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## THE DOCTRINE OF WAIVER AND CONSENT SEARCHES

### I. Introduction

In May 1973 the United States Supreme Court, in *Schneckloth v. Bustamonte*,<sup>1</sup> held that the police need not advise an individual who is not in custody that he has a constitutional right to refuse to consent to a search of his property. Although the conceptual ramifications of the decision are complex, the factual background of the case is rather simple. At 2:40 in the morning a car containing Robert Bustamonte and five other men was stopped by a policeman in Sunnyvale, California, for being driven with the license plate light and one headlight burned out. When the policeman routinely asked for a driver's license, the driver was unable to furnish one; only one of the six, Joe Alcala, was able to comply with the request. After all six had stepped out of the car and following the arrival of two additional officers, a request was made to search the auto. Admittedly the requesting officer had no probable cause and in the absence of consent a search could not legally be conducted. Mr. Alcala, claiming the car belonged to a brother, agreed to the search and even opened the trunk for the officer. There was no evidence indicating that Alcala knew he had a constitutional right to refuse consent. Upon inspecting the trunk, the officer found three stolen checks wadded up under the rear seat. The respondent in *Schneckloth* was ultimately convicted for possessing a check with intent to defraud. He unsuccessfully challenged the constitutionality of the search in California courts and thereafter unsuccessfully sought a writ of habeas corpus in a federal district court. On appeal to the Court of Appeals for the Ninth Circuit the decision was reversed and remanded.<sup>2</sup> The Court of Appeals reasoned that the consent operated as a waiver of Bustamonte's fourth and fourteenth amendment rights and, therefore, demanded an examination of whether it had been given with full understanding of the right to refuse. It further held that a mere verbal expression of assent combined with the absence of coercion was not sufficient to justify finding a valid consent.<sup>3</sup>

The Supreme Court reversed the Court of Appeals and held:

[W]hen 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, direct or implied. Voluntariness is a question of fact to be determined from all the circumstances, and while the subject's knowledge of a right to refuse is a factor to be taken into account, the prosecution is not required to demonstrate such knowledge as a prerequisite to establishing a voluntary consent.<sup>4</sup>

In so holding, the Court rejected the application of the doctrine of waiver estab-

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1 412 U.S. 218 (1973).

2 *Bustamonte v. Schneckloth*, 448 F.2d 699 (9th Cir. 1971).

3 *Id.* at 700-01.

4 412 U.S. at 248-49.

lished in *Johnson v. Zerbst*<sup>5</sup> to the consent search situation and indeed to the fourth amendment itself. That doctrine demands that in order for the relinquishment or waiver of a constitutional right to be valid it must be proven that the individual giving up the right knew of its existence and realized the consequences of the waiver. In the words of the *Johnson* Court, "waiver is ordinarily an *intentional* relinquishment or abandonment of a *known* right or privilege."<sup>6</sup> Since the Supreme Court in *Miranda v. Arizona*<sup>7</sup> applied this definitional standard by requiring advisement of constitutional rights, many commentators had argued<sup>8</sup> and some courts had held<sup>9</sup> that the same approach should be applied to the consent search. Despite the persuasiveness of this suggested approach, the Supreme Court rejected it in the *Schneckloth* decision, noting that to do otherwise would seriously hamper effective law enforcement;<sup>10</sup> the decision demanded only that a consent must be voluntary as determined by the totality of the circumstances.

This note will first briefly examine the use of the doctrine of waiver since its creation in *Johnson* and then focus on its constitutional basis and the discrete requirements of knowledge and voluntariness. This will be done in order to provide the reader with a historical and conceptual perspective from which to view the decision in *Schneckloth v. Bustamonte*. The *Schneckloth* case will be analyzed in detail along with the potential application of the waiver doctrine to a variation of the *Schneckloth* fact pattern—a search consented to by one in custody. It should be emphasized that this note deals with the doctrine of waiver only as it applies in criminal litigation.

## II. The Supreme Court and the Doctrine of Waiver

In instances where the Supreme Court has analyzed the validity of a waiver of a constitutional right, it has consistently recognized a rebuttable presumption against valid waiver. It has demanded that a court must "indulge every reasonable presumption against waiver."<sup>11</sup> Mere acquiescence in the loss of a fundamental right will not be presumed;<sup>12</sup> moreover, no court may find a valid waiver if the record is silent on the issue.<sup>13</sup> The basic philosophy underlying this allocation of the burden of proof to the prosecution is based on the assumption that it would be almost impossible for an accused to prove that a constitutionally valid waiver had not taken place.<sup>14</sup> This strong presumption has been relaxed only in

5 304 U.S. 458 (1938). The specific holding of the case, that valid waiver of counsel was to be determined by viewing the totality of the circumstances, was, of course, overruled by *Miranda v. Arizona*, 384 U.S. 436 (1966).

6 304 U.S. at 646 (dictum) (emphasis added).

7 384 U.S. 436 (1966).

8 See Note, *Consent Searches: A Reappraisal After Miranda v. Arizona*, 67 COLUM. L. REV. 130 (1967); Note, *Consent Search: Waiver of Fourth Amendment Rights*, 12 ST. L. U. L.J. 297 (1968); Tigar, *Foreword: Waiver of Constitutional Rights: Disquiet in the Citadel*, 84 HARV. L. REV. 1 (1970).

9 See, e.g., *United States v. Nikrasch*, 367 F.2d 740 (7th Cir. 1966), and *United States v. Blalock*, 255 F. Supp. 268 (E.D. Pa. 1966).

10 412 U.S. at 229.

11 *Aetna Ins. Co. v. Kennedy*, 301 U.S. 389, 393 (1937).

12 *Ohio Bell Telephone Co. v. Public Utilities Comm'n*, 301 U.S. 292, 307 (1937).

