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Search and Seizure: Consent to Search: Schneckloth v. Bustamonte, 412 U.S. 218 (1973)

claim that the majority's opinion extends the obligation to testify before the grand jury to an obligation to produce all physical evidence whatever its character. In fact, the Court's holding is much more limited. According to the majority's two-step analysis, the petitioners did not have an expectation of privacy in the physical characteristics of their voice and handwriting exemplars. No language in the opinion hints at an extension beyond these types of evidence to such things as personal papers; in fact, the majority reaffirms the application of the fourth amendment to a subpoena *duces tecum* which is overbroadly drawn. Thus, Stewart's two-step test in substance comports with Justice Marshall's theory that the type of evidence sought before the grand jury should govern the safeguards provided. Both agree that when the zone of privacy is invaded, the government must make a showing of reasonableness before a grand jury can compel the production of physical evidence. The disagreement occurred primarily over whether there was an exception of privacy in the instant cases.

The clash between the Court and Justices Marshall and Douglas indicates a continuing reexamination by the Court of the status of the grand jury in the criminal justice system. Both the majority and minority realized that the invaluable investigatory and screening functions of the grand jury do not justify abridging a witness' constitutional rights. In fact, such abridgement directly contradicts the traditional role of the grand jury. The grand jury was originally conceived to protect an accused person from political harassment by the government. It was assigned special powers to subpoena witnesses and documents and operate without the limitation imposed on trial courts. However, overzealous and politically motivated prosecutors have used the grand jury's authority to badger suspects. Consequently, Supreme Court decisions which increase grand jury powers must also consider their abusive potential in the hands of prosecutors.

Both sides agreed that the traditional view of the grand jury as an independent body interposed between accused and accusor may no longer be realistic.[38] The Court emphasized, however, as it did in *Kastigar v. United States*[39] and *Branzburg v. Hays*,[40] the necessity for grand juries to have wide powers so that "the public's interest in the fair and expeditious administration of the criminal laws" [41] is protected, while the dissenters emphasized the possibility that prosecutorial abuse will occur unless grand jury processes are carefully scrutinized.

If the holding in *Dionisio* and *Mara* is limited to voice and handwriting exemplars and fingerprints, as Justice Stewart's opinion indicated, the spectre of abuse raised by the dissenters seems remote, since evidence in which a witness has a real expectation of privacy will remain obtainable only with a showing of reasonableness. If, however, the legal principle established in *Dionisio* and *Mara* expands to other types of physical evidence where there is a legitimate expectation of privacy, then the independence of the grand jury which both sides seek to preserve will be threatened by prosecutors who will be tempted to use grand juries to avoid fourth amendment reasonableness showings.

[38] *Id.*
[39] 406 U.S. 441 (1972).
[40] 408 U.S. 665 (1972).
[41] 410 U.S. at 17.

SEARCH AND SEIZURE

Consent to Search: Schneckloth v. Bustamonte, 412 U.S. 218 (1973)

In *Schneckloth v. Bustamonte*[1] the Supreme Court held that consent to a police search is valid when voluntarily given even though the subject of the search may be unaware of his fourth amendment right to freely and effectively refuse.

The defendant, Robert Bustamonte, had been a passenger in a car stopped for motor vehicle violations. The police asked the occupants to step out when the driver failed to produce a valid operator's license. When asked if the car could be searched, a rider, Joe Alcala, responded, "Sure go ahead." The driver later testified that Alcala assisted in the search by opening the trunk and glove compart-

[1] 412 U.S. 218 (1973).

ments after an officer had asked, "Does the trunk open?" Prior to this request there had been no discussion of a crime and no one had been threatened with arrest. According to the officer's uncontradicted testimony, it "was all very congenial at this time." [2]

The police found several stolen checks in the car and Bustamonte was charged with possession of a check with intent to defraud. The checks were admitted into evidence over the defendant's objection that they had been acquired through an unconstitutional search and seizure. The resulting conviction was affirmed by the California appellate court. The California supreme court denied reivew and Bustamonte did not appeal to the Supreme Court. He sought instead a writ of habeas corpus contending that his imprisonment was unconstitutional due to the alleged violations of his fourth amendment rights. The federal district court denied the request. The Court of Appeals for the Ninth Circuit set the district court's order aside and remanded the case to the district court to determine if the consent had been a valid waiver of constitutional rights.[3] Subsequently the Supreme Court granted the state's petition for certiorari in order to determine what constitutes a valid consent for a police search.[4]

Prior to *Schneckloth*, the Supreme Court had, on occasion, reversed convictions for want of valid consent. In *Amos v. United States*,[5] the Court found coercion implicit where the defendant's wife had allowed the search after government officials announced that they had come to search the premises. In *Johnson v. United States*,[6] the Court again held that entry had been gained by submission to authority after a narcotics agent said, "I want to talk to you." In *Bumper v. North Carolina*,[7] the Court held that a search could not be justified as lawful when "consent" was given after the government officials had asserted that they possessed a warrant to search the premises. Such a situation was "instinct with coercion."

In other cases the Supreme Court had upheld convictions based on evidence found during consent searches. In *Davis v. United States*,[8] the Court held consent to search an office was voluntary where the defendant was under arrest and being interrogated. Several reasons were mentioned for the holding but the Court stressed that the search was for gasoline rationing coupons which remained government property and which were subject to inspection at anytime. The Court stated that duress would not so readily be implied in such situations.[9] In *Zap v. United States*,[10] the Court held that the defendant had voluntarily waived his claims to privacy by agreeing to permit inspection of his records in order to obtain government contracts. In *Coolidge v. New Hampshire*,[11] the Court reversed a state conviction but stated that there is nothing constitutionally suspect about consenting to a search in order to cooperate with the police.

