can establish such consent.").

[81] Strauss (n 66).

to go through the burdensome process of obtaining a warrant. This contradicts the intent of the Fourth Amendment to limit the discretion and abuse by law enforcement officers to violate citizens' privacy.[82]

Instead, the courts should be encouraging the use of warrants that allow neutral magistrates to evaluate the facts to determine if probable cause exists and limit the scope of the search. Allowing the liberal use of consent searches essentially permits causeless, groundless, and boundary-free searches which contradicts the protections provided in the Fourth Amendment. If officers are given the discretion to choose whether to get a warrant, like the court in *Spivey* allows, then officers will be less compelled to apply for a warrant and will be encouraged to come up with creative ways to avoid having to obtain a warrant. Warrants face the possibility of being rejected due to lack of probable cause and requires officers to complete burdensome paperwork and patiently await the magistrate judge's approval.

B. Undermining public trust in a government institution

As a government institution, the police are held to a higher standard of integrity than other organisations. The public looks up to the government to maintain order and provide security in their life. If the police are allowed to violate the protections of the Constitution, they betray the *quid pro quo* relationship established between the citizens of a country and their government. If the police expect citizens to cooperate in their efforts to maintain law and order, there is a correlative duty upon officers to act with integrity and honesty towards citizens.[83] As Justice Brandies said in his dissent in *Olmstead v United States*,

> Our Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example… If the Government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy.[84]

People have a right to expect that the government, when acting in an official capacity, will behave in an honourable manner. Therefore, it is improper to allow government agents to induce consent through exploitation of a citizen's trust in the institution, only to betray that trust.[85] Allowing methodical police deception, such as the ruse employed in *Spivey*, will serve to undermine the public's faith in the government in many ways. For instance, when a citizen reports a crime, they

[82] ibid.

[83] Milton Hirsch, '*Wyche v State: A Case Analysis*' (2008) 33 Nova L Rev 137, 149.

[84] *Olmstead v United States* 277 US 438 (1928) 485.

[85] *US v Piper* 681 Federal Supplement 833 (Middle District of Georgia 1988) 837.

expect that officers will legitimately follow up on their report. Understandably, the proceeding investigation may require officers to investigate the scene of the incident. Instances such as the one in *Spivey*, however, will create paranoia for citizens who may normally cooperate with officers, in fear that the officers are not actually following up on the crime they reported. Allowing officers to deceive people about the purpose and nature of their investigation makes it impossible for citizens to know the real intent of officers seeking to enter their residence. It is not good practice for courts to require citizens to specifically inquire about *all* the purposes of a police officer's investigation, because this fosters public scepticism in the police as an institution. In the current climate of heated dispute regarding police shootings, authorised police deception may further increase scepticism from an already distrustful public that is predisposed to doubt police authority.

Authorising police deception would create a dual role for officers who are required to testify in the courtroom. The same officers that acted dishonestly in inducing consent to search would then be expected to convey a sense of trustworthiness and integrity when testifying in court.[86]

C. Sanctioning deceptive police protocols

As mentioned previously, police protocol often encourages officers to use deceptive techniques and psychological manipulation when investigating a crime. As far as police are concerned, lies relating to police authority or purpose are often considered "techniques of the trade" that should be fostered rather than condemned.[87]

The courtroom is not the only place where officers face competing expectations. Officers are expected to function as both peacekeepers and investigators. The public demands a level of transparency with officers to ensure their abilities to keep them safe, but often officers are forced to conceal the truth and even lie about facts and circumstances to complete their duty as peacekeepers.[88] Furthermore, if officers are constantly fulfilling both roles, those who are seeking the assistance of the peacekeeper then become vulnerable subjects to the investigator.

Allowing officers to deceive citizens in an effort to fulfil this dual role does not come without consequences. If reporting a crime means that a person may become the subject of an investigation themselves, people may stop reporting crimes. Even the innocent may become paranoid of police deception and exploitation of their need for assistance that they are deterred from seeking police help for

[86] Jones (n 2) 530.

[87] Jerome H Skolnick, *Justice Without Trial: Law Enforcement in Democratic Society* (John Wiley & Sons Inc 1967) 196–197.