13 *Boykin v. Alabama*, 395 U.S. 238, 243 (1969).

14 See *Schneckloth v. Bustamonte*, 412 U.S. 218, 286 (1973) (Marshall, J., dissenting).

the context of a waiver of the right to a speedy trial. In the case of *Barker v. Wingo*<sup>15</sup> the Court shifted the burden of proof requirements so that, to some extent, the accused was now called to share in the burden<sup>16</sup> because of the character of the right itself.

The Court, however, has placed much greater emphasis on the requirement that the relinquishment, or waiver, of a right must fulfill the definitional standards of *Johnson v. Zerbst*—that it be knowing and intelligent. The Court has been inconsistent in dealing with the problem of determining how knowledge of the right is to be ascertained and to what extent, and in what degree, an understanding of the consequences of waiver is to be demanded and determined.<sup>17</sup> More recently, the Court has begun to recognize a third requirement—that a waiver be not only knowledgeable and intelligent but also voluntary, that is, the product of an uncoerced free will.<sup>18</sup> These concepts have been periodically intermingled; often the analysis of one has given meaning to the other.<sup>19</sup> The net effect has been a confusing array of case law; much of this uncertainty stems from the constitutional basis of the waiver doctrine itself.

### A. The Constitutional Basis

When the Supreme Court enunciated what was to become the doctrine of waiver in *Johnson v. Zerbst*, it did not explicitly base its reasoning on any constitutional theory.<sup>20</sup> The language it used was broad and all-encompassing. Justice Black, speaking for the majority, implicitly appeared to be saying that the doctrine was constitutionally mandated—the very grant of a constitutional right demanded as a corollary that it be given up only under carefully circumscribed conditions. Some legal scholars tended to view it in this manner.<sup>21</sup> Such an approach received support from the language of the Court in *Miranda v. Arizona*.<sup>22</sup> There the Court spoke in terms of reasserting the “high standards of proof for the waiver of constitutional rights,”<sup>23</sup> and noted that only after the now famous warnings had been given could a suspect “knowingly and intelli-

15 407 U.S. 514 (1972).

16 The Court characterized this as a “balancing test, in which the conduct of both the prosecution and the defendant is weighed.” *Id.* at 530. The test involved the balancing of four suggested factors: “. . . length of delay, the reason for the delay, the defendant’s assertion of his right, and the prejudice to the defendant.” *Id.*

It should be emphasized that the Court premised its holding on the finding that the speedy trial right is “generally different from any of the other rights enshrined in the Constitution for the protection of the accused.” *Id.* at 519. The Court stressed several factors: deprivation of the right may be to the advantage of the accused, and thus would “not *per se* prejudice the accused’s ability to defend himself”; and the nature of the right is much more vague than other procedural rights in that it is “impossible to determine with precision when the right has been denied.” *Id.* at 519-21.

17 See text accompanying notes 29 through 41 *infra*.

18 *Brady v. United States*, 397 U.S. 742 (1970); see also *McCarthy v. United States*, 394 U.S. 459 (1969).

19 See, e.g., *McCarthy v. United States*, 394 U.S. 459 (1969). There the Court observed: “. . . because a guilty plea is an admission of all the elements of a formal criminal charge, it cannot be truly voluntary unless the defendant possesses an understanding of the law in relation to the facts.” *Id.* at 466 (emphasis added).

20 304 U.S. at 464.

21 See note 8 *supra*.

22 384 U.S. 436 (1966).

23 *Id.* at 475.

gently waive" his rights.<sup>24</sup> Such measures were required because of the "fundamental"<sup>25</sup> nature of the right involved.

With the benefit of hindsight, it is now clear that if a general waiver standard for fundamental rights was indeed originally intended, the application of *Johnson* suggests an alternative constitutional basis. The requirement is simply part of the gloss of the fourteenth amendment due process clause left over from the selective incorporation of various protections of the Bill of Rights. Such a basis would permit application of the *Johnson* formula in varying degrees to specific rights after analysis of the inherent requirements of each. This is in fact what the Court has done<sup>26</sup> although its analysis is open to criticism. A careful reading of the Court's opinion in *Miranda* lends support to this interpretation for it does not assert as broad an application of the *Johnson* formula as the "corollary" argument suggests.<sup>27</sup>

Implicitly recognizing this as the constitutional basis of the waiver doctrine, the Court has proceeded to establish differing standards for analysis of waiver of different constitutional rights. The path which it has blazed is not very consistent, as the subsequent analysis will make clear.

### B. The Requirement of a Knowing Waiver

Although prior to *Schneckloth* the Court had been generally consistent in demanding that an individual know of a right before he gives it up,<sup>28</sup> it has not been so consistent in its use of standards for determining the existence of such knowledge. At times the Court has evaluated the "totality of the circumstances"

24 *Id.* at 479.

25 *Id.* at 468. In dissent, Mr. Justice Harlan characterized this as "voluntariness with a vengeance." *Id.* at 505.

26 *See, e.g.,* *Barker v. Wingo*, 407 U.S. 514 (1972).

27 In *Miranda*, the Court explicitly recognized that any "statement given freely and voluntarily without any compelling influence is, of course, admissible in evidence." 384 U.S. at 478. It additionally noted:

There is no requirement that police stop a person who enters a police station and states that he wishes to confess to a crime, or a person who calls the police to offer a confession or any other statement he desires to make. Volunteered statements of any kind are not barred by the Fifth Amendment and their admissibility is not affected by our holding today.

*Id.* This was a frank recognition that the police and the prosecution were not to be saddled with an impossible burden in dealing with a situation they had not initiated. It was also a frank recognition that in noncoercive circumstances, waiver of the right to remain silent need not be accompanied by an informed understanding of the right; the waiver need only be voluntary.

28 *But see* note 27 *supra*, and *Rogers v. United States*, 340 U.S. 367 (1951). In *Rogers* the petitioner was found to have waived her privilege against self-incrimination in a grand jury proceeding when, without knowledge of the privilege or advice of counsel, she had freely answered some questions on a given criminal fact. The Court observed:

Requiring full disclosure of details after a witness freely testifies as to a criminal fact does not rest upon a further "waiver" of the privilege against self-incrimination. Admittedly, petitioner had already "waived" her privilege of silence when she freely answered criminal questions relating to her connection with the Communist Party.

*Id.* at 374. The continued vitality of this position is, however, open to doubt. *See generally* *Miranda v. Arizona*, 384 U.S. at 476 n.45.

surrounding the alleged waiver.<sup>29</sup> At other times it has focused only on the conduct of the accused in the belief that a given course of conduct might indicate knowledge.<sup>30</sup>

In guilty plea cases, where an accused waives the privilege against compulsory self-incrimination,<sup>31</sup> the right to a jury trial,<sup>32</sup> the right to confront one's accusers,<sup>33</sup> and the right to contest the admissibility of the prosecution's evidence,<sup>34</sup> the Court has been more exacting. It has applied a dual standard: the trial court judge must conduct an on-the-record inquiry to determine the nature of the defendant's waiver,<sup>35</sup> and the accused must be represented by competent counsel.<sup>36</sup>

The most stringent and objective approach taken by the Court is in the context of waiver of the right to remain silent arising from custodial interrogation. In *Miranda v. Arizona* the Court demanded that an accused be informed of this right as well as right to counsel. It observed:

[A]ssessments of the knowledge the defendant possessed, based on information as to his age, education, intelligence, or prior contact with authorities, can never be more than speculation; a warning is a clearcut fact. More important, whatever the background of the person interrogated, a warning at the time of the interrogation is indispensable to overcome its pressures and to insure that the individual knows he is free to exercise the privilege at that point in time.<sup>37</sup>

The Court has never been terribly demanding in requiring that an accused fully understand the legal consequences of relinquishing a given constitutional

29 This was the test originally adopted by the Court in *Johnson*. There the Court held that the determination of knowledgeable waiver "must depend, in each case, upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused." 304 U.S. at 464.

30 See *Illinois v. Allen*, 397 U.S. 337 (1970), and the statement of Justice Black, dissenting, in *Rogers v. United States*, 340 U.S. at 377. In *Allen* the Court was faced with the difficult question of what to do with boisterous and unruly defendants in a criminal trial. The Court held:

[W]e explicitly hold today that a defendant can lose his right to be present at trial if, after he has been warned by the judge that he will be removed if he continues his disruptive behavior, he nevertheless insists on conducting himself in a manner so disorderly, disruptive, and disrespectful of the court that his trial cannot be carried on with him in the courtroom.

397 U.S. at 343. The Court went on to note that a defendant could regain his constitutional right by agreeing to conduct himself in a civilized manner. *Id.* Professor Tigar has condemned this decision as turning waiver into a "punitive sanction." Tigar, *supra* note 8, at 11.

The Court recently had an opportunity to re-examine the standards for having conduct amount to a knowing and intelligent waiver of the right to be present at trial. However, the Court backed down from this issue by holding that it had improvidently granted certiorari. *Tacon v. Arizona*, 410 U.S. 351, 352 (1973).

31 *Malloy v. Hogan*, 378 U.S. 1 (1964).

32 See *Duncan v. Louisiana*, 391 U.S. 145 (1968).

33 See *Pointer v. Texas*, 380 U.S. 400 (1965).

34 *McMann v. Richardson*, 397 U.S. 759, 766 (1970). For greater elaboration on the procedural rights thus waived, see Tigar, *supra* note 8, at 20. This waiver is premised on the fact that a guilty plea "represents a break in the chain of events which has preceded it in the criminal process." *Tollett v. Henderson*, 411 U.S. 258, 267 (1973).

35 *McCarthy v. United States*, 394 U.S. 459 (1969); *Boykin v. Alabama*, 395 U.S. 238 (1969).

36 See *McMann v. Richardson*, 397 U.S. 759 (1970).

37 384 U.S. at 469.

right. According to *Miranda*, a person must be warned that any statement made by him after waiver of the right to remain silent and have counsel present can and will be used against him at trial. This certainly does not inform him of *all* the possible ramifications of a decision to forego the rights.<sup>38</sup> In the guilty plea context the Court has relied almost exclusively on counsel to provide an accused with an understanding of the consequences of his waiver.<sup>39</sup> This is perhaps true because of the complexity of the legal ramifications of a guilty plea. The Court will assume a valid waiver if it was made upon advice "within the range of competence demanded of attorneys in criminal cases,"<sup>40</sup> and provided that the accused was not "incompetent or otherwise not in control of his mental faculties."<sup>41</sup> Beyond such a *de minimis* standard the Court would not go. Thus, in the guilty plea context the knowledge of the defendant is coextensive with the presence and advice of competent counsel.<sup>42</sup>

To summarize: courts have generally required that a waiver be a knowing one—that the person waiving a right know of its existence and appreciate the consequences of its relinquishment. The standard for determining a knowing waiver, however, is multiple and varies with the right involved.

