NORTH CAROLINA LAW REVIEW

Volume 52 | Number 3 Article 8

2-1-1974

Criminal Procedure -- Standards for Valid Consent to Search

William R. Sage

Criminal Procedure—Standards for Valid Consent to Search

A warrantless search is reasonable under the fourth amendment only within a few "specifically established and well delineated exceptions."[1] Most of these exceptions are based upon the necessity of immediate police action where the requirement of a warrant would severely hamper effective law enforcement or threaten the safety of police officials.[2] The exception based upon consent has not been so well delineated although it is settled that it is based not on exigent circumstances but upon the theory that anyone may cooperate with law enforcement officials and that such cooperation should be encouraged.[3] The question of when a consent to search is validly given has until recently been a matter of dispute among state and federal courts.[4]

The United States Supreme Court has formulated the test for a valid consent in *Schneckloth v. Bustamonte*.[5] Denying that a defendant's knowledge of his right to withhold consent was a prerequisite for a valid search, the Court held "that when the subject of a search is not in custody and the State attempts to justify the 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."[6]

Schneckloth involved the search of an automobile based entirely upon consent. The respondent, Robert Bustamonte, and five companions were stopped by a police officer on routine patrol because of a nonfunctioning headlight and license plate light. The driver, Joe Gonzales, failed to produce a valid operator's license and only Joe Alcala, who explained that the car belonged to his brother, could produce a license. The officer asked the six occupants to step out of the car, and after the arrival of two additional officers, he asked Alcala if he could search the car. Alcala replied, "Sure, go ahead." No one had been arrested, and the atmosphere was described by the officers and

1. Katz v. United States, 389 U.S. 347, 357 (1967).
2. *See, e.g.*, Coolidge v. New Hampshire, 403 U.S. 443 (1971); Chimel v. California, 395 U.S. 752 (1969).
3. *See* text accompanying note 58 *infra*.
4. *Compare, e.g.*, Wren v. United States, 352 F.2d 617 (10th Cir. 1965), *and* Higgins v. United States, 209 F.2d 819 (D.C. Cir. 1954), *with* Lucas v. State, 368 S.W.2d 605 (Tex. Crim.), *cert. denied*, 375 U.S. 925 (1963). *See also* notes 12-13 *infra*.
5. 412 U.S. 218 (1973).
6. *Id.* at 248-49.

Gonzales as "congenial". Alcala assisted in the search by opening the trunk of the car. Under the rear seat the officers found three crumpled checks which had been stolen from a car wash. Only then were the men arrested.

The respondent was convicted of possession of a check with intent to defraud. The conviction was affirmed on appeal,[7] and the California Supreme Court denied review.[8] But the Ninth Circuit Court of Appeals, vacating a district court's denial of a writ of habeas corpus, remanded for a determination of whether Alcala had known of his fourth amendment right to withhold his consent to the search.[9] The United States Supreme Court, in an opinion by Mr. Justice Stewart, held that, while the defendant's knowledge of his rights is one of the facts to be considered, it is not an essential element of an effective consent. Rather, the determination must focus on the voluntariness of the consent, considering all the surrounding circumstances. Therefore, the Court reasoned, the inquiry thought necessary by the court of appeals was not required.[10]

Prior to *Schneckloth* there was conflict among the lower courts, as illustrated by that of the California courts and the Ninth Circuit. The courts of California applied the voluntariness test as formulated by Justice Traynor in *People v. Michael*:[11] "Whether in a particular case an apparent consent was in fact voluntarily given or was in submission to an express or implied assertion of authority, is a question of fact to be determined in the light of all the circumstances."[12] This test is primarily concerned with the actions of the police in eliciting the consent and requires a determination of whether there had been coercion or duress involved.

