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Search and Seizure—KNOWLEDGE OF FOURTH AMENDMENT RIGHTS NOT A PREREQUISITE TO A VALID CONSENT SEARCH—*Schneckloth v. Bustamonte*, 93 S. Ct. 2041 (1973).*

The fourth amendment to the United States Constitution,¹ applicable to the states through the fourteenth amendment,² guarantees to every citizen the inalienable right to be secure against unreasonable searches and seizures. As a response to a long history of English colonial abuses,³ the fourth amendment was intended by the drafters of the Bill of Rights⁴ to be a safeguard against governmental misuse of the writs of assistance⁵ and the general warrant.⁶ The Supreme Court has broadly interpreted the constitutional mandate of the fourth amendment as proscribing all searches and seizures which do not comply with its stringent provisions.⁷ However, certain specifically established and well-defined exceptions to

* Subsequent to printing, this case has been reported in 412 U.S. 218 (1973).

1. U.S. CONST. amend. IV:

The 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, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

2. “. . . [N]or shall any State deprive any person of life, liberty, or property without due process of law. . . .” U.S. CONST. amend. XIV § 1. See *Mapp v. Ohio*, 367 U.S. 643 (1961); *Rees v. Commonwealth*, 203 Va. 850, 127 S.E.2d 406 (1962).

3. *Chimel v. California*, 395 U.S. 752 (1969) quoting *United States v. Rabinowitz*, 339 U.S. 56, 69 (1950) (Frankfurter, J., dissenting):

[T]he Amendment’s proscription of “unreasonable searches and seizures” must be read in light of “the history that gave rise to the words” — a history of “abuses so deeply felt by the Colonies as to be one of the potent causes of the Revolution” *Id.* at 760-61.

4. See *Davis v. United States*, 328 U.S. 582, 604-05 (1946) (Frankfurter, J., dissenting). For a comprehensive analysis of the fourth amendment in its historical perspective see Lasson, *The History and Development of the Fourth Amendment to the United States Constitution*, 55 THE JOHN HOPKINS STUDIES IN HISTORICAL AND POLITICAL SCIENCE (Part 2) 1 (1937); Note, *Warrantless Searches in Light of Chimel: A Return to the Original Understanding*, 11 ARIZ. L. REV. 457, 460-75 (1969).

5. See *Boyd v. United States*, 116 U.S. 616, 625 (1886). Writs of assistance did not require a showing of probable cause before a magistrate, nor was any judicial supervision provided for their use. See generally Carden, *Federal Power to Seize and Search Without Warrant*, 18 VAND. L. REV. 1 (1964); Lasson, note 4 *supra* at 39-40.

6. The historical development of the general warrant can be traced to the infamous Star Chamber. It was not until 1765 that the practice of issuing general warrants was renounced by the English courts. See *Boyd v. United States*, 116 U.S. 616, 625-41 (1886). The House of Commons declared the general warrant illegal in 1776. See *Henry v. United States*, 361 U.S. 98, 100 n.1 (1959).

7. In *Katz v. United States*, 389 U.S. 347 (1967) the Court stated:

[S]earches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment — subject only to a few specifically established and well delineated exceptions. *Id.* at 357.

the warrant requirement have been judicially recognized as being within the general framework of the Constitution.⁸ One such recognized exception is a search conducted pursuant to voluntary consent.⁹

In the recent case of *Schneekloth v. Bustamonte*,¹⁰ the United States Supreme Court ruled¹¹ that the fourth amendment does not require a law enforcement officer to warn an individual who is not in custody of his constitutional right to refuse to consent to a warrantless search.

In *Schneekloth*, a California¹² police officer stopped an automobile for a minor traffic violation,¹³ and after discovering that the only person possessing a driver's license was a passenger, the officer requested the six passengers, including Bustamonte, to step out of the car. With the consent of the bailee of the automobile,¹⁴ the officer searched the car. Subsequently, three

8. For a general cataloging of the recognized exceptions and supporting cases see *Vale v. Louisiana*, 399 U.S. 30, 35 (1970); *Wheeler v. Goodman*, 330 F. Supp. 1356, 1361-62 (W.D.N.C. 1971); *One 1963 Chevrolet Pickup Truck v. Commonwealth*, 208 Va. 506, 158 S.E.2d 755 (1968).

9. See, e.g., *Bumper v. North Carolina*, 391 U.S. 543 (1968); *Henry v. Commonwealth*, 211 Va. 48, 175 S.E.2d 416 (1970). For discussion and analysis of consent searches see C. BERRY, *ARREST, SEARCH AND SEIZURE* 91-99 (1973); W. RINGEL, *SEARCHES AND SEIZURES, ARRESTS AND CONFESSIONS* (1972); Miles and Wefing, *The Automobile Search and the Fourth Amendment: A Troubled Relationship*, 4 SETON HALL L. REV. 105 (1972).