While the Court found, or failed to find, a valid consent in each of these cases, it did not clearly state whether consent need only be voluntary and free of coercion to be valid or whether it must be a waiver of a known constitutional right. Reflecting the lack of clarity in Supreme Court decisions, the state and lower federal courts have not agreed on the standard defining a valid consent.[12] It was

[2] 412 U.S. at 220. *See also* People v. Bustamonte, 270 Cal. App. 2d 648, 76 Cal. Rptr. 17 (1969). The police requested Alcala's consent for the search since the automobile belonged to his brother who was not present. The Court did not discuss the issue of third-party consent except to observe in a footnote that such consents have been found valid by the Court. 412 U.S. at 246 n.34. Justice Marshall in dissent stated that Bustamonte, like Alcala, had standing to object. *Id.* at 278 n.3. Presumably this was assumed by the Court.

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

[4] Justice Powell thought that the real issue was the extent to which federal collateral review should be available to state prisoners relying on the exclusionary rule. While he joined the Court's opinion, he devoted his concurring opinion to the question of collateral review rather than to the issue of determining the standard for consent in a search and seizure context. 412 U.S. at 250.

[5] 255 U.S. 313 (1921).

[6] 333 U.S. 10 (1948).

[7] 391 U.S. 543, 550 (1968). The officials in *Bumper* had a warrant, but the prosecutor chose to rely on the "consent" rather than on the warrant to justify the search.

[8] 328 U.S. 582 (1946).

[9] Justice Frankfurter dissented vigorously saying that the consent was coerced since the agents threatened to break down the door and since one agent was attempting to force open a rear window. He also objected to the finding of voluntariness from the fact that what the officers compelled Davis to give up were rationing coupons whereas the restrictions of the fourth amendment guard the right to be free of governmental intrusion and should not hinge on the character of the object sought. *Id.* at 600–02.

[10] 328 U.S. 624 (1946).

[11] 403 U.S. 443 (1971).

[12] In Cipres v. United States, 343 F.2d 95, 97 (9th Cir. 1965), for example, the court held that the issue was whether the defendant had understood that her consent to a search of her luggage waived her constitutional immunity from unreasonable search and seizure. On the other hand, Justice Traynor in People v. Michael, 45 Cal. 2d 751, 753, 290 P.2d 852, 854 (1969), held that the issue was whether the consent was given in response to assertions of official authority; knowl-

against this judicial background that the Court defined "consent" as applied in the search and seizure context.

The analysis of the majority[13] in *Schneckloth* began with two assumptions: a search authorized by a valid consent is constitutionally permissible even lacking probable cause, and the prosecution has the burden of proving the validity of the consent.[14] In order to determine the meaning of "voluntariness" in a search situation the Court analogized to its long series of cases involving questionably "voluntary" confessions. In those cases the Court assessed the totality of the circumstances surrounding the confession to determine whether it was voluntary or coerced. Justice Stewart in *Schneckloth* emphasized that no single criterion controlled but rather that many different factors caused confessions to be held involuntary and therefore inadmissible.[15] The "totality of the circumstances" test in effect balanced the recognized need for suspect interrogation against the constitutional requirement that the criminal law be justly administered. This rule balanced these needs by restricting the questioning allowed.[16]

The Court in *Schneckloth* held that because of similar considerations the question of whether consent to a search is involuntary is a question of fact to be determined from the surrounding circumstances; knowledge of the right to refuse is only one factor and not dispositive of the issue.[17] The Court appeared to reach this conclusion by balancing the legitimate need for law enforcement searches against the protection afforded by the fourth amendment. Factors of effective law enforcement, including situations in which evidence can only be obtained by a consent search[18] or where wholly innocent persons would prefer a consent search rather than a search based on a warrant, require the validity of consent searches. However, these considerations often conflict with the protection against unreasonable intrusions which often start, in the words of *Boyd v. United States*, "by silent approaches and slight deviations from legal modes of procedures."[19] The balance is struck by requiring the government to prove that consent was voluntary (to guarantee fourth amendment rights) while not requiring proof that the subject intentionally waived his right to refuse (to facilitate the practice of consent searches).[20]

The defendant argued that the problem of proving a knowledgeable consent would be obviated to a great extent by advising the subject of the search of his right to refuse. The Court, however, specifically refused to require this practice or even to recommend it, stating that this suggestion had been almost unanimously rejected by federal and state courts. It emphasized that it would be impractical to require "the detailed requirements of an effective warning"[21] because consent searches usually occur in informal, "on-the-scene" situations as opposed to the trial atmosphere or custodial interrogation in which defendants are advised of their rights.[22] Thus *Schneckloth* restricted

edge of constitutional rights was not mentioned. The court in Byrd v. Lane 398 F.2d 750, 753 (7th Cir. 1968), held that a consent to search was valid because it was freely given, without promise or coercion.

[13] Justice Stewart wrote the opinion of the Court joined by Chief Justice Burger and Justices White, Blackmun, Powell, and Rehnquist. Justice Blackmun filed a concurring opinion as did Justice Powell joined by Chief Justice Burger and Justice Rehnquist. Justices Douglas, Brennan, and Marshall each filed dissenting opinions.

[14] 412 U.S. at 222.

[15] Factors that were taken into account include the nature of physical treatment given the accused, Reck v. Pate, 367 U.S. 433 (1961); the extent of his education, Payne v. Arkansas, 356 U.S. 560 (1958); his intelligence, Fikes v. Alabama, 352 U.S. 191 (1957); his age, Haley v. Ohio, 332 U.S. 596 (1948); the nature of the questioning, Ashcraft v. Tennessee, 322 U.S. 143 (1944); the length of detention, Chambers v. Florida, 309 U.S. 227 (1940). *See generally* Miranda v. Arizona, 384 U.S. 436, 504 (1966) (Harlan, J., dissenting).

[16] *E.g.* Haynes v. Washington, 373 U.S. 503, 515 (1963). Justice Stewart quoted with approval Justice Frankfurter in Culombe v. Connecticut, 367 U.S. 568, 602 (1961), on the test of voluntariness:

> Is the confession the product of an essentially free and unconstrained choice by its maker? If it is, if he has willed to confess, it may be used against him. If it is not, if his will has been overborne and his capacity for self-determination critically impaired, the use of his confession offends due process.

