CRIMINAL PROCEDURE—SEARCH AND SEIZURES—Fourth amendment held not to require that one giving permission for a consent search be informed that he has the right to withhold his consent. *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973).

Respondent, Robert Bustamonte, was arrested after police officers searched the car in which he was riding and found three checks,[1] previously stolen from a car wash.[2] The search took place after Police Officer Rand stopped respondent's automobile because one headlight and a license plate light were burned out. Joe Alcala and the respondent were in the front seat with Joe Gonzales, the driver. There were also three other men in the rear seat. Of the six, only Alcala could produce a driver's license. Alcala explained that the car belonged to his brother. After two additional policemen had arrived, Officer Rand asked Alcala's permission to search the car, to which Alcala replied, "Sure, go ahead."[3] Until this time, the officers had threatened no one with arrest.[4] The search then revealed the three stolen checks.

At trial, respondent moved to suppress the introduction of this evidence on the ground that the material had been acquired by the use of an unconstitutional search and seizure.[5] The trial judge denied the motion to suppress the evidence obtained in the search, and respondent was convicted in the Superior Court of the County of Santa Clara on a charge of possessing a check with intent

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[1]The checks were found wadded up under the left rear seat of the automobile. Schneckloth v. Bustamonte, 412 U.S. 218, 220 (1973).

[2]A check writing machine and several blank checks had been stolen from the office of the car wash. People v. Bustamonte, 270 Cal. App. 2d 648, 76 Cal. Rptr. 17 (1969).

[3]412 U.S. at 220.

[4]In fact, according to Officer Rand's uncontradicted testimony, it "was all very congenial at this time." *Id.*

[5]Any search conducted without a warrant issued upon probable cause is unreasonable. Katz v. United States, 389 U.S. 347, 357 (1967). There are, however, some exceptions to this general rule, one of which is a search conducted after obtaining a valid consent to search from the suspect. Davis v. United States, 328 U.S. 582, 593 (1946); Zap v. United States, 328 U.S. 624, 630 (1946). Since there was no warrant involved in the instant case, the search was constitutionally invalid without Alcala's consent. The other men in Alcala's car also had standing to assert Alcala's constitutional right to be free from a warrantless search. Jones v. United States, 362 U.S. 257 (1960). *Compare* Cotton v. United States, 371 F.2d 385 (9th Cir. 1967), *with* Diaz-Rosendo v. United States, 357 F.2d 124 (9th Cir. 1966) (en banc).

to defraud.[6] The California Court of Appeals affirmed respondent's conviction.[7] The California Supreme Court denied review.[8] The respondent then sought a writ of habeas corpus, which was denied by the United States District Court for the Northern District of California.[9] On appeal, the Court of Appeals for the Ninth Circuit set aside the district court's order.[10] The appellate court reasoned that consenting to a search was a waiver of respondent's fourth and fourteenth amendment rights. On this basis, the court ruled that the State must show that consent had been given with an understanding that it could be effectively withheld.[11]

The United States Supreme Court, in *Schneckloth v. Bustamonte*,[12] then granted the State's petition for certiorari, and reversed the court of appeals. Justice Stewart wrote the opinion of the Court, to which Justices Douglas, Brennan, and Marshall separately dissented.[13] The Court ruled that when the subject of a consent search is not in custody, and the State attempts to justify a search on the basis of his consent, the State must show that the consent was voluntarily given. Voluntariness, in this situation, is a question of fact to be determined from all of the circumstances surrounding the consent. While the subject's knowledge of his right to refuse to consent is a factor to be taken into consideration, the prosecution is not required to demonstrate the subject's knowl-

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[6]CAL. PENAL CODE § 475(a) (1967), which involves possession of a completed check with intent to defraud.

[7]People v. Bustamonte, 270 Cal. App. 2d 648, 76 Cal. Rptr. 17 (1969).

[8]412 U.S. at 221 n.2.

[9]*Id.* at 221 n.3.

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

[11]*Id.* at 700. The court further held that consent could not be found solely from the absence of coercion and a verbal expression of consent.

[12]412 U.S. 218 (1973).

[13]The Court was also asked to overrule its prior decision in Kaufman v. United States, 394 U.S. 217 (1969), which allowed a state or federal prisoner to collaterally attack his conviction when the exclusionary rule had been violated. 412 U.S. at 249 n.38. The majority found no valid fourth or fourteenth amendment claim and, therefore, did not rule on that point. *Id.* However, Justice Powell, with whom Chief Justice Burger and Justice Rehnquist joined, addressed this question in his concurring opinion. *Id.* at 250 (Powell, J., concurring). Justice Powell summarized his opinion by stating:

> I would hold that federal collateral review of a state prisoner's Fourth Amendment claims—claims which rarely bear on innocence—should be confined solely to the question of whether the petitioner was pro-

edge of his right to refuse to consent as a prerequisite to establishing a voluntary consent.[14]

The Court, in deciding the question of what the State must prove to demonstrate that a consent was "voluntarily" given, adopted the standard applied by the state courts of California. That standard, as expressed by Justice Traynor of the Supreme Court of California, stated that whether an apparent consent was given voluntarily or in submission to an express or implied assertion of authority is a question of fact to be determined from all of the circumstances of the particular case.[15]

In determining whether a confession is voluntary, the Court reasoned that two competing concerns were present. First, the reviewing court must have assurances that the consent was given in the absence of coercion. Second, the court must consider the

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vided a fair opportunity to raise and have adjudicated the question in state courts.

Id. Also in agreement with Justice Powell was Justice Blackmun, but he felt it was not necessary to overrule *Kaufman* to decide the present case. *Id.* at 249 (Blackmun, J., concurring). Justice Stewart, who wrote the majority opinion in the present case, joined with Justice Harlan in his dissent in Kaufman v. United States, 394 U.S. 217, 242 (1969) (Harlan, J., dissenting). Justice Marshall, who dissented in the instant case, did not take part in the consideration or decision of *Kaufman*. *Id.* at 231.

[14]Specifically, the *Bustamonte* Court held:

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

412 U.S. at 248.

[15]*Id.* at 230. Justice Traynor stated this view in People v. Michael, 45 Cal. 2d 751, 753, 290 P.2d 852, 854 (1955). Defendant was prosecuted for violations of the narcotics laws. The narcotics were found in defendant's possession after defendant's mother had consented to a search of the house. The defendant contended that the admission of the officers into her house, and the production of the narcotics, were in submission to authority and without effective consent. *See, e.g.*, People v. Tremayne, 20 Cal. App. 3d 1006, 98 Cal. Rptr. 193 (1971); People v. Roberts, 246 Cal. App. 2d 715, 55 Cal. Rptr. 62 (1966); *cf.* People v. MacIntosh, 264 Cal. App. 2d 701, 70 Cal. Rptr. 667 (1968). *But see* Blair v. Pitchess, 5 Cal. 3d 258, 486 P.2d 1242, 96 Cal. Rptr. 42 (1971).

need of the police for consent searches.[16] The Supreme Court stated that these two concerns could be best served, in the area of consent searches, by applying the standard of voluntariness as developed in those cases dealing with the voluntariness of a defendant's confession for purposes of the fourteenth amendment.[17] By using this standard, the Court would look to all of the surrounding circumstances, as opposed to one specific criterion.[18] Thus, the defendant's knowledge of his right to refuse consent is only one factor among many to be considered. In this way, "searches that are the product of police coercion can . . . be filtered out without undermining the continuing validity of consent searches."[19]

The requirement of the Court that consent to a warrantless search must be given voluntarily cannot be criticized. However, respondent argued that in addition to the consent being voluntarily given, it should also be given with knowledge that it can be effectively withheld. The *Bustamonte* Court declined to hold that consent must be knowledgeable.[20] Instead, the Court reduced knowledge to a single factor to be considered in determining voluntariness.[21] It is questionable that consent to a warrantless search could truly be called voluntary if, in fact, the suspect did not know he could effectively refuse.[22]

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[16]412 U.S. at 227.

[17]The Court stated that the most accurate meaning of voluntariness was developed in those cases dealing with coerced confessions. The Court further stated that it would look to that body of case law to initially determine the meaning of voluntariness in the context of consent searches. *Id.* at 223.