The Ninth Circuit, on the other hand, approached the issue by considering consent a waiver of fourth and fourteenth amendment rights. This test primarily focused on the state of the defendant's knowledge. It not only required a showing of voluntariness by the

7. People v. Bustamonte, 270 Cal. App. 2d 648, 76 Cal. Rptr. 17 (1969).
8. The order of the Supreme Court of California is unreported.
9. Bustamonte v. Schneckloth, 448 F.2d 699 (9th Cir. 1971).
10. 412 U.S. at 248-49.
11. 45 Cal. 2d 751, 290 P.2d 852 (1955).
12. *Id.* at 753, 290 P.2d at 854; *see* United States v. Smith, 308 F.2d 657 (2d Cir. 1962), *cert. denied*, 372 U.S. 906 (1963); United States v. Perez, 242 F.2d 867 (2d Cir.), *cert. denied*, 354 U.S. 941 (1957); People v. Tremayne, 20 Cal. App. 3d 1006, 98 Cal. Rptr. 192 (1971); State v. Hauser, 257 N.C. 158, 125 S.E.2d 389 (1962) (per curiam).

state but also an affirmative showing that the defendant had knowledge of his right freely and effectively to withhold his consent.[13]

In upholding the California approach, the Court in *Schneckloth* adopted the reasoning of cases involving coerced confessions that were decided prior to *Escobedo v. Illinois*.[14] In those cases the due process balancing of individual liberty against the security of society was reached by use of the voluntariness test, that is whether, judging from the "totality of the circumstances," the confession was "the product of an essentially free and unconstrained choice by its maker."[15] Applying these standards to consent searches, the Court concluded that the waiver approach of the Ninth Circuit was inappropriate.[16]

This resolution of the conflict has some basis in a few early cases concerning consent searches, although it was by no means compelled by precedent. The consent search has been recognized at least since *Davis v. United States*[17] in which the Court upheld the search of a gasoline station storeroom on the basis of the defendant's consent.

The Court focused, however, on the public nature of the gas rationing coupons that were the objects of the search and avoided the question of consent in the more usual case of *private* documents.[18] Al-

13. "Such a waiver cannot be conclusively presumed from a verbal expression of assent. The Court must determine from all the circumstances whether the verbal assent reflected an understanding, uncoerced, and unequivocal election to grant the officers a license which the person knows may be freely and effectively withheld." Cipres v. United States, 343 F.2d 95, 97 (9th Cir. 1965); *see* United States v. Mapp, 476 F.2d 67 (2d Cir. 1973); Schoepflin v. United States, 391 F.2d 390 (9th Cir.), *cert. denied*, 393 U.S. 865 (1968); Rosenthall v. Henderson, 389 F.2d 514 (6th Cir. 1968); United States v. Nikrasch, 367 F.2d 740 (7th Cir. 1966); State v. Witherspoon, 460 S.W.2d 281 (Mo. 1970). *But see* Martinez v. United States, 333 F.2d 405 (9th Cir. 1964).

14. 378 U.S. 478 (1964). *Escobedo* marked the initial shift from subjective voluntariness to a more objective inquiry into whether the defendant had in fact been advised of his rights. The shift was completed two years later in Miranda v. Arizona, 384 U.S. 436 (1966); *see* text accompanying note 28 *infra*.

15. 412 U.S. at 225, *quoting* Culombe v. Connecticut, 367 U.S. 568, 602 (1961).

16. [W]e cannot accept the position of the Court of Appeals in this case that proof of knowledge of the right to refuse consent is a necessary prerequisite to demonstrating a "voluntary" consent. Rather it is only by analyzing all the circumstances of an individual consent that it can be ascertained whether in fact it was voluntary or coerced. It is the careful sifting of the unique facts and circumstances of each case that is evidenced in our prior decisions involving consent searches.

412 U.S. at 232-33.

17. 328 U.S. 582 (1946). In an earlier case the Court hinted that consent might be a valid exception to the warrant requirement in some instances when it curtly rejected the contention that the consent involved in that case operated as a valid waiver. Amos v. United States, 255 U.S. 313 (1921).

18. We do not stop to review all of our decisions which define the scope of "reasonable" searches and seizures. For they have largely developed out of cases involving the seizure of *private* papers. We are dealing here not

though the Court appeared to examine the surrounding circumstances and spoke in terms of voluntariness,[19] the precedential value of *Davis* proved to be merely in establishing that consent is a valid exception to the warrant requirement.[20] The standards for determining when a particular consent is valid were not clearly explained and consequently became a question for lower courts.