412 U.S. at 225–26.

[17] 412 U.S. at 227.

[18] Justice Stewart suggested that *Schneckloth* itself is an example in which evidence was obtained when the police had no warrant and lacked probable cause. *Id.* at 227–28.

[19] *Id.* at 228. (Stewart, J., quoting Boyd v. United States, 116 U.S. 616, 635 (1886)).

[20] Justice Marshall rejected this balancing test near the end of his dissent:

> [T]he Court now sanctions a game of blindman's buff, in which the police always have the upper hand, for the sake of nothing more than the convenience of the police.... The Framers of the Fourth Amendment struck the balance against this sort of convenience and in favor of certain 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.

412 U.S. at 289–90.

[21] *Id.* at 231.

[22] *Id.* at 232, 245. Justice Marshall rejected Stewart's

the warnings required by *Miranda v. Arizona*[23] to the interrogation setting, holding them to be inapplicable to rights developed by the fourth amendment.

Justice Stewart also stated that prior search and seizure cases support the conclusion that a consent search is valid when given voluntarily and not as the result of express or implied coercion. He interpreted *Davis v. United States*[24] to show that many factors were considered in finding a valid consent.[25] *Bumper v. North Carolina*[26] was seen as an implicit recognition that knowledge of a right to refuse is not a prerequisite when a search is granted in submission to a claim of lawful authority.[27] Thus both the traditional concept of voluntariness in confession and consent search cases and the policy considerations behind those decisions were urged by the Court as reasons why awareness of fourth amendment rights is not an essential requirement of an effective consent.[28]

The issue of whether consent to a search necessarily involves a waiver of constitutional rights was discussed at length by Justice Stewart.[29] He concluded that the protections afforded by the fourth amendment are vastly different from those afforded by the fifth and sixth amendments. The latter two amendments protect rights guaranteed to a criminal defendant in order to preserve a fair trial. The protections applicable in the trial setting include the right to counsel, the right to confront one's accusors, the right to a speedy trial, the right to a jury trial, the right not to be twice jeopardized and the right to be informed and understanding of all rights lost upon a plea of guilty.[30] These amendments also guarantee the defendant the right to protect the reliability of the truth determining process at certain pre-trail stages such as post-indictment pre-trial line-ups[31] and custodial interrogations.[32]

In contrast, fourth amendment protections do not prevent unfair results in a criminal proceeding.[33] Rather they guarantee freedom from unreasonable searches and protect one's privacy against arbitrary intrusions by the State.[34] The fourth amendment "is not an adjunct to the ascertainment of truth," but it protects "quite different constitutional values—values reflecting the concern of our society for the right of each individual to be let alone."[35] The distinction made between the protections guaranteed by these amendments to the Constitution indicates that the difference between the non-custodial/pre-indictment settings as opposed to the "critical stage" settings continues to be significant for the Court.[36]

Justice Stewart gave two additional reasons for not requiring proof of an understanding waiver of the right to refuse permission for a police search.[37] He stated that such a waiver would be extremely difficult to prove, even in cases where the search was completely voluntary. A defendant could "effectively frustrate the introduction into evidence of the fruits of a search by simply failing to

assumption that a warning would detrimentally alter the informality of the circumstances surrounding a request for consent stating that reported cases in which the subject was informed of his right to refuse consent show that nothing disastrous happened. *See also* Thompson, *The Supreme Court and the Criminalist: a Coming Decade of Criminal Law Revolution*, in LAW ENFORCEMENT SCIENCE AND TECHNOLOGY 981, 982 (S. Yefsky ed. 1967).

[23] 384 U.S. 436 (1966). *Miranda* held that a suspect in custody must be warned of the right to remain silent and the right to have counsel present during any questioning.

[24] 328 U.S. 582 (1946).

[25] These factors included the nature of the area searched, the time of day, the existence of the right to inspect the coupons, the nature of the request, and the brevity of the refusal period. Justice Stewart did not mention the emphasis that the Court in *Davis* placed on the government's ownership of the coupons.

[26] 391 U.S. 543 (1968).

[27] Justice Stewart cited but did not discuss Johnson v. United States, 333 U.S. 10 (1948); Zap v. United States, 328 U.S. 624 (1946); and Amos v. United States, 255 U.S. 313 (1921), in support of this assertion.

[28] 412 U.S. at 234. Justice Stewart's references to the dissent's assumption that a consent must be an understanding waiver of fourth amendment rights indicate rather clearly his attitude toward that assumption. At various places he labeled the waiver standard a "talismanic definition," *Id.* at 224; a "*sine qua non*," *Id.* at 227; an "infallible touchstone," *Id.* at 229; and a "litmus-paper test." *Id.* at 230.

[29] *Id.* at 235-46.

[30] *Id.*

[31] *See* United States v. Wade, 388 U.S. 218 (1967); Gilbert v. California, 388 U.S. 263 (1967) (right to counsel at such line-ups).

[32] *See* note 23 *supra*.

[33] 412 U.S. at 242. Justice Powell in his concurring opinion also accepted the distinction between "trial rights" and the right to be free of unreasonable searches. "Prisoners raising Fourth Amendment claims collaterally usually are quite *justly* detained." *Id.* at 258.

[34] *See also* Katz v. United States, 389 U.S. 347, 351 (1967); Wolf v. Colorado, 338 U.S. 25, 27 (1949).

[35] 412 U.S. at 242. (Stewart, J., citing Tehan v. United States *ex rel.* Schott, 382 U.S. 406, 416 (1966)).

[36] *See* United States v. Ash, 93 S. Ct. 2568 (1973); Kirby v. United States, 406 U.S. 682 (1972); United States v. Wade, 388 U.S. 218 (1967); Gilbert v. California, 388 U.S. 263 (1967); Miranda v. Arizona, 384 U.S. 436, 478 (1966).

