NOTES

CUSTODIAL CONSENTS TO SEARCH IN ALASKA: A WAIVER APPROACH, AT LEAST WHERE MIRANDA WARNINGS ARE ABSENT?

Article I, section 14 of the Alaska Constitution, which restates the fourth amendment to the United States Constitution almost verbatim, provides the people of Alaska with protection against governmental searches and seizures unless a neutral magistrate has issued a warrant based on probable cause prior to the search.[1] Both federal and Alaska courts recognize a firmly established exception to the warrant requirement in cases where an individual consents to a search.[2] Police frequently rely upon the consent search as an investigatory technique because it allows an immediate search and avoids the administrative burdens associated with obtaining a warrant. Additionally, upon obtaining consent, an officer is permitted to search despite the fact that a warrant would be unobtainable due to the lack of probable cause.

Not all forms of apparent consent, however, will result in the individual's loss of constitutional search and seizure protection. Alaska courts place the burden on the prosecution to demonstrate that the

1. Art. I, § 14 of the Constitution of Alaska provides:

> The right of the people to be secure in their persons, houses *and other property,* papers, and effects, against unreasonable searches and seizures, shall not be violated. 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. (emphasis added).

The fourth amendment to the United States Constitution provides:

> 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 person or things to be seized.

U.S. CONST. amend. IV.

2. *E.g.,* United States v. Smith, 308 F.2d 657, 663 (2d Cir. 1962), *cert. denied,* 372 U.S. 906 (1963); Sleziak v. State, 454 P.2d 252, 256 (Alaska), *cert. denied,* 396 U.S. 921 (1969).

consent is "unequivocal, specific and intelligently given, uncontaminated by any duress or coercion."[3] The United States Supreme Court has interpreted the fourth amendment to require a showing "that the consent was, in fact, freely and voluntarily given."[4] In applying article 1, section 14 of the Alaska Constitution, Alaska courts have given careful consideration to federal court interpretations of the fourth amendment, while reserving the freedom to interpret the state constitution more expansively than the federal Constitution.[5]

Although Alaska courts have addressed many of the issues raised by the consent search exception,[6] an important question regarding consent searches in Alaska remains unresolved: what standard should be applied to assess the sufficiency of consent given by one who is in custody but has not yet received Miranda warnings?[7] This note will discuss the progression of the law of consent searches in the federal courts and in Alaska before considering the appropriate standard to apply to custodial consents given in the absence of Miranda warnings. In analyzing the possible standards to apply to such a situation, this note will ultimately focus on the importance of the individual's knowledge of his fourth amendment right to refuse to consent. Finally, as the appropriate solution to this important constitutional question, this

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3. Erickson v. State, 507 P.2d 508, 515 (Alaska 1973) (quoting Rosenthal v. Henderson, 389 F.2d 514, 516 (6th Cir. 1968)).

4. Bumper v. North Carolina, 391 U.S. 543, 548 (1968).

5. *See* State v. Glass, 583 P.2d 872, 876 (Alaska 1978).

6. Several of these cases are discussed *infra* at notes 34-60 and accompanying text.

7. Miranda v. Arizona, 384 U.S. 436 (1966), requires in essence that police officers advise an individual of his fifth and sixth amendment rights prior to custodial interrogation.

A recent Alaska Court of Appeals decision, Brown v. State, 684 P.2d 874 (Alaska Ct. App. 1984), provides the Alaska Supreme Court an opportunity to decide this issue. The majority of the Court of Appeals found that Brown had voluntarily consented to the search of a motel room. Brown had been stopped and frisked by an officer of the Anchorage Police Department, and was not given Miranda warnings prior to consenting to the search. The court cited Schneckloth v. Bustamonte, 412 U.S. 218 (1973), in its analysis of the consent, stating that "[i]n assessing whether a consent was voluntary, all the surrounding circumstances must be considered," and noted that "[t]emporary custody, standing alone, does not invalidate a subsequent consent to search." *Brown,* 684 P.2d at 880. The court did not discuss the standards set forth for the analysis of custodial consents in Sleziak v. State, 454 P.2d 252 (Alaska), *cert. denied,* 396 U.S. 921 (1969), and Pistro v. State, 590 P.2d 884 (Alaska 1979), because it apparently accepted the trial court's conclusion that Brown was not in custody. The dissent's conclusion that Brown was in custody is, however, arguably more consistent with Alaska's treatment of the question of custody. *See* Hunter v. State, 590 P.2d 888 (Alaska 1979). The Alaska Supreme Court will have an opportunity to rule on the appropriate standard for assessing custodial consents given in the absence of Miranda warnings only if it refuses to accept the trial court's conclusion that Brown was not in custody.

note will suggest the adoption of a waiver standard, requiring that the consenter be shown to have known of his right to refuse to consent before he can be held to have relinquished it.

I. THE FEDERAL CONSENT STANDARD: WAIVER APPROACH REJECTED BY THE UNITED STATES SUPREME COURT

As noted by Professor Wayne LaFave, the distinction between *waiver* of a known right and *voluntariness* is crucial to the assessment of consent:

> [I]f a consent search is a matter of waiver, then the consent would be effective only upon a showing that the individual who purportedly consented *knew* that he had a right to refuse consent. On the other hand, if voluntariness is the test then the question is whether the person made a *free choice,* which does not inevitably require such a showing [of knowledge].[8]

Despite the significance of the distinction between waiver and voluntariness, early United States Supreme Court decisions supported conflicting conclusions as to whether an individual had to know of his fourth amendment rights and effectively waive them in order to give a valid consent to search. In *Johnson v. United States,*[9] the Court held that the defendant's compliance with a police officer's demand to open her hotel room door was not "an understanding and intentional waiver of a constitutional right."[10] The *Johnson* Court's language was similar to the Court's classic definition of waiver as "an intentional relinquishment or abandonment of a known right or privilege."[11] Two other Supreme Court cases decided shortly before *Johnson* did not, however, rely solely on an explicit waiver approach. In *Davis v. United States*[12] and *Zap v. United States*[13] the Court comingled elements of both waiver and voluntariness in finding a valid consent.[14]

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8. 2 W. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 8.1(a), at 612-13 (1978).

9. 333 U.S. 10 (1948).

10. *Id.* at 13.

11. Johnson v. Zerbst, 304 U.S. 458, 464 (1938) (involving an alleged waiver of right to counsel protected by sixth amendment).

