In the

Supreme Court of the United States

MERLE R. SCHNECKLOTH,

Petitioner,

v.

ROBERT CLYDE BUSTAMONTE,

Respondent.

No. 71-732

Washington, D. C.
October 10, 1972

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Tuesday, October 10, 1972.

The above-entitled matter came on for argument at 1:02 o'clock, p.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM O. DOUGLAS, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice

APPEARANCES:

ROBERT R. GRANUCCI, ESQ., Deputy Attorney General, 6000 State Building, San Francisco, California 94102; for the Petitioner.

STUART P. TOBISMAN, ESQ., 611 West Sixth Street, Room 3600, Los Angeles, California 90017; for the Respondent.

C O N T E N T S

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P R O C E E DI N G S

MR. CHIEF JUSTICE BURGER: We'll hear arguments next in No. 71-732, Schneckloth again Bustamonte.

Mr. Granucci, you may proceed whenever you're ready.

ORAL ARGUMENT OF ROBERT R. GRANUCCI, ESQ.,

ON BEHALF OF THE PETITIONER

MR. GRANUCCI: Mr. Chief Justice, and may it please the Court:

This case comes here on a writ of certiorari to review a judgment of the United States Court of Appeals from the Ninth Circuit, reversing an order of the United States District Court for the Northern District of California, denying Mr. Bustamonte's petition for a writ of habeas corpus.

The questions presented are:

One, whether the court of appeals erred in holding invalid the search based upon a verbal expression of consent in an atmosphere free of coercion, on the sole ground that the State had failed to demonstrate that consent was given with knowledge that it could be withheld.

The second point is somewhat broader. It is: whether questions relating to search and seizure should be made available to state prisoners seeking to set aside a final conviction on federal habeas corpus.

A jury found Robert Clyde Bustamonte guilty of

possessing a completed check with intent to defraud. At the trial three stolen and forged checks were admitted into evidence over defense objection.

The facts of the case are these:

On January 19, 1967, the Speedway Car Wash in Mountain View, California, a town about 30 miles south of San Francisco, was burglarized. A number of blank checks and a check protector were taken. Subsequently these checks were completed by respondent Bustmonte, using the check protector and forging the car wash owner's name.

Bustamonte, together with Joe Alcala and Joe Gonzales, then set out to cash the checks.

On the evening of January 30, the three proceeded to San Jose, to find persons who might be willing to use false identification to cash the checks and give them the proceeds.

They picked up three men, but their efforts to cash the checks were unsuccessful.

About 2:45 --

QUESTION: Can you connect the picking up of the three men with the efforts to cash the checks?

MR. GRANUCCI: Yes, that was the --

QUESTION: That was the purpose of their association at that moment?

MR. GRANUCCI: Yes. This evidence came out at the

trial. It appears in the opinion of the California Court of Appeals.

At 2:45 the following morning, as the six men were driving along the highway, a police officer on patrol noticed that their car had only one functioning headlight. He made a U-turn to follow the car, and then saw that it had no rear license plate light, either. He then stopped the car. Gonzales was driving and Alcala and Bustamonte were in the front seat. Three other men were in the rear.

Gonzales had no driver's license, nor any identification. Neither did anybody else, except Mr. Alcala, who produced his driver's license and stated that the car belonged to his brother.

The officer who was along asked the men to step out of the car. Meanwhile he had called for a backup patrol.

After the officer was joined by two other police officers, he asked Alcala if he could search the car. Alcala replied, "Sure, go right ahead."

Gonzales, who testified at the trial, corroborated this statement and testified that Alcala even assisted in the search. In the search the officers found three protectorized checks, wadded up under the rear seat. These checks were payable to different named individuals. Later on a search warrant was obtained to search Bustamonte's own two automobiles. There the searching officers found other blank

Speedway checks, the check protector, and a number of traffic citations relating to Bustamonte.

The writing on the checks was that of Bustamonte.

At the trial, and on appeal in the California Court of Appeals, our intermediate appellate court, Bustamonte contended that Alcala's consent to search was invalid, because Alcala had not been warned of his right to refuse consent.

The California Court of Appeal rejected this contention. It applied the established State standard for judging consent searches, first articulated by a former State Chief Justice, Robert Traynor, the ultimate of California's exