Search by Consent

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PART IV

The Second Requirement of Lawful Consent—Voluntariness

To be lawful, a consent to search first must be obtained from a person entitled to grant such authority. The foregoing sections considered the problem of who is empowered to consent. What follows addresses the second obstacle which must be overcome—proof that the consent is *voluntarily* given.

The leading Supreme Court decisions concerning the voluntariness question are *Bumper* v. *North Carolina*, 391 U.S. 543 (1968) and *Schneckloth* v. *Bustamonte*, 412 U.S. 218 (1973). In *Bumper*, the majority pointed out:

> "When a prosecutor seeks to rely upon consent to justify the lawfulness of a search, he has the burden of proving that the consent was, in fact, freely and voluntarily given." 391 U.S. at 548.

Five years later, the Court in *Schneckloth* considered the question of what the prosecution must prove to demonstrate that a consent is voluntary:

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recognized legitimacy of consent searches with the requirement that they be free from any aspect of official coercion cannot be resolved by any infallible touchstone. To approve such searches without the most careful scrutiny would sanction the possibility of official coercion; to place artificial restrictions upon such searches would jeopardize their basic validity. Just as was true with confessions, the requirement of a 'voluntary' consent reflects a fair accommodation of the constitutional requirements involved. In examining all the surrounding circumstances to determine if in fact the consent to search was coerced, account must be taken of subtly coercive police questions, as well as the possibly vulnerable subjective state of the person who consents. Those searches that are the product of police coercion can thus be filtered out without undermining the continuing validity of consent searches. In sum, there is no reason for us to depart in the area of consent searches, from the traditional definition of 'voluntariness'." 412 U.S. at 229.

The Court thus adopted a "totality of circumstances" test. As in the question of voluntary confessions, no single criterion controls. Whether the consent is in fact voluntary or the product of duress and coercion, express or implied, is determined by a careful review of all the facts surrounding the giving of consent. In the remainder of this section, factors relevant to a determination of voluntariness will be considered.

Custody

One of the issues left open in *Schneckloth* v. *Bustamonte*, 412 U.S. 218 (1973), was whether a voluntary consent could be obtained from an accused in police custody. Some earlier authority existed for the proposition that custody in and of itself was sufficiently oppressive as to render any consent to search coerced. See, e.g., *United States* v. *Nikrasch*, 367 F. 2d 710 (7th Cir. 1966); *Judd* v. *United States*, 190 F. 2d 649 (D.C. Cir. 1951); *United States* v. *Ortiz*, 331 F. Supp. 514 (D. P.R. 1971). But the majority view considered custody simply one of many factors to be evaluated in judging the voluntariness of consent. Custody alone was not determinative.

Whatever doubt lingered in the wake of *Schneckloth* was dispelled by the Supreme Court in *United States* v. *Watson*, 423 U.S. 411 (1976). In *Watson*, the defendant was arrested without warrant for possession of stolen credit cards. He was searched, but no credit cards were found on his person. An officer then asked if he could look in Watson's car, which was located nearby. Watson told him to "go ahead" despite the officer's warning that anything found could be used against him. Stolen credit cards were found in the car, and Watson was charged and convicted. On appeal, he argued that both the arrest and the ensuing vehicle search were illegal.

In considering the voluntariness of Watson's consent, Justice White, speaking for the Court, noted:

> "There was no overt act or threat of force against Watson proved or claimed. There were no promises made to him and no indication of more subtle forms of coercion that might flaw his judgment. He had been arrested and was in custody, but his consent was given while on a public street, not in the confines of the police station. *Moreover, the fact of custody alone has never been enough in itself to demonstrate a coerced confession or consent to search.*" *Id.* at 424 [emphasis added].

That consent to search was obtained from Watson on the street rather than in the stationhouse in no way impairs the conclusion that custody is but one of many factors to be weighed in determining voluntariness. While the government's burden of proof may be greater where a police station consent is obtained, recent decisions indicate that such consent is valid.

In *United States* v. *Smith*, 543 F. 2d 1141 (5th Cir. 1976), the defendant, suspected of possessing a stolen government check, was stopped in his vehicle by local police. When the officer smelled alcohol on his breath, he was taken into custody for driving while intoxicated and transported to the police station. At the stationhouse, it was determined that defendant had failed to register as a convicted felon in accordance with local law and was charged with that misdemeanor. He was then advised of the suspected possessory violation and asked for consent to search his car and personal belongings. He signed a form granting the officers permission to search, and a stolen U.S. Treasury check was found in the car. The defendant was convicted.