In *Davis* the Court did not refer to the concept of waiver, although this concept had been developed earlier in the context of the sixth amendment right to counsel. In *Johnson v. Zerbst*,[21] the Court spoke of the waiver of a constitutional right in general terms. "A waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege."[22] This standard was accepted and applied by the Court in areas other than the right to counsel,[23] and two years after *Davis* the Court invalidated a consent search using the language of the waiver standard. In *Johnson v. United States*[24] the Court said, "It [entry into defendant's hotel room] was granted in submission to authority rather than as an *understanding and intentional waiver* of a constitutional right."[25] The seed for conflict as to the applicable standard for determining the validity of consent was planted here.

---

with *private* papers or documents, but with gasoline rationing coupons which never became the property of the holder but remained at all times the property of the government and subject to inspection and recall by it.
328 U.S. at 587-88.

19. In a companion case the Court upheld a search "consented" to by contract. The Court held that "those rights [under the fourth and fourteenth amendments] may be waived. And when petitioner . . . specifically agreed to permit inspection of his accounts and records, he voluntarily waived such claim to privacy which he otherwise might have had . . . ." Zap v. United States, 328 U.S. 624, 628 (1946).

20. Zap v. United States, 328 U.S. 624 (1946), is cited by the American Law Institute for this proposition rather than as authority for the voluntariness test of consent. The ALI did not mention *Davis* but concluded that "voluntariness is not enough; effective consent requires awareness as well." ALI MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE, *Commentary* at 192 (Proposed Official Draft No. 1, 1972) [hereinafter cited as MODEL CODE].

21. 304 U.S. 458 (1938).

22. *Id.* at 464.

23. *See, e.g.*, Barker v. Wingo, 407 U.S. 514 (1972) (speedy trial); McMann v. Richardson, 397 U.S. 759 (1970) (guilty plea); Barber v. Page, 390 U.S. 719 (1968) (right of confrontation); Brookhart v. Janis, 384 U.S. 1 (1966) (same); Green v. United States, 355 U.S. 184 (1957) (double jeopardy); Adams v. United States *ex rel.* McCann, 317 U.S. 269 (1942) (jury trial). The right to counsel and the *Zerbst* waiver standard were extended in United States v. Wade, 388 U.S. 218 (1967) (post-indictment pre-trial lineup); *In re* Gault, 387 U.S. 1 (1967) (juvenile proceeding).

24. 333 U.S. 10 (1948).

25. *Id.* at 13 (emphasis added). *Johnson* was distinguished as involving "implied" consent in a case upholding a search based upon "express" consent which the court concluded was "knowingly made." United States v. MacLeod, 207 F.2d 853, 856 (7th Cir. 1953).

That seed did not begin to grow, however, until the mid-Sixties when the waiver standard was extended to the fifth amendment, which had long been under the exclusive protection of the voluntariness test.[26] In *Miranda v. Arizona*[27] the privilege against self incrimination came under the additional protection of the rigid waiver requirements.[28] A few lower courts almost immediately held that *Miranda* compelled application of the waiver standard to consent searches and that specific warnings of fourth amendment rights were required before obtaining the consent of a subject.[29] Most courts rejected the proposition that such warnings were required, although some continued to apply the knowing waiver standard to the fourth amendment.[30]

The Supreme Court had the opportunity to resolve the conflict among the courts on this issue in *Bumper v. North Carolina*.[31] The alleged consent was given by the black defendant's sixty-six year-old grandmother to four white police officers claiming authority to search under a warrant.[32] Conspicuously absent from Mr. Justice Stewart's majority opinion was any mention of the word "waiver."[33] Instead the majority held the search invalid on the basis of the claim of authority: "When a prosecutor seeks to rely upon consent to justify the lawfulness of a search, he has the burden of proving that the con-

26. Escobedo v. Illinois, 378 U.S. 478 (1964); *see* note 14 *supra*. The shift from voluntariness to waiver during this period is well illustrated by the Ninth Circuit cases: Martinez v. United States, 333 F.2d 405 (9th Cir. 1964) (voluntariness); Cipres v. United States, 343 F.2d 95 (9th Cir. 1965) (waiver).

27. 384 U.S. 436 (1966).

28. *Miranda* abandoned "a long history of judicial review of the validity of confessions under the vague and subjective test of the due process clause, substituting therefor a rigidly specific and objective standard founded on the fifth amendment's self-incrimination provision." Note, *Consent Searches: A Reappraisal After Miranda v. Arizona*, 67 COLUM. L. REV. 130, 133 (1967).