10. 93 S. Ct. 2041 (1973).

11. The decision of the Court presented no consensus among the Justices as to the reasons for the holding. Justice Stewart wrote the opinion of the Court based on the consent search situation presented by the facts. Justice Powell, joined by Chief Justice Burger and Justice Rehnquist, concurred in the Court's opinion but based his reasoning on the peripheral issue of federal collateral review of habeas corpus, failing to even mention the consent search issue presented by the facts. Justice Blackmun filed a separate concurring opinion which agreed with the reasoning advanced by Justice Powell but questioned its applicability to the facts of the case. Justices Douglas, Brennan and Marshall filed separate dissenting opinions which were based on the issue of whether an individual can consent to a search without the knowledge that he has the right to refuse to consent, the dominant issue presented in *Schneekloth*. The Court's holding thus presents four opinions: the "majority" opinion, the three-Justice concurring opinion, the separate concurring opinion, and the three dissenting opinions based on the facts. Clearly, there is no definitive holding presented on the facts of the case.

12. For a discussion of the California judicial system and unlawful search and seizure claims see Manwaring, *California and the Fourth Amendment*, 16 STAN. L. REV. 318 (1964).

13. The officer, while on routine patrol in the early hours of the morning, "observed that one headlight and its license plate light were burned out." 93 S. Ct. 2041, 2044 (1973). See generally Annot., 10 A.L.R.3d 314 (1966).

14. The majority of courts have recognized as valid a consent to search given by a bailee of an automobile. See, e.g., *United States v. Eldridge*, 302 F.2d 463 (4th Cir. 1962); *United States v. Mazzella*, 295 F. Supp. 1033 (S.D.N.Y. 1969); *Hamilton v. State*, 260 F. Supp. 632 (E.D.N.C. 1966); *Henry v. Commonwealth*, 211 Va. 48, 175 S.E.2d 416 (1970); *Hotis, Search of Motor Vehicles*, 73 DICK. L. REV. 363, 417-20 (1969); 41 ST. JOHN'S L. REV. 82 (1966); 33 U. CHI. L. REV. 797 (1966). *But see* B. GEORGE, *CONSTITUTIONAL LIMITATIONS ON EVIDENCE IN*

stolen checks were found, which, with other evidence, was later used to convict Bustamonte of possessing a check with intent to defraud. No arrest had been made at the time of the search and the entire sequence of events took place in a "cogential" atmosphere.¹⁵

While the fourth amendment prohibits an unreasonable search and seizure,¹⁶ the determination of reasonableness¹⁷ depends on the particular facts of each case. Consequently, the circumstances surrounding a consent search receive close scrutiny by the courts.¹⁸ In evaluating the source of the consent, the courts have stressed that one who has a definite possessory interest in the property to be searched has standing to consent to the search.¹⁹ As with the waiver of any constitutional right, the consent to conduct a search which would otherwise be constitutionally prohibited²⁰ must be knowingly and intelligently given,²¹ and must be voluntary and "uncontaminated by any duress or coercion, actual or implied."²²

CRIMINAL CASES 448 (1973).

15. According to uncontradicted testimony at trial, the bailee of the car, Alcala, actively assisted the patrolman in searching the car. *People v. Bustamonte*, 270 Cal. 2d 648, 76 Cal. Rptr. 17 (Ct. App.) (1969). See generally Annot., 9 A.L.R.3d 858 (1966).

16. See *Chimel v. California*, 395 U.S. 752, 772-73 (1969) (White, J., dissenting); *Kirby v. Commonwealth*, 209 Va. 806, 167 S.E.2d 411 (1969).

17. As with all legal principles which involve the concept of "reasonableness", the courts have attempted to delineate the various components which could be useful in defining a "reasonable" search. See *United States v. Rabinowitz*, 339 U.S. 56 (1950), where the Supreme Court summarizes the result of its efforts:

What is a reasonable search is not determined by any fixed formula. The Constitution does not define what are "unreasonable" searches, and, regrettably, in our discipline we have no ready litmus-paper test. *Id.* at 63.

18. Whether a search and seizure is unreasonable within the meaning of the fourth amendment depends upon the facts and circumstances of each case. See, e.g., *Preston v. United States*, 376 U.S. 364, 366 (1964). See *Vale v. Louisiana*, 399 U.S. 30, 36 (1970) (Black, J., dissenting); *Hoover v. Beto*, 467 F.2d 516, 520 (5th Cir. 1972); *Cabbler v. Commonwealth*, 212 Va. 520, 184 S.E.2d 781 (1971).

