



1-1-1969

# The Need for a Warning Prior to a Waiver of the Fourth Amendment

Joseph C. Sanfilippo

Follow this and additional works at: <http://digitalcommons.law.scu.edu/lawreview>



Part of the [Law Commons](#)

## Recommended Citation

Joseph C. Sanfilippo, Comment, *The Need for a Warning Prior to a Waiver of the Fourth Amendment*, 10 SANTA CLARA LAWYER 205 (1969).

Available at: <http://digitalcommons.law.scu.edu/lawreview/vol10/iss1/11>

This Comment is brought to you for free and open access by the Journals at Santa Clara Law Digital Commons. It has been accepted for inclusion in Santa Clara Law Review by an authorized administrator of Santa Clara Law Digital Commons. For more information, please contact [sculawlibrarian@gmail.com](mailto:sculawlibrarian@gmail.com).

## THE NEED FOR A WARNING PRIOR TO A WAIVER OF THE FOURTH AMENDMENT

Over the years the United States Supreme Court has guarded the citizen's rights under the fourth, fifth and sixth amendments.<sup>1</sup> The judicial system has been quick to strike down a statute or procedure which has gnawed at the fundamental roots of our democratic society. In the course of admonishing infractions, the Court has given instructions to insure that repeated offenses will not occur.

The fifth amendment right to refrain from making self-incriminating statements places the burden upon the prosecution to establish the guilt of an individual with evidence other than the accused's own testimony. The sixth amendment right to counsel assures each citizen the opportunity for representation in a criminal proceeding which may deprive him of life, liberty or property. The Court has protected both fundamental rights in order to maintain high standards of justice.

An excellent example of the Court's protective efforts is the decision of *Miranda v. Arizona*.<sup>2</sup> Any citizen placed under custodial interrogation must be advised of his rights under the fifth and sixth amendments prior to such interrogation, otherwise exculpatory or inculpatory statements will not be admissible in a criminal proceed-

---

<sup>1</sup> U.S. CONST. amend. IV: "The right of the people to be secure in their persons, houses, 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."

U.S. CONST. amend. V: "No person . . . shall be compelled in any criminal case to be a witness against himself, nor deprived of life, liberty, or property, without due process of law. . . ."

U.S. CONST. amend. VI: "In all criminal prosecutions the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence."

<sup>2</sup> 384 U.S. 436 (1966). This case held that "[T]he prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination. By custodial interrogation, we mean questioning initiated by law enforcement officials after a person has been taken into custody or otherwise deprived of his freedom in any significant way. As for the procedural safeguards to be employed, unless other fully effective means are devised to inform accused persons of their right to silence and to assure a continuous opportunity to exercise it, the following measures are required. Prior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed. The defendant may waive effectuation of these rights, provided the waiver is made voluntarily, knowingly and intelligently." *Id.* at 444.

ing against him.<sup>3</sup> In *Miranda* the Supreme Court recognized that when a person is cut off from familiar surroundings and confronted by police authority, he is in such a heightened emotional state that his rational abilities are impaired.<sup>4</sup> Seeking to alleviate the pressure placed upon the suspect due to the interrogative atmosphere, the Court designed the *Miranda* warnings to inform the suspect that he has certain rights which will be recognized by the court,<sup>5</sup> that the police interrogators may not necessarily be acting in his best interests,<sup>6</sup> and that he has no duty to cooperate with the police questioning.<sup>7</sup>

Prior to *Miranda*, the waiver of rights test was employed to determine whether, in light of all the circumstances, the accused was aware of his rights.<sup>8</sup> The Supreme Court rejected this "special circumstance" test because it was too speculative. As a more precise test for establishing a waiver, the Court chose to require the giving of a warning.<sup>9</sup>

The fourth amendment seeks to protect the citizen's rights to privacy and freedom from an unreasonable search and seizure. The exclusionary rule of *Mapp v. Ohio*<sup>10</sup> prohibits the introduction of any evidence obtained as a result of a violation of the fourth amendment. As yet the Supreme Court has not declared that a citizen must be advised of his right to refuse consent to an otherwise illegal search. Currently the fourth amendment waiver test is similar to the pre-*Miranda* "special circumstance" test, that is, was the waiver free, voluntary and intelligent in light of all the circumstances.<sup>11</sup>

One can make an intelligent waiver of his fifth and sixth amendment rights only after a clear explanation and consequent understanding of those rights.<sup>12</sup> A waiver of the right to remain silent, after *Miranda*, could be an "express statement that the individual is willing to make a statement and does not want an attorney."<sup>13</sup> The foregoing should be strictly construed when the suspect is answering the questions posed by his interrogators. This waiver is valid only

---

<sup>3</sup> *Id.*

<sup>4</sup> *Id.* at 465.

<sup>5</sup> *Id.* at 468.

<sup>6</sup> *Id.* at 469.

<sup>7</sup> *Id.* at 468.

<sup>8</sup> Generally the circumstances considered were the age, intelligence and educational background of the suspect. *Crooker v. California*, 357 U.S. 433 (1958).

<sup>9</sup> *Miranda v. Arizona*, 384 U.S. 436, 468-69 (1966).

<sup>10</sup> 367 U.S. 643 (1961).

<sup>11</sup> *Judd v. United States*, 190 F.2d 649 (D.C. Cir. 1950); *People v. Michael*, 45 Cal. 2d 751, 290 P.2d 852 (1955).

<sup>12</sup> *Miranda v. Arizona*, 384 U.S. 436, 476.

<sup>13</sup> *Id.* at 475.

if it was preceded by a warning that the suspect could remain silent and could have an attorney present during the questioning. Such a warning is the only effective means of protecting fifth and sixth amendment rights.<sup>14</sup>

The lack of a warning requirement prior to the exercise of the fourth amendment right differs from the general rule applicable to the fifth and sixth amendments and thus raises the issue of a possible violation of the fourteenth amendment due process clause.<sup>15</sup>

The purpose of this comment will be to demonstrate the validity of a theory requiring a fourth amendment pre-waiver warning. A comparison is made between searches conducted with consent under both California and federal procedure. Whereas California courts adopt a less rigorous standard for a waiver in case of search, the federal courts adhere more closely to the waiver conditions of *Miranda*.

A citizen unconscious of his fourth amendment rights cannot intelligently waive them. Rather he is merely acceding to the request made by the police officer unaware of the import or the consequences of his act. This form of waiver scarcely resembles the waiver principles of *Miranda*. If a citizen were aware of his right, he could use both his will and intellect, rather than his will alone, when giving consent to an otherwise illegal search.

#### WAIVER OF THE FOURTH AMENDMENT

Fourth amendment rights are as fundamental and important as those of the fifth and sixth amendments and "require no less knowing a waiver than do the Fifth and Sixth."<sup>16</sup> Neither state nor federal officers should be able to invade a citizen's privacy unless they carry a search warrant issued by a detached magistrate and based upon probable cause supported by oath or affidavit.<sup>17</sup> Searches made with

---

<sup>14</sup> *Id.* at 467.

<sup>15</sup> U.S. CONST. amend. XIV: "No state shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law. . . ."

<sup>16</sup> *United States v. Blalock*, 255 F. Supp. 268, 269 (E.D. Pa. 1968).

<sup>17</sup> CAL. PEN. CODE. § 1525 (West 1956): "A search warrant cannot be issued but upon probable cause, supported by affidavit, naming or describing the person, and particularly describing the property and the place to be searched."

FED. R. CRIM. P. 41(c) (1968): "A warrant shall issue only on affidavit sworn to before the judge or commissioner and establishing grounds for issuing the warrant. If the judge or commissioner is satisfied that grounds for the application exist or that there is probable cause to believe that they exist, he shall issue a warrant identifying the property and naming or describing the person or place to be searched."

the consent of the person searched,<sup>18</sup> in an emergency situation to prevent the destruction of evidence,<sup>19</sup> and those incident to a lawful arrest<sup>20</sup> encompass the full range of exceptions to this rule.

Consent never enters into the emergency situation where the primary purpose is to prevent the destruction of evidence.<sup>21</sup> In the situation of a search incident to a lawful arrest, the search becomes illegal when the officer exceeds the permissible scope of the search. Beyond that point the consent of the suspect is necessary before the officer can continue the search, unless the officer procures a search warrant from a magistrate. It is in these consent search cases that the waiver of the fourth amendment is in issue.

Consent searches are usually requested in one of three situations, when a search warrant cannot be issued; when a lawful arrest cannot be made; or when a lawful arrest is made and the search requested cannot be justified as incidental thereto. In any case, asking a citizen to consent to an otherwise illegal search is equivalent to asking him to forego his constitutional right to have a magistrate determine whether probable cause exists to justify that search.<sup>22</sup>

The courts prefer the issuance of a warrant from a detached magistrate and look with disfavor upon a consent search. "Every reasonable presumption" is indulged against waiver; the courts will not acquiesce in the loss of fundamental rights.<sup>23</sup>

In *Johnson v. Zerbst*,<sup>24</sup> the Supreme Court defined a waiver as "ordinarily an intentional relinquishment or abandonment of a known right or privilege."<sup>25</sup> Implicit in this definition is the necessity for rational judgment and the total awareness of all reasonable consequences of a waiver.<sup>26</sup> Otherwise, the definition would be meaningless.

Prior to an otherwise valid waiver of the fifth and sixth amendment rights, a warning must be given for the purpose of making the person aware of those rights.<sup>27</sup> This is an absolute prerequisite to an intelligent decision to waive them.<sup>28</sup> There is no justification for not applying the same standard to an intelligent waiver of the right to refuse consent to an otherwise illegal search.

---

<sup>18</sup> *Zap v. United States*, 328 U.S. 624 (1946).

<sup>19</sup> *Warden, Maryland Penitentiary v. Hayden*, 387 U.S. 294 (1967).

<sup>20</sup> *United States v. Rabinowitz*, 339 U.S. 56 (1950).

<sup>21</sup> *Warden, Maryland Penitentiary v. Hayden*, 387 U.S. 294 (1967).

<sup>22</sup> *Johnson v. United States*, 333 U.S. 10 (1948).

<sup>23</sup> *Johnson v. Zerbst*, 304 U.S. 458, 464 (1937).

<sup>24</sup> *Id.* at 458.

<sup>25</sup> *Id.* at 464.

<sup>26</sup> *Id.* at 465.

<sup>27</sup> *Miranda v. Arizona*, 384 U.S. 436, 468 (1966).

<sup>28</sup> *Id.* at 469.

## WAIVER IN CALIFORNIA

*The Test*

The courts generally base their theory of consent to search on a case by case factual analysis. In *People v. Michael*,<sup>29</sup> police officers questioned the defendant at her home concerning her use of narcotics. The suspect's mother then voluntarily produced a small vial stating that it contained all the drugs that her daughter had in the house. The police sought and received a verbal consent from the defendant to search a nearby bedroom. The court held that in light of all the circumstances the consent was free and voluntary, since to hold otherwise would unreasonably hamper police activities.<sup>30</sup> To object to the search, the person need not "[F]orcibly resist an officer's assertion of authority. . . ."<sup>31</sup> But at the same time, if he freely consents or produces evidence of his own free will, it cannot be said that his constitutional rights have been violated nor that the search was unreasonable.<sup>32</sup>

The test, then, is whether the consent is given freely and voluntarily in light of all the circumstances. Guidelines are difficult to develop since the circumstances can vary widely in each case. Nor can one develop concrete maxims for weighing the many elements which the trier of fact must consider. Consent is a question of fact. Therefore the decision made by the trier of fact upon the validity of an alleged waiver is reversible only at the appellate level in cases where the error is obvious or the evidence is insufficient. Thus the trier of fact bears the burden of deciding a constitutional issue having grave repercussions which would be considerably lessened, however, if the presence or absence of a warning were considered. Clearly this would facilitate the determination of whether a knowledgeable waiver was in fact made.

*The Verbal Response of the Consenting Party*

Absent circumstances of duress or coercion, the courts consider the suspect's verbal response a primary factor in determining the validity of consent.<sup>33</sup> A verbal consent to search weighs heavily with the appellate court in deciding whether the consent was voluntarily

---

<sup>29</sup> 45 Cal. 2d 751, 290 P.2d 852 (1955).

<sup>30</sup> *Id.* at 754, 290 P.2d at 854.

<sup>31</sup> *Id.* at 753, 290 P.2d at 854.

<sup>32</sup> *Id.* at 753, 290 P.2d at 853-54.

<sup>33</sup> See *People v. Shelton*, 60 Cal. 2d 740, 388 P.2d 665, 36 Cal. Rptr. 433 (1964); *People v. Burke*, 47 Cal. 2d 45, 301 P.2d 241 (1956); *People v. Bustamonte*, 270 A.C.A. 707, 76 Cal. Rptr. 17 (1969); *People v. Roberts*, 246 Cal. App. 2d 715, 55 Cal. Rptr. 62 (1967); *People v. Justiniano*, 236 Cal. App. 2d 542, 46 Cal. Rptr. 333 (1965).

given.<sup>34</sup> Therefore it is often difficult to convince the fact finder that the person did not mean what he said. However if *Miranda*-like warnings were required and given, the trier of fact would have a better indication that the waiver was voluntary and intelligent. Nevertheless, California chooses not to impose the need for a warning but relies upon the "scrutiny of the voluntariness of the consent"<sup>35</sup> as more protection than the recital of a warning by the police. The necessity of a warning would not only facilitate the trial court's analysis of the consent issue, but would also assure the defendant a meaningful opportunity to exercise his constitutional rights by laying a foundation for an intelligent waiver.<sup>36</sup>

### *Submission to Police Authority*

Submission to police authority weighs most heavily of all circumstances against a finding of an intelligent waiver. In *People v. Dahlke*,<sup>37</sup> the defendant was arrested, handcuffed and taken to the police station. While emptying the contents of his pockets, the defendant displayed a set of car keys. The police asked him if he had any objection to a search of his car. He replied, "Do what you want."<sup>38</sup> The court held this to be a free and voluntary consent and not a submission to authority. In contrast stands *Castenada v. Superior Court*,<sup>39</sup> where all present were lawfully arrested for possession of narcotics. The police asked the defendant if he had any more narcotics at another address. When the defendant inquired whether they had a search warrant, the police replied that there would be no need for one if he would consent. The court held the subsequent verbal consent, "Go ahead,"<sup>40</sup> to be involuntarily given and a submission to authority.

The difference between the two cases is that in *Castenada*, the evidence tended to show that the defendant knew of his right to have a magistrate determine the existence of probable cause. But in *Dahlke*, there was no mention of the defendant's awareness of this constitutional right. Defendant in *Castenada* consented involuntarily because he knew his rights but eventually succumbed to pressure. Consent was voluntary in *Dahlke* only because defendant in his limited awareness allowed the officers to do exactly what they requested. In *Castenada*, the defendant's awareness of the need for a

---

<sup>34</sup> *Supra*, note 28.

<sup>35</sup> *People v. Beal*, 268 Cal. App. 2d 481, 485, 73 Cal. Rptr. 787, 790 (1969).

<sup>36</sup> *See Miranda v. Arizona*, 384 U.S. 436, 475 (1966).

<sup>37</sup> 257 Cal. App. 2d 82, 64 Cal. Rptr. 599 (1968).

<sup>38</sup> *Id.* at 85, 64 Cal. Rptr. at 602.

<sup>39</sup> 59 Cal. 2d 439, 380 P.2d 641, 30 Cal. Rptr. 1 (1965).

<sup>40</sup> *Id.* at 441, 380 P.2d at 642, 30 Cal. Rptr. at 2.

search warrant was a determinative factor in finding that his consent was involuntarily given. Yet the absence of this awareness in *Dahlke* was not important to prove the voluntary character of consent.<sup>41</sup> Under such rulings the hardened criminal, who had learned his rights through bitter experience, would find himself in a better position than would the relatively innocent first offender. The injustice of such a result is patent.

California's interpretation of submission to authority requires that the individual first do something affirmative to indicate his reluctance to cooperate with the police. This affirmative act may be a request for a search warrant,<sup>42</sup> repeated denials of guilt,<sup>43</sup> attempts to mislead the police in procuring evidence<sup>44</sup> or prior evasion of arrest.<sup>45</sup> But whatever the activity, it must be positioned against police authority. Such a viewpoint fails to recognize that in some situations, because of fear, respect or excitability, a person may either fail to object or remain completely silent, thereby impliedly waiving his right to object.<sup>46</sup> Thus in *Dahlke*, the defendant could easily have been so frightened that he didn't even consider refusing consent. If so, this inaction would be a passive submission to authority and should be an equally valid reason for the court to find that the consent given was neither voluntary nor free.

The totality of circumstances test allows for too much speculation regarding whether or not a person consented intelligently as well as voluntarily. Any doubt as to an effective waiver could be significantly reduced if a person were informed of his right to refuse consent to an otherwise illegal search. Furthermore, one would certainly feel less compelled to acquiesce to a warrantless search if he knew of his right to refuse.

The California courts do not specifically require that a waiver be intelligent. They are thus partially inconsistent with the Supreme Court's definition of waiver as an "intentional relinquishment or abandonment of a known right or privilege."<sup>47</sup> The federal courts require that any waiver of the fourth amendment must be free, voluntary and *intelligent* in light of all the circumstances.<sup>48</sup> A few federal courts go so far as to require that a warning be given to

---

<sup>41</sup> *People v. Dahlke*, 257 Cal. App. 2d 82, 64 Cal. Rptr. 599 (1968).

<sup>42</sup> *Castenada v. Superior Court*, 59 Cal. 2d 439, 380 P.2d 641, 30 Cal. Rptr. 1 (1965).

<sup>43</sup> *People v. Currier*, 232 Cal. App. 2d 103, 42 Cal. Rptr. 562 (1965).

<sup>44</sup> *Id.*

<sup>45</sup> *People v. Vasquez*, 256 Cal. App. 2d 342, 63 Cal. Rptr. 885 (1967).

<sup>46</sup> *But cf. Lane v. Superior Court*, 271 A.C.A. 933, 76 Cal. Rptr. 895 (1969).

<sup>47</sup> *Johnson v. Zerbst*, 304 U.S. 458, 464 (1937).

<sup>48</sup> *Judd v. United States*, 190 F.2d 649 (D.C. Cir. 1950).



assure that the waiver is intelligent.<sup>49</sup> This view recognizes the reality that some citizens, when faced with police authority, are not in a position to make a rational or intelligent decision. Thus the federal courts usually require that the individual be aware of his rights and choose not to assert them while realizing the consequences of that decision.<sup>50</sup>

### FEDERAL WAIVER

The federal courts' approach to waiver of fourth amendment rights emphasizes the importance of a citizen's awareness of his constitutional right to be free from an unreasonable search and seizure. These courts utilize the three part test expressed in *Judd v. United States*.<sup>51</sup> The consent given must be free and intelligent,<sup>52</sup> specific and unequivocal,<sup>53</sup> and uncontaminated by duress or coercion, actual or implied.<sup>54</sup> By delineating the three specific elements needed for a waiver to be constitutionally valid, the federal courts have promulgated a basic outline which the trier of fact can use. The specificity of the federal test contrasts with the amorphous test of the California courts, asking whether the waiver was free and voluntary in light of all the circumstances. The two approaches do not differ in substance, for the elements of the federal test are implicit in the California test. The difference is rather a matter of emphasis, with the federal courts stressing the factor of intelligence and the California courts stressing the factor of voluntariness.

#### *The Waiver Must Be Free and Intelligent*

The requirement that a waiver be free and intelligent is a prerequisite to a constitutionally valid consent. In *United States v. Page*,<sup>55</sup> federal narcotics agents, without probable cause to arrest, interviewed the defendant and asked to search the premises after telling the suspect that he had a right to refuse. The court held that consent was free and intelligent.<sup>56</sup> Not all federal cases are decided on the presence or absence of a pre-waiver warning, yet the element of rational understanding is implicit throughout the federal approach.

---

<sup>49</sup> *United States v. Nikrasch*, 367 F.2d 740 (7th Cir. 1966); *United States v. Blalock*, 255 F. Supp. 268 (E.D. Pa. 1966).

<sup>50</sup> *United States v. Vickers*, 387 F.2d 703 (4th Cir. 1967); *Cipres v. United States*, 343 F.2d 95 (9th Cir. 1965); *Canida v. United States*, 250 F.2d 822 (5th Cir. 1958); *United States v. Wallace*, 272 F. Supp. 841 (S.D. N.Y. 1963).

<sup>51</sup> 190 F.2d 649 (D.C. Cir. 1950).

<sup>52</sup> *Id.* at 651.

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> 302 F.2d 81 (9th Cir. 1962).

<sup>56</sup> *Id.* at 83.

In *Cipres v. United States*,<sup>57</sup> defendant, suspected of importing marijuana, was stopped at an airport terminal and asked if her suitcase could be searched. Her response, "Yes, I have nothing to hide,"<sup>58</sup> was in itself insufficient to conclude that her consent was intelligent. The court said that the consent must have "reflected an understanding, uncoerced and unequivocal election to grant the officers a license which the person knows may be freely and effectively withheld."<sup>59</sup> The *Cipres* reasoning parallels the Supreme Court view of waiver and closely resembles the language of *Miranda*. If a person waives this fundamental constitutional right, the trial court must find that he was aware of the viable alternative of refusing consent. Spoken words alone may indicate a valid consent but when linked to other latent circumstances, the opposite conclusion is possible.<sup>60</sup>

### *The Waiver Must Be Specific and Unequivocal*

Inherent in the requirement that the waiver be free and intelligent is the requirement that it be specific and unequivocal.<sup>61</sup> In *United States v. Minor*,<sup>62</sup> federal revenue agents suspected the defendant of operating an illegal distillery. They went to the defendant's home and knocked on the door. Instead of admitting the agents, the defendant spoke with them outside. The agents threatened that they could get a search warrant but still requested permission to search the premises. Defendant acquiesced, "Well, it's there, I guess you might just as well know it."<sup>63</sup> The court held the waiver to be involuntary because the prosecution failed to prove that the consent was specific and unequivocal.<sup>64</sup>

An ambiguous reply does not give an officer the absolute right to search. Even though a person admits to the presence of damaging evidence, he can still demand a search warrant.<sup>65</sup> The federal courts are prone to discourage federal officers from exercising their often biased judgment in these matters.<sup>66</sup>

<sup>57</sup> 343 F.2d 95 (9th Cir. 1965).

<sup>58</sup> *Id.* at 97.

<sup>59</sup> *Id.*

<sup>60</sup> *Weed v. United States*, 340 F.2d 827 (10th Cir. 1965).

<sup>61</sup> *Channel v. United States*, 285 F.2d 217 (9th Cir. 1960).

<sup>62</sup> 117 F. Supp. 697 (E.D. Okla. 1953).

<sup>63</sup> *Id.* at 698.

<sup>64</sup> *Id.*

<sup>65</sup> *Higgins v. United States*, 209 F.2d 819 (D.C. Cir. 1954). "But no sane man who denies his guilt would actually be willing that policemen search his room for contraband which is certain to be discovered." *Id.* at 820.

<sup>66</sup> *United States v. Arrington*, 215 F.2d 630 (7th Cir. 1954). "[I]t is high time that courts place their stamp of disapproval upon this increasing practice of federal officers searching a home without a warrant on the theory of consent, particularly where no reason is shown why a search warrant was not obtained. The protection

*The Waiver Must Be Uncontaminated by Duress or Coercion*

The great majority of federal cases is decided by balancing an intelligent and free waiver with the requirement that it be given without duress or coercion. This third element of the federal test is similar to the California concept of submission to authority. Apparently the federal courts realize that submission to authority is often not only the unsuccessful resistance of police authority, but also frequently a passive unwillingness to assert a right in the presence of police authority.

In *United States v. Shropshire*,<sup>67</sup> the defendant went to the door expecting to see a friend but instead five policemen confronted him. The court found the officers' imposing presence coupled with the defendant's surprise to be impliedly coercive, thus nullifying the consent to search. The person consenting must come to a decision independent of any actual or implied pressure exerted by the presence of police authority.<sup>68</sup> However, if the person consenting is, for example, an articulate businessman,<sup>69</sup> it is not likely that he would easily be cowed into consenting contrary to his wishes.<sup>70</sup> A federal court has held that consent given by such a person is free despite an element of possible duress or coercion.<sup>71</sup> Therefore, police exertion of duress is not regarded as controlling.<sup>72</sup>

The police practice of presenting alternatives hostile to the person's best interests is also criticized by the courts. A choice between coerced consent or a ransacking of the premises under the guise of a search warrant is not an intelligent and voluntary choice.<sup>73</sup> The choice in a consent-search situation should be between cooperation and non-cooperation.<sup>74</sup>

Bifurcation of the consent into the elements of freedom and intelligence on the one hand, and the absence of duress and coercion on the other, is the recurrent theme of the federal holdings in this

afforded by the Fourth Amendment should not be made dependent upon the probity of the officer to justify a search on consent. Otherwise the rights guaranteed to the citizen by the Amendment will be impaired so as to become little more than an empty gesture." *Id.* at 637.

<sup>67</sup> 271 F. Supp. 521 (E.D. La. 1967).

<sup>68</sup> *Pekar v. United States*, 315 F.2d 319 (5th Cir. 1963).

<sup>69</sup> *United States v. Martin*, 176 F. Supp. 262 (S.D. N.Y. 1959).

<sup>70</sup> See also *Tatum v. United States*, 321 F.2d 219 (9th Cir. 1963). In this case, the defendant's being a private detective prevented the court from holding that he was coerced into consenting by policemen. The court felt that it was unlikely that one so accustomed to policemen could be so easily coerced.

<sup>71</sup> *United States v. Martin*, 176 F. Supp. 262 (S.D. N.Y. 1959).

<sup>72</sup> *Id.*

<sup>73</sup> *United States v. Waldron*, 219 F.2d 37 (D.C. Cir. 1955).

<sup>74</sup> *United States v. Mason*, 290 F. Supp. 843 (D. N.H. 1968); *United States v. Gross*, 137 F. Supp. 244 (S.D. N.Y. 1956).

area. In the final decision, both the intellect and the will of the person consenting must operate in order to waive the constitutional right. The suspect must have viable alternatives and must not be coerced into consenting for fear of reprisal. The intellect must decipher the logic and reasoning of the will's determination. Furthermore, a showing must be made that the suspect's consideration of the various consequences was tantamount to a wilful and knowledgeable waiver.

### THE NEED FOR A PRE-WAIVER WARNING

After *Miranda*, the procedural safeguards of criminal law tended more toward preserving constitutional rights than toward restricting state police activities. The focus shifted to the citizen rather than the policeman. *Miranda's* purpose was the preservation of the citizen's dignity by advising him of his right to refrain from self-incrimination and his right to counsel during custodial interrogation.<sup>75</sup> When the authorities restrain a person's freedom in any significant manner, they must apprise him of his fifth and sixth amendment rights.<sup>76</sup> An analogous situation exists when an officer, during the interrogation of an individual, requests permission to search a given locality which is under that individual's control. The question is again whether that individual must be informed of his right to refuse consent prior to a waiver, just as an individual must be informed of his right to remain silent and his right to counsel prior to an intelligent waiver.

The courts divide distinctly on this issue. The California courts state that there is no absolute requirement that an officer advise a citizen of his right to refuse consent to a search.<sup>77</sup> One group of federal courts substantially agrees with this viewpoint.<sup>78</sup> Another group takes an approach which is diametrically opposed and requires that a warning be given before any finding of an intelligent waiver.<sup>79</sup>

#### *The California Approach*

The controversy began in California with the vigorous dissent of Justice Kingsley in *People v. Campuzano*.<sup>80</sup> Police officers went to

---

<sup>75</sup> *Miranda v. Arizona*, 384 U.S. 436, 457 (1966).

<sup>76</sup> *Id.* at 444.

<sup>77</sup> *People v. Stark*, 275 A.C.A. 782, 80 Cal. Rptr. 307 (1969); *People v. Fuller*, 268 A.C.A. 909, 74 Cal. Rptr. 488 (1969); *People v. Baker*, 267 Cal. App. 2d 916, 73 Cal. Rptr. 455 (1969); *People v. Cirilli*, 265 Cal. App. 2d 607, 71 Cal. Rptr. 604 (1968); *People v. Chaddock*, 249 Cal. App. 2d 483, 57 Cal. Rptr. 582 (1967).

<sup>78</sup> *Gorman v. United States*, 380 F.2d 158 (1st Cir. 1967).

<sup>79</sup> *United States v. Nikrasch*, 376 F.2d 740 (7th Cir. 1966); *United States v. Blalock*, 255 F. Supp. 268 (E.D. Pa. 1966).

<sup>80</sup> 254 Cal. App. 2d 52, 61 Cal. Rptr. 695 (1967).

a business establishment suspected of narcotics traffic. With the permission of the owner, they searched the premises and found heroin among the belongings of the defendant employee. The police arrested and handcuffed the defendant and asked permission to search his home for more narcotics. The defendant verbally consented. The majority held the consent to be free and voluntary since the defendant, apparently of his own choice, acquiesced in the request. Justice Kingsley maintained that since the defendant was under custodial interrogation as described in *Miranda*, he should have been warned of his fourth amendment rights, and the search was therefore unreasonable. He also noted that "[T]he importance of warning a suspect of his constitutional right to object to a search [under the circumstances of arrest] is even greater where police interrogation is to follow."<sup>81</sup> There were clear and sufficient grounds for obtaining a search warrant without hampering effective law enforcement since the defendant was in custody and could not destroy the evidence sought.<sup>82</sup>

The specific issue of the need for a pre-waiver warning was argued in *People v. Chaddock*.<sup>83</sup> Police questioned a felon parolee about a recent robbery where a description given of the car used in the robbery matched that of the defendant's car. The police found a gun in the trunk of his car. Its possession, unknown to the defendant, was a violation of his parole and he was arrested. Defendant's reply, "Certainly,"<sup>84</sup> in response to a request by the officers to search his car was held to reflect a free and voluntary consent since the defendant, a prior felon, was cooperative at all times with the police. The argument that a warning should have been given was flatly rejected on the theory that a request to search implies an opportunity to refuse.<sup>85</sup>

Abstractly, this reasoning may be valid; but in actuality it begins to crumble. Although the inference of an opportunity to refuse is present, such inference is not a clear-cut fact. A felon on parole, fearing police reprisal, would be likely to forego any exercise of his rights. The uneducated and the timid would probably prefer cooperation to a possible adverse reaction from the police. For these reasons, a suspect should be apprised of his fourth amendment rights prior to waiver. An awareness of such rights should not turn in any degree on education, bravery, or self-confidence.

---

<sup>81</sup> *Id.* at 61, 61 Cal. Rptr. at 701.

<sup>82</sup> *Id.* at 62, 61 Cal. Rptr. at 702.

<sup>83</sup> 249 Cal. App. 2d 483, 57 Cal. Rptr. 582 (1967).

<sup>84</sup> *Id.* at 484, 57 Cal. Rptr. at 583.

<sup>85</sup> *Id.* at 485, 57 Cal. Rptr. at 584.

The right to be free from an unreasonable search and seizure is available to all, not only those who are emotionally and intellectually able to assert it.

The California view respecting waiver of the fourth amendment rights seems anomalous when compared to past decisions on waiver of other constitutional rights. The court in *People v. Dorado*,<sup>86</sup> a forerunner of *Miranda v. Arizona*,<sup>87</sup> considered it necessary to protect the citizen's right to refrain from self-incrimination long before the Supreme Court decided the issue in *Miranda*. *Dorado* noted with approval the *Johnson v. Zerbst* definition of waiver<sup>88</sup> and stated that unless evidence were introduced showing the defendant was aware of his sixth amendment rights, "[T]he failure of the officers to inform him of that right would preclude a finding that he knowingly waived it,"<sup>89</sup> since the defendant could not waive what he did not know.

The status of the law in California is that one cannot waive the rights afforded by the fifth and sixth amendments without first being made aware of those rights.<sup>90</sup> This is true regardless of his age, education or background.<sup>91</sup> There is no requirement, however, that a person be informed of his fourth amendment rights prior to their waiver despite its equally fundamental character.<sup>92</sup> Apparently in California, the law is satisfied that a person is aware of his right to refuse merely from the doubtful implication of his consent to a request, when, in fact, there may be no such awareness at all.

Since *Miranda* and *Dorado*, there can be no presumption of awareness of fifth and sixth amendment rights absent a warning. By analogy, in the case of waiver of consent to search, there should be no presumption of awareness of fourth amendment rights without a warning.

### *The Gorman Approach*

Certain federal courts rejecting the need for a specific warning agree with the basic California position. In *Gorman v. United*

<sup>86</sup> 62 Cal. 2d 338, 398 P.2d 361, 42 Cal. Rptr. 169 (1965).

<sup>87</sup> 384 U.S. 436 (1966).

<sup>88</sup> See text accompanying note 23 *supra*.

<sup>89</sup> *People v. Dorado*, 62 Cal. 2d 338, 352, 398 P.2d 361, 370, 42 Cal. Rptr. 169, 178 (1965).

<sup>90</sup> *Miranda v. Arizona*, 384 U.S. 436 (1966); *People v. Dorado*, 62 Cal. 2d 338, 398 P.2d 361, 42 Cal. Rptr. 169 (1965).

<sup>91</sup> See *Miranda v. Arizona*, 384 U.S. 436 (1966) where the special circumstances test is rejected.

<sup>92</sup> *Supra*, note 77.

*States*,<sup>93</sup> federal officers arrested the defendant for a narcotics offense. Incident to that arrest, they searched him and found a rent receipt from a nearby motel. The police took him to the station house, advised him of his rights under *Miranda* and interrogated him concerning a recent robbery. In the course of questioning, the officers sought permission to search the motel room and the defendant verbally consented. The court held this consent to be voluntary and intelligent since after being advised of his fifth and sixth amendment rights, the defendant knew he had no duty to cooperate with the officers.<sup>94</sup> Defense counsel argued by analogy to *Miranda* that the defendant should also have been advised of his right to refuse to consent to the otherwise illegal search. The court recognized the "surface plausibility" of the theory but rejected it because to warn the suspect of his fourth amendment rights would be a "mechanistic duplication" downgrading the effect of the *Miranda* warnings.<sup>95</sup> Furthermore, the court noted that the law of search and seizure is not concerned with unreliability of confessions or self-incrimination or the right to counsel at all critical stages but rather with the "maintenance of civilized police practice."<sup>96</sup>

Since the *Gorman* court feared downgrading of the *Miranda* warnings if another were given it relied on those warnings to encompass a fourth amendment warning. Using a theory similar to the "inference of refusal" in California, the court found a fourth amendment warning implicit in the fifth amendment warning. It reasoned that defendant should have known that anything found in the search could be used in a criminal proceeding against him.<sup>97</sup>

This theory was held to be untenable in *United States v. Moderacki*,<sup>98</sup> which criticized the *Gorman* interpretation of the *Miranda* warnings. "The key to a voluntary waiver," the court said, "is whether it was done knowingly. An inference that a person has been warned is not one and the same thing as an actual warning."<sup>99</sup>

*Moderacki* also rejected the notion that an additional fourth amendment warning would be a "mechanistic duplication."<sup>100</sup> It con-

<sup>93</sup> 380 F.2d 158 (1st Cir. 1967).

<sup>94</sup> *Id.* at 164.

<sup>95</sup> *Id.* It is difficult to see how an additional warning about a different right would downgrade the *Miranda* warnings as is contended in this objection. The probable effect of a triple warning encompassing the fourth, fifth and sixth amendments would be to make the suspect more fully aware of all of them.

<sup>96</sup> *Id.*

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

<sup>98</sup> 280 F. Supp. 633 (D. Del. 1968).

<sup>99</sup> *Id.* at 636.

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

ceded that the warning would be repetitive since it would be similar to the *Miranda* warnings but emphasized that “[L]acking an explicit warning as to his rights under the Fourth amendment, it can never be known with certainty whether a defendant voluntarily waived those rights.”<sup>101</sup>

Although the rights guaranteed by the fourth, fifth, and sixth amendments differ, standards for waiver should be the same for all. To require a lesser standard for the fourth amendment than for the fifth and sixth derogates the equally fundamental character of the fourth amendment.

The purpose of the fourth amendment, according to *Gorman*, is to maintain civilized police practices. Today, however, its primary purpose is protection of the personal rights of the citizen.<sup>102</sup> As early as 1886, the Supreme Court said in *Boyd v. United States*,<sup>103</sup> “It is not the breaking of his doors, and the rummaging of his drawers, that constitutes the essence of the offense [of an unreasonable search and seizure]; but it is the invasion of his indefeasible right of personal security, personal liberty and private property. . . .”<sup>104</sup> The fourth amendment protects the personal right of privacy rather than the physical premises.<sup>105</sup> The maintenance of civilized police practices is not in itself the end sought by the fourth amendment, but rather it is a reasonable means toward achieving a meaningful respect for a person’s right of privacy, the primary goal of the fourth amendment.

### *The Blalock Rule*

The court in *Moderacki* based its decision on two federal cases, *United States v. Nikrasch*<sup>106</sup> and *United States v. Blalock*,<sup>107</sup> which were the first to state that a specific warning is needed to intelligently waive the right to refuse an otherwise illegal search and seizure. *Nikrasch* indicated by way of dictum that although the prosecution failed to argue the point on appeal, the defendant could not have knowingly waived his right without a warning.<sup>108</sup> In *Blalock*, three FBI agents encountered the defendant in his hotel lobby. After identifying themselves and briefly questioning him, one agent took the defendant to the men’s room and frisked him for weapons.

---

<sup>101</sup> *Id.*

<sup>102</sup> *Katz v. United States*, 389 U.S. 347 (1967).

<sup>103</sup> 116 U.S. 616 (1886).

<sup>104</sup> *Id.* at 630.

<sup>105</sup> *Katz v. United States*, 389 U.S. 347 (1967).

<sup>106</sup> 376 F.2d 740 (7th Cir. 1966).

<sup>107</sup> 255 F. Supp. 268 (E.D. Pa. 1966).

<sup>108</sup> *United States v. Nikrasch*, 376 F.2d 740, 744 (7th Cir. 1966).



The defendant and all three agents then went to the defendant's room. There the agents advised the defendant of his rights under *Miranda* and questioned him about a recent robbery. The defendant denied any connection with that offense. The agents then said that if this were true, he should have no objection to a search of the room. Agreeing with this reasoning, he consented to the search.

The court held this waiver to be unintelligent. An intelligent consent implies that the suspect is aware of his rights. One can intelligently waive a right only if one knows of that right, but cannot waive rights of which he is unaware.<sup>109</sup>

Although the *Blalock* decision preceded *Gorman*, the court discussed the same objections raised in the later case. *Blalock* concluded that the requirement of a warning would not be a burden to police officers or an obstruction to criminal investigation.<sup>110</sup> The main thrust of the decision was that the fourth, fifth and sixth amendments are of equal dignity and should be enforced with the same constitutional strictness.<sup>111</sup> To inform the defendant of his right to counsel and the right to remain silent but not to warn him of his right to refuse an otherwise illegal search is a failure to recognize this equality. Since it is equally fundamental with respect to waiver, "[T]he Fourth amendment requires no less knowing a waiver than do the Fifth and Sixth."<sup>112</sup> A warning of each individual right is a prerequisite to a valid waiver of any one right in order "to protect the possibility that the ignorant may surrender their rights more readily than the shrewd."<sup>113</sup>

*Blalock* is consistent with the constitutional interpretations of a valid waiver that are expressed in *Miranda*. A warning respecting fourth amendment rights is necessary to insure that all citizens, regardless of age, education, or background have a more meaningful opportunity to enjoy their constitutional rights. If a warning were required with the same strictness as that provided in *Miranda*, someone who would otherwise be convicted might go free. "[B]ut it is the law that sets him free. Nothing can destroy a government more quickly than its failure to observe its own laws, or worse, to disregard the charter of its own existence."<sup>114</sup> The purpose of requiring a warning is not to hamper police activity but rather to attempt to assure each citizen his full compliment of constitutional rights. To recognize each citizen's right to refuse consent to an unlawful search

---

<sup>109</sup> United States v. Blalock, 255 F. Supp. 268, 269 (E.D. Pa. 1966).

<sup>110</sup> *Id.* at 269.

<sup>111</sup> *Id.*

<sup>112</sup> *Id.*

<sup>113</sup> *Id.*

<sup>114</sup> Mapp v. Ohio, 367 U.S. 643 at 659.

yet at the same time to fail to advise him of that right blunts the thrust of the fourth amendment.

### CONCLUSION

To hold that one may waive his right to be free from an unreasonable search and seizure without being aware of that right is contrary to the standards of due process.<sup>115</sup> Such an approach violates the basic concept that a fundamental right should not be so easily lost. A warning respecting the fourth amendment should be required so that all citizens, prior to their relinquishment of a constitutional right, are aware of that right and the consequences of its abandonment. If a sovereign state chooses to reject the requirement of a specific warning, it should assure by other means that a defendant is aware of his right to refuse an unreasonable search and seizure.

However, to give a pre-waiver fourth amendment warning is not burdensome in light of the rights involved. The United States Justice Department apparently does not feel that a warning burdens or interferes with its activities. In its search and seizure manual, the point is clearly made that when the officer requests a search he must "[E]xplain to the individual that he is not required to consent and . . . make him aware that any evidence found may be used against him."<sup>116</sup> There is no reason to believe that the burden on the states would be more severe.

*Joseph C. Sanfilippo*

---

<sup>115</sup> Cf. *Miranda v. Arizona*, 384 U.S. 436 (1966); *Gideon v. Wainwright*, 372 U.S. 335 (1963); *Mapp v. Ohio*, 367 U.S. 643 (1961).

<sup>116</sup> CRIMINAL DIVISION, U.S. JUSTICE DEP'T. HANDBOOK ON THE LAW OF SEARCH AND SEIZURE, 47-48 (1968).

