Search by Consent

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Conclusion

Proof of Consent

Ordinarily, a law enforcement officer seeks the consent to search, obtains the invitation to enter, conducts the search, and records the circumstances of the transaction. Yet it is the prosecutor who later must prove the consent was lawful, and he depends heavily on the officer in meeting this burden of proof. So while the problem of proof is principally a concern of the prosecutor, the officer must share in the responsibility of demonstrating that the search conformed to fourth amendment requirements.

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.

Burden of Proof

Searches conducted outside the judicial process, i.e., without warrant, are *per se* unreasonable under the fourth amendment, subject to a few carefully delineated exceptions. *Coolidge* v. *New Hampshire*, 403 U.S. 443 (1971); *Katz* v. *United States*, 389 U.S. 347 (1967). The burden of showing the exemption rests with those who seek it (the State). *United States* v. *Jeffers*, 342 U.S. 48 (1951).

Before discussing the State's burden of proof, it is well to note that in any consent search case there are two questions that must be resolved: (1) Did the consenting party have the capacity or authority to waive? and (2) was the consent voluntary?

In *United States* v. *Matlock*, 415 U.S. 164 (1974), the issue was whether evidence presented by the Government with respect to voluntary consent of a third party to search the appellant's living quarters was sufficient to render the evidence thereby seized admissible. The problem was not the voluntariness of the consent, but whether the third party had authority to permit the search. The Court made plain that the authority did exist, 415 U.S. at 169–71, and in addition, the Government met its burden of proof by showing by the preponderance of the evidence that the

third party could and did consent, 415 U.S. at 177–78, n. 14. The Court noted, ". . . the controlling burden of proof at suppression hearings should impose no greater burden than proof by a preponderance of the evidence." *Ibid.* See also *United States* v. *Harris*, 534 F. 2d 95 (7th Cir. 1976); *United States* v. *Cook*, 530 F. 2d 145 (7th Cir. 1976), cert. denied 426 U.S. 909 (1976); *State* v. *Koucoules*, 343 A. 2d 860 (Me. 1974); *State* v. *Peterson*, 525 S.W. 2d 599 (Mo. App. 1975).

Where the issue is the voluntariness of consent, lower courts are not agreed on the appropriate evidentiary standard. Some have held the proper burden to be preponderance of the evidence, citing *United States* v. *Matlock, supra*, and *Lego* v. *Twomey*, 404 U.S. 477 (1972), a confession case. See, e.g., *United States* v. *Boston*, 508 F. 2d 1171 (2d Cir. 1974), cert. denied 421 U.S. 1001 (1975); *United States ex rel. Rigsbee* v. *Parkinson*, 407 F. Supp. 1019 (D. S.D. 1976); aff'd 545 F. 2d 56 (8th Cir. 1976); *State* v. *McLain*, 367 A. 2d 213 (Me. 1976); *State* v. *Wilson*, 367 A. 2d 1223 (Md. 1977); *State* v. *Peterson, supra*. Many, however, have insisted on a higher standard. See, e.g., *United States* v. *Mapp*, 476 F. 2d 67 (2d Cir. 1973) (clear and convincing evidence); *United States* v. *Jones*, 475 F. 2d 723 (5th Cir. 1973), cert. denied 414 U.S. 841 (1973) (clear and convincing evidence); *United States* v. *Pugh*, 417 F. Supp. 1019 (W.D. Mich. 1976) (clear and convincing evidence); *United States* v. *Pagan*, 395 F. Supp. 1052 (D.P.R. 1975), aff'd 537 F. 2d 554 (1st Cir. 1976) (clear and convincing evidence); *Hock* v. *State*, 531 S.W. 2d 701 (Ark. 1976) (clear and positive evidence); *State* v. *Bidegain*, 541 P. 2d 971 (N.M. 1975) (clear and positive evidence); *Evans* v. *State*, 530 S.W. 2d 932 (Tex. Crim. App. 1975) (positive and unequivocal evidence).