19. As a general rule, the constitutional right to privacy is personal to the individual and cannot be waived by a third party. See *Stoner v. California*, 376 U.S. 483 (1964). However, the right of a third party to consent to a search of jointly controlled property has been judicially recognized by a majority of courts. For an enumeration of cases see *United States ex rel. Cabey v. Mazurkiewicz*, 431 F.2d 839, 845-46 (3d Cir. 1970).

20. Judicial hostility to consent searches is evident in the requirement that the state bear the burden of proving that the consent-given was voluntary and uncoerced. See, e.g., *United States v. Jeffers*, 342 U.S. 48, 51 (1951); *Morris v. Commonwealth*, 208 Va. 331, 157 S.E.2d 191 (1967). In addition, the courts will not lightly infer a waiver of fourth amendment rights and will "indulge every reasonable presumption against waiver." *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938) quoting *Aetna Ins. Co. v. Kennedy*, 301 U.S. 389, 393 (1937).

21. See, e.g., *Davis v. United States*, 328 U.S. 582, 594 (1946) (Frankfurter, J., dissenting); *United States v. Vickers*, 387 F.2d 703 (4th Cir. 1967); *United States v. Blalock*, 255 F. Supp. 268 (E.D. Pa. 1966); *Cardwell v. Commonwealth*, 209 Va. 68, 161 S.E.2d 787 (1968).

22. *Channel v. United States*, 285 F.2d 217, 219 (9th Cir. 1960). See *Bumper v. North*

The majority in *Schneckloth* closely followed the reasoning of previous Court decisions which defined "voluntariness" in the context of an in-custody interrogation.²³ Discerning a clear distinction between the constitutional mandates of the fourth and fifth amendments with respect to consent searches and in-custody interrogation,²⁴ the Court reasoned that the circumstances surrounding a consent search do not present the same grave danger of coercion that is inherent in an in-custody interrogation situation.²⁵ The Court recognized that consent must still be voluntary, but in the absence of a coercive element, knowledge of the right to withhold consent is merely one factor in determining the validity of the consent.²⁶

The concurring opinion in *Schneckloth* does not discuss the factual situation presented, and its failure to do so results in an equal division among the Justices on the constitutional issue of consent to search. Instead, the opinion addresses the broader, theoretical aspects of the availability of federal habeas corpus to a state prisoner asserting an allegedly unlawful search and seizure claim under the fourth amendment.²⁷ In stressing the

Carolina, 391 U.S. 543 (1968); *Brown v. Mississippi*, 297 U.S. 278 (1936); *Karwicky v. United States*, 55 F.2d 225, 226 (4th Cir. 1936) (per curiam); *United States v. Kuntz*, 265 F. Supp. 543 (N.D.N.Y. 1967).

23. *Miranda v. Arizona*, 384 U.S. 436 (1966). After examining the various definitions it had previously established, the Court concluded that the "traditional" determination of voluntariness—"the totality of all the surrounding circumstances"—is also applicable to consent searches. 93 S. Ct. 2041, 2046-52 (1973).

24. 93 S. Ct. at 2054-59. *But see Zap v. United States*, 328 U.S. 624, 628 (1946); *Boyd v. United States*, 116 U.S. 616, 630-35 (1886); 46 N.C. L. Rev. 142, 144 (1967).

25. 93 S. Ct. 2041, 2054-59. In *Linkletter v. Walker*, 381 U.S. 618 (1965), the Court also decided that when compared to the likelihood of a coerced confession in in-custody interrogation, "there is no likelihood of unreliability or coercion present in a search-and-seizure case." *Id.* at 638. The dissenting opinions in *Schneckloth* view the possibility of coercion as gravely inherent in the consent search situation. Both Justice Douglas and Justice Marshall stated that "under many circumstances a reasonable person might read an officer's 'may I' as the courteous expression of a demand backed by force of law." 93 S. Ct. 2041, 2072, 2079 (1973) quoting *Bustamonte v. Schneckloth*, 448 F.2d 699, 701 (9th Cir. 1971).

26. 93 S. Ct. at 2048. The Court stated:

While knowledge of the right to refuse consent is one factor to be taken into account, the government need not establish such knowledge as the *sine qua non* of an effective consent.

The dissenting opinions of Justices Brennan and Marshall sharply criticize this conclusion. Justice Brennan summarizes his position as follows:

It wholly escapes me how our citizens can meaningfully be said to have waived something as precious as a constitutional guarantee without ever being aware of its existence. *Id.* at 2073.