[37] Justice Black defined such a waiver as "an intentional relinquishment or abandonment of a known right or privilege." Johnson v. Zerbst, 304 U.S. 458, 464 (1938).

testify that he in fact knew he could refuse to consent."[38]

The final reason for not requiring an understanding waiver lies in the Court's assumption that the police at the scene would be unable to determine whether the consent was in fact understandingly given; an examination necessary to determine the suspect's comprehension could only be done by a trial judge.[39] Justice Stewart recalled that *Miranda* had rejected the suggestion of inquiring of the defendant as to the extent of his understanding of his rights because such inquiries could "never be more than speculative."[40] Therefore, *Miranda* required that a warning be given to all persons in custody. The Court in *Schneckloth* clearly feared that for the same reason the requirement of a waiver "would inevitably lead to a requirement of detailed warnings before a consent search."[41]

Three members of the Court dissented in *Schneckloth* based on their belief that consent to a search constitutes a waiver of constitutional rights which requires an intentional relinquishment of a known right.[42] Justice Marshall stated that an uninformed consent is just as unconstitutional as a consent secured by police coercion.[43] The validity of the consent depends on the understanding the subject has of his fourth amendment rights.[44] The subject who understands these rights has the ability to allow or to refuse the search because the search context is not inherently coercive.[45] Justice Marshall, therefore, concluded that a person could not validly consent to an action that violated his rights if he were not aware that he possessed such rights.[46]

Justice Marshall also objected to defining a valid consent for a search in terms of voluntariness as found in confession cases because the voluntariness standard was developed to decide issues entirely different from those arising under the fourth amendment. The pre-*Miranda* cases cited by the majority concerned compulsion which negated the voluntariness of the defendant's confession. The *Miranda* warning is significant not so much for the information it conveys, but rather because the warning itself will lessen the possibility that statements by the defendant will have been elicited by coercion. Since "no sane person would knowingly relinquish a right to be free of compulsion," knowledge of that right in confession cases is irrelevant.[47]

Four members of the Court joined the opinion of the majority but also wrote or joined concurring opinions.[48] Justice Powell endorsed the test of a valid consent announced by the Court, but he emphasized that in his opinion the real issue was the extent to which federal habeas corpus should be available to state prisoners who seek to suppress evidence based on the exclusionary rule.[49] In his

[38] 412 U.S. at 230. *But see* United States v. Curiale, 414 F.2d 744 (2d Cir. 1969); Rosenthall v. Henderson, 389 F.2d 514 (6th Cir. 1968), in which the prosecution proved understanding waivers. Stewart called these "rare cases." 412 U.S. at 229. Justice Marshall in dissent suggested that there are several ways to show the subject's awareness of his rights. *Id.* at 286–87.

[39] *Id.* at 244.

[40] *Id.* at 245 n.33 (Stewart, J., citing Miranda v. Arizona, 384 U.S. 436, 468–69 (1966)).

[41] 412 U.S. at 245 n.33. While both *Schneckloth* and *Miranda* accepted the difficulty of determining the defendant's subjective state, the Court rejected the standard in *Schneckloth* but preserved it by requiring a warning in *Miranda*.

[42] The opinions of Justices Douglas and Brennan were quite brief. Justice Douglas stressed that the petition should have been dismissed since the district court might have determined that the search was knowingly and intelligently allowed. Justice Brennan stated that, "It wholly escapes me how citizens can meaningfully be said to have waived something as precious as a constitutional guarantee without ever being aware of its existence." *Id.* at 277.

[43] The terminology used by Justices Stewart and Marshall in stating the issue is indicative of their dissimilar conclusions. Stewart: When is a consent voluntary? Marshall: Is a simple verbal assent a relinquishment of the right to refuse? "Consent" implies a certain amount of control over events with permission granted for the search. "Assent" implies acquiescence and agreement to avoid trouble.

[44] Justice Marshall disagreed with the Court's assertion that its prior search and seizure cases were decided on an evaluation of all the circumstances. He found only two cases, *Zap* and *Davis*, in which the Court had upheld a search based on consent and the decision in each case, he felt, turned on special circumstances. *Id.* at 279–84 nn.5, 6, 8, 9, 10.

[45] *Id.* at 281. Justice Marshall tacitly assumed that anyone wanting to exclude the police would do so if that person knew that he had a right to refuse. He therefore strenuously objected to the idea that a case could arise in which the consent would be held voluntary even though the defendant had proved his lack of knowledge.

[46] *Id.* at 285. This raises the possibility of cases in which knowledge of the right to refuse would not have affected the subject's response. If the State could not prove that the consent was understandingly given, the exclusionary rule would apply even though, given the attitude of the subject at the time of the request, the search would have been allowed anyway. Justice Marshall did not consider this to be a realistic possibility. *See* note 43 *supra*.

[47] 412 U.S. at 282 n.8 (Marshall, J., dissenting).

[48] Justice Blackmun concurred in a very brief opinion. Justice Powell, joined by Chief Justice Burger and Justice Rehnquist, wrote a lengthy concurring opinion. *Id.* at 249–50.

[49] According to Justice Powell, the issue of habeas corpus availability in fourth amendment cases was "the overriding issue briefed and argued in this case." *Id.* at 250. Justice Stewart acknowledged that California had urged the reversal of cases expanding the availability of habeas corpus. *Id.* at 249 n.38.

view fourth amendment claims seldom bear any relationship to the prisoner's innocence. Therefore, he would restrict such collateral claims to the question of whether the prisoner had an adequate opportunity to raise the claim in the state court.