12. 328 U.S. 582 (1946).

13. 328 U.S. 624 (1946).

14. In *Davis,* the defendant was convicted of violating wartime gasoline rationing regulations on the basis of evidence discovered during a search of the defendant's business premises. The Court discussed the issue of the validity of the consent in terms resembling an evaluation of the totality of the circumstances. In considering the totality of the circumstances, the Court implied that the determination of consent revolved around the issue of voluntariness or lack of coercion, yet the Court based its decision on the fact that the evidence was property of the government that was subject to inspection at any time. 328 U.S. at 593-94. The validity of a consent where private property is involved was not considered. In *Zap,* the Court again discussed the totality of the circumstances, yet rested its conclusion that the defendant had consented

The Supreme Court's approach remained unclear in the wake of *Bumper v. North Carolina,*[15] in which the Court avoided use of the term "waiver," and demanded instead that the consent be "freely and voluntarily given."[16] While *Bumper* may thus have foreshadowed the Court's adoption of a voluntariness standard for evaluating consents, it failed to provide solid authority for that proposition because the Court limited its holding to cases in which an individual has given consent "only after the official conducting the search has asserted that he possesses a warrant."[17]

In *Schneckloth v. Bustamonte*[18] the Court unequivocally adopted a voluntariness approach to assessing the validity of consent given by one *not* in custody. Equating a waiver of fourth amendment rights with consent, the Ninth Circuit, in its *Schneckloth* decision, had demanded a showing that the defendant knew of his right to withhold consent before he could be held to have waived his fourth amendment rights.[19] The Supreme Court, however, declined to adopt an absolute requirement that knowledge be shown in order to validate the consent.

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upon the defendant's "voluntary waiver" of his fourth and fifth amendment rights. 328 U.S. at 628.

15. 391 U.S. 543 (1968). In *Bumper,* the Court invalidated a consent given by the defendant's grandmother to several officers who claimed to possess a search warrant. The state produced no warrant either at the time of the search or at trial.

16. *Id.* at 548.

17. *Id.*

18. 412 U.S. 218 (1973). Bustamonte was a passenger in a car stopped by police for minor traffic violations. When another of the passengers consented to a search of the car, the officers found stolen checks that were later used as evidence against Bustamonte. The search would have been held illegal for lack of probable cause in the absence of consent.

19. 448 F.2d 699 (9th Cir. 1971), *rev'd,* 412 U.S. 218 (1973). Significantly, the Ninth Circuit's holding did not demand that police inform the defendant of his fourth amendment rights. The court believed that the existence of knowledge could be demonstrated by means other than an explicit warning. California courts had "reasoned that the mere request for consent carries with it an implication that consent may be withheld and that knowledge of this implication may be inferred from assent." *Id.* at 700. The Ninth Circuit found this "mere verbal assent" to be an inadequate demonstration of knowledge. *Id.* at 700-01.

Justice Marshall in his dissenting opinion in *Schneckloth* noted several means, apart from an express advisement of fourth amendment rights, of demonstrating knowledge of the right to refuse to consent to a search:

> [T]here are several ways by which the subject's knowledge of his rights may be shown. The subject may affirmatively demonstrate such knowledge by his responses at the time the search took place. . . . Denials of knowledge may be disproved by establishing that the suspect had, in the recent past, demonstrated his knowledge of his rights, for example, by refusing entry when it was requested by the police. The prior experience or training of the subject might in some cases support an inference that he knew of his right to exclude the police.

412 U.S. at 286.

Instead, the Court embraced a totality of the circumstances test, in which knowledge of the right to refuse to consent is only one factor to be considered in evaluating the validity of a consent.[20]

Borrowing from cases analyzing the voluntariness of confessions, the Court in *Schneckloth* found it appropriate to consider a myriad of factors involving both the character of the accused and any potentially coercive police behavior during the interrogation in order to determine whether consent was voluntarily given.[21] Most significantly, the Court noted that "[w]hile 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."[22] This rejection of an absolute knowledge requirement is based largely on the Court's perception that in most cases the state would be unable to meet the prosecutorial burden of demonstrating knowledge.[23] The Court considered requiring that a subject be advised of his right to refuse to consent before the police could attempt to elicit his consent. This requirement would have guaranteed the concept of actual knowledge a prominent and easily demonstrable role in consent analysis. The Court concluded, however, that it was "thoroughly impractical" to burden the police in their exercise of the standard investigatory technique of a consent search with the requirement that police deliver an "effective warning" to the accused regarding his fourth amendment rights.[24]

The Court distinguished cases in which it had demanded a knowing and intelligent waiver of other constitutional rights as involving "rights which the Constitution guarantees to a criminal defendant in order to preserve a fair trial."[25] The Court felt that although the reliability of testimonial evidence obtained under coercive conditions is open to question, physical evidence retains the same degree of reliability regardless of how it is obtained. The Court deemed a waiver standard necessary to uphold those constitutional provisions bearing directly on the integrity of the trial process.[26] In contrast to this truth-ascertainment function of certain constitutional provisions, the Jus-

20. *See* 412 U.S. at 226, 248-49.

21. 412 U.S. at 225-27.

22. *Id.* at 227. Thus, under the Court's totality approach, "knowledge or lack of knowledge is merely one of the constituent factors in the ultimate voluntariness equation." C. MAYLON, JR., THE RIGHT OF THE PEOPLE TO BE SECURE 170 (1977).

23. *Schneckloth,* 412 U.S. at 230.

24. *Id.* at 230-31. The Court's consideration and assessment of fourth amendment "warnings" distorts the burden on the police by failing to recognize the existence of other methods of proving a defendant's knowledge of his right to refuse to consent. *See supra* note 19.

25. *Id.* at 237.

26. For example, this "knowing and intelligent waiver" standard has been ap-

tices viewed the fourth amendment "as a protection of quite different constitutional values — values reflecting the concern of our society for the right of each individual to be let alone."[27] The Court, therefore, did not consider a waiver standard necessary to protect the interests guaranteed by the fourth amendment.