### C. The Requirement of Voluntariness

Even though a person might have knowledge of his rights, his relinquishment of them may not be the result of a free choice; waiver may be an involuntary act and as such would not be valid.<sup>43</sup> The primary purpose of any inquiry into the voluntariness of a waiver of rights is to determine whether the relinquishment can reasonably be said to be the result of the actor's free will, or the product of "actual or threatened physical harm . . . or mental coercion overbearing the will of the defendant."<sup>44</sup>

The most extensive judicial treatment of the meaning of voluntariness can be found in cases dealing with allegedly coerced confessions. Prior to the decision of *Escobedo v. Illinois*<sup>45</sup> the Court was always willing to tolerate some pressure, with the inquiry being "how much pressure on the suspect was permissible."<sup>46</sup> The ultimate test for voluntariness had traditionally been the "totality of the circumstances," a flexible standard designed "to respond to the endless mutations of fact presented. . . ."<sup>47</sup> The many factors considered in such an evaluation have

38 Perhaps the Court recognized that if a suspect is willing to give up these key rights, one can infer a willingness to give up other less important ones without full understanding. See Note, *Consent Searches: A Reappraisal After Miranda v. Arizona*, 67 COLUM. L. REV. 130, 153 (1967).

39 *Brady v. United States*, 397 U.S. 742, 756 (1970); *McMann v. Richardson*, 397 U.S. 759, 771 (1970); see also *Parker v. North Carolina*, 397 U.S. 790 (1970). The role of counsel is most fully analyzed in *McMann*.

40 *McMann v. Richardson*, 397 U.S. at 771.

41 *Brady v. United States*, 397 U.S. at 756.

42 Given the wide range of competence found in attorneys in criminal cases, the correlative depth of knowledge now symbolically required could range from relative ignorance to full understanding.

43 See *McCarthy v. United States*, 394 U.S. 459 (1969).

44 *Brady v. United States*, 397 U.S. at 750.

45 378 U.S. 478 (1964).

46 *Miranda v. Arizona*, 384 U.S. 436, 507 (1966), (Harlan, J., dissenting).

47 *Id.* at 508.

ranged from threats,<sup>48</sup> physical deprivation,<sup>49</sup> and extended interrogation<sup>50</sup> to lack of education,<sup>51</sup> low intelligence,<sup>52</sup> and failure to advise the accused of his rights.<sup>53</sup> Although no one factor was ever deemed controlling,<sup>54</sup> some were given more weight than others depending on the facts of the case.

Recently, the Supreme Court has begun to recognize voluntariness as part of the test for a valid waiver. Although the Court has periodically used the concept in other areas,<sup>55</sup> it has treated the concept of voluntariness most fully in the guilty plea cases. Beginning with *McCarthy v. United States*,<sup>56</sup> it recognized that a plea must be "equally voluntary and knowing."<sup>57</sup> The Court continued to intermingle the concepts<sup>58</sup> until, in *Brady v. United States*,<sup>59</sup> it created a new analytical framework. Separate analysis was given both the voluntary and the knowledgeable nature of the waiver of the various rights accomplished by a guilty plea.<sup>60</sup> Although this dual test originated in the context of a challenge to the validity of a plea of guilty, its use by the Court in *Schneckloth* would appear to indicate that it is a viable test in other circumstances.

### III. *Schneckloth v. Bustamonte*: Waiver at the Threshold?

While the *Brady* bifurcation of voluntariness and knowing waiver did not result in the creation of meaningful indicia of how knowledge or voluntariness is to be determined, it did create a broad analytical framework that would make it possible for the Court to categorically reject application of waiver standards to a constitutional right for the first time since the development of the *Johnson v. Zerbst* definitional formula. In the case of *Schneckloth v. Bustamonte*<sup>61</sup> the Court concluded that the validity of consent searches should be determined only by looking at the voluntary nature of the consent even though a consent search was the only method whereby an individual could relinquish his fourth amendment protections. The Court found that knowledge of the right waived and appreciation of the consequences of the waiver were important only to the extent that they had a bearing on the voluntariness of the consent, and even then not as prerequisites but only as possible elements to consider in the totality of the circumstances.

48 *E.g.*, *Payne v. Arkansas*, 356 U.S. 560 (1958).

49 *E.g.*, *Reck v. Pate*, 367 U.S. 433 (1961).

50 *E.g.*, *Chambers v. Florida*, 309 U.S. 227 (1940).

51 *E.g.*, *Payne v. Arkansas*, 356 U.S. 560 (1958).

52 *E.g.*, *Fikes v. Alabama*, 352 U.S. 191 (1957).

53 *E.g.*, *Davis v. North Carolina*, 384 U.S. 737 (1966).

54 *Schneckloth v. Bustamonte*, 412 U.S. 218, 226 (1973).

55 See notes 27 and 28 *supra*.

56 394 U.S. 459 (1969).

57 *Id.* at 466.

58 The Court stated that a guilty plea "cannot be truly voluntary unless the defendant possesses an understanding of the law in relation to the facts." *Id.*

59 397 U.S. 742 (1970).

60 See text accompanying notes 32-35 *supra*.

61 412 U.S. 218 (1973).

### A. Nature of the Fourth Amendment Right

The fourth amendment has long been recognized as creating fundamental rights<sup>62</sup> designed to protect the privacy of individuals.<sup>63</sup> By its terms, however, it does not confer absolute protection on the citizenry. Rather, it protects against "unreasonable searches and seizures" and provides that "no warrant 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."<sup>64</sup> It is not readily apparent if the reasonableness clause is to be read in conjunction with the warrant clause or if each is to be considered as having an independent bearing on the particular search and seizure under consideration. Determination of this question has divided the Court for years and is still the source of an ongoing dispute.<sup>65</sup> Whichever standard dominates in a given case may affect the degree of restrictiveness with which the Court will view a warrantless search and seizure.