This argument is premised on Justice Powell's belief that the use of habeas corpus has been extended far beyond its traditional purpose of affording a means of ending unjust incarceration.[50] Under common law once the prisoner had been convicted, the court receiving a habeas corpus petition could only inquire into the jurisdiction of the committing court; it could not redetermine the facts and issues.[51] Subsequently, the Court held in *Frank v. Magnum*[52] that federal courts may grant petitions in those cases in which the state court procedures are so ineffective that the defendant has no adequate opportunity to raise his constitutional claims. Nothing in the legislative history of the present habeas corpus act, according to Justice Powell, indicated any desire to expand the function of the writ.[53]

This over-extension has caused the subordination of important societal values including efficient use of the courts,[54] finality in criminal trials,[55] the minimization of friction between the federal and state courts[56] and the preservation of the doctrine of federalism.[57] These problems should not be tolerated because collateral attacks in search and seizure cases rarely concern innocence. To the contrary, the evidence in dispute is often highly reliable proof of guilt.[58] Justice Powell would therefore require that a habeas corpus petition raise questions about the prisoner's actual guilt.[59]

Implicit in Justice Powell's opinion is a dislike for the exclusionary rule. He criticized its failure to deter illegal searches.[60] Since the rule fails to deter in the normal course of criminal proceedings, it would be an even less effective deterrent in cases of collateral attack where the length of time between the search and the exclusion of evidence is so great that there will be little if any association by the police of the exclusion and the search.[61] Thus he would have held that petitions for a writ of habeas corpus that claim only the use of illegally gotten evidence should be dismissed by the court receiving the petition.[62]

The significance of *Schneckloth* lies in the fact that it defined the meaning of consent in the search and seizure context.[63] Contrary to earlier expectations,[64] the Court established that to be valid,

[50] *Id.* at 250. *See also* Fay v. Noia, 372 U.S. 391, 448 (1963) (Harlan, J., dissenting). Justice Powell cited several cases that expanded the availability of habeas corpus. Kaufman v. United States, 394 U.S. 217 (1969) (collateral review of search and seizure claims are available to federal prisoners); Fay v. Noia, *supra*, (state prisoners are not automatically precluded from raising constitutional issues which the state court had refused to consider because of the defendant's failure to comply with state procedural rules); Brown v. Allen, 344 U.S. 443 (1953) (the right of federal courts to redetermine constitutional issues is not a restricted right).

[51] 412 U.S. at 253–54 (Powell, J., citing Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 461, 446 (1963); Oaks, *Legal History in the High Court—Habeas Corpus*, 64 MICH. L. REV. 451–56 (1966).

[52] 237 U.S. 309 (1915).

[53] 412 U.S. at 273–74. The pertinent portions of the habeas corpus statute are 28 U.S.C. § 2254(a) (1966) and § 2255 (1949).

[54] Justice Powell cited the *1972 Annual Report of the Director of the Administrative Office of the United States Court* showing the number of state prisoner federal habeas corpus petitions increased from 1,020 in 1961 to 7,949 in 1972. The largest number for any one year was 9,063 petitions in 1970. 412 U.S. at 260 n.14.

[55] *See* Sanders v. United States, 373 U.S. 1, 24, 25 (1963) (Harlan, J., dissenting); Amsterdam, *Search, Seizure, and Section 2255: a Comment*, 112 U. PA. L. REV. 378, 383–84 (1964).

[56] Powell quoted Justice Reardon of the Massachusetts Supreme Judicial Court as stating that of the problems between the state and federal judiciaries, the greatest is "the effect of federal habeas corpus proceedings on State courts" which Reardon called "the humiliation of review from the full bench of the highest State appellate court to a single United States District judge." 412 U.S. at 264 n.21.

[57] *Id.* at 259. Powell also stated:

> In my view, this Court has few more pressing responsibilities that to restore the mutual respect and the balanced sharing of responsibility between the state and federal courts which our tradition and the Constitution itself so wisely contemplate.

Id. at 265.

[58] *Id.* at 258 (Powell, J. citing Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. CHI. L. REV. 142 (1970)).

[59] *See also* Harris v. Nelson, 394 U.S. 286, 302–03 (1969) (Black, J., dissenting); Kaufman v. United States, 394 U.S. 217, 237–38 (1969) (Black, J., dissenting).

[60] 412 U.S. at 267 n.25. Although he criticized the rule, Justice Powell did not call for its total abandonment at the present time.

[61] *Id.* at 269. Justice Powell also reasoned that because of *Kaufman*, the practical effect of the habeas petitions is the exclusion of evidence from the "vast twilight zone" of search and seizure law since evidence from flagrant fourth amendment abuses will have been excluded by trial and state appellate courts.

[62] *Id.* at 273–74.

[63] Since *Schneckloth* did not involve consent given in custodial circumstances, the Court specifically excluded this issue from the ambit of the ruling. *Id.* at 240–41 n.29, 247 n.36. However, the Court may have indicated its view when it noted that "other courts have been particularly sensitive to the heightened possibilities for coercion when the 'consent' to search was given by a person in custody." *Id.*, n.29 (citing cases).

[64] Some commentators and courts interpreted *Miranda* to mean that subjects of a prospective search should be warned of their right to effectively refuse

search consent need not be made with an awareness and understanding of fourth amendment rights. It is interesting to note that the test of voluntariness adopted by the Court is very similar to Section 3501 of Title II of the Omnibus Crime Control and Safe Streets Act of 1968 regarding admissibility of confessions.[65]

The decision demonstrates that certain distinctions used recently by the Court remain important for a majority of its members. The "critical stage" concept of criminal proceedings has been reasserted as a means of distinguishing those rights that cannot be relinquished absent an understanding waiver from those rights that can be abandoned in ignorance without causing reversible error. In the process the Court has said in effect that rights guaranteed by the fourth amendment will receive less protection than rights guaranteed by the fifth and sixth amendments.

A problem in *Schneckloth* is that both the Court and the dissenting Justices strained to buttress their conclusions with the same few cases—cases which are ambiguous on the issue since they did not attempt to determine a standard of consent. It would have been better to have relied less on *stare decisis* and to have held instead that to the extent that earlier cases required a knowing and intentional waiver of constitutional rights, those cases will no longer be followed.