The *Schneckloth* Court confined its holding to cases in which an individual has given consent while not in police custody. The majority expressly reserved judgment on the standard to be applied to a challenged consent given by one in custody:

> [T]he present case does not require a determination of the proper standard to be applied in assessing the validity of a search authorized solely by an alleged consent that is obtained from a person after he has been placed in custody. We do note, 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.[28]

The Court's recognition of the possible application of more stringent standards to custodial consents caused some observers to predict that the Court would eventually demand a showing of knowledge of the right to refuse to consent in such cases.[29] An analogy to one of the principal rationales behind the *Miranda* decision provided support for this assertion. *Miranda* found the distinction between "inherently coercive" custodial police contacts and noncustodial police contacts to be of constitutional significance; the coercive nature of the custodial situation demanded greater protection of the constitutional rights involved.[30] Although the *Schneckloth* Court found an explicit waiver of fourth amendment rights unnecessary based on the substantive difference between rights designed to protect the fairness of the trial process and fourth amendment concerns, *Schneckloth* had not involved a custodial search.[31] The *Schneckloth* Court's opinion thus left room for

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plied to test the validity of a waiver of counsel, the waiver of one's right to a jury trial, and the waiver of one's right to a speedy trial. *Id.* at 237-38 (citations omitted).

27. *Id.* at 242 (quoting Tehan v. United States *ex rel.* Shott, 382 U.S. 406, 416 (1965)).

28. *Id.* at 240 n.29 (citations omitted). *See also id.* at 248, where the Court states:

> Our decision today is a narrow one. 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. (emphasis added).

29. *See* Note, *Search and Seizure—Knowledge of Fourth Amendment Rights Not a Prerequisite to Valid Consent Search—Schneckloth v. Bustamonte,* 8 U. RICH. L. REV. 359, 365 (1974); Comment, *Consent Searches: A Reappraisal After Miranda v. Arizona,* 67 COLUM. L. REV. 130, 158 (1967). *See also* United States *ex rel.* Lundergan v. McMann, 417 F.2d 519, 521 (2d Cir. 1969).

30. Miranda v. Arizona, 384 U.S. 436, 467-68 (1966).

31. *See supra* text accompanying notes 25-27.

debate as to whether the custodial coercion recognized in *Miranda* would create a demand that the government demonstrate an individual's knowledge of his right to refuse to consent in a custodial search situation.

The Court made clear, however, in *United States v. Watson*[32] that it considered the *Schneckloth* totality test adequate for assessing in-custody consents. The Court found that Watson, who was given Miranda warnings and was advised that the fruits of the search could be used against him, had voluntarily consented. In applying the *Schneckloth* totality test, the Court found no need to accord greater weight to the question of knowledge of the right to refuse to consent when the factor of custody was added to the calculus:

> [T]he fact of custody alone has never been enough in itself to demonstrate a coerced confession or consent to search. Similarly, under *Schneckloth,* the absence of proof that Watson knew he could withhold his consent, though it may be a factor in the overall judgment, is not to be given controlling significance.[33]

II. ALASKA'S APPROACH TO CUSTODIAL CONSENTS TO SEARCH

The first Alaska case concerned with the sufficiency of a defendant's consent was *Sleziak v. State.*[34] *Sleziak,* which set forth a standard apparently designed to apply to both custodial and noncustodial consents, adopted the reasoning of *Gorman v. United States,*[35] quoting the First Circuit's opinion in that case at length. An analysis of the *Gorman* court's rationale is therefore crucial to a thorough understanding of the Alaska Supreme Court's decision in *Sleziak.*

In *Gorman,* a New York City police officer arrested the defendant, took him to police headquarters, and advised him of his Miranda

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32. 423 U.S. 411 (1976), *reh'g denied,* 424 U.S. 979 (1976).

33. *Id.* at 424.

Custodial consents have been examined by the United States Supreme Court on two significant occasions since *Watson.* In United States v. Mendenhall, 446 U.S. 544 (1980), the Court upheld the government's claim that a suspected drug courier's removal of her clothing and consequent exposure of a controlled substance was a consensual act. Even facts that indicated the suspect was not free to leave did not prevent the Court from reaching that conclusion. In Florida v. Royer, 460 U.S. 491 (1983), the Court found a suspect's consent to the opening of his luggage to have been tainted by the circumstances of his arrest and thus invalidated the consent. Without probable cause, police officers had involuntarily confined the defendant in a small room prior to his consent to the search. Interestingly, the Court paid particular attention to the fact that the suspect was not advised of his right to refuse to consent. Yet nothing stated in *Royer* would indicate that the rationale of *Watson,* as drawn from *Schneckloth,* is of diminished significance.

34. 454 P.2d 252 (Alaska), *cert. denied,* 396 U.S. 921 (1969). The state's evidence in *Sleziak* consisted principally of a gun that Sleziak allegedly had permitted officers to retrieve from his home.

35. 380 F.2d 158 (1st Cir. 1967).

rights before an FBI agent asked him if he had any objection to a search of his motel room.[36] The defendant consented to the search.[37] After noting that "since arrest carries its own aura of coercion, the burden on the government to show voluntary consent is 'particularly heavy,' "[38] the court set about the business of determining whether Gorman's consent was valid. The court held that:

> [W]hen the accused is directly asked whether he objects to the search, there must be at least some suggestion that his objection is significant or that the search waits upon his consent. When this is combined with a warning of his right to be silent, and his right to counsel, which would seem in the circumstances *to put him on notice* that he can refuse to cooperate, we think it fair to infer that his purported consent is in fact voluntary.[39]

The *Gorman* court found an explicit warning of fourth amendment rights unnecessary based on the rationale subsequently adopted by the Supreme Court in *Schneckloth.*[40] In addition, the court did not demand proof of *actual* knowledge of the specific right to refuse to consent. Instead, the majority found that the notice regarding a suspect's general right of noncooperation[41] imparted by Miranda warnings would adequately advise individuals of their fourth amendment rights.[42] "[T]hat things which might be found in a search could be used against an accused seems implicit in the warnings of the right to remain silent. . . ."[43] The *Gorman* court reasoned that the fifth amendment warnings combined with the request for permission to search gave the defendant *constructive* knowledge of his specific right to refuse to consent.[44]

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36. *Id.* at 161.

37. *Id.*

38. *Id.* at 163 (quoting Judd v. United States, 190 F.2d 649, 651 (D.C. Cir. 1951)).

39. *Id.* at 163-64 (emphasis added).

40. *Id.* at 164; *see* text accompanying notes 26-27.

41. *See supra* note 39 and accompanying text.