Written or Oral Proof

Whatever standard is imposed on the prosecution to prove consent, the better practice is to get it in writing. Properly authenticated, a written consent to search is highly persuasive. To be sure, the consenting party may argue that his signature was coerced or the result of trickery, fraud, or improper promises. But these objections may be overcome by testimony of officers who obtained the consent and have firsthand knowledge of the surrounding circumstances.

Proper use of a written consent search form is demonstrated in *United States* v. *Haun*, 409 F. Supp. 1134 (E.D. Tenn. 1975), where an FBI Agent obtained a consent to search for a stolen weapon from a suspect in custody. The court noted that the Agent punctiliously "dotted all the i's and crossed all the t's." Numerous other decisions approving consent searches reflect the desirability of obtaining the consent in writing. See *United States* v. *Smith*, 543 F. 2d 1141 (5th Cir. 1976), cert. denied 51 L. Ed. 2d 564 (1977) (written consent form quoted in its entirety); *United States* v. *Willis*, 473 F. 2d 450 (6th Cir. 1973), cert. denied 412 U.S. 908 (1973) (language of consent form reproduced in opinion). The language of consent need not be on a preprinted form. *United States ex rel. Lundergan* v. *McMann*, 417 F. 2d 519 (2d Cir. 1969) (detective "wrote out" consent form which defendant read and signed); *United States* v. *Hecht*, 259 F. Supp. 581 (W.D. Pa. 1966) (consent recorded in language written on old envelope).

A waiver of the right to be free in one's home from unreasonable searches need not be in writing. *United States* v. *Strouth*, 311 F. Supp. 1088 (E.D. Tenn. 1970). So long as the language is specific and unambiguous (See Part VI—Implied Consent, Ambiguous or Equivocal Responses), a valid consent may be proven. See, e.g., *United States* v. *Boston*, 508 F. 2d 1171 (2d Cir. 1974), cert. denied 421 U.S. 1001 (1975); *United States* v. *Legato*, 480 F. 2d 408 (5th Cir. 1973), cert. denied 414 U.S. 979 (1973); *Earls* v. *State of Tennessee*, 379 F. Supp. 576 (E.D. Tenn. 1974); *United States* v. *Kohne*, 358 F. Supp. 1053 (W.D. Pa. 1973), aff'd sub nom. *Appeal of Denham*, 485 F. 2d 679 (3d Cir. 1973), cert. denied 417 U.S. 918 (1974).

Cautionary Warnings

After the Supreme Court decision in *Miranda* v. *Arizona*, 384 U.S. 436 (1966), which required cautionary warnings of fifth and sixth amendment rights prior to a waiver thereof by an accused in custody, it was argued frequently, but generally unsuccessfully, that a warning of fourth amendment rights should likewise precede any effort by an officer to obtain a consent to search.

The Court laid the matter to rest in *Schneckloth* v. *Bustamonte*, 412 U.S. 218 (1973). It was held that the State need not prove knowledge of the right to refuse consent as a necessary prerequisite to demonstrating a voluntary consent. A cautionary warning, therefore, prior to seeking consent, is not essential. The Court pointed out that ". . . it would be thoroughly impractical to impose on the normal consent search the detailed requirements of an effective warning," but also made

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clear that the subject's knowledge of a right to refuse is a factor to be taken into account in deciding the voluntariness of a consent.

The rule regarding warnings is no different, even if the consenting party is in custody. The absence of proof that the suspect in custody knows he can withhold consent, though a factor in the overall judgment, is not to be given controlling significance. *United States* v. *Watson,* 423 U.S. 411, 424 (1976). See also *United States* v. *Smith,* 543 F. 2d 1141 (5th Cir. 1976), cert. denied 51 L. Ed. 2d 564 (1977); *United States* v. *Garcia,* 496 F. 2d 670 (5th Cir. 1974), cert. denied 420 U.S. 960 (1975).

Special Situations

Employment Contracts—Conditions of Employment

Ordinarily, the search of an employee's locker, desk, or personal belongings by his employer, acting alone, raises no constitutional issue. The employer acts as a private citizen and the fourth amendment, designed to deter *official* or *governmental* misconduct, simply has no applicability. *Burdeau* v. *McDowell,* 256 U.S. 465 (1921). See also *Coolidge* v. *New Hampshire,* 403 U.S. 443, 488 (1971). Evidence taken by the private employer may be turned over to authorities and used in a criminal prosecution. The employer's conduct may be tortious, but it is not unconstitutional.