Significantly, the *Miranda* Court cites *Zerbst*, noting that it "has always set high standards of proof for the waiver of constitutional rights," and that it "re-assert[s] these standards as applied to in-custody interrogation." 384 U.S. at 475.

29. *E.g.*, United States v. Nikrasch, 367 F.2d 740 (7th Cir. 1966); United States v. Moderaki, 280 F. Supp. 633 (D. Del. 1968); United States v. Blalock, 255 F. Supp. 268 (E.D. Pa. 1966). *See also* Note, 67 COLUM. L. REV., *supra* note 28.

30. *See, e.g.*, Schoepflin v. United States, 391 F.2d 390 (9th Cir.), *cert. denied*, 393 U.S. 865 (1968). *See also* Hotis, *Search of Motor Vehicles*, 73 DICK. L. REV. 363, 416 (1968); Mintz, *Search of Premises by Consent*, 73 DICK. L. REV. 44, 67 (1968).

Some courts, of course, continued to apply the voluntariness test; *e.g.*, State v. McCarty, 199 Kan. 116, 427 P.2d 616 (1967); State v. Forney, 181 Neb. 757, 150 N.W.2d 915 (1967).

31. 391 U.S. 543 (1968).

32. The warrant, however, was not used at trial for some unexplained reason, and the prosecution chose to rely on consent to justify the search. *Id.* at 546.

33. *See* Note, *Consent and the Constitution After Bumper v. North Carolina*, 6 CALIF. W.L. REV. 316 (1970).

sent was, in fact, freely and voluntarily given. This burden cannot be discharged by showing no more than acquiescence to a claim of lawful authority."[34] The force of this statement which apparently supported the voluntariness test, was unfortunately weakened when the Court added: "When a law enforcement officer claims authority to search a home under a warrant, he announces in effect that the occupant has no right to resist the search."[35] This statement has been construed as a recognition of the applicability of the waiver standard.[36]

Although *Bumper* seemed to embrace the voluntariness test of consent, the conflict continued among the courts. In *United States v. Mapp*[37] the Second Circuit cited *Bumper* for the proposition that "[w]here there is coercion there cannot be consent."[38] But the court went on to require proof of knowledgeable waiver in order to show an effective consent, citing *Johnson v. Zerbst.* The court held the search invalid because, applying the waiver principles, the consent was not " 'unequivocal, specific and intelligently given . . .' [amounting] to a knowing and voluntary waiver of constitutionally protected rights."[39]

Schneckloth presented the opportunity for the Court to clear up the waiver-voluntariness conflict.[40] Since it was apparent that neither test was compelled by precedent, the major question to be resolved was whether the voluntariness test or the waiver criteria better implements the policies of the fourth amendment. The Court did not discuss the policy considerations underlying the acceptance of voluntariness and rejection of the waiver standard beyond its general conclusion that waiver would impair the recognized utility of consent searches.[41]

One of the Court's arguments against application of the waiver standard in *Schneckloth* was based on its reluctance to require specific warnings of these rights before any consent search. Although there are conflicting opinions as to the necessary content of such warnings,[42]

---

34. 391 U.S. at 548-49.

35. *Id.* at 550.

36. "Where the police claim authority to search yet in fact lack such authority, the subject does not know that he may permissibly refuse them entry, and it is this lack of knowledge that invalidates the consent." 412 U.S. at 285 (Marshall, J., dissenting and citing *Bumper*).

37. 476 F.2d 67 (2d Cir. 1973). This case was decided while *Schneckloth* was before the Supreme Court.

38. *Id.* at 77.

39. *Id.*

40. *See* text accompanying note 14 *supra.*

41. 412 U.S. at 227-31.

42. One author, after an in-depth analysis of the effects of *Miranda* on consent searches, has suggested that a warning should be required as follows:

the Court decided that any warning would destroy the utility of the consent search as a law enforcement device by upsetting the "informal and unstructured conditions" under which the ordinary request to search is made.[43]

Mr. Justice Marshall, in dissent, disagreed with the Court's conclusions as to the effect of a warning.[44] He argued that a decision to apply the knowing waiver standard to consent searches would not require that a warning requirement be judicially imposed on the police. Although the police would be assured of the admissibility of any evi-

---

> You have a right to refuse to allow me to search your home, and if you decide to refuse, I will respect your refusal. If you do decide to let me search, you won't be able to change your mind later on, and during the search I'll be able to look in places and take things which I couldn't even if I could get a search warrant. You have a right to a lawyer before you decide, and if you can't afford a lawyer we will get you one and you won't have to pay for him. There are many different laws which are designed to protect you from my searching, but they are too complicated for me to explain or for you to understand, so if you think you would like to take advantage of this very important information, you will need a lawyer to help you before you tell me I can search.