Nevertheless, the Court has recognized a myriad of exceptions to the fourth amendment protections. Despite the admonition of Mr. Justice Frankfurter that the "exceptions cannot be enthroned into the rule,"<sup>66</sup> the tendency has been to allow warrantless searches and seizures when "the exigencies of the situation [make] that course imperative."<sup>67</sup> In so doing, the Court has created a rather confusing set of standards. Indeed, the state of the law is such as to compel Mr. Justice Rehnquist to recently make the tongue-in-cheek comment that "this branch of the law is something less than a seamless web."<sup>68</sup> Although an analysis of all these exceptions is beyond the scope of this note,<sup>69</sup> it is sufficient for our purposes to indicate that they range from the virtually unrestricted border search<sup>70</sup> to the more limited "stop and frisk" confrontation.<sup>71</sup> An increasingly

62 *E.g.*, *Gouled v. United States*, 255 U.S. 298 (1921).

63 *Katz v. United States*, 389 U.S. 347 (1967).

64 U.S. Const. amend. IV.

65 For example, in *Cady v. Dombrowski*, 413 U.S. 433, 439 (1973), the Court based its decision on its finding that "the ultimate standard . . . is reasonableness." However, in the previous term the Court had emphasized that the "warrant clause . . . is not dead language," *United States v. United States District Court*, 407 U.S. 297, 315 (1972), and stated that under a pure reasonableness test, fourth amendment protections "would approach the evaporation point." *Id.*, at 315 n.16, quoting *Chimel v. California*, 395 U.S. 752, 765 (1969). For analysis of the philosophical debate, see *Player, Warrantless Searches and Seizures*, 5 Ga. L. Rev. 269 (1971).

66 *United States v. Rabinowitz*, 339 U.S. 56, 80 (1950), (Frankfurter, J., dissenting).

67 *McDonald v. United States*, 335 U.S. 451, 456 (1948). The Court noted in *Coolidge v. New Hampshire*, 403 U.S. 443, 474-75 (1971):

It is accepted, at least as a matter of principle, that a search or seizure carried out on a suspect's premises without a warrant is *per se* unreasonable, unless the police can show that it falls within one of a carefully defined set of exceptions based on the presence of "exigent circumstances." As to other kinds of intrusions, however, there has been disagreement about the basic rules to be applied, as our cases concerning automobile searches, electronic surveillance, street searches and administrative searches make clear.

68 *Cady v. Dombrowski*, 413 U.S. 433, 439 (1973).

69 For an excellent analysis, see Landynski, *The Supreme Court's Search For Fourth Amendment Standards: The Warrantless Search*, 45 CONN. B.J. 2 (1971).

70 *E.g.*, *Almeida-Sanchez v. United States*, 413 U.S. 266 (1973).

71 *Terry v. Ohio*, 392 U.S. 1 (1968).

significant exception<sup>72</sup> to the requirement is the search conducted pursuant to the consent of the subject of the search or an appropriate third party.

### B. *The Nature of Consent*

The consent search has traditionally been recognized as a standard investigatory technique of the police which, when properly obtained and conducted, is not violative of the fourth amendment. A consent search may be requested by a police officer for a variety of reasons: he may have probable cause to search but wish to avoid the administrative inconvenience of getting a search warrant; he may have reasonable suspicion, not amounting to probable cause, that evidence of criminal activity would be discovered and consent would be the only legally available vehicle for verifying the suspicion; or he may simply want to engage in an otherwise illegal fishing expedition. Whatever the motive for requesting permission to search, once validly granted, any tangible, non-testimonial proof of criminal activity which is uncovered is admissible as evidence at trial.

The constitutional basis for allowing consent searches is somewhat murky. One could argue that the amendment was designed to protect the individual from searches which he would not agree to in the first place. It has also been suggested that one may view a search conducted on the basis of consent as being reasonable and thus vitiating the requirement of the amendment.<sup>73</sup> Alternatively, one judicial scholar has argued that such searches are allowed "because we permit our citizens to choose whether or not they wish to exercise their constitutional rights."<sup>74</sup> Whatever basis is used, it is nonetheless clear that consent is a "mechanism by which substantive requirements, otherwise applicable, are avoided."<sup>75</sup>

The Court has addressed itself to the problems presented in consent searches at various times and from various perspectives. Although it has generally equated consent with waiver,<sup>76</sup> it has done so almost cavalierly. Cases were resolved by looking to see if the consent had been "freely and voluntarily given,"<sup>77</sup> emphasizing that where coercion is present "there cannot be consent."<sup>78</sup> It has also recognized that mere "acquiescence to a claim of lawful authority" would not validate a search.<sup>79</sup>

Additionally, the Court has concerned itself with who can consent. In doing so, it has recognized a type of vicarious power to consent, or consent by third parties. Such searches are based on a variety of theories, the most important

72 In *Camara v. Municipal Court*, 387 U.S. 523 (1967), the Court urged those attempting to conduct administrative searches to try to gain entrance by consent before resorting to the fourth amendment's warrant process. *Id.* at 539-40.

73 Note, *Consent Search: Waiver of Fourth Amendment Rights*, 12 St. L. U. L.J. 297, 298 (1968).

74 *Schneckloth v. Bustamonte*, 412 U.S. 218, 283 (1973), (Marshall, J., dissenting).

75 *Id.* at 282.

76 *Stoner v. California*, 376 U.S. 489 (1964); *Zap v. United States*, 328 U.S. 624 (1946); *Davis v. United States*, 328 U.S. 582 (1946); *Amos v. United States*, 255 U.S. 313 (1921).

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

78 *Id.* at 550.