42. *Gorman* "implies that the fourth and fifth amendments overlap. The fifth amendment warning against self-incrimination is apparently sufficiently encompassing to protect fourth amendment guarantees." Note, *Schneckloth v. Bustamonte: The Question of Noncustodial and Custodial Consent Searches,* 66 J. CRIM. L. & CRIMINOLOGY 286, 300 n.142 (1975). The *Gorman* court recognized this overlap, at least for notice purposes, when it rejected the idea that the fourth amendment covers "a different order of risks" than that covered by the threshold fifth amendment warning. 380 F.2d at 164.

43. *Gorman,* 380 F.2d at 164.

44. The fifth amendment warnings do not inform an individual of his right to refuse *to consent to the search,* and thus should not satisfy a waiver standard. The *Gorman* and *Sleziak* courts apparently reasoned otherwise, since *Gorman* recognized the necessity of satisfying a waiver standard. The advisement of fifth amendment rights might, however, carry with it a negative implication regarding fourth amendment rights. This notion was explored in commentary following *Schneckloth:*

In relying on a finding that the defendant had at least constructive knowledge of his right to refuse to consent, the *Gorman* court expressed the concern that some level of knowledge of a right to refuse be attributable to the purported consenter before the consent could be valid. In addition, the *Gorman* court quoted the classic "knowing and intelligent waiver" language used in *Johnson v. Zerbst,*[45] when listing the "ground rules" for finding a valid consent.[46] This citation indicates that the *Gorman* court formulated a standard that preserved an inviolate, if somewhat unorthodox, role for knowledge in the evaluation of consents.

As previously mentioned, the Alaska Supreme Court applied the *Gorman* rationale in *Sleziak v. State.*[47] In *Sleziak,* the consenting individual was neither under arrest nor a prime suspect, yet he had been requested to come to police headquarters for questioning and had been advised of his basic Miranda rights prior to giving the alleged consent.[48] The majority noted that the defendant's awareness of his fifth amendment rights and the lack of extraordinarily coercive police behavior made it "not unreasonable to conclude that [the defendant] was put on notice that he could refuse to cooperate with the law enforcement authorities."[49] The court did not see an explicit "Miranda-type warning as to fourth amendment rights" as a necessary prerequisite to consent.[50] The court did, however, reserve an important question for future determination: "When presented with a factual situation in which no warning of fifth or sixth amendment rights have been given

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> Although the *Gorman* approach perceives the fourth and fifth amendments as having different purposes, many courts continue to hold that Miranda warnings coupled with the request for permission to search are all that is required to validate a custodial consent search. The theory is that the warnings and the request for permission give the defendant constructive knowledge that he may refuse to consent. This may be true, yet the theory can just as easily cut the other way. The accused might reason that, since he has been told that he has a right to remain silent and a right to a lawyer and since he has not been told that he can refuse the search, he therefore must allow it. Or, he might simply perceive the request to search as a "formality."

Note, *supra* note 42, at 300 (footnote omitted).

45. 304 U.S. 458, 464 (1938), noting that a waiver consisted of "an intentional relinquishment or abandonment of a known right or privilege."

46. 380 F.2d at 163.

47. 454 P.2d at 258-60.

48. The police made no "arrest," and the court's opinion lacks any significant discussion of the role played by custody. But in light of the important roles that the giving of Miranda warnings, which are based on the theory that custody is inherently coercive, and the First Circuit's opinion in *Gorman,* which involved a custodial situation, played in the Alaska Supreme Court's decision, it is reasonable to conclude that the court intended the *Sleziak* standard of voluntariness to apply to custodial situations.

49. 454 P.2d at 258.

50. *Id.* at 258-59.

prior to the obtaining of consent, we will re-examine the question of whether advisement of fourth amendment rights is a necessary prerequisite to a valid consent to search."[51]

Following the lead provided by the United States Supreme Court in *Schneckloth,* the Alaska Supreme Court in *Frink v. State* [52] partially resolved the question it had reserved in *Sleziak.* In *Frink,* the defendant challenged the validity of his noncustodial consent to a search of his car.[53] The court stated, "[Defendant] argues that the state, to show consent, must specifically prove that he knew of his right to refuse to allow the search. The Court in *Schneckloth* rejected that argument, and we do not believe that the Alaska Constitution requires a different standard for noncustodial consent searches."[54] In a footnote, the court limited its adoption of the *Schneckloth* totality approach to noncustodial situations, specifically not addressing "whether a different standard would be appropriate in assessing the validity of a consent to search obtained from a person who is in custody."[55]

In *Pistro v. State,*[56] the Alaska Supreme Court demonstrated that it was still applying the *Sleziak* standard to custodial consents that followed Miranda warnings. Pistro consented to a search after receiving Miranda warnings under circumstances clearly indicating that he was in custody.[57] The court quoted *Gorman* before stating: "In *Sleziak,* we developed our own test for consent, under which a defendant will be held to have consented voluntarily, unequivocally and intelligently to a search if, under the circumstances, it is reasonable to conclude that he was 'put on notice that he could refuse to cooperate with law enforcement authorities.' "[58] *Pistro* confirms that the *Sleziak-Gorman* "constructive knowledge" approach remains operative in

51. *Id.* at 259-60.

52. 597 P.2d 154 (Alaska 1979).

53. The defendant was convicted of first-degree murder, partially on the basis of evidence recovered from his car. *Id.* at 159-60. At the time of the search, the defendant had not been read his Miranda rights. *Id.* at 160.

54. *Id.* at 169.

55. *Id.* at 167 n.25.

56. 590 P.2d 884 (Alaska 1979).

57. The consent in *Pistro* was obtained after the individual being questioned had been taken by a police officer to his patrol car. *Id.* at 887 n.12. Additionally, the officer had informed him that he was "under suspicion of grand larceny." *Id.* at 885. The Ninth Circuit stated in United States v. Bekowies, 432 F.2d 8, 12 (9th Cir. 1970), that:

> [A] suspect will be held in custody if the actions of the interrogating officers and the surrounding circumstances, fairly construed, would reasonably have led him to believe he could not leave freely.

(citing Lowe v. United States, 407 F.2d 1391, 1397 (9th Cir. 1969)). The Alaska Supreme Court adopted this objective test in Hunter v. State, 590 P.2d 888 (Alaska 1979), on the same day it decided *Pistro.*

58. 590 P.2d at 887 (quoting *Sleziak,* 454 P.2d at 258).