Note, 67 COLUM. L. REV., *supra* note 28, at 158.

Others have been willing to settle for less detail; *e.g.*, "You do not have to consent to a search of your house, and without your permission, I cannot make any search without a search warrant." This statement was considered enough in Note, *Effective Consent to Search and Seizure*, 113 U. PA. L. REV. 260, 268 (1964). Mr. Justice Marshall appears to agree that this type of warning is all that is required in order to show that a person consents "knowingly." *See* note 44 *infra*.

MODEL CODE § SS 240.2(2) provides:

> **Required Warning to Persons Not in Custody or Under Arrest.** Before undertaking a search under the provisions of this Article, an officer present shall inform the individual whose consent is sought that he is under no obligation to give such consent and that anything found may be taken and used in evidence.

43. 412 U.S. at 232. The effects of a warning should be considered in the context of what groups of persons are likely to consent without the warning and who would not consent if warnings were given. One author lists five such groups: (1) innocent, cooperating citizens, (2) coerced consenters, (3) criminals attempting to curry favor, believing "the game is up," (4) citizens ignorant of right to refuse, and (5) guilty persons "attempting to outwit police and divert suspicion." Of these groups, he concludes that only two will be affected by warnings. The last group may even be encouraged to consent as a strategic ploy; while group four will be affected by warnings to the extent that "knowledge will merely serve to remove them into another class of consenters or refusers." Note, 67 COLUM. L. REV., *supra* note 28, at 159-60.

"Perhaps the strongest argument for requiring a warning is that without undue burden it will, in many cases, avoid confusion . . . . It is considerably less burdensome—both in terms of the difficulty of giving it and the number of times it will have to be given—than a warning prior to interrogation." MODEL CODE, *Commentary*, at 194.

44. "I doubt that a simple statement by an officer of an individual's right to refuse consent would do much to alter the informality of the exchange, except to alert the subject to a fact that he is surely entitled to know." 412 U.S. at 287.

It is significant that the F.B.I. and the Bureau of Narcotics and Dangerous Drugs have been giving warnings before obtaining consent "for decades" without apparent difficulty. MODEL CODE, *Commentary*, at 195.

dence seized, as a practical matter, only if a warning were given, he argued:

> It must be emphasized that the decision about informing the subject of his rights would lie with the officers seeking consent. If they believed that providing such information would impede their investigation, they might simply ask for consent, taking the risk that at some later date the prosecutor would be unable to prove that the subject knew of his rights or that some other basis for the search existed.[45]

It seems inevitable, however, that warnings would be necessary in most situations if the waiver standard were applied to consent searches.[46]

Furthermore, the Court pointed out that the waiver standard had been applied, "[a]lmost without exception . . . to those rights which the Constitution guarantees to a criminal defendant in order to preserve a fair trial."[47] It concluded that since the fourth amendment has "nothing whatever to do with promoting the fair ascertainment of truth at a criminal trial,"[48] the waiver approach would be misplaced in this context. This conclusion, however, does not withstand analysis.

There are two major policies to be considered in deciding which of the two standards to apply to any constitutional right. *First*, there is the policy of permitting "citizens to choose whether or not they wish to exercise their constitutional rights."[49] The waiver standard was formulated to promote this policy by requiring that a defendant be informed of his constitutional rights before he is allowed to forego them. *Second*, there is the policy of preventing *coercion* of a defendant in derogation of his constitutional rights. The voluntariness test is pri-

---

45. 412 U.S. at 287. He concluded that the effect of the Court's opinion would be to relegate the protection of the fourth amendment to "the sophisticated, the knowledgeable, and . . . the few." *Id.* at 289.

46. "Unless the police undertake some responsibility for advising the person whose cooperation is sought of his rights, there are created the same problems of establishing that a consent to search is 'freely and voluntarily given,' as troubled the courts with confessions and led to the requirements imposed by *Miranda*." MODEL CODE, *Commentary*, at 193.