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On appeal, Smith argued that the stationhouse consent to search was involuntary. The Federal appellate court, responding to the question left unanswered in *Watson*, pointed out:

> "The fact that Smith gave his consent when he was in custody *at the police station*, while another 'factor in the overall judgment,' does not justify a departure from the 'totality of the circumstances' approach established in *Schneckloth* and *Watson*. This case simply does not raise 'the spector of incommunicado police interrogation in some remote station house' alluded to in *Schneckloth*. . . ." *Id.* at 1146 [emphasis in original].

See also *United States* v. *Haun*, 409 F. Supp. 1134 (E.D. Tenn. 1975) (consent to search premises obtained from defendant under arrest and in detectives' office at police headquarters deemed voluntary); *Surianello* v. *State*, 553 P. 2d 942 (Nev. 1976) (consent to search motel room obtained from defendant in custody at police headquarters held voluntary). Decisions prior to *Watson* which hold that custody at the police station will not nullify an otherwise voluntary consent are cited in *United States* v. *Smith*, *supra*, at 1146.

Use of Force and Threats

The very purpose of a weapon is to coerce, to demand submission and cooperation. It is hardly surprising then that courts attach special significance to the use of weapons while eliciting consent to search. The question is whether this factor alone will vitiate the consent. Is consent obtained at gunpoint involuntary *per se?*

The totality of circumstances test, mandated by the Supreme Court in *Schneckloth*, makes plain that use of a weapon, standing alone, will not invalidate a consent. The "presence or absence of a single consensual or coercive factor is not of itself controlling as a matter of law." *United States* v. *Hearn*, 496 F. 2d 236 (6th Cir. 1974), cert. denied 419 U.S. 1048 (1974). Nonetheless, it is apparent that display of a firearm weighs heavily in any determination of voluntariness. And it is equally apparent that a reviewing court will pay considerable deference to the trial court's finding on the question of voluntariness.

In *United States* v. *Whitlock*, 418 F. Supp. 138 (E.D. Mich. 1976), Federal narcotics agents arrested and handcuffed the defendant at gunpoint outside his apartment. He was returned to the apartment where a consent to search his wife's car was secured. One of the issues raised was whether his consent was voluntary. The court, in concluding that the consent was coerced, pointed to the "manner in which the defendant was initially approached and detained," which was "earmarked by surprise, fright, and confusion." A month earlier, the same court held that a consent obtained from an arrested narcotics suspect by police with service revolvers drawn was involuntary. The open display of weapons by the arresting officers was cited as a key factor in determining the voluntariness of the consent. *United States* v. *Edmond*, 413 F. Supp. 1388, 1391 (E.D. Mich. 1976).

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See also *Kirvelaitis* v. *Gray*, 513 F. 2d 213 (6th Cir. 1975), cert. denied 423 U.S. 855 (1975) (nothing in record supports conclusion consent given at gunpoint is voluntary; overpowering armed police presence requires additional evidence that choice was uncoerced beyond defendant's mere assent to search); *United States* v. *Bergdoll*, 412 F. Supp. 1323 (D. Del. 1976) (dictum) (agents knocking on door with guns drawn constitutes precisely the kind of overt act and threat of force which Supreme Court has held to vitiate any consent to search).

Where other factors are present which tend to lessen the impact of the show of force, a voluntary consent may be found. For example, in *United States* v. *Cepulonis*, 530 F. 2d 238 (1st Cir. 1976), cert. denied 426 U.S. 908 (1976), the defendant was arrested outside a motel, returned to his room, and there was asked for consent to search. He was handcuffed and surrounded by officers, two of whom carried shotguns. As to whether these circumstances were coercive, the court stated that while the decision "could have gone either way," the trial judge was not in error when he held the consent voluntary. A persuasive fact in reaching this result was the defendant's prior acquaintance with violence and the police. He was "less likely than most to be intimated by the agents' show of force." See also *United States* v. *Evans*, 519 F. 2d 1083 (9th Cir. 1975), cert. denied 423 U.S. 916 (1975) (approach with drawn guns did not invalidate consent where defendant later acknowledged

Law enforcement officers of other than Federal jurisdiction who are interested in any legal issue discussed in this article should consult their legal adviser. Some police procedures ruled permissible under Federal constitutional law are of questionable legality under State law or are not permitted at all.

the act to be voluntary and where he was warned of his right to refuse consent); *United States* v. *Miley*, 513 F. 2d 1191 (2d Cir. 1975), cert. denied sub nom. *Goldstein* v. *United States*, 423 U.S. 842 (1975) (a few agents with weapons drawn as a precautionary measure does not invalidate consent to search); *United States* v. *Savage*, 459 F. 2d 60 (5th Cir. 1972), affirmance of conviction vacated, new judgment entered affirming conviction with leave to appeal 483 F. 2d 67 (5th Cir. 1973) (defendant's will not overborne by armed officers who did not use weapons in threatening manner); *State* v. *Watson*, 559 P. 21 121 (Ariz. 1976) (five officers with drawn guns, consent nevertheless voluntary).

