

Proposed Ordinance Would Ensure Law Enforcement Obtains Meaningful Consent When Requesting to Search Individuals

When officers want to search someone, they must either secure a warrant or meet an exception to that requirement, one of which is obtaining an individual's consent to be searched. Studies show that BIPOC individuals are disproportionately stopped and asked to consent to searches and that individuals do not understand they can say no. As Justice Thurgood Marshall once said, "All the police must do is conduct what will inevitably be a charade of asking for consent. If they display any firmness at all, a verbal expression of assent will undoubtedly be forthcoming."

Research indicates Justice Marshall's fear of a charade was true and that most adults consent because they don't realize they have a choice. This ordinance would ensure individuals understand their rights before consenting to a search by requiring law enforcement to connect them to a lawyer.

THE DISPARATE IMPACT OF POLICE STOPS

Considerable research shows that police stops and searches are racially disparate. We also know that BIPOC individuals frequently waive their rights when asked to consent to a search. Specifically, the research shows:

- Consent searches comprise more than 90% of all warrantless searches by police.¹
- The vast majority of adults consent to searches.²
- In Seattle, Black individuals are stopped five times as often as white individuals, and Native Americans are stopped nine times as often as white Americans.³
- BIPOC pedestrians are significantly more likely to be searched than their white counterparts.⁴
- Law enforcement is more likely to find weapons on white people.⁵

THIS ORDINANCE WILL PROTECT CONSTITUTIONAL RIGHTS

Both the Washington and federal constitutions require that police have a warrant to conduct a search. However, there are exceptions, such as after an arrest or when there is contraband in plain view. When none of the exceptions apply and even if there aren't reasonable grounds to

think that a crime has been committed, an armed police officer can "ask" an individual for consent to search their person or belongings.

The idea of consent assumes that an individual who is being asked to consent actually understands that they can say no. But studies show that most adults, regardless of race, aren't aware that they have the right to refuse a search,⁶ do not feel free to refuse police requests to search,⁷ and frequently "interpret questions or suggestions as orders when they come from a person of authority."⁸ And because of the experiences in their community, because so many BIPOC individuals have lost their lives at the hand of law enforcement, they are likely to feel that the safest path is to agree to be searched. The idea of consent in such circumstances is a fantasy.

By enacting this ordinance, King County will demonstrate a commitment to protecting the constitutional rights of BIPOC individuals and to ensuring that they are not subject to fishing expeditions by law enforcement or the degrading experience of a stop where the "officer is looking for more." While the disparate stops and searches of BIPOC individuals will continue to be a profound harm impacting our community, by enacting this ordinance King County can begin to mitigate some of those long-lasting harms.

Frequently Asked Questions

Does this ordinance prevent law enforcement from conducting any searches?

No. An officer may still search someone pursuant to a warrant or, if they don't have a warrant, under one of the many legal exceptions to the warrant requirement. For example, an officer may search a person if they have arrested that person or see contraband in plain view; they may stop and frisk someone during a brief investigatory stop; or they may search someone if the officer fears destruction of evidence. If an officer cannot search an individual pursuant to these many avenues, they currently can "ask" for consent.

How will this ordinance be enforced?

This ordinance will require quarterly reporting to the King County Council regarding any attorney consultations required by the ordinance.

Is this a pilot program?

Yes, which means the implications can be reassessed before it is made permanent.

Have any other jurisdictions done this?

Other jurisdictions have recognized that consent searches are flawed and give rise to concerns about racial disproportionality. In response to litigation, the California Highway Patrol has prohibited its officers from asking for consent to search vehicles stopped for traffic infractions. New Jersey only

permits consent searches where an officer stops a vehicle and suspects criminal activity.

If a person receives information about their rights in writing, why should they also be connected to an attorney via a phone?

As noted above, studies show people do not feel free to refuse police requests to search⁹ and frequently "interpret questions or suggestions as orders when they come from a person of authority."¹⁰ We must ensure that people can discuss their constitutional rights, including any questions they have, with an attorney, rather than with the armed law enforcement officer asking them to waive their constitutional rights.

How will officers arrange for these consultations?

Since this is an extension of already existing practices, including a state law that requires that youth consult with an attorney before waiving constitutional rights, procedures are already in place to allow consultations to happen "in the field." In addition, law enforcement has experience connecting people with an attorney in other situations (e.g., when asking someone to take a breath test after a DUI arrest). Finally, the King County Department of Defense already staffs a robust on-call attorney line. This program is being proposed as a pilot and so the implications can be reassessed before it is made permanent.

Endnotes

- 1 Ric Simmons, [Not "Voluntary" but Still Reasonable: A New Paradigm for Understanding the Consent Searches Doctrine](#), Indiana Law Journal, 2005. "Over 90% of warrantless police searches are accomplished through the use of the consent exception to the Fourth Amendment."
- 2 People consent to searches so often that it undermines the meaningfulness of the consent and the believability that police are respecting the doctrine. Some studies find that between 85% and 90% of drivers consent to searches of their vehicle and even more pedestrians consent.
- 3 Center for Policing Equity, [The Science of Justice: Seattle Police Department, National Justice Database City Report](#), January 2021.
- 4 Ibid.
- 5 Ibid.
- 6 Tracey Maclin, [The Decline of the Right of Locomotion: The Fourth Amendment on the Streets](#), Cornell Law Review, 1990.
- 7 Janice Nadler, [No Need to Shout: Bus Sweeps and the Psychology of Coercion](#), The Supreme Court Review, 2002.
- 8 Josephine Ross, [Can Social Science Defeat a Legal Fiction? Challenging Unlawful Stops Under the Fourth Amendment](#), Washington & Lee Journal of Civil Rights & Social Justice, 2012.
- 9 Janice Nadler, [No Need to Shout: Bus Sweeps and the Psychology of Coercion](#), supra.
- 10 Josephine Ross, [Can Social Science Defeat a Legal Fiction? Challenging Unlawful Stops Under the Fourth Amendment](#), supra.