47. 412 U.S. at 237.

48. *Id.* at 242.

49. *Id.* at 283 (Marshall, J., dissenting). The Court in Miranda v. Arizona, 384 U.S. 436 (1966), implicitly recognized the importance of this policy. Although ostensibly based in terms of preventing coercion, *Miranda* recognized that the presence of counsel at interrogations, required under Escobedo v. Illinois, 378 U.S. 478 (1964), was sufficient to insure that a confession was "not the product of compulsion." 384 U.S. at 466. The warning requirement can be viewed as recognition that the policy of allowing an intelligent choice is equally as important as dispelling coercion.

marily concerned with promoting this policy but the waiver standard also prevents coercion where it interferes with exercise of free choice.[50] The difference in operation of the two standards can best be shown by a comparison of the policies of the fourth and fifth amendments.

Although these two amendments have long been recognized as overlapping and complementing each other,[51] there are distinctions; some are more subtle than their relative importance in ensuring a fair trial, which is the only one drawn by the Court.[52] There are no circumstances under which self incrimination can constitutionally be compelled. The concern of the fifth amendment, then, is with *compulsion.* Logically the voluntariness test was developed in this context to promote the second policy above. But even in this area of concern with coercion, the voluntariness test proved unsatisfactory and was discarded in *Miranda.* The waiver standard with its concommitant warnings was substituted, but still with the primary function of preventing the coercion inherent in all custodial interrogations.[53] The first policy is not applicable to a great extent to the fifth amendment since "no sane person would knowingly relinquish a right to be free of compulsion."[54]

The fourth amendment right to privacy, on the other hand, can forcibly be invaded whenever the police have probable cause and a warrant. Since the ordinary consent search takes place in the defendant's familiar surroundings rather than the inherently coercive atmosphere of police custody, the coercion problem is less prominent.[55]

---

50. "[I]t is just as unconstitutional to search after coercing consent as it is to search after uninformed consent . . . ." 412 U.S. at 282 n.8 (dissenting opinion).

51. *See, e.g.,* Mapp v. Ohio, 367 U.S. 643 (1961); Boyd v. United States, 116 U.S. 616 (1886).

52. *See* text accompanying note 47 *supra.*

53. *Miranda* recognized the importance of the waiver criteria in promoting intelligent choice; *see* note 49 *supra.* But the Court's primary concern in *Miranda* was with *coerced* confessions, and the waiver criteria implicit in the warnings related to the waiver of those rights of which a suspect is informed; not to the waiver of the right to be free of compulsion.

54. 412 U.S. at 281 (dissenting opinion).

55. The Court, in *Schneckloth,* specifically left open the question whether the waiver standard and warnings are required if consent is obtained from a suspect in custody. It noted, however, "that other courts have been particularly sensitive to the heightened possibilities for coercion when the 'consent' to a search was given by a person in custody." *Id.* at 240-41 n.29.

The lower courts have disagreed on the validity of in-custody consent. *Compare* People v. Garcia, 227 Cal. App. 2d 345, 38 Cal. Rptr. 670, *cert. denied,* 379 U.S. 949 (1964), *and* People v. Valdez, 188 Cal. App. 2d 750, 10 Cal. Rptr. 664 (1961), *and* State v. Forney, 181 Neb. 757, 150 N.W.2d 915 (1967), *with* Channel v. United States, 285 F.2d 217 (9th Cir. 1960), *and* Judd v. United States, 190 F.2d 649 (D.C. Cir. 1951), *and* State v. Witherspoon, 460 S.W.2d 281 (Mo. 1970).

Although the Court points out that a defendant's ignorance of his fourth amendment rights is one of the factors to be considered under the voluntariness test,[56] it is a weak concession to the first policy above when the coercion question is the ultimate inquiry.[57] Since the knowledge factor is not conclusive of "coercion," it is difficult to conceive of how a defendant who has no knowledge of his fourth amendment rights and yet who is not coerced under the test, can be said to have *chosen* to forego those rights by consenting to a search. Therefore, the voluntariness test, rejected even in the fifth amendment context where coercion is the main problem, is surely an ill-fitting transplant into the fourth amendment.