The use of weapons is the most blatant example of force and duress. But other, more subtle, tactics are sometimes used. Where a defendant is held in incommunicado custody, isolated in a strange place, and questioned for over 2 hours, a consent thereafter obtained will be tainted. *United States* v. *Rothman*, 492 F. 2d 1260 (9th Cir. 1973). The court further noted in *Rothman*:

> "The psychological atmosphere in which the consent is obtained is a critical factor in the determination of voluntariness. . . . In looking at the factual issue of voluntariness, the court must be aware of the 'vulnerable subjective state' of the defendant as well as the possibility of 'subtly coercive police questions'." *Id.* at 1265.

Physical force therefore is not essential to a finding of coercion. The mere threat of some police action or the imposition of a condition that overbears the will of the consenting party is sufficient. See *United States* v. *Bolin*, 514 F. 2d 554 (7th Cir. 1975) (consent obtained during custodial interrogation and after suspect impliedly threatened with arrest of girlfriend if he did not consent is involuntary); *United States* v. *Ruiz-Estrella*, 481 F. 2d 723 (2d Cir. 1973) (consent involuntary where suspect removed from boarding area at airport and isolated in coercive environment with uniformed sky marshal); *United States* v. *Enserro*, 401 F. Supp. 460 (W.D.N.Y. 1975) (consent to warrantless search obtained under erroneous threat that subject would face criminal penalties under Federal statute unless he signed consent does not justify the search by consent); *Padron* v. *State*, 328 So. 2d 216 (Fla. App. 1976) (requiring 16-year-old boy to make choice between permitting a search of premises or yielding to unreasonable alternative of evacuating premises on extremely cold night operated to strip consent to search of any voluntary character).

Submission to Authority

Numerous cases have considered the problem of consent given in response to an assertion of police authority, express or implied. Most involve the use or threat of a search warrant. *Bumper* v. *North Carolina*, 391 U.S. 543 (1968), is the leading case and the starting point. In *Bumper*, officers wanted to search the rural residence of an elderly grandmother. She was told the officers had a warrant, at which point she permitted them to enter and search. Incriminating evidence was found. Later, the State sought to validate the search not on the basis of the purported warrant, but rather on the consent given by the grandmother. In fact, the warrant was never produced. The Supreme Court rejected the argument on grounds that the consent to search was involuntary:

> "When a prosecutor seeks to rely upon consent to justify the lawfulness of a search, he has the burden of proving that the consent was, in fact, freely and voluntarily given. This burden cannot be discharged by showing no more than acquiescence to a claim of lawful authority. A search conducted in reliance upon a warrant cannot later be justified on the basis of consent if it turns out that the warrant was invalid. The result can be no different when it turns out that the State does not even attempt to rely upon the validity of the warrant, or fails to show that there was, in fact, any warrant at all. When a law enforcement officer claims authority to search a home under a warrant, he announces in effect that the occupant has no right to resist the search. The situation is instinct with coercion—albeit colorably lawful coercion. Where there is coercion there cannot be consent." *Id.* at 548–50.

Why would the prosecution attempt to justify a search on the basis of consent, with its heavy burden of proof, when the search was made under authority of a warrant? The answer to this question may be that the warrant was defective, *Commonwealth* v. *Pichel*, 323 A. 2d 113 (Pa. Super. Ct. 1974) (warrant invalid, consent made in response to announcement of warrant involuntary); or that there was no warrant at all. *State* v. *Basham*, 223 S.E. 2d 53 (W. Va. 1976) (State troopers "purportedly" obtained search warrant, no indication that warrant was ever produced, consent nevertheless voluntary). Where a legally sufficient search warrant has been issued, acquiescence to a declaration that officers have a warrant will not render the search unlawful. The entry and search may be justified under the warrant or by voluntary consent. *United States* v.

Pagan, 395 F. Supp. 1052 (D. P.R. 1975), aff'd 537 F. 2d 554 (1st Cir. 1976).

It would seem to make little difference whether the consent entry to premises follows announcement that officers possess an arrest warrant rather than a search warrant, if the process is later found invalid. A Texas appellate court reached such a conclusion in *Evans* v. *State*, 530 S.W. 2d 932 (Tex. Crim. App. 1975). Officers with a defective arrest warrant gained entry to premises by asserting they had a warrant for a person believed to be inside. Contraband was found in plain view. The court held that in the absence of a valid warrant, the entry could only be justified by consent, and consent under these circumstances was not freely given. Submission to authority cannot be disguised as a voluntary consent to search. *Id.* at 939.

The threat of obtaining a search warrant has frequently preceded a consent to search. Generally, a request for consent to search by an officer, accompanied by a statement that he can or will obtain a search warrant in the event of refusal does not, standing alone, invalidate the consent. The issue was squarely before a Federal appellate court in *United States* v. *Faruolo*, 506 F. 2d 490 (2d Cir. 1974). FBI Agents had probable cause to believe defendant had stolen wearing apparel in his house. He was arrested in his yard, given *Miranda* warnings, asked for permission to search the house, and advised that he did not have to permit the search. One Agent also pointed out that if he did not consent, a "search warrant would be applied for and further conveyed his (Agent's) belief that one would be issued." The defendant consented, and evidence was seized.

On appeal, the court held the FBI Agent's statement that he would apply for a warrant, which conveyed the impression that one would be obtained, was not a coercive factor negating consent. Such a "well-grounded" statement does not constitute trickery or deceit.

Accord: *United States* v. *Tortorello*, 533 F. 2d 809 (2d Cir. 1976), cert. denied 50 L. Ed. 2d 177 (1976) (statement that agent "could get a warrant" does not affect voluntariness of consent); *United States* v. *Gavic*, 520 F. 2d 1346 (8th Cir. 1975) (statement that agent "would procure a warrant" does not invalidate consent); *United States* v. *Miley*, 513 F. 2d 1191 (2d Cir. 1975), cert. denied sub nom. *Goldstein* v. *United States*, 423 U.S. 842 (1975) (statement that obtaining warrant was a mere formality, which was "wholly accurate," does not impair voluntariness of consent); *United States* v. *Agosto*, 502 F. 2d 612 (9th Cir. 1974) (statement that officers "would get a warrant" and premises would be secured in the interim does not constitute coercion as a matter of law); *United States* v. *Culp*, 472 F. 2d 459 (8th Cir. 1973), cert. denied 411 U.S. 970 (1973) (indication that officers will "attempt to obtain" or "are getting" a warrant does not render consent involuntary); *People* v. *Hancock*, 525 P. 2d 435 (Colo. 1974) (statement that "warrant would be sought" if no consent does not negate voluntary consent).

Some courts have emphasized that advice to a consenting party that a warrant can or will be sought in the event of refusal is not improper, so long as the requesting officer in fact has probable cause to search. *Code* v. *State*, 214 S.E. 2d 873 (Ga. 1975), reflects this view. The Georgia Supreme Court noted that a detective's statement that he would obtain a warrant if consent were not forthcoming did not invalidate a consent since probable cause existed to get the warrant. See also *United States* v. *Miley*, *supra*; *United States* v. *Faruolo*, *supra*. In the absence of probable cause to search or arrest, such a statement has been deemed coercive. *Herriott* v. *State*, 337 So. 2d 165 (Ala. Crim. App. 1976).

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The language used by the officer in asking for consent to search can be important. Compare this statement: "If you do not consent, I will apply for a search warrant as soon as I leave here"; with: "If you do not consent, I'll be back here in a couple hours with a half dozen officers who will take this place apart." It is reasonable to expect a court to disallow a consent as involuntary when it follows the latter statement.

Both Federal and State decisions seem to find an officer's simple statement of fact acceptable. Thus, when he advises a person that he "will attempt to get a search warrant" if consent is withheld, such a statement is not coercive. *United States* v. *Boukater*, 409 F. 2d 537 (5th Cir. 1969). And as can be seen from the decisions cited above, assertions that the officer "could get" or "would procure" a warrant do not necessarily cause a coerced and involuntary response. See, e.g., *United States* v. *Tortorello*, *supra*; *United States* v. *Gavic*, *supra*. An indepth analysis of implied coercion, including the threat to obtain a warrant, can be found in *Whitman* v. *State*, 336 A. 2d 515 (Md. Ct. Spec. App. 1975).

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