Justice Marshall similarly questions the majority's holding, which he claims "confines the protection of the Fourth Amendment against searches conducted without probable cause to the sophisticated, the knowledgeable, and, I might add, the few." *Id.* at 2079.

27. The concurring Justices perceived the central issue of the case as follows:

The specific issue before us, and the only one that need be decided at this time, is the

common law development of the writ,²⁸ the concurring Justices concluded that federal review of fourth amendment claims presently raised by state prisoners²⁹ have extended "well beyond the traditional purposes of the writ of habeas corpus."³⁰ By limiting federal collateral review to only those claims which have a bearing on the question of innocence,³¹ the historic purpose of the writ will be reasserted.³² In addition, the protracted litigation,³³ the depreciation of the finality of prior judgments,³⁴ and the derogation of the constitutional balance between the federal and state judicial systems,³⁵ which now exists, would be eliminated.³⁶

Implicit in the majority's rationale is a realization of the balance that must be maintained between the preservation of constitutionally protected rights and the permissible intrusion on those rights.³⁷ A formal warning, presented in a specific formula, would at first glance, appear to be an

extent to which a state prisoner may obtain federal habeas corpus review of a Fourth Amendment claim. *Id.* at 2067.

28. See, e.g., *Ex parte Watkins*, 28 U.S. (3 Pet.) 193, 201-02 (1830); *Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 93-94 (1807); Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441 (1963); Oaks, *Legal History in the High Court - Habeas Corpus*, 64 MICH. L. REV. 451 (1966).

29. In *Kaufman v. United States*, 394 U.S. 217 (1969), the Court held that collateral review of search and seizure claims was appropriate on motions filed by federal prisoners under 28 U.S.C. § 2255. The same privilege for those in state custody is now authorized by 28 U.S.C. § 2254(a) (1964).

30. 93 S. Ct. 2041, 2060 (1973) (Powell, J., concurring).

31. For a thorough analysis of the question of innocence and federal habeas corpus review see *Kaufman v. United States*, 394 U.S. 217, 231 (1969) (Black, J., dissenting); Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. CHI. L. REV. 142 (1970); Pollack, *Proposals to Curtail Federal Habeas Corpus for State Prisoners: Collateral Attack on the Great Writ*, 66 YALE L.J. 50 (1956); Reitz, *Federal Habeas Corpus: Postconviction Remedy for State Prisoners*, 108 U. PA. L. REV. 461 (1960).

32. 93 S. Ct. 2041, 2067 (1973) (Powell, J., concurring).

33. *Sanders v. United States*, 373 U.S. 1 (1963) (Harlan, J., concurring):

Both the individual criminal defendant and society have an interest in insuring that there will at some point be the certainty that comes with an end to litigation, and that attention will ultimately be focused not on whether a conviction was free from error but rather on whether the prisoner can be restored to a useful place in the community. *Id.* at 24-25.

34. See, e.g., *Linkletter v. Walker*, 381 U.S. 618 (1965); Amsterdam, *Search, Seizure and Section 2255: A Comment*, 112 U. PA. L. REV. 378, 383-84 (1964) (The article addresses the issue of collateral review for federal prisoners, but its argument is equally applicable to state prisoners).

35. See, e.g., *Fay v. Noia*, 372 U.S. 391, 464 (1963) (Harlan, J., dissenting); *Erie R.R. v. Tompkins*, 304 U.S. 64, 78-79 (1938); *Baltimore & O.R.R. v. Baugh*, 149 U.S. 368, 401 (1893); Bator, note 28 *supra* at 451.

36. 93 S. Ct. 2041, 2064-72 (1973) (Powell, J., concurring).

37. *Id.* at 2046.

adequate means of safeguarding both interests.³⁸ In *Miranda v. Arizona*,³⁹ the Supreme Court announced the absolute necessity of providing an accused with threshold warnings of his fifth and sixth amendment rights.⁴⁰ But even in *Miranda*, the Court⁴¹ clearly stipulated those circumstances which would require the detailed warning of rights⁴² and those which would not.⁴³ The fact that a formal warning is required to protect certain constitutional rights does not of itself indicate the need to require a formal warning to protect all constitutional rights.⁴⁴

The reasoning of the concurring opinion is relevant in its consideration of fourth amendment claims presented for federal collateral review.⁴⁵ The

38. For a model formula to be used by law enforcement officers in presenting a warning of fourth amendment rights, see Wilberding, *Miranda-Type Warnings for Consent Searches?*, 47 N.D. L. REV. 281, 284 (1971); Note, *Consent Searches: A Reappraisal After Miranda v. Arizona*, 67 COLUM. L. REV. 130, 150-68 (1967).