79 *Id.* at 549-50. In *Bumper* the petitioner's grandmother had submitted to a search in response to the claim of a policeman that he had a valid search warrant. The search warrant was never produced at trial.

being an implied agency or assumption of the risk theory<sup>80</sup> and the recognition of a property interest.<sup>81</sup> The Court has somewhat hedged this latter theory by holding that the owner of a hotel, or his employee, may not consent to the search of a guest's room,<sup>82</sup> nor may a landlord authorize a search of his tenant's quarters.<sup>83</sup>

Prior to the decision in *Schneckloth v. Bustamonte*,<sup>84</sup> however, the Court had never squarely faced the question of what constituted a valid consent. Ever since *Miranda v. Arizona*<sup>85</sup> there had been considerable agitation in the academic community for creating a fourth amendment warning requirement,<sup>86</sup> or some other method<sup>87</sup> for proving that an individual had consented to a search with the knowledge that he had a constitutional right to refuse. Several lower federal courts had accepted this position and required that the prosecution must prove that a defendant knowingly consented to the search before its fruits would be admissible in evidence.<sup>88</sup> When the Court finally dealt with the issue, it firmly rejected all suggestions based on a *Miranda* analogy and dealt with the problem of waiver analysis in a manner which left fundamental questions unresolved.

### C. *Schneckloth v. Bustamonte*: Analysis, Criticism, and Projection

#### 1. The Voluntary Waiver

The Court defined the issue in *Schneckloth* as being "what must the prosecution prove to demonstrate that a consent was 'voluntarily' given,"<sup>89</sup> and confined itself to situations where the subject of a search is not in custody. In analyzing the requirement of voluntariness, the Court relied heavily on pre-*Miranda* coerced confession cases.

At the outset, the Court recognized that a confession was traditionally voluntary if it was "the product of an essentially free and unconstrained choice

80 *Frazier v. Cupp*, 394 U.S. 731 (1969); see also *Lopez v. United States*, 373 U.S. 427 (1963), and *Hoffa v. United States*, 385 U.S. 293 (1966).

81 For an excellent discussion, see Dutile, *Some Observations on the Supreme Court's Use of Property Concepts in Resolving Fourth Amendment Problems*, 21 CATH. U. L. REV. 1 (1971).

82 *Stoner v. California*, 376 U.S. 483 (1964).

83 *Chapman v. United States*, 365 U.S. 610 (1961).

84 412 U.S. 218 (1973).

85 384 U.S. 436 (1966).

86 The following warning was proposed in Note, *Consent Searches: A Reappraisal After Miranda v. Arizona*, 67 COLUM. L. REV. 130, 158 (1967):

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.

87 Note, *Consent Search: Waiver of Fourth Amendment Rights*, 12 St. L. U. L.J. 297, 307 (1968) suggests that the police might carry a tape recorder with them which could simultaneously give a potential subject of a search a warning and record his response.

88 See note 7 *supra*.

89 *Schneckloth v. Bustamonte*, 412 U.S. 218, 223 (1973).

by its maker."<sup>90</sup> It stated, however, that this "cannot be taken literally to mean a 'knowing' choice,"<sup>91</sup> and held that the same was true for the consent search area. With regard to the specific test for voluntariness in the area of consent searches the Court said:

[W]hen the subject of the search is not in custody and the State attempts to justify the search on the basis of consent, the Fourth and Fourteenth Amendments require that it demonstrate that the consent was in fact voluntarily given, and not the result of duress or coercion, express or implied. Voluntariness is a question of fact to be determined from all the circumstances. . . .<sup>92</sup>

The Court also indicated that the subject's knowledge of the right to permit a search could be considered in determining voluntariness, but was not a pre-requisite to establishing uncoerced consent.<sup>93</sup> In the consent search situation, therefore, the traditional requirements that a valid waiver be knowing and intelligent were merged into the concept of voluntariness.

## 2. Trial and Non-Trial Rights

As has already been indicated earlier in this note, the Court categorically refused to extend the *Johnson v. Zerbst* formula to the consent search situation. To do otherwise, the Court reasoned, would be to "generalize from the broad rhetoric of some of our decisions, and to ignore the substance of the different constitutional guarantees."<sup>94</sup> Indeed, the Court even refused to indulge "every reasonable presumption . . . [against] voluntary relinquishment" since the public should be encouraged to consent to a search, that is, to give up their fourth amendment guarantees.<sup>95</sup> The Court argued that the very nature of the fourth amendment protection distinguished it from the rights which had been accorded the standards of *Johnson*. Those rights, the Court emphasized, are designed "to preserve a fair trial,"<sup>96</sup> while the rights enshrined in the fourth amendment are not: evidence seized in violation of the rights is nonetheless reliable. Ignoring the conceptual confusion endemic to past waiver cases, the Court confidently stated:

A strict standard of waiver has been applied to those rights guaranteed to a criminal defendant to insure that he will be accorded the greatest possible opportunity to utilize every facet of the constitutional model of a fair

90 412 U.S. at 225, quoting *Columbe v. Connecticut*, 367 U.S. 568, 602 (1961).

91 412 U.S. at 224.

92 *Id.* at 248-49.

93 *Id.*

94 *Id.* at 246. The language is very similar to that of Mr. Justice Harlan dissenting in *Miranda v. Arizona*, 384 U.S. 436, 511 (1966). In fact, the Court in *Schneekloth* appears to borrow heavily from both the language and analytical framework used in Mr. Justice Harlan's dissent.

95 412 U.S. at 243. The policy rationale for such a call to relinquish a constitutional protection was that "the resulting search may yield necessary evidence for the solution and prosecution of crime, evidence that may insure that a wholly innocent person is not wrongly charged with a criminal offense." *Id.*

96 *Id.* at 237.

criminal trial. Any trial conducted in derogation of that model leaves open the possibility that the trial reached an unfair result precisely because all the protections specified in the Constitution were not provided.<sup>97</sup>

In thus deriving guidance from the facts of past waiver cases, the Court noted that such rights were either basic trial rights, rights applicable to "trial-type situations," or those applicable to "certain stages before the actual trial . . . [which] protect the fairness of the trial itself."<sup>98</sup> Therefore, because the Court could not find precedent for the application of the strict standard of knowing waiver to the non-custodial investigative process, it refused to apply it. This logic overlooks the fact that *Schneckloth* was the first case in which the Court faced the issue.