The Court argued, however, that it is not the policy of the fourth amendment "to discourage citizens from aiding to the utmost of their ability in the apprehension of criminals."[58] Obviously the encouragement of citizen cooperation, however, cannot override concern for the protection of constitutional rights. Police convenience in conducting searches where there is both insufficient evidence to constitute probable cause for a warrant and no exigent circumstances which allow the warrant to be dispensed with, is an important consideration, but it must not be allowed to deprive citizens of the right to *choose* whether to cooperate or to assert their constitutional rights.

As support for its position that consent is not a waiver in the constitutional sense, the Court argued that the waiver standard is inconsistent with those cases upholding searches based upon the consent of a third party.[59] However, it seems questionable that the recognized validity of third party consent is inconsistent with application of a waiver standard to a defendant's consent. Such searches are upheld on the rationale that by entrusting his property so completely to a third party, the defendant no longer has a justifiable expectation of privacy in the property and that he "assumes the risk" that the third

---

The Model Code provides that any in-custody consent is invalid unless *Miranda* warnings and fourth amendment warnings were given. MODEL CODE § SS 240.2(3).

56. 412 U.S. at 249.

57. The policy of allowing an intelligent choice seems particularly applicable to the fourth amendment if it is assumed that an individual is more likely instinctively to protect the privacy of his *thoughts* without knowledge of his fifth amendment rights to such privacy, than he is to protect the privacy of his *possessions* without knowledge of protection under the fourth amendment.

58. 412 U.S. at 243, *quoting* Coolidge v. New Hampshire, 403 U.S. 443, 488 (1971).

59. "[I]t is inconceivable that the Constitution could countenance the waiver of a defendant's right to counsel by a third party, or that a waiver could be found because a trial judge reasonably, though mistakenly, believed a defendant had waived his right to plead not guilty." 412 U.S. at 246.

party will allow a search.[60] Therefore, the defendant cannot assert the fourth amendment to bar admission of evidence seized in the search, not because his rights were waived by the third party, but because he has relinquished his privacy.[61] The question whether the waiver standard applies to the consent of the third party as a relinquishment of *his own* right to privacy in the property over which he had control remained unresolved in those cases.[62]

It is clear from the foregoing analysis that the voluntariness test for determining the validity of a consent to search is neither required by precedent nor well suited to the policies of the fourth amendment. Even so, the practical effects of the Court's decision may not be felt immediately. However, the use of the consent search device to overcome the warrant and probable cause requirements of the fourth amendment is likely to increase. With voluntariness as the test to be used for challenged searches, it is not difficult to predict that, in many cases, unsophisticated defendants will be held to have "waived" constitutional rights, the existence of which they had no knowledge.

WILLIAM R. SAGE

Environmental Law—Rucker v. Willis: Are Impact Statements for Private Projects That Require Federal Permits an Endangered Species?

The National Environmental Policy Act of 1969 (NEPA)[1] has had a short yet tumultuous history. In declaring a national policy concern-

60. *See* Frazier v. Cupp, 394 U.S. 731 (1969). This rationale is logical when read in conjunction with the "right to privacy" approach to the fourth amendment in Katz v. United States, 389 U.S. 347 (1967).

61. This approach is consistent with the "misplaced trust" cases in which a defendant is unprotected by the fourth amendment in his disclosures to a trusted third party who turns out to be a police informant and who either reports to the police or simultaneously records or transmits his conversations with the defendant. *See, e.g.*, United States v. White, 401 U.S. 745 (1971); Hoffa v. United States, 385 U.S. 293 (1966).

62. The Supreme Court has not been consistent in its justification of third party consents. It initially accepted the rationale that the defendant had made the third party his agent with "apparent authority" to waive his right to privacy. *See* Stoner v. California, 376 U.S. 483 (1964). This "agency" rationale has been thoroughly criticized; *see* Note, 67 COLUM. L. REV., *supra* note 28, at 48-50; Note, 113 U. PA. L. REV., *supra* note 42, at 272-77. *See generally* Hotis, *supra* note 30, at 417-20; Mintz, *supra* note 30, at 49-50; Scurlock, *Basic Principles of the Administration of Criminal Justice with Particular Reference to Missouri Law*, 38 U.M.K.C.L. REV. 167, 205-06 (1970).

1. 42 U.S.C. §§ 4321-47 (1970).