It is a quite different matter, however, where the employer acts as an agent of police, or where the employer himself is a governmental officer. Under these circumstances, a search by the employer becomes "official" action for purposes of the fourth amendment. Thus, the question is whether the search is reasonable. The test of reasonableness is best met by adherence to the warrant procedure. But even in the absence of a warrant, the search may be lawful. Where, for example, an employee relinquishes his right of privacy in a desk or locker as a condition of employment, he assumes the risk of entry by his employer and may not assert later that his constitutional right was infringed.

A decision which illustrates the point is *United States* v. *Bunkers,* 521 F. 2d 1217 (9th Cir. 1975), cert. denied 423 U.S. 989 (1975). Bunkers was a postal employee suspected of stealing packages traveling through the mails. Postal inspectors with "well-founded suspicions" caused a warrantless search to be made of her locker, where she was thought to be storing the stolen property. Her conviction of theft was appealed on grounds that the inspectors illegally searched the locker.

The Federal appellate court rejected the claim, holding that the postal employee did not possess a reasonable expectation of privacy in a work-connected post office locker supplied by the Government. Furthermore, the court pointed out that by the terms of her employment agreement she effectively relinquished her fourth amendment protection in the locker. A similar case is *United States* v. *Donato,* 269 F. Supp. 921 (E.D. Pa. 1967), aff'd 379 F. 2d 288 (3d Cir. 1967), where a warrantless search of an employee's locker was made at the U.S. Mint in Philadelphia and justified pursuant to a Mint regulation authorizing inspection of employees' lockers "whenever necessary for any reason." See also *United States* v. *Collins,* 349 F. 2d 863 (2d Cir. 1965), cert. denied 383 U.S. 960 (1966) (warrantless search of employee's desk by U.S. Customs agent and Post Office inspector lawful).

Decisions approving warrantless searches of lockers or desks based on a finding of "no reasonable expectation of privacy" are *United States* v. *Speights,* 413 F. Supp. 1221 (D. N.J. 1976) (police officer had no justified expectation of privacy in his locker as against superiors); *Shaffer* v. *Field,* 339 F. Supp. 997 (C.D. Cal. 1972), aff'd 484 F. 2d 1196 (9th Cir. 1973) (deputy sheriff had no constitutionally justifiable expectation of privacy in his substation locker). But see *State* v. *Ferrari,* 357 A. 2d 286 (N.J. App. 1976) (deputy chief entitled to fourth amendment protection in locked desk).

Effect of Statutes and Ordinances

Can a legislature condition the conferral of an advantage on a citizen by requiring that he yield a constitutional right? It seems clear that in limited circumstances such a price can be exacted from an individual. Statutes requiring waiver invariably concern activities where tight control is the order of the day and warrantless searches and inspections are essential to protect the public interest. They are confined to activities which threaten public safety or have a high potential for corruption and vice. In effect, the laws require citizens to consent to warrantless searches in return for a benefit granted by the State. Licensing statutes provide a good example.

In *Lanchester* v. *Pennsylvania State Horse Racing Commission* 325 A. 2d 648 (Pa. Cmwlth. Ct. 1974), a horse trainer appealed his license suspension for violation of the Pennsylvania Rules of Racing. The suspension followed a hearing at which evidence was presented which had been forcibly seized from the trainer's truck without warrant by commission officials. At issue was the constitutionality of the search.

The Pennsylvania Court held that the search was reasonable on two grounds. First, warrantless regulatory searches in pervasively regulated businesses may be authorized by a legislature. The court cited two Supreme Court decisions supporting this view—*United States* v. *Biswell,* 406 U.S. 311 (1972); *Colonnade Catering Corp.* v. *United States,* 397 U.S. 72 (1970). *Biswell* concerned the warrantless search of a federally licensed

gun dealer's storeroom; *Colonnade*, the inspection of a licensed alcohol beverage dealer's premises. Both decisions recognize that control and regulation of the firearms and spirits industries, given their potential for abuse, can only be achieved through frequent and unannounced inspections.