[18]The Court discussed some of the factors used to determine voluntariness for purposes of the fourteenth amendment: Davis v. North Carolina, 384 U.S. 737 (1966) (the length of the detention); Payne v. Arkansas, 356 U.S. 560 (1958) (the low intelligence of the accused); Fikes v. Alabama, 352 U.S. 191 (1957) (the lack of any advice to the accused of his constitutional rights); Haley v. Ohio, 332 U.S. 596 (1948) (the youth of the accused); Ashcraft v. Tennessee, 322 U.S. 143 (1944) (the use of physical punishment such as the deprivation of food or sleep); Chambers v. Florida, 309 U.S. 227 (1940) (the repeated and prolonged nature of the questioning). *See also* 412 U.S. at 226. Presumably the Court intended to use many, if not all, of these factors in determining the voluntariness of a consent search.

[19]412 U.S. at 229.

[20]*Id.* at 227.

[21]*See* note 18 *supra.*

[22]412 U.S. at 284 (Marshall, J., dissenting).

In *Miranda v. Arizona*,[23] the Supreme Court set forth the requirement that police, before interrogation is initiated, inform an in-custody suspect of his rights. This, of course, requires that the suspect speak both voluntarily and with knowledge that he could effectively refuse to speak. However, in the instant case, the Court felt that the situation in which a consent search normally arises was dissimilar to the custodial interrogation situation, discussed in *Miranda*,[24] and that, therefore, no warning should be required.[25]

In *Miranda*, the Court found that custodial interrogations usually take place in an "inherently coercive situation,"[26] while the *Bustamonte* Court found that consent searches are most likely to occur in places familiar to the suspect, and under less formal and less structured circumstances.[27] The fact that consent searches usually take place in such surroundings does not necessarily exclude an "inherently coercive situation." From the point of view of the suspect, it is somewhat difficult to see which situation is more potentially coercive, being held at a stationhouse, or being stopped on the highway by a police car.[28] Both situations might be described as "inherently coercive." Therefore, under the *Miranda* standard, the suspect should be protected by a warning before he is asked to submit to a consent search. This warning would assure that anything the suspect did or said would be both voluntary and knowledgeable. The need for a warning seems apparent. For example, in the view of the court of appeals, as restated by Justice Marshall, "under many circumstances a reasonable person

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[23]384 U.S. 436 (1966). *See generally* Warden, Miranda—*Some History, Some Observations, and Some Questions*, 20 VAND. L. REV. 39 (1966).

[24]384 U.S. 436 (1966).

[25]412 U.S. at 247.

[26]*Id.*

[27]The Court stated:

> In this case there is no evidence of any inherently coercive tactics—either from the nature of the police questioning or the environment in which it took place. Indeed, since consent searches will normally occur on a person's own familiar territory, the spectre of incommunicado police interrogation in some remote station house is simply inapposite.

Id.

[28]The respondent was stopped at 2:40 a.m. by Officer Rand. Officer Rand did not ask to search Alcala's car until two other policemen had arrived on the scene. *Id.* at 220.

might read an officer's 'May I' as the courteous expression of a demand backed by force of law."[29]

The Court also was concerned that requiring the defendant to have knowledge of his right to refuse to consent would decrease the effectiveness of law enforcement officials.[30] This situation could arise if a defendant, who was the subject of the search, failed or refused to testify that he had known he could refuse to consent.[31] Moreover, the Court seemed to fear even more the increased burden of proof placed on the prosecution.[32] This fear, that a guilty defendant could be set free because of an illegally conducted consent search, might be alleviated, to some extent, if a suspect were advised of his right to refuse to be subjected to a consent search. However, the Court stated that advising the defendant of this right would interfere with police investigatory techniques. The Court explained that "it would be thoroughly impractical to impose on the normal consent search the detailed requirements of an effective warning."[33] The Court's concern appears to be unfounded, especially in light of the fact that the Federal Bureau of Investigation has for several years given a warning before obtaining consent to search.[34] It would thus seem that the requirement of a warning is not too great a burden for the local police to bear.[35]

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[29]*Id.* at 289. (Marshall, J., dissenting).

[30]*Id.* at 231.

[31]*Id.* at 230.

[32]From the following, it appears evident that the prosecution's burden of proof is the Court's chief concern:

> The very object of the inquiry—the nature of a person's subjective understanding—underlines the difficulty of the prosecution's burden under the rule applied by the Court of Appeals in this case.

Id. However, with a warning appearing as evidence, the burden of proof would conceivably shift to the defendant to prove that his consent was not knowledgeable.

[33]*Id.* at 231. The Court also cited numerous federal and state cases supporting its position. *Id.* at 231 nn.13, 14.

[34]Note, *Consent Searches: A Reappraisal After* Miranda v. Arizona, 67 COLUM. L. REV. 130, 143 (1967) (referring to a letter from J. Edgar Hoover on file in the Columbia Law Library).

[35]Several federal courts and commentators have either required or suggested that law enforcement officials warn a suspect of his fourth amendment rights. *See* United States v. Miller, 395 F.2d 116 (7th Cir.), *cert. denied*, 393 U.S. 846 (1968) (defendant had freely, voluntarily and intelligently consented to a search and seizure); United States v. Nikrasch, 367 F.2d 740 (7th Cir.

The Ninth Circuit Court of Appeals based its opinion on the theory that consenting to a search was a waiver of a person's fourth amendment rights.[36] The standard for an effective waiver of a constitutional right was set forth in *Johnson v. Zerbst*,[37] in which the United States Supreme Court held that a waiver requires "an intentional relinquishment or abandonment of a known right or privilege."[38] The court of appeals, in the case at bar, relied on several federal court decisions after *Johnson* which held that a valid consent to a warrantless search constitutes a waiver of fourth amendment rights.[39] In *Bustamonte*, however, the Supreme Court

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1966) (because the in-custody defendant had not been appraised of his fourth amendment rights, the defendant did not effectively consent to a warrantless search of his car); United States v. Moderacki, 280 F. Supp. 633 (D. Del. 1968) (the subject of the search must be warned that he need not submit to the search). *See generally* 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. LOUIS U.L.J. 297 (1968); Note, *Effective Consent To Search and Seizure*, 113 U. PA. L. REV. 260 (1964). *But see* Leeper v. United States, 446 F.2d 281 (10th Cir. 1971), *cert. denied*, 404 U.S. 1021 (1972); United States *ex rel.* Cole v. Mancusi, 429 F.2d 61 (2d Cir. 1970), *cert. denied*, 401 U.S. 957 (1971); United States *ex rel.* Harris v. Hendricks, 423 F.2d 1096 (3d Cir. 1970); United States v. Vickers, 387 F.2d 703 (4th Cir. 1967), *cert. denied*, 392 U.S. 912 (1968).

[36] As the court stated,

> Any consent to the search, then, amounted to a waiver of a constitutional right and, to be effective, must meet the established standards for a constitutional waiver.

448 F.2d at 700.

[37] 304 U.S. 458 (1938).

[38] *Id.* at 464.

[39] *See, e.g.*, Schoepflin v. United States, 391 F.2d 390 (9th Cir. 1968) (the words used by a suspect must show an understanding, uncoerced, and unequivocable election to grant the officers a license, which the suspect knew could be freely and effectively withheld, before a consent search will be deemed valid); Cipres v. United States, 343 F.2d 95 (9th Cir. 1965) (waiver, for the purpose of a consent search, means the intentional relinquishment of a known right or privilege).

There are several other federal court decisions not cited by the court of appeals which refer to a consent to a warrantless search as a waiver of fourth amendment rights. These cases also state that the consent must be knowingly and intelligently made. United States v. Curiale, 414 F.2d 744, 746 (2d Cir.), *cert. denied*, 396 U.S. 959 (1969); Pendleton v. Nelson, 404 F.2d 1074, 1076 (9th Cir. 1968); Rosenthall v. Henderson, 389 F.2d 514, 515 (6th Cir. 1968); Wren v. United States, 352 F.2d 617, 618 (10th Cir. 1965), *cert. denied*, 384 U.S. 944 (1966); Simmons v. Bomar, 349 F.2d 365, 366 (6th Cir. 1965); United States v. Smith, 308 F.2d 657, 663 (2d Cir. 1962), *cert. denied*, 372 U.S. 906 (1963); Judd v. United States, 190 F.2d 649, 650 (D.C. Cir. 1951);

said that the standard of a knowing waiver, as stated in *Johnson*, was to protect sixth amendment rights of a fair trial, not fourth amendment rights.[40] The Court further stated that there was a great difference between those rights that protect a fair trial and those that protect against unreasonable searches and seizures.[41] The Court concluded that there was nothing in the purposes or application of the waiver requirements of *Johnson* that compels the equation of a knowing waiver with a consent search. The Court further held that by requiring such a waiver it would be ignoring the substance of the differing constitutional guarantees.[42]