The position of the concurring Justices indicates that the question of collateral attack on incarcerations based on claims of violations of fourth amendment rights is far from settled.[66] Their opinions also show a continuing dislike for the exclusionary rule.[67] It may be that this rule caused at least four members of the Court to call for a restriction on the use of federal habeas corpus by state prisoners. As Justice Brennan stated in *Kaufman v. United States*,[68] the proposal to exclude those petitions for habeas corpus based on alleged violations of the exclusionary rule "brings into question the propriety of the exclusionary rule itself."[69] It may also be that it is the dislike of the exclusionary rule that led six members of the Court to sanction a voluntary consent standard for some constitutional rights and a knowing and understanding waiver standard for others.

permission to insure the admissibility of any evidence seized during the search. See United States v. Blalock, 255 F. Supp. 268 (E.D. Pa. 1966); Note, *Consent and the Constitution after Bumper v. North Carolina*, 6 CAL. W.L. REV. 316 (1970); Note, *Consent Searches: A Reappraisal After Miranda v. Arizona*, 67 COLUM. L. REV. 130 (1967).

[65] Section 3501 reads in part:

(a) A confession . . . shall be admissible in evidence if it is voluntarily given. . . . (b) The trial judge in determining the issue of voluntariness shall take into consideration all the circumstances surrounding the giving of the confessions, including. . . . (3) whether or not the defendant was advised or knew that he was not required to make any statement and that any such statement could be used against him . . . . The presence or absence of any of the above-mentioned factors to be taken into account by the judge need not be conclusive on the issue of the voluntariness of the confession . . . .

18 U.S.C. § 3501 (1968).

[66] Since the Court held that there was no valid fourth amendment claim in *Schneckloth*, it declined to discuss the question of habeas corpus. 412 U.S. at 429 n.38. In his concurring opinion Justice Blackmun agreed with views of Justice Powell but did not join his opinion because he also felt that no valid fourth amendment claim was offered. Although he avoided the issue of habeas corpus in this case, Justice Stewart joined dissenting opinions in Kaufman v. United States, 394 U.S. 217, 242 (1969) and in Fay v. Noia, 372 U.S. 391, 448 (1963) that opposed the increased availability of the writ. *See also* note 48 *supra*.

[67] 412 U.S. at 267–69 nn. 24–27. (Powell, J., dissenting). *See also* Bivens v. Six Unknown Named Agents, 403 U.S. 388, 411 (1971) (Burger, C. J., dissenting).

[68] 394 U.S. 217 (1969).

[69] *Id.* at 229.

Border Searches: Almeida-Sanchez v. United States, 93 S. Ct. 2535 (1973)

In *Almeida-Sanchez v. United States*,[1] the United States Supreme Court confronted an issue of first impression: whether, and under what circumstances, the Immigration and Naturalization Service may conduct warrantless searches of automobiles by roving patrols[2] for the purpose of apprehending aliens illegally entering this country.[3]

[1] 93 S. Ct. 2535 (1973).

[2] The Border Patrol conducts three types of surveillance: (1) permanent checkpoints at certain nodal intersections; (2) temporary checkpoints at various places; and (3) roving patrols. *Id.* at 2537. *Almeida-Sanchez* is concerned only with the latter.

[3] In 1971 "The Immigration and Naturalization Service located 402,126 deportable aliens . . . . Of the total, 317,882 or 76 percent entered illegally at points other than points of entry. Almost all (317,302) came

Defendant Almeida-Sanchez was convicted of having knowingly received, concealed and facilitated the transportation of 161 pounds of illegally imported marijuana in violation of 21 U.S.C. § 176(a) (1964). The marijuana was discovered by officers of the Immigration and Naturalization Service who were conducting a roving border area check of automobiles for aliens. It was undisputed that the patrol had no search warrant, probable cause or "reasonable suspicion" [4] for the stop and subsequent search.[5]

At the time of the stop and search near Glamis, California, the defendant was travelling west on State Highway 78. The majority noted that the road is essentially an east-west highway which also meanders north and east near Glamis. However, nowhere does the highway reach the Mexican border.[6]

In a brief majority opinion, the Court of Appeals for the Ninth Circuit rejected the defendant's contention that the warrantless search and seizure was unconstitutional under the fourth amendment.[7] It recognized that the search was not a border search,[8] but upheld its validity on the basis of § 287(a) of the Immigration and Naturalization Act,[9] which permits warrantless searches of vehicles for aliens "within a reasonable distance from any external boundary of the United States." Regulations of the Attorney General define a reasonable distance as "within 100 air miles from any external boundary of the United States." [10] The majority also relied on its prior decisions supporting the constitutionality of § 287(a) of the Immigration and Naturalization Act with regard to alien searches.[11]

The Supreme Court granted certiorari[12] and reversed the decision. The Court held that in the absence of probable cause or consent, warrantless searches by roving patrols of the Immigration and Naturalization Service violate the fourth amendment right to be free from "unreasonable searches and seizures." [13] Writing for the majority,[14] Mr. Justice Stewart could find no support for the constitutionality of the searches in the Court's automobile search decisions[15] nor in its administrative inspection decisions.[16] He also found no support for the searches in § 287(a) of the Immigration and Naturalization Act.

The Supreme Court previously had held that warrantless searches of automobiles were permissible if made upon probable cause:

> [T]hat is, upon a belief, reasonably arising out of the circumstances known to the seizing officer that

across land borders—98.9 percent from Mexico." 1971 ATT'Y GEN. REP. 151.

[4] For a discussion of "reasonable suspicion," see Adams v. Williams, 407 U.S. 143, 145–46 (1972); Terry v. Ohio, 392 U.S. 1, 30 (1967).

[5] 93 S. Ct. at 2537.

[6] The dissent relied on an oral stipulation in open court and described the area of the stop in different terms. It emphasized the north-south character of Highway 78 near Glamis and noted that on occasions the Border Patrol conducted roving checks of vehicles on the highway. Further, the dissent stated that the stop occurred 20 air miles north of the Mexican border, while the majority put the distance at 25 miles. 93 S. ct. at 2546 (White, J., dissenting).

[7] 452 F.2d 459 (9th Cir. 1971).

[8] The ninth circuit previously described border searches as those "made at or in the immediate vicinity of an international border crossing." Alexander v. United States, 362 F.2d 379, 382 (9th Cir. 1966), *cert. denied*, 385 U.S. 977 (1966); *accord*, United States v. McDaniel, 463 F.2d 129 (5th Cir. 1971).