[88] Jones (n 2) 529.

fear of an investigation turning up some unintentional or trivial illegal activity. But the current legal framework, as highlighted by the majorities' opinion—that those caught in these broad webs of deception have assumed the risk—give officers nearly limitless discretion.[89] Since citizens will have no way of knowing whether their cooperation or assistance to law enforcement is being called on for public or personal good or for the purpose of incriminating them, they will be discouraged from aiding in the apprehension of criminals.[90] This decision essentially requires citizens to confront officers about the purpose of their investigation which may, in turn, signal to officers that the suspect is being uncooperative and may potentially trigger friction on both sides of the encounter.

Encouraging officers to employ deceptive techniques is an outcome-focused practice that is adverse to the traditional criminal justice paradigm that places the value and materiality of evidentiary fruit secondary to the legality of its procurement.[91] Police deception seems to run contrary to social instinct that usually commands honesty and transparency from those seeking cooperation from others.[92] In essence, it seems that the police are holding their societal function above the manners of social norms and, based on the value of evidence that such practices may unearth, hold their methods as an exception to the guiding principles of criminal justice.

VI. Drawing Some Lines on Police Deception

Courts have taken a *laissez-faire* approach to the issue of police deception as it pertains to constitutional rights for far too long. As new technologies develop and continue to shape the Fourth Amendment, lines need to be drawn on how far officers can go before deceptive techniques overbear a person's free will to consent. Courts must tread carefully when developing new approaches to interpreting the Fourth Amendment because they often require the courts to weigh the individual rights of citizens against crime control and societal welfare; too much lenience with officers may lead the people to think the courts are favouring a more tyrannical form of governmental control, whereas too much restriction on police may lead

89 Joh (n 62) 251.

90 *Krause v Commonwealth* 206 South Western Reporter 3d 922 (KY 2006) 926.

91 Jones (n 2) 529.

92 Irina Khasin, '*Honesty is the Best Policy: A Case for the Limitation of Deceptive Police Interrogation Practices in the United States*' (2009) 42 Vanderbilt Journal Transnational Law 1029, 1037 (noting that "the practice of police deception runs contrary not only to widely held beliefs about right and wrong, but also to the ideals of the American criminal justice system").

people to believe the courts are too soft on crime and may raise safety concerns for society.

Thus far, the Supreme Court has not addressed deception in the context of inducing consent to search.[93] According to LaFave, there is no communal understanding as to what constitutes permissible deception in criminal policing.[94] With few to no restrictions on police deception in obtaining consent to search, there remains a hollow void in the understanding of how far police may go to persuade a subject's consent. There are three rules proposed in this article to help fill in the gap on police deception and offer some guidance on creating a more structured analysis for courts to evaluate their decisions on police trickery.

The first rule proposed is to prohibit officers from impersonating other government officials in an effort to induce a subject's consent. When an officer impersonates another type of government agent, they are still acting under colour of governmental authority. In *Bumper*, the Supreme Court held that a consent to search obtained by a fraudulent claim of authority is considered coercive and involuntary and may lead to suppression of any fruits procured from the search.[95] Although *Bumper* involved a situation in which officers made a fraudulent claim that they had a warrant to search the residence when they actually did not have one, the rule derived from this case lends itself to the rule proposed in this section. Similar to the facts in *Bumper*, the officers in *Spivey* made a fraudulent claim of authority when they had Agent Lanfersiek disguise himself as a local police officer. Police officers have the authority to investigate burglaries, such as the one that they lead Austin to believe they were there to investigate. By acting under the guise of a local officer, Agent Lanfersiek portrayed to Austin that he had the authority to investigate a burglary when in fact he did not. This rule simply extends this prohibition on fraudulent claims of authority to induce consent to include officers going undercover as other government agents to disguise their lawful authority. As discussed throughout this article, when acting under the capacity of a government official, officers are expected to behave honourably. When these agents use the trust that citizens have in the government to provoke their consent, any deception used by them reflects poorly on the nobility of the institution and undermines the trust that people have in the government.

The second rule proposed is that there should be a 'meeting of the minds' on the purpose of the search that officers are seeking consent for. The plain view doctrine was not meant for officers to abuse by manipulating a subject in a way that will induce consent to enter with the hopes that officers will then find incriminating

[93] Strauss (n 66) 884.
[94] LaFave (n 80) s 8.2(n).
[95] *Bumper* (n 44) 548–550.

evidence once inside. By allowing officers to pretend they are at a residence for a specific purpose, whereas in fact the actual purpose remains undisclosed, crosses the line from a simple strategic omission to a deceptive manipulation meant to trick the suspect into giving their permission to search.