Alaska for in-custody consents.[59]

Although the Alaska Supreme Court in *Frink* adopted *Schneckloth's* totality approach with regard to noncustodial consents, Alaska has yet to embrace the Supreme Court's holding in *Watson* by expressly applying *Schneckloth* to custodial consents as well as noncustodial consents. The *Sleziak* approach, which remains applicable to custodial consents, has been employed only to determine that the presence of Miranda warnings was *sufficient* to allow a finding of voluntariness. The question of whether a lack of both Miranda warnings and fourth amendment warnings renders a custodial consent *insufficient* is an issue that has remained undecided since it was reserved in *Sleziak*. The case of *Brown v. State*[60] provides the Alaska Supreme Court with an opportunity to resolve the question, making a discussion of Alaska's standard and the possible alternatives particularly timely.

III. THE ALTERNATIVE STANDARDS FOR ALASKA'S EVALUATION OF CUSTODIAL CONSENTS ABSENT PRIOR MIRANDA WARNINGS

Three methods of approaching a custodial consent given without Miranda warnings are plausible:[61] (1) using the totality of the circumstances approach applied in *Watson*; (2) using the test set forth in *Sle-*

59. In situations such as that in Hubert v. State, 638 P.2d 677 (Alaska 1981), where both custody and Miranda warnings are present, a finding of voluntariness without explicit statements by the court as to which analysis it used does not indicate whether the *Sleziak* constructive knowledge test or the federal totality standard was applied, since on most facts the two approaches will lead to the same conclusion. In Gray v. State, 596 P.2d 1154, 1158 n.18 (1979), the Alaska Supreme Court indicated in dicta that it considers the federal approach applicable to consent given by an individual who has received Miranda warnings. This dicta might be taken as an assertion that the federal standard is applicable to custodial consents, although the court did not discuss whether the individual had been in custody. Considering, however, the absence of any custody discussion, the lack of any citation to *Watson,* and the fact that the court's comments consisted merely of dicta contained in a footnote, it appears on the basis of *Pistro* that custodial consents in Alaska continue to be governed by the *Sleziak* standard.

60. 684 P.2d 874 (Alaska Ct. App. 1984). *See supra* note 7 for a discussion of the issue presented in *Brown.*

61. Other alternative standards exist, but appear less plausible: (1) The court could declare that a suspect's consent given while in custody and in the absence of Miranda warnings is per se invalid. This approach was adopted in Schorr v. State, 499 P.2d 450 (Okla. Crim. App. 1972), *overruled in part,* Rowbotham v. State, 542 P.2d 610 (Okla. Crim. App. 1975), but has been rejected in the vast majority of jurisdictions. The recognition of an overlap between fourth and fifth amendment rights, relied on in *Gorman* for the purpose of creating constructive notice of fourth amendment rights, will likely not be relied on as the basis for a demand that Miranda warnings be given as part of a valid consent. This conclusion is buttressed by

ziak and *Pistro,* with reliance on factors other than a fifth amendment warning to demonstrate constructive knowledge of a right to refuse; and (3) requiring that the individual giving consent waive his right to refuse consent, as demonstrated either by fourth amendment warnings or an awareness of fourth amendment rights prior to consent.

A. The *Watson* Approach

Both the Ninth Circuit Court of Appeals and the United States Supreme Court opinions in *Watson* demonstrate the application of a totality test that considers custody along with many other factors in seeking to determine whether the search was a result of undue coercion rather than voluntary consent.[62] The differential importance accorded the factor of custody by each of the courts in *Watson,* particularly with respect to the effect of custody on the defendant's knowledge of his right to refuse,[63] accounts for the courts' different conclusions on the consent issue. The Supreme Court did not allow the lack of knowledge to assume controlling significance in the custo-

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Gorman's finding that "the rules governing searches are [not concerned] with the exclusion of unreliable evidence . . . or with the exclusion of self-incriminatory statements. . . ." 380 F.2d at 164. (2) The court could conceivably conclude that custodial and noncustodial consents are to be treated in precisely the same manner, thus not even considering custody as a factor amongst the totality of circumstances. The Fifth Circuit adopted this approach in United States v. Garcia, 496 F.2d 670 (5th Cir. 1974), *cert. denied,* 420 U.S. 960 (1975). Alaska appears unlikely to adopt this approach given *Sleziak's* use of the *Gorman* reasoning, which was based in part on an acknowledgement of the added coercion inherent in an arrest situation. (3) The court could conceivably adopt the approach taken in State v. Johnson, 68 N.J. 349, 346 A.2d 66 (1975), which held that under New Jersey's constitution, knowledge of a right to refuse is an essential element of voluntariness in all consents to search. This appears extremely unlikely, as it would require overruling *Frink* by imposing a waiver standard, rather than the *Schneckloth* totality test, for noncustodial as well as for custodial consents.

62. *See* 504 F.2d 849, 853 (9th Cir. 1974), *rev'd,* 423 U.S. 411 (1976), *reh'g denied,* 424 U.S. 979 (1976); *infra* note 63.

63. The Ninth Circuit, although employing a balancing test, had accorded more significance to the defendant's knowledge of his right to refuse the request to search in the custodial situation than did the United States Supreme Court. The Ninth Circuit stated:

> Here, we find that the totality of circumstances strongly suggests coercion. Appellant had been placed under arrest and was in custody at the time that he gave the officers permission to search his car. . . . [N]othing indicates that Watson knew or was advised of his right not to consent to the search of his automobile. Hence, in light of *Schneckloth* . . . we hold that the in-custody search of the appellant was invalid, and the fruits of the search should have been suppressed.