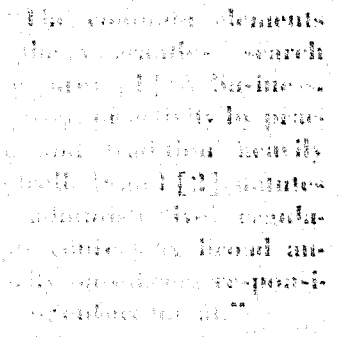
Second, the *Lanchester* court held that an express consent to search, obtained from an applicant for a horse trainer's license as a condition precedent to licensing, is a relinquishment of constitutional protection:

> "Where an individual entering a traditionally regulated licensed field such as horse racing consents to a warrantless search of his person or premises directly related to or involved in that endeavor, his consent is held to constitute a waiver of his Fourth Amendment protections within the limits of valid regulation." *Lanchester* v. *Pennsylvania State Horse Racing Commission, supra,* at 653.

The same conclusion was reached by a State appellate court in *Greensboro Elks Lodge* v. *North Carolina Board of Alcoholic Control*, 220 S.E. 2d 106 (N.C. App. 1975). In order to effectively control the dispensing of spirits, a State statute authorized certain officers to enter licensed premises in the performance of their duties at any hour of the day or night. Officers made a warrantless entry and seized certain evidence. At issue was the admissibility of such evidence in a license suspension hearing. The court held that the Elks Lodge, by seeking and obtaining a permit to dispense intoxicating beverages, waived its fourth amendment right to the limited extent of inspection to enforce State liquor regulations. The court quoted from a 1973 Supreme Court decision:

> ". . . [B]usinessmen engaged in . . . federally licensed and regulated enterprises accept the burdens as well as the benefits of their trade. . . . *The businessman in a regulated industry in effect consents to the restrictions placed upon him.*" *Almeida-Sanchez* v. *United States*, 413 U.S. 266, 271 (1973) [emphasis added].

And unlike the administrative inspection cases where close regulation of a particular industry is not the objective, *Camara* v. *Municipal Court*, 387 U.S. 523 (1967); *See* v. *Seattle*, 387 U.S. 541 (1967), the officers need not obtain prior judicial approval (i.e., warrant) prior to entry. Compare *United States* v. *Biswell, supra,* and *Colonnade Catering Corp.* v. *United States, supra,* with *United States* v. *Enserro*, 401 F. Supp. 460 (W.D. N.Y. 1975).



The common elements in the warrantless search cases are: (1) A business, industry, or activity by practice and tradition heavily controlled; and (2) statutes or administrative regulations conferring broad authority on officers responsible for enforcement. In the absence of such factors, a law will not survive constitutional challenge. In 1976, the Supreme Court of Ohio was called upon to determine the constitutionality of a municipal ordinance which compelled the seller of real property to tender a certificate of inspection to a prospective buyer. In order to obtain the certificate, the seller had to submit to a warrantless inspection of the premises. Failure to tender the certificate subjected the seller to criminal penalties. The court found the ordinance in violation of the fourth amendment. A citizen cannot be placed in a position where he must agree to a search or face a criminal penalty. *Wilson* v. *City of Cincinnati*, 346 N.E. 2d 666 (Ohio 1976).

Parolees and Probationers

In recent years, an entire body of law has developed about the rights of prisoners, parolees, and probationers. Most is beyond the scope of this discussion and of limited interest to law enforcement officers. Yet one problem is of concern—the right of a parolee (or probationer) to be free from unreasonable search of his premises.

Parole or probation is not a right enjoyed by those convicted of crime. Rather it is a benefit accorded in the correctional process where release of a prisoner is deemed advantageous to both State and individual. There are, of course, significant differences of legal status between the parolee and probationer. But common to both is the purpose of release. It is rehabilitation. The rehabilitative effort is invariably accompanied by State-imposed limits and conditions on the freedom of the parolee or probationer. So long as the restrictions are reasonable, i.e., contribute significantly to the rehabilitation of the convicted person and the protection of the public, they are lawful. See *Morrissey* v. *Brewer*, 408 U.S. 471, 477–80 (1972) (parole); *Porth* v. *Templar*, 453 F. 2d 330 (10th Cir. 1971) (probation).