### 3. The Conceptual Problems

The fact that the Court refused to apply the standard of knowing waiver in consent searches is of less importance than why it refused. One would hope that an analysis of the Court's reasoning would provide some insight into the nature of waiver rather than its form. Unfortunately that is not the case.

The Court argues that "there is nothing in the *purposes* or *application* of the waiver requirements of *Johnson v. Zerbst* that justifies, much less compels, the equation of a knowing waiver with a consent search."<sup>99</sup> As already indicated, the now announced purpose is to protect the fairness of a criminal trial. It is significant, however, that the Court spent precious little space in analyzing the purposes and precedents of the fourth amendment. Not a word is devoted to the fundamental nature of the rights protected by it despite ample precedent for the proposition. If one were to consider the context of past waiver cases, it would appear that the purpose of the *Johnson* standards is to protect *fundamental* rights. Apparently the Court has now decided that this was mere rhetoric. But what is it that makes the fourth amendment protections less fundamental than others? The Court states that a search cannot be "somehow 'unfair' if a person consents" to it.<sup>100</sup> Yet what essentially is it that makes an uninformed waiver of a fourth amendment right fair, while the uninformed waiver of a trial right is unfair? Both must be voluntary, but one requires the additional element of knowledge. Moreover, is the constitutional model of a fair criminal trial less endangered by unwitting renunciation of a fundamental constitutional right than by the exclusion of illegally seized evidence? In terms of the purposes served in incorporating rights in a written constitution, what significant qualitative difference exists? It is difficult to imagine the constitutional model of a criminal trial remaining untarnished in a case such as *Schneckloth* when the conviction is for *possession* of something and the item was seized following an unintelligent and

<sup>97</sup> *Id.* at 241.

<sup>98</sup> *Id.* at 238-39. The Court characterized its prior waiver decisions differently in the case of *Barker v. Wingo*. There the Court said that previous decisions had involved "rights which must be exercised or waived at a specific time or under clearly identifiable circumstances." 407 U.S. at 529.

<sup>99</sup> *Id.* at 246 (emphasis added).

<sup>100</sup> *Id.* at 242.

unknowing waiver of substantive constitutional requirements. The fact of possession guarantees conviction once requisite intent is established. It now appears that the prosecution can have its cake and eat it too without tainting the constitutional model.<sup>101</sup>

The key to an understanding of the Court's waiver analysis is to appreciate what it perceives as the utter impossibility of applying the strict standard in the consent context. The decision conveys the distinct impression that the Court is bound and determined to protect consent searches from rigorous constitutional scrutiny.<sup>102</sup> The straw-man logic of the opinion is intriguing. The Court assumes that *Johnson v. Zerbst* necessarily demands a thorough examination "designed for a trial judge in the structured atmosphere of a courtroom."<sup>103</sup> Once this postulate is established, the Court goes on to note:

It would be unrealistic to expect that in the informal, unstructured context of a consent search, a policeman, upon pain of tainting the evidence obtained, could make the detailed type of examination demanded by *Johnson*. And, if for this reason a diluted form of "waiver" were found acceptable, that would itself be ample recognition of the fact that there is no universal standard that must be applied in every situation where a person forgoes a constitutional right.<sup>104</sup>

The inherent benefit of such analysis is that once one assumes the need for such a diluted examination, common sense would demand rejection. The problem is that such analysis overlooks the less demanding role assigned to competent counsel by the *Brady* trilogy and, more importantly, avoids the implications of *Miranda*. As has already been noted, once the *Miranda* warnings have been given, a suspect may then waive his rights without any exacting examination by the police. Thus, the Court assumes the extremes of the required examination and the degree of knowledge, something which has been previously required only in the context of a guilty plea, and consequently selectively eliminates consent searches from scrutiny under the standard of *Johnson*.

It should be noted at this point that the Court implicitly recognized that a waiver had been made by Mr. Bustamonte.<sup>105</sup> It appears the Court assumed, however, that its validation does not require the application of the strict standard of *Johnson*: that is, it need not be knowing and intelligent. While the Court

101 Since a strict fourth amendment waiver standard would operate functionally as an exclusionary rule, one may view this as an attempt on the part of the Court to limit the rule. That this is the expressed desire of some of the members of the Court is clear. See *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971), (Burger, C. J., dissenting).

102 Mr. Justice Marshall uses much stronger language:

It is regrettable that the obsession with validating searches like that conducted in this case, so evident in the Court's hyperbole, has obscured the Court's vision of how the Fourth Amendment was designed to govern the relationship between police and citizen in our society.

412 U.S. at 290 (Marshall, J., dissenting).

103 *Id.* at 244.

104 *Id.* at 245.

105 Mr. Justice Marshall suggests that such a "strained argument . . . is fundamentally inconsistent with the law of unconstitutional conditions." *Id.* at 288 n.12 (Marshall, J., dissenting).

limits that requirement to rights relating to the fairness of a trial, it gives no further indication as to what validates an unknowing waiver. Given the Court's heavy reliance on the standard of voluntariness, however, it must be assumed that this new type of waiver is somehow merged with the lower standard of voluntary renunciation. Thus, the concepts become coextensive and we are left with two standards of waiver: voluntary waiver and knowing and intelligent waiver.