504 F.2d 849, 853 (9th Cir. 1974). The Ninth Circuit also cited with approval the statement in United States v. Rothman, 492 F.2d 1260, 1264 n.1 (9th Cir. 1973), that "[a]rrest is but one factor, *albeit a critical one,* in determining whether or not the consent was voluntary." 504 F.2d at 853 (emphasis added).

dial situation, and regarded custody merely as an additional factor to be included in the basic *Schneckloth* totality test.[64]

An analysis of the wisdom of the *Watson* approach, which gives less than controlling significance to the defendant's knowledge of his fourth amendment rights,[65] necessitates an inquiry into the proper role of knowledge in the custodial situation. Commentary that followed the Supreme Court's treatment of knowledge in *Schneckloth* provides insight into the knowledge question in general. In discussing *Schneckloth,* LaFave points out:

> The Court quite correctly says that the protections of the Fourth Amendment have to do with privacy rather than accuracy in the guilt-determination process, but it is never explained why unwitting surrender of the right to privacy should not be a matter of concern. It is denied that 'a search . . . is somehow unfair' if a person consents to a search, but this is a nonsensical observation when used to resolve the very meaning of the word consent. Of course there is nothing unfair about the police searching in response to a voluntary and knowing relinquishment of Fourth Amendment protections. But if, as assumed by the *Schneckloth* majority, 'consent' may be present even when the consenting party is ignorant of his Fourth Amendment rights, then it is difficult to see how it can be concluded that a search pursuant to such a consent is not 'unfair' but rather an event in which 'the community has a real interest.'[66]

The *Schneckloth* Court was particularly concerned with preserving the value of the consent search as an effective investigatory device for the police.[67] Commentators have expressed concern that the balance struck by the totality approach sacrifices too much in the way of individual rights to achieve this end,[68] particularly since "[t]he fourth

64. 423 U.S. at 424-25. Most states considering custodial consents to search since *Watson* have adopted *Watson's* rationale, as demonstrated by the approach of the Oregon Supreme Court in State v. Flores, 280 Or. 273, 570 P.2d 965 (1977). The Oregon Supreme Court declined to interpret its relevant constitutional provision "more strictly than the United States Supreme Court interpreted the Fourth Amendment in *United States v. Watson.* . . ." *Id.* at 282, 570 P.2d at 970 (citation omitted).

65. *See supra* text accompanying note 33.

66. LAFAVE, *supra* note 8, § 8.1, at 617-18.

67. *See supra* text accompanying notes 22-24. *See also* Schneckloth v. Bustamonte, 412 U.S. 218, 243 (1973), where the Court states: "We have only recently stated: '[I]t is no part of the policy underlying the Fourth and Fourteenth Amendments to discourage citizens from aiding to the utmost of their ability in the apprehension of criminals.' " (quoting Coolidge v. New Hampshire, 403 U.S. 443, 488 (1971)).

68. *See* Note, *Consent Searches and the Fourth Amendment: Voluntariness and Third Party Problems,* 5 SETON HALL L. REV. 211, 251-52 (1974). Justice Marshall's dissent in *Schneckloth,* 412 U.S. at 290, also saw the totality approach as an unjustified sacrifice of individual rights: "The Framers of the Fourth Amendment struck the balance against this sort of convenience and in favor of basic civil rights. It is not for this Court to restrike that balance because of its own views of the needs of law enforcement officers."

amendment has long been recognized as creating fundamental rights designed to protect the privacy of individuals."[69] The Supreme Court noted in *Glasser v. United States*[70] that in order to protect the rights guaranteed by the Bill of Rights "we indulge every reasonable presumption against waiver of fundamental rights." The fundamentality of fourth amendment rights should seemingly assure that a *knowing* rather than merely an *uncoerced* consent to search will be demanded before the right will be considered waived.[71]

The concessions made to governmental interests by *Schneckloth's* totality test are even less palatable in the custodial situation.[72] The giving of a warning would not interrupt the investigatory "flow" to the same degree as in a noncustodial situation, since the police are in control of the pace of events once the suspect is in custody. "Moreover, the likelihood of the police having probable cause to obtain a search warrant is greater at this stage, and if [a court] will not go so far as to demand that they adhere to the requisite judicial process, it should at least be more exacting in its demands for a valid consent. Strict waiver standards would seem appropriate."[73]

The United States Supreme Court failed to address any of these arguments when it determined in *Watson* that custody is merely an additional, non-controlling factor in the totality equation. The Court found only that to demand that an arrestee be informed of his right to withhold consent "would not be consistent with *Schneckloth* and

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69. Note, *The Doctrine of Waiver and Consent Searches,* 49 NOTRE DAME LAW. 891, 898 (1974). *See* Katz v. United States, 389 U.S. 347 (1967); Gouled v. United States, 255 U.S. 298 (1921).

70. 315 U.S. 60, 70 (1942) (defendant in conspiracy case deprived of fundamental right to effective assistance of counsel when codefendant's counsel was appointed to represent him over defendant's objection).

71. The New Jersey Supreme Court adopted the position suggested by this argument, demanding that knowledge of the right to refuse be shown as a prerequisite to both custodial and noncustodial consents:

> We conclude that under Art. I, par. 7 of our State Constitution [covering searches and seizures] the validity of a consent to a search, even in a noncustodial situation, must be measured in terms of waiver; i.e., where the State seeks to justify a search on the basis of consent it has the burden of showing that the consent was voluntary, an essential element of which is knowledge of the right to refuse consent.
>
> Many persons, perhaps most, would view the request of a police officer to make a search as having the force of law. Unless it is shown by the State that the person involved knew that he had the right to refuse to accede to such a request, his assenting to the search is not meaningful. One cannot be held to have waived a right if he was unaware of its existence.

State v. Johnson, 68 N.J. 349, 353-54, 346 A.2d 66, 68 (1975).

72. LAFAVE, *supra* note 8, § 8.2, at 669, states: "[T]he reasoning in *Schneckloth* concerning the practical considerations does not carry over to the case in which the party whose consent is sought is then in police custody."

73. Note, *supra* note 69, at 904-05.

would distort the voluntariness standard that we reaffirmed in that case."[74] The *Watson* approach allows a court to hold that a defendant who had absolutely no knowledge of his right to refuse had consented "voluntarily."[75] It essentially adopts the notion that fourth amendment rights are to be protected from loss through coercion, but not from loss by unknowing surrender.

Alaska courts have, however, found a place for knowledge — albeit constructive knowledge — in the assessment of consents to search. Because Alaska courts chose to apply the *Gorman* rationale to custodial searches, those courts have attributed constructive knowledge of fourth amendment rights to the defendant when Miranda warnings preceded a request for permission to search.[76] Thus, a showing of knowledge in some form has played a significant role in determining the voluntariness of custodial consents. The *Watson* approach renders the knowledge element theoretically expendable. Accordingly, adoption of the *Watson* approach would represent a retrenchment in terms of privacy guarantees under the Alaska Constitution.