Officers acting in a disclosed capacity should be required to divulge their prior intentions while conducting investigation before obtaining consent to search from a suspect. If there is no meeting of the minds on the subject matter of a search that officers are seeking to conduct, the scope of the consent cannot be considered to authorise any search executed for a purpose beyond what the suspect was aware of at the time of consent. In *Florida v Jimeno*, the Court made it clear that the burden lies on the defendant to set express parameters to limit the scope of their consent.[96] It is not possible, however, to set boundaries on the purpose of consent when citizens are deceived as to the purpose of the investigation and therefore, citizens require greater protection in this area to safeguard their Fourth Amendment right.

Although this rule may seem simple on its face, applying it in a fashion that accords the Court's approach to evaluating Fourth Amendment violations may not be so easy. Prior case law maintains that the subjective intentions of police officers play no role in evaluating Fourth Amendment violations.[97] Also, dissecting the true nature of all investigations when there are multiple being conducted on one occasion proves difficult when officers are not willing to be candid about what their intentions were prior to searching the residence.

Courts should evaluate this second rule through an objective lens. To determine if there was in fact a meeting of the minds as to the purpose of the investigation that the subject consented to, courts should consider the totality of the circumstances of each case. When evaluating the totality of the circumstances there are a number of factors which courts may analyse to reach a determination.

One factor that the courts may find useful to consider is the nature of the officer's primary assignment within the government organisation at the time of the search. A specific assignment of an officer within an organisation will shed light

[96] *Florida v Jimeno* 500 US 248 (1991) 251.

[97] *Whren v United States* 517 US 806 (1996) 813 (noting that pretextual stops based on an officer's subjective motivations, if otherwise supported by probable cause, are permissible because courts only look objectively at whether there was probably cause or reasonable suspicion for the stop); *Horton v California* 496 US 128 (1990) 138 (stating that "evenhanded law enforcement practices are best achieved by the application of objective standards of conduct, rather than the subjective state of mind of an officer"); *Devenpeck v Alford* 543 US 146 (2004) 154–155 (holding that an arresting officer's subjective reason for making an arrest is irrelevant when the criminal offense as to which the known facts provide probable cause).

on their role in an investigation and the nature of the crime for which they seek to gain evidence. An assignment to a specific task force or agency may also reveal the authority of an officer to investigate specific crimes. For instance, Agent Lanfersiek was a member of the Secret Service assigned to a fraud task force. Therefore, his assignment reveals that his main intentions for being at the residence was to investigate Austin and Spivey for fraud and that as a federal agent, he had no authority to investigate local burglaries. Detective Iwaskewycz was also assigned to the fraud task force within the Lauderhill Police Department. Although he technically has the authority to investigate local burglaries, his division assignment channels his role within the department to fraud-related crimes.

Another factor that courts may find useful to consider is the nature of the evidence collected by the officers in connection to the suspect. Although the plain view doctrine allows officers to collect evidence of any type of crime they visually detect in a legal search, when you combine the evidence procured with the assignment within the organisation, this may lend additional support towards the true nature of the investigation. In *Spivey* the prints collected were clearly a sham because Agent Lanfersiek was unfamiliar with the practices of how to gather fingerprints. Aside from the tapes which could have easily been requested and retrieved without intrusion, the only real evidence procured from this search was evidence of credit card fraud to be used against the residents. When paired with their assignments, this shows that the main motivation for the search was to uncover evidence for credit card fraud by inducing consent in order to avoid having to obtain a warrant.

Another factor to be considered may be any deliberate investigative measures taken to investigate a crime that was not disclosed to the defendant prior to consent. Although there are no examples of this in the case of *Spivey*, this factor may be useful in a situation where officers enter a dwelling under certain claimed intentions but employ search methods inconsistent with the reason for entrance that they conveyed to the subject who granted consent.

Another element that the courts may find useful to consider is whether the subject is aware that anything officers see in the house may also be used against them. This is in no way a requirement for officers to advise all subjects of a search that anything found within the residence during a search may be used against them. This educational factor is to simply give credit to officers who intentionally help reduce the possibility for deception when they inform subjects of the potential consequences of their consent. Although the courts should not give this factor heavy weight in their analysis, if an officer makes the subject aware of the significance of

their consent, it should be considered as a factor weighing against abusive police deception.

The courts should weigh these factors, as well as any other factors presented in each case, to determine if the totality of the circumstances support a finding of a 'meeting of the minds' regarding a subject's consent. It is again important to point out that this rule will apply only to officers requesting consent to search while acting in their official capacity.

The third rule, which really functions as an alternative to the second rule mentioned above, is to require officers to identify the task force they are acting under when requesting consent to conduct a search. Although courts tend to shy away from creating bright-line rules regarding the Fourth Amendment, crafting such a requirement would be useful in preventing major deceptive ruses such as the one presented in *Spivey*. Requiring officers to reveal their task force within the organisation generates more transparency between citizens and officers. If officers are not attempting to trick or deceive a subject as to the intentions of their search, they should have no problem disclosing their particular task force assignments to the subjects for which they are seeking consent. For example, in *Spivey*, if the officers had disclosed their assignments prior to requesting consent from Austin, this would dramatically reduce the potential for overwhelming police deception. This would mean that Austin was aware that the officers were part of the fraud task force and that there is the potential that they may be investigating her for fraud as well. It allows for the subject to delineate the intentions of the officers for herself and make a more informed decision of consent based on her evaluation.

A. Benefits to citizens

When crafting a new guiding principle in the law it is important for courts to weigh the interests of the government against the interest of the citizens before implementing the new principle. The citizens are in a position to receive the most benefit from any of the rules listed above. Implementing any of these rules will serve as a protective device on a citizen's Fourth Amendment rights. All of the rules are aimed at preventing officers from using twofold strategies in which they find some tenuous excuse to investigate a house to avoid disclosing their main purpose for being there. The first and third rules suggested are directed at preventing officers from taking their deception too far while acting under the colour of the law. The second rule is meant to prevent citizens from essentially consenting to a lie under the pretence that officers are there to aid them, when in fact they are the target of an investigation. Creating rules such as these will allow citizens to gain more trust in law enforcement, especially in a time of turmoil with law enforcement.

Without any guidance on police deception, police are free to deceive the public on what they are consenting to which may foster distrust in the government. This is especially important in situations such as the one in *Spivey* when officers attempt to strategise around the requirements provided in the Fourth Amendment.

B. Benefits to law enforcement

Implementing rules such as the ones suggested above will create clearer guidelines about the amount of deception police may use when seeking consent. By creating clearer guidelines, officers will not be as likely to risk doing something that may cause evidence that is vital to their case to be suppressed. Although bright-line rules are not generally used in regards to the Fourth Amendment, police need clearer guidance on just how far they may take their deception when acting under the colour of authority. Officers have many technicalities they must abide by to prevent getting their cases thrown out. These suggestions will provide officers with clear rules to abide by without having to decipher the grey area of law that surrounds police deception.

C. Benefits to courts

Applying guidelines such as the ones suggested above will further benefit the courts by creating a structure in which they may analyse whether police deception has crossed the constitutional boundaries provided by the Fourth Amendment. The second suggested rule allows the courts to weigh the costs of police deception with the benefits based on the amount of deception used to obtain consent, without having to draw a bright-line rule. Implementing guidelines for courts to evaluate cases of deception will provide consistency in application while preventing officers from having free-range discretion on how much deception they may use to induce consent.

Overall, these rules promote the honesty and integrity necessary to maintain a certain level of trust between law enforcement and the public when operating under the colour of government authority. Fostering and preserving the public's faith and trust in government agencies is essential to maintaining the public's cooperation with the institution.

VII. Conclusion

Consent to search that is given to officers who have deliberately misrepresented their authority and intent for their presence in order to circumvent the need for a warrant is not voluntary consent and violates the Fourth Amendment. According to Justice Scalia, the warrant requirement in the Fourth Amendment has become

"so riddled with exceptions that it [is] basically unrecognizable".[98] To alleviate some of the confusion caused by all of these exceptions, the Court needs to implement guidelines that draw some clear parameters by which officers should abide. The current judicial framework on police deception encourages deceitful consent searches, despite the consequential impact this may have on privacy and the contradiction it has with the purposes of the Fourth Amendment. The courts should adopt rules to help provide parameters for police use of deception to obtain consent to search. Implementing such rules will help to maintain the trust needed between citizens and law enforcement and help provide procedural guidelines to officers who wish to seize evidence vital to their case without fear that it will be suppressed.

[98] *California v Acevedo* 500 US 565 (1991) 582 (concurrence).