#### 4. In-Custody Consent as Waiver

Despite the conclusions reached by its analysis of purpose and application of waiver standards, the Court suggests that if the consent were given by a person in custody the considerations would be different.<sup>106</sup> Analogizing to *Miranda*, the Court justifies this suggestion by noting the "heightened possibilities for coercion when the 'consent' to a search was given by a person in custody."<sup>107</sup> Such a suggestion presents some serious conceptual problems.<sup>108</sup>

Given the increased aura of coercion present, one would suspect that at least a *Miranda*-type warning would be required to dispel the coercion. Indeed, one court has suggested that the *Miranda* warnings are themselves sufficient since fourth amendment warnings are implicit in the warning of the right to remain silent.<sup>109</sup> If the suspect invokes his rights and demands an attorney, then one can assume, based on prior Court decisions, that any future waiver will be knowing and intelligent if the attorney is reasonably competent. If, however, the subject waives his right to counsel and his right to remain silent, can we necessarily infer that a later consented-to search would be a knowing and intelligent choice? Arguably, *Miranda* stands for the proposition that waiver of the rights contained in the warnings may signal waiver of other supplementary rights.<sup>110</sup> But as the Court indicated in *Schneckloth*, fourth amendment rights are of a "wholly different order"<sup>111</sup>; and, therefore, one would hope that a specific fourth amendment warning would be required. Admittedly, a detailed examination of the nature conducted by a judge in a criminal trial could not be administered, but it need not be administered in the strict *Miranda* context either. Additionally, the policy considerations influencing the *Schneckloth* approach in non-custodial situations would not be determinative in a custodial context. A fourth amendment warning would not unnecessarily interfere with traditional police investigative functions; *Miranda* has already interrupted the process at that stage. Moreover, the likelihood of the police having probable cause to obtain a search warrant is greater at this stage, and if the Court will not go so far as to demand that they adhere to the requisite judicial process, it

106 *Id.* at 240-41 n.29. It is important, conceptually, to emphasize that this was suggested in the midst of the Court's waiver analysis.

107 *Id.*

108 C. McCORMICK, HANDBOOK OF THE LAW OF EVIDENCE § 175, at 404 (2d ed. 1972).

109 *Gorman v. United States*, 380 F.2d 158 (1st Cir. 1967).

110 See Note, *Consent Searches: A Reappraisal After Miranda v. Arizona*, 67 COLUM. L. REV. 130, 153 (1967).

111 412 U.S. at 242.

should at least be more exacting in its demands for a valid consent. Strict waiver standards would seem appropriate.

Nevertheless, it is still difficult to understand why the stage of the process should affect the consideration of the right involved here. Unlike the right to counsel, which attaches at *specific* stages of the process as *Kirby v. Illinois*<sup>112</sup> makes clear, the fourth amendment protections surround the individual at all stages of his existence, subject of course to the carefully defined exceptions.

If, however, the Court's suggestion is viewed in the context of traditional fourteenth amendment voluntariness standards, the proposition makes more sense. 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.<sup>113</sup> 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.<sup>114</sup> Statements made by the suspect at the time the search took place, as well as past refusals by the suspect to allow a search could indicate knowledge. Indeed, even 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."<sup>115</sup> In third party consent searches where one has standing to challenge, as in *Schneckloth*, the prosecutor could call the third party to testify under oath. Of course, if this latter course were chosen, the third party could well invoke his privilege against self-incrimination and thereby create the tactical quagmire analogous to that presented in *Barker v. Wingo*.<sup>116</sup> Nevertheless, warnings would be the preferable method, and the question would again become: is a specific fourth amendment warning necessary? Here again, the considerations would be basically those described above.

## VI. Conclusion

The history of knowing waiver, born in conceptual contradiction, has been a rather tortured and twisting attempt at accommodating the literal meaning of the requirement with the asserted policy needs of differing constitutional rights.

112 406 U.S. 682 (1972).

113 Cf. *Davis v. North Carolina*, 384 U.S. 737, 740 (1966), "(failure to warn a suspect of his rights is a "significant factor in considering the voluntariness" of a confession where trial held prior to *Escobedo* and *Miranda*).

114 412 U.S. at 286.

115 *Id.*

116 407 U.S. 514 (1972). In *Barker* the prosecution sought and received sixteen continuances over a period of nearly five years. The strategy was to remove any problem of self-incrimination which might be faced by the accused's accomplice, who then could be called to testify against the accused. Unfortunately it took nearly five years and six trials to convict the accomplice.

The notion that waiver was designed as an independent substantive requirement giving added support to individual freedoms has become largely meaningless illusion. The concept has changed its meaning with virtually each application; it has become a barometer of the changing philosophical tendencies of the Court and has on many occasions been treated as though it were excess baggage.

Structurally, the Court at this time views the renunciation of constitutional rights in the following manner: Is the right waived a fundamental one? If so, is the suspect's act voluntary, that is, is it the product of a not-too-coerced will? Does the right pertain to guaranteeing the fairness of a criminal trial? If so, did the suspect know that he had a constitutional right not to give up the protection; and, depending on the right, did he understand the legal consequences of his act? In determining whether additional rights will be brought within the protective umbrella of waiver, the Court will look to the purposes and application of the knowing waiver formula to divine the appropriateness of inclusion. Practically speaking, this means that the Court will determine if effective law enforcement will be served by demanding a knowledgeable and intelligent waiver; if not, then only voluntary waiver is necessary.

With the decision in *Schneckloth v. Bustamonte* the concept has become an overinflated word of art. There, the Court apparently followed the admonition of Mr. Justice Harlan in his *Miranda* dissent and refused to "carry over . . . engaging rhetoric and to obscure the policy choices to be made in regulating"<sup>117</sup> consent searches. By doing so, it was unwilling to meet the challenge given by Mr. Justice Goldberg when he noted in *Escobedo v. Illinois*:

[N]o system of criminal justice can, or should, survive if it comes to depend for its continued effectiveness on the citizens' abdication through unawareness of their constitutional rights. . . . If the exercise of constitutional rights will thwart the effectiveness of a system of law enforcement, then there is something very wrong with that system.<sup>118</sup>

Eugene E. Smary

117 384 U.S. 436, 511 (1966) (Harlan, J., dissenting).  
118 378 U.S. 478, 490 (1964).