[9] Immigration and Naturalization Act § 287(a), 8 U.S.C. § 1357(a) (1952):

> (a) Any officer or employee of the Service authorized under regulations prescribed by the Attorney General shall have power without warrant . . . (3) within a reasonable distance from any external boundary of the United States, to board and search for aliens any vessel within territorial waters of the United States and any railway car, aircraft, conveyance, or vehicle. . . .

[10] 8 C.F.R. § 287.1(a)(2) (1964), *amending* 8 C.F.R. § 287.1(a)(2) (1957).

[11] *See* Duprez v. United States, 435 F.2d 1276 (9th Cir. 1970) (defendant was stopped at an immigration checkpoint 67 to 77 miles from the Mexican border); Fumigalli v. United States, 429 F.2d 1011 (9th Cir. 1970) (defendant was stopped at an immigration checkpoint 49 miles north of the Mexican border); Miranda v. United States, 426 F.2d 283 (9th Cir. 1970) (defendant was stopped at an immigration checkpoint 60 to 70 miles north of the Mexican border). In all three cases, the court held that § 287(a) of the Immigration and Naturalization Act permits warrantless searches of vehicles for concealed aliens within 100 miles of an external boundary of the United States.

[12] 406 U.S. 944 (1972).

[13] U.S. CONST. amend. IV:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

[14] Justices Douglas, Brennan, Marshall and Powell joined in the majority opinion. Justice Powell also filed a concurring opinion. Justice White filed a dissenting opinion in which Chief Justice Burger and Justices Blackmun and Rehnquist joined.

[15] Coolidge v. New Hampshire, 403 U.S. 443 (1971); Chambers v. Monroney, 399 U.S. 42 (1970); Carroll v. United States, 267 U.S. 132 (1924).

[16] United States v. Biswell, 406 U.S. 311 (1972); Colonnade Catering Corp. v. United States, 397 U.S. 72 (1970); Camara v. Municipal Court, 387 U.S. 523 (1967); See v. City of Seattle, 387 U.S. 541 (1967).

> an automobile . . . contains that which by law is subject to seizure and destruction.[17]

This exception[18] to the warrant requirement of the fourth amendment developed because of the mobility of the automobile. Since an automobile is a "fleeting target," a warrantless search, when based upon probable cause, is less offensive than a warrantless search of a store or dwelling. In light of this reasoning and the reasoning in the more recent case of *Chambers v. Monroney*,[19] the Court created no new fourth amendment right when it required probable cause for a search of an automobile by a roving patrol of the Immigration and Naturalization Service. In *Chambers*, the Court noted that probable cause is the "minimum requirement for a reasonable search permitted by the Constitution." [20]

In *Camara v. Municipal Court*[21] the Court had permitted administrative inspections on less than probable cause. Inspectors did not have to have specific knowledge about a particular building, but still had to meet a "standard of reasonableness." [22] This standard, which would vary with the municipal program being enforced, would include such factors as passage of time, nature of the building and condition of the entire area. Nevertheless, consent or a warrant based on such factors was necessary before the inspection could begin. Roving patrols of the Immigration and Naturalization Service, however, acted without warrant, probable cause or consent. The searches were made solely at the discretion of the officer on patrol and lacked any judicial safeguards. In rejecting the government's contention that the alien smuggling problem was so serious as to permit such searches, the Court reaffirmed its holding in *United States v. United States District Court*.[23] There, the Court noted that before a search is initiated, the fourth amendment contemplates judicial judgment, not executive discretion.[24]

After stating that neither its automobile search decisions nor its administrative inspection decisions justified a warrantless search, the Court then examined § 287(a) of the Immigration and Naturalization Act to see if there was any support for the roving searches in the Act of Congress. The Court did not question the power of Congress to exclude aliens,[25] nor did it touch the issue of the authority of the Immigration and Naturalization Act to permit warrantless searches at the border or its functional equivalent.[26] However, it did not extend this exception to the fourth amendment to the roving patrols. On this issue the majority relied on Chief Justice Taft's opinion in *Carroll v. United States*[27]

[17] Carroll v. United States, 267 U.S. 132, 149 (1924). The Court found that probable cause existed in *Carroll* when prohibition officers, while on a highway frequently used for transporting liquor, stopped and searched a car upon faith of information previously obtained by them that the car and its occupants were engaged in bootlegging.

[18] Other exceptions to the warrant requirement are: (1) a search incident to an arrest of the area within the immediate control of the person arrested from which he might gain possession of a weapon or destroy evidence, Chimel v. California, 395 U.S. 752, 762–63 (1969); (2) a search of the outer clothing for weapons during a stop and frisk situation to discover weapons which could be used to assault the officer, Terry v. Ohio, 392 U.S. 1, 32 (1967); and (3) the seizure of objects within plain view of the arresting officer, Harris v. United States, 390 U.S. 234, 236 (1967).

[19] 399 U.S. 42 (1970). *Chambers* involved the warrantless search of an automobile after it was taken to a police station. The Court held that the search was valid since they saw "little difference between on the one hand seizing and holding the car before presenting the probable cause issue to a magistrate and on the other hand carrying out an immediate search without a warrant. Given probable cause to search, either cause is reasonable under the fourth amendment." *Id.* at 51.

[20] *Id.*

[21] 387 U.S. 523 (1967). *See also*, See v. City of Seattle, 387 U.S. 541 (1967).

[22] 387 U.S. at 538–39.

[23] 407 U.S. 297 (1972). In *District Court* the government argued that warrantless electronic surveillance was lawful as an exercise of presidential power to protect national security. Nevertheless, the Court held that the surveillance violated the fourth amendment and ordered the government to disclose the overheard conversations. Domestic security is not an exception to the prior judicial review provisions of Title III and the fourth amendment.

[24] The Court also distinguished the decisions in Colonnade Catering Corp. v. United States, 397 U.S. 72 (1969) involving a liquor licensee and United States v. Biswell, 406 U.S. 311 (1972) involving a licensee under the Gun Control Act of 1968. Both decisions permitted warrantless searches of federally licensed buildings on two grounds. First, those cases dealt with businessmen who accepted the restrictions of their trade, while any individual was subject to a Border Patrol search. Second, in those cases the searching officers positively knew the premises contained liquor or guns, whereas there was often no reason to believe an automobile contained concealed aliens.