In *Bustamonte*, the Court has thus limited the required use of a knowing waiver to only those rights that protect the truth finding process and not those that protect personal liberties.[43] The curious result reached by the Court's *Bustamonte* decision is that a suspect can "consent" to a search without realizing that he had a right to withhold his consent. As Justice Marshall pointed out in his dissent, it is hard to visualize how a suspect's consent

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United States v. Blalock, 255 F. Supp. 268 (E.D. Pa. 1966); *cf.* Zap v. United States, 328 U.S. 624 (1946).

[40]*But see* Johnson v. United States, 333 U.S. 10 (1948), wherein the Supreme Court said that the consent to the search, "was granted in submission to authority rather than as an understanding and intentional waiver of a constitutional right." *Id.* at 13. It seems that in *Johnson* the Court was applying the standard of a knowing waiver to fourth amendment rights. In the instant case, however, the Court stated of the decision in *Johnson:*

> [W]hile the Court spoke in terms of 'waiver' it arrived at the conclusion that there had been no 'waiver' from an analysis of the totality of the objective circumstances—not from the absence of any express indication of Johnson's knowledge of a right to refuse or the lack of explicit warnings.

412 U.S. at 243 n.31.

[41]412 U.S. at 242.

[42]*Id.* at 246.

[43]*Id.* at 237. The Court stated:

> Almost without exception the requirement of a knowing and intelligent waiver has been applied only to those rights which the Constitution guarantees to a criminal defendant in order to preserve a fair trial.

Id. The one exception the Court mentioned was Marchetti v. United States, 390 U.S. 39 (1968), in which the Court found no waiver of the right against compulsory self-incrimination when a gambler was forced to pay a wagering tax. The *Bustamonte* Court added that the decision was based on the lack of a "voluntary" waiver rather than the lack of any "knowing and intelligent waiver." 412 U.S. at 237 n.18.

could be considered an uncoerced choice when he did not know of his right to refuse.[44]

The *Bustamonte* Court held that, for purposes of the fourth and fourteenth amendments, the State must prove that the consent to a consent search was voluntarily given.[45] In order to prove voluntariness, the Court has adopted a complicated and subjective test that involves many different factors.[46] That which would seem to be the most important factor, the suspect's knowledge of his right to withhold his consent, is thus only one factor among many to be considered in a particular case.[47]

The Court could have easily solved this apparent inequity by requiring the police to inform a suspect of his fourth amendment rights before obtaining his consent to search.[48] This requirement would assure a knowing and intelligent waiver of a suspect's fourth amendment rights in all cases. The *Bustamonte* Court declined to require such a warning. Perhaps the Court justifiably feared restricting the police in their investigatory activities.[49] But, whatever the underlying reasons, Justice Marshall's forewarning in his dissent seems to ring true. Justice Marshall aptly stated that the Court's holding confines the protection of the fourth amendment, in the context of consent searches, "to the sophisticated, the knowledgeable, and I might add, the few."[50]

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[44]*Id.* at 277 (Marshall, J., dissenting).

[45]*See* note 14 *supra.*

[46]*See* note 18 *supra.*

[47]412 U.S. at 277.

[48]*See* note 35 *supra.* The warning might include explanation to the suspect of the following elements: that he has a right to refuse the search, that his refusal will be effective, that only one item was being sought and any other items found could not be used against him, and that he could effectively retract his consent at any time. The warning could be delivered orally by the policeman or printed on a form to be signed by the suspect upon his consent. This method, however, could present problems in those areas where the rate of illiteracy is high. *See also* Fredricksen v. United States, 266 F.2d 463 (D.C. Cir. 1959).

[49]*See* note 33 *supra* & accompanying text.

[50]412 U.S. at 289 (Marshall, J., dissenting).