B. The *Sleziak-Pistro* Constructive Knowledge Approach

In *Sleziak,* the Alaska Supreme Court attached particular importance to the presence of Miranda warnings and to a request for permission to search in finding that the defendant had constructive knowledge of his right to refuse to consent to a search. *Sleziak* and *Gorman* present a standard that falls between the *Watson* approach and a more conventional waiver test. *Sleziak* does not demand a showing that the purported consenter had actual knowledge of his fourth amendment rights.[77] Yet *Sleziak* and *Pistro's* requirement that the individual have been "put on notice" of his right to refuse to cooperate with the police[78] clearly demonstrates a desire that some level of knowledge regarding the right to withold consent, even if only constructively attributed to the individual, be demonstrated in order to validate the consent.[79] While the courts have previously used this intermediate position in cases where Miranda warnings *have* been given, use of the approach becomes more problematic in a custodial setting where such warnings have not been given. Does a request for permission to search

74. 423 U.S. at 425.

75. Justice Marshall's dissent in *Schneckloth,* 412 U.S. at 289 n.13, stated: "The Court's half-hearted defense, that lack of knowledge is to be 'taken into account,' rings rather hollow, in light of the apparent import of the opinion that even a subject who proves his lack of knowledge may nonetheless have consented 'voluntarily,' under the Court's peculiar definition of voluntariness."

76. *See* text accompanying notes 40-46, 56-59.

77. 454 P.2d 252, 258-59 (Alaska), *cert. denied,* 396 U.S. 921 (1969).

78. *See supra* text accompanying note 58.

79. *See supra* text accompanying notes 40-46.

impart sufficient knowledge, in the absence of Miranda warnings, to permit a finding that the consenting individual has been adequately advised of his fourth amendment right to refuse to consent?[80] If a request alone is not sufficient, what will constitute adequate constructive notice of the right, absent the explicit notice regarding the right to be uncooperative imparted by Miranda warnings?

The language of the *Sleziak* test leaves room for the argument that factors other than Miranda warnings can put the individual on notice that he can refuse to cooperate, and thus put him on constructive notice of his fourth amendment rights.[81] It is difficult, however, to imagine any circumstances or statements, short of an explicit fourth amendment warning, that would be as effective as Miranda warnings in conveying the option of noncooperation to an individual in custody. An even more attenuated connection between consent and knowledge would be sanctioned if courts allowed other circumstances or statements to supplant the giving of Miranda warnings in showing constructive knowledge. Consequently, application of *Sleziak's* test to custodial situations where Miranda warnings have not been given would represent an erosion of the protections currently provided pursuant to article 1, section 14 of the Alaska Constitution.

C. A Waiver Approach

A waiver approach would demand that an individual be shown to have known of the existence of his fourth amendment rights before he

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80. An individual's assent to such a request would not qualify as a waiver. *See* the pre-*Schneckloth* analysis in Cipres v. United States, 343 F.2d 95, 97 (9th Cir. 1965) (applying a waiver standard to an individual's consent to a search of her luggage). The Ninth Circuit's *Schneckloth* opinion, applying a waiver analysis, addressed the issue of implied consent:

> It would appear that the California courts, in addition to finding that the atmosphere was not coercive, have relied entirely on the verbal expression of assent. They have reasoned that the mere request for consent carries with it an implication that consent may be withheld and that knowledge of this implication may be inferred from assent. Yet, as we have noted, mere verbal assent is not enough. Further, in our view, the "implication" apparently relied on by the California courts can hardly suffice as a general rule. 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.

448 F.2d 699, 700-01 (9th Cir. 1971), *rev'd,* 412 U.S. 218 (1973). The Supreme Court's opinion did not have to address this question, as it discarded the waiver approach and held that the government did not have to demonstrate knowledge. 412 U.S. at 227.

If Alaska courts wish to assure a role for knowledge in the assessment of consent, the concerns of the Ninth Circuit in *Schneckloth* regarding the potential misinterpretation of a request as a "demand backed by force of law" counsel against allowing an implication of consent from mere acquiescence to a request for permission to search.

81. *See supra* text accompanying note 58.

could be held to have relinquished them.[82] The actual knowledge demanded by such a standard can be satisfied by methods short of requiring police to give fourth amendment warnings.[83] For example, the police might use the suspect's statements at the time of the search or any prior experience in refusing police searches to demonstrate his knowledge of his rights. Recognition of these methods greatly undermines the Supreme Court's major argument against use of the waiver standard — the burden imposed on police in requiring explicit fourth amendment warnings.

The New Jersey Supreme Court recognized the viability of a waiver approach when it held in *State v. Johnson*[84] that all consents, whether custodial or noncustodial, were to be judged by a waiver standard.[85] The court rejected the arguments outlined by the Supreme Court in *Schneckloth,* choosing instead to provide greater protection for the rights contained in the New Jersey Constitution:[86]

> Many persons, perhaps most, would view the request of a police officer to make a search as having the force of law. Unless it is shown by the State that the person involved knew that he had the right to refuse to accede to such a request, his assenting to the search is not meaningful. One cannot be held to have waived a right if he was unaware of its existence.[87]

The concerns expressed by the New Jersey Supreme Court in *Johnson* are especially germane to custodial consents given that an individual is more likely to interpret a "request" as a "command" when an officer has assumed control over the individual's freedom of action.[88] This interpretation would seem to be particularly likely where Miranda warnings are absent.[89] To insure that the added coercion of the custodial situation does not render an individual's constitutional

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82. *See supra* text accompanying note 8.

83. *See Schneckloth,* 412 U.S. at 286 (Marshall, J., dissenting).

84. 68 N.J. 349, 346 A.2d 66 (1975).

85. *Id.* at 354, 346 A.2d at 68. The court defined waiver by stating: "Where the State seeks to justify a search on the basis of consent it has the burden of showing that the consent was voluntary, an essential element of which is knowledge of the right to refuse consent." *Id.* This language makes clear that the denomination of an approach as a "voluntariness" standard does not necessarily mean that knowledge is not a prerequisite; knowledge of a right to refuse to consent may be considered as vital to a finding of "voluntariness." *Sleziak's* discussion of voluntariness should accordingly not be read as a thorough rejection of all waiver concepts, particularly in light of *Sleziak's* reliance on *Gorman,* which expressly recognized waiver as one of the "ground rules" for an effective consent. *See supra* text accompanying notes 45-46.

86. *Johnson,* 68 N.J. at 353-54, 346 A.2d at 67-68.

87. *Id.* at 354, 346 A.2d at 68.