Release on probation or parole is generally provided for by statute. Conditions of release may be imposed by the sentencing court or an administrative board or department. To in-

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sure compliance with these conditions, the courts and boards rely upon probation and parole officers, who are vested with arrest and search authority with respect to those in their charge. The authority is not unlimited. Even probationers and parolees enjoy some constitutional protection. *Croteau* v. *State*, 334 So. 2d 577 (Fla. 1976); *Tamez* v. *State*, 534 S.W. 2d 686 (Tex. Crim. App. 1976).

Suppose a State, acting through its parole board, imposes on a parolee as a condition of release a requirement to submit to a search of his dwelling at any time at the complete discretion of a law enforcement officer. In effect, the State exacts a consent to search as the price of freedom. Will this condition survive constitutional challenge? There is a conflict in the reported decisions. Recent Federal cases hold the condition either overly broad, allowing any police officer to conduct an unrestricted "probation" search, *United States* v. *Consuelo-Gonzalez*, 521 F. 2d 259 (9th Cir. 1975); or involuntary, *United States* v. *Smith*, 395 F. Supp. 1155 (W.D. N.Y. 1975). Some State courts agree with this view, *Tamez* v. *State, supra*, but others have concluded that the consent search provision of parole or probation does not offend the fourth amendment. *People* v. *Mason*, 488 P. 2d 630 (Cal. 1971), cert. denied. 405 U.S. 1016 (1972); *State* v. *Schlosser*, 202 N.W. 2d 136 (N.D. 1972).

There is another basis for a parole or probation search. It arises from the unique role the officer plays in the correction scheme. He may make a warrantless search of premises of a parolee or probationer, but his actions must be reasonable. To satisfy the reasonableness requirement, he must: (1) Carefully limit his search to purposes of parole or probation supervision; and (2) justify the search based on an objective standard. The standard is defined as facts amounting to a reasonable belief or suspicion. See *Latta* v. *Fitzharris*, 521 F. 2d 246 (9th Cir. 1975), cert. denied 423 U.S. 897 (1975); *United States* v. *Smith, supra.*

The foregoing is of little significance to the law enforcement officer unless he causes or participates in the search. Notwithstanding some decisions to the contrary, many courts disapprove the practice of police acting as parole or probation officers, *People* v. *Anderson*, 536 P. 2d 302 (Colo. 1975), or using the probation officer as a "stalking horse for the police," *Latta* v. *Fitzharris, supra.* At the same time, nothing should preclude "mutually beneficial cooperation" between parole or probation officers and other law enforcement officials, so long as the cooperation does not result in a subterfuge for criminal investigations. *United States* v. *Consuelo-Gonzalez, supra*, at 267; *State* v. *Simms*, 516 P. 2d 1088 (Wash. App. 1973).

Conclusion

Consent to search does not substitute for a search warrant. Yet used judiciously, it can be a lawful and effective means of finding and seizing evidence. For the officer, it is also an area of high vulnerability. A consent to search is the relinquishment of a citizen's fundamental protection under the Constitution. Defense attorneys, therefore, may be expected to attack the search routinely and vigorously. Courts will examine carefully the circumstances surrounding the consent to determine voluntariness. The law enforcement officer must be prepared to demonstrate the rights of the consenting party were not violated. He should identify the person empowered to give consent, do nothing to interfere with the free choice of the consenter to reject the officer's request to search, and make an accurate record of what happened.

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Officers are entitled and expected to use all lawful techniques in the investigation of crime. There is little doubt that the consent search is firmly established as one such technique. Its importance and propriety are nowhere better described than in the words of Justice Stewart:

> "In situations where the police have some evidence of illicit activity, but lack probable cause to arrest or search, a search authorized by a valid consent may be the only means of obtaining important and reliable evidence. . . . [A] search pursuant to consent may result in considerably less inconvenience for the subject of the search, and, properly conducted, is a constitutionally permissible and wholly legitimate aspect of effective police activity." *Schneckloth* v. *Bustamonte*, 412 U.S. 218, 227–28 (1973).

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