39. 384 U.S. 436 (1966).

40. *Id.* at 471-72. The Court required that any suspect held in custody must be informed that (1) he has the right to remain silent; (2) anything he does say may be used against him in a court of law; and (3) he has the right to the presence of an attorney, retained or appointed, before questioning.

41. The *Miranda* requirement of a warning of fifth and sixth amendment rights received a varied reaction from the judicial community, especially in its application to consent searches. According to one line of cases, the *Miranda* warning should be applied to all search and seizure situations, without exception. See, e.g., *United States v. Nikrasch*, 367 F.2d 740 (7th Cir. 1966). Other courts perceive no reason to require the *Miranda* warning in a search and seizure situation. See, e.g., *United States v. Cox*, 464 F.2d 937 (6th Cir. 1972); *Gorman v. United States*, 380 F.2d 158 (1st Cir. 1967); *State v. McCarthy*, 199 Kan. 116, 427 P.2d 616 (1967).

42. Only when the suspect is in "custody or otherwise deprived of his freedom of action in any significant way" does the requirement of a warning come into force. *Miranda v. Arizona*, 384 U.S. 436, 444 (1966).

43. The Court clearly emphasized that:

Our decision is not intended to hamper the traditional function of police officers investigating crime. . . . General on-the-scene questioning as to facts surrounding a crime or other general questioning of citizens in the fact-finding process is not affected by our holding. *Id.* at 477.

44. In *Gorman v. United States*, 380 F.2d 158 (1st Cir. 1967), the court stated:

Although the analogy with *Miranda v. State of Arizona* . . . has a surface plausibility, we do not think that the *Miranda* prescription, formulated to give threshold warnings of fifth and sixth amendment rights at the earliest critical time in a criminal proceeding, must or ought to be mechanically duplicated when circumstances indicate the advisability of requesting a search. *Id.* at 164.

In *People v. Duren*, 9 Cal. 3d 218, 507 P.2d 1365, 107 Cal. Rptr. 157 (1973) quoting *People v. Beal*, 268 Cal. 2d 481, 485, 73 Cal. Rptr. 787, 790 (1969), the California Supreme Court concluded:

The trial court's scrutiny of the voluntariness of the consent is far more protection to a defendant than the recital of some warning by the police. 507 P. 2d at 1381.

45. The reasoning presented in the opinion can be logically applied to any claim presented by a state or federal prisoner for federal collateral review, regardless of the factual situation.

historical analysis of the intent and purpose of the writ of habeas corpus substantially supports the proposition the opinion sets forth. However, by pursuing the peripheral issue of federal collateral review of habeas corpus, the concurring Justices failed to confront the central issue presented to the Court for its review. The failure by the concurring Justices to discuss the issue of a fourth amendment warning for consent searches results in a less than definitive ruling on whether a law enforcement officer is required to give a warning of fourth amendment rights before conducting a consent search.

The wisdom of the *Schneckloth* decision is that it resolves the constitutional issue concerning the requirement of fourth amendment warning of rights within the exact confines of those situations where the consent to search is voluntarily given, the one giving the consent is not in custody, and the general atmosphere surrounding the giving of consent is not coercive.⁴⁶ Only if these elements are present can a law enforcement officer dispense with a warning of fourth amendment rights. The Court implicitly recognized that the application of its holding to a different set of facts would disrupt the precarious constitutional balance it has sought to attain.⁴⁷ It must be conceded, however, that despite the limitations placed on its holding, the Court's opinion is greatly undermined by its inability to present a consensus opinion on the constitutional issue of the necessity for fourth amendment warnings. In light of the diverse nature of the Court's opinion, further pronouncements on the issue of whether a law enforcement officer is required to give warnings of fourth amendment rights can be expected.

J. V. B. II

46. 93 S. Ct. 2041 (1973):

We hold only that when the subject of a search is not in custody and the State attempts to justify a search on the basis of his consent, the Fourth and Fourteenth Amendments require that it demonstrate that the consent was in fact voluntarily given, and not the result of duress or coercion, express or implied. Voluntariness is a question of fact to be determined from all the circumstances, and while the subject's knowledge of a right to refuse is a factor to be taken into account, the prosecution is not required to demonstrate such knowledge as a prerequisite to establishing a voluntary consent. *Id.* at 2059.

47. A warning of fourth amendment rights could be required under the *Schneckloth* holding where, for example, the officer approached the car with his revolver drawn, and then requested permission to search. A warning could also be required where the one giving the consent could not understand the nature of the request to search, as where he was a foreigner who did not understand English or where he was mentally incapable of understanding.