88. *See supra* note 80.

89. To accord such significance to Miranda warnings is not to say that these warnings entirely eliminate concerns about the effect of custody on the individual's perception of his ability to refuse to consent to a search. It is uncertain, if not

protections meaningless, the Alaska Supreme Court should adopt a waiver standard for the assessment of custodial consents, at least where Miranda warnings have not been given.

It may seem incongruous to some that a waiver standard could be employed for evaluating custodial consents while voluntariness remains the operative standard in noncustodial situations. The use of such different standards might initially appear unfounded since the protections accorded the individual by the fourth amendment, unlike protections such as the right to counsel, apply regardless of whether the individual has entered a particular phase of the criminal procedure process. The different standards are, however, reconcilable:

> Voluntariness analysis has historically tolerated some coercion, and the stage of the prosecutorial process could well affect the degree of coercion which the Court is willing to accept in any given case. Since custodial interrogation is inherently coercive under the *Miranda* rationale, something more than a totality of the circumstances test is needed to dispel the taint which any confession or consent to search would have. Knowledge of the right to refuse consent could well indicate that a suspect's will was not overborne and could serve as a significant factor in a more refined totality test. This could be accomplished by a variety of methods: a warning would be one, and surely the most objective method. However, the Court would not necessarily have to confine itself to it. As Mr. Justice Marshall suggested in his *Schneckloth* dissent, other less certain, yet acceptable, methods exist.[90]

A footnote in *Frink v. State*[91] demonstrates that the Alaska Supreme Court appears willing to entertain the idea that different standards should apply to custodial consents:

> The parties have not addressed the issue of whether a different standard would be appropriate in assessing the validity of a consent to search obtained from a person who is in custody as opposed to a person who gives consent in a noncustodial situation . . . . We do not address the issue.

The other potential incongruity in the suggested approach exists in the different standards that might be applied within the custody context: where Miranda warnings have been given, the *Sleziak-Gorman* approach to voluntariness might be retained, even if the court imposed a knowing waiver standard in the absence of Miranda warnings. The *Sleziak* court left open the possibility of almost precisely

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unlikely, that an individual will understand a fifth amendment warning to confer upon him a right to refuse the officer's subsequent request to search. *See supra* note 44.

90. Note, *supra* note 69, at 905. As used here, the author's "more refined totality test" contemplates the use of a waiver standard. The knowledge inquiry occurs at the threshold, and if knowledge is demonstrated the inquiry proceeds to determine whether it was overborne by looking to the totality of the surrounding circumstances. If knowledge is *not* demonstrated under a waiver analysis, the consent is invalid.

91. 597 P.2d 154, 167 n.25 (Alaska 1979).

this situation, apparently untroubled by any incongruity.[92] The ramifications of such different standards within the custody context would, however, produce a somewhat curious result. Courts would essentially require a showing of knowledge only where the police were unable to succeed in meeting the "constructive knowledge" requirement. Conceivably, the practical effect of this situation would be a more certain delivery of Miranda warnings by police, because the police would likely prefer that the individual from whom consent is being sought know as little about his right to refuse to divulge information as is constitutionally permissible.[93]

The presence of such differential knowledge requirements within the custodial context may not be entirely intellectually satisfying. If for this reason the Alaska Supreme Court does not wish to sanction the existence of both a waiver approach and a constructive knowledge approach in custodial situations, it will be faced with two more logically harmonious alternatives. First, the constructive knowledge approach could be rejected in favor of a requirement that knowledge be unequivocally demonstrated before a valid custodial consent could be given. This approach would, of course, supplant *Sleziak's* view that information such as Miranda warnings adequately advises an individual of his right to refuse to consent to a search. Second, the course charted by *Watson* could be chosen, in which case knowledge would not be a necessary prerequisite to the finding of a valid custodial consent under any circumstance. The first course is more in line with the historical treatment of fundamental personal rights under the federal Constitution,[94] and appears more consonant with the standard for consents outlined by the Alaska Supreme Court in *Erickson v. State.*[95] The purpose of this note, however, has not been to analyze in detail the wisdom of adopting a uniform waiver approach to custodial consents. Rather, this note has sought only to demonstrate the necessity of applying a waiver standard where Miranda warnings have not been given to an individual in custody, as this is the issue that has remained unresolved in the wake of *Sleziak.*

92. *See supra* text accompanying note 51.

93. As noted previously, a requirement that the consenting party have knowledge of his right to refuse does not mandate that an express fourth amendment warning be given. *See supra* note 19. If, however, the "constructive notice" option — which allows reliance on Miranda warnings for knowledge purposes — were not available, an express warning often would be necessary when the questioning officer does not know the extent of the individual's knowledge. If the option of relying on constructive notice is available, the police officer would doubtless prefer to deliver Miranda warnings rather than the more specific fourth amendment warnings due to the more obscure nature of the information Miranda warnings impart about the right to refuse to consent to a search.

94. *See* text accompanying notes 69-71.

95. 507 P.2d 508, 515 (Alaska 1973); *see supra* note 3 and accompanying text.

IV. CONCLUSION

Fifteen years ago, Alaska left undecided an important search and seizure issue: What standard should be applied to assess the validity of a consent to search given by an individual who is not in custody and who has not received Miranda warnings? When Miranda warnings were given and extraordinarily coercive circumstances were not present, Alaska courts have found that consent was given voluntarily based on the constructive knowledge of fourth amendment rights imparted by the warnings and by a request to search. In the absence of Miranda warnings, Alaska's approach to the role to be accorded knowledge in a custodial situation remains unclear. Because a custodial setting without Miranda warnings can fairly be characterized as more coercive than a custodial circumstance in which such warnings have been given, it would be curious to give knowledge a less substantial role in the more coercive situation. Yet this peculiar situation could exist if Alaska adopts the totality standard approved by the United States Supreme Court in *Watson* as its approach for custodial consents given in the absence of Miranda warnings while retaining the constructive knowledge approach it approved in *Sleziak* for custodial consents given following Miranda warnings. Alaska should guarantee knowledge a more significant role by adhering to a waiver standard when the coercion inherent in custody is not mitigated by Miranda warnings, or by going a step further and requiring that a waiver standard apply to all custodial consents. Either approach is preferable to the erosion of the protections currently provided by article 1, section 14 of the Alaska Constitution that would follow an adoption of the *Watson* approach.

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