[25] The authority of Congress to formulate American immigration policy comes from U.S. CONST. art. I, § 8 which gives Congress the power "to regulate commerce with foreign nations, and among the several States, and with the Indian tribes." The first alien legislation was the Alien Act of June 25, 1798, 1 Stat. 570, which authorized the President to deport any aliens he deemed dangerous. AUERBACH, IMMIGRATION LAWS OF THE UNITED STATES (2d ed. 1961). *See also*, Kleindienst v. Mandel, 408 U.S. 753 (1972).

[26] The Court described functional equivalents of border searches as established checkpoints at the junction of two highways that extend from international borders or destinations of nonstop flights from foreign countries. 93 S. Ct. at 2539.

[27] 267 U.S. 132 (1924).

which stated that because of national self-protection, travellers crossing international borders may be stopped and required to identify themselves and their belongings as lawfully entitled to enter the country. However, those lawfully within the country and using the public highways may not be stopped unless a competent official has probable cause to believe they are carrying contraband.[28]

By restricting itself to the question of the constitutionality of roving searches for smuggled aliens, the Court avoided the broader question of the constitutionality of searches at the border or its functional equivalent.[29] The Court approved border searches in dictum in *Carroll*,[30] but never determined the standard of reasonableness for such searches. As interpreted by the federal courts, however, the border search is an exception to the probable cause requirement of the fourth amendment. It may be made upon mere suspicion and neither a search warrant nor probable cause is necessary.[31] The search must only meet a standard of reasonableness.[32] This exception to the fourth amendment is based on the acknowledged difficulty of policing the border.[33]

The concurring opinion of Mr. Justice Powell is important as an insight into what circumstances may create probable cause for a search for smuggled aliens. The majority required probable cause for such searches, but failed to describe or explain a situation when probable cause would exist. It did not note whether there had to be specific knowledge about a particular area or general knowledge about any area near the international border.[34] Mr. Justice Powell, on the other hand, noted that in certain circumstances there may exist a functional equivalent of probable cause to meet the requirements of the fourth amendment.[35]

Important to the discovery of a functional equivalent of probable cause would be the particular area where the roving patrol operated. Is it an area where aliens frequently enter the United States illegally or would a search of the area be a mere fishing expedition? Another important factor is the degree of intrusion on the driver of the automobile. Finally, decisions of the courts of appeals should be examined for prior judicial approval of the type of search to be undertaken.[36]

In addition to dealing with the probable cause requirement of the fourth amendment, Mr. Justice Powell also considered the warrant requirement. He rejected the government's contention that no rational warrant procedure was available and proposed the use of area warrants as explained in *Camara*.[37] Judges could issue such warrants for particular roads for a reasonable period of time. This was especially feasible in light of the government's admission that the incidence of "illegal transportations on certain roads is predictable, and the roving searches are apparently planned in advance or carried out according to a predetermined schedule." [38]

While the majority chose probable cause as the standard for a constitutional search by a roving patrol, Mr. Justice White chose "reasonableness" as the standard in his dissent.[39] To meet fourth amendment requirements, the search for aliens must only be reasonable under the circumstances. Neither probable cause nor a warrant are necessary. He cited *Terry v. Ohio*,[40] *Chimel v. California*,[41] *Camara*, *Colonnade Catering Corp. v. United States*,[42]

[28] *Id.* at 154.

[29] For a discussion of the constitutionality of border searches, see generally, Comment, *Border Searches—A Prostitution of the Fourth Amendment*, 10 ARIZ. L. REV. 465 (1968); Comment, *Search and Seizure at the Border—The Border Search*, 21 RUTGERS L. REV. 513 (1967); Comment, *Border Searches and the Fourth Amendment*, 77 YALE L. J. 1007 (1968).

[30] "Travellers may be so stopped in crossing an international boundary because of national self-protection reasonably requiring one entering the country to identify himself to come in, and his belongings as effects which may be lawfully brought in." 267 U.S. at 154.

[31] *See* Shorter v. United States, 469 F.2d 61, 63 (9th Cir. 1972); *accord*, United States v. Warner, 441 F.2d 821, 832 (5th Cir. 1972).

[32] *See* United States v. McDaniel, 463 F.2d 129, 132–33 (5th Cir. 1972).

[33] *See* United States v. Warner, 441 F.2d 821, 832 (5th Cir. 1971). *See also* note 3 *supra*.

[34] In *Camara* the Court stated that probable cause could be based on knowledge of conditions in an area as a whole and not just on conditions in a particular building. 387 U.S. at 538.

[35] 93 S. Ct. at 2541 (Powell, J., concurring).

[36] Other possible factors might include proximity of the highway to the border, whether the highway touches the border, frequency of alien smuggling in the area, and the type of vehicle (e.g., camper, mini-bus).

[37] In *Camara* the Court permitted warrants based on conditions of the area as a whole and not just on conditions in a particular building. 387 U.S. at 538. Mr. Justice Stewart, writing for the majority in *Almeida-Sanchez*, did not mention such warrants, possibly because he joined in Mr. Justice Clark's dissent from their use in *Camara* and *See*. There, the dissenters feared that area warrants would destroy the integrity of magistrates. They feared that warrants would be printed upon pads of a thousand and would be identical, except for street and house number. Magistrates would then become mere rubber stamps. See v. City of Seattle, 387 U.S. 541, 554 (1967) (Clark, J., dissenting).

[38] 93 S. Ct. at 2544 (Powell, J., concurring).

[39] Mr. Justice White thought warrants were not constitutionally necessary in searches for aliens by roving patrols, although he did agree with Mr. Justice Powell that they should be issued.

[40] 392 U.S. 1 (1968).

[41] 395 U.S. 752 (1969).

[42] 397 U.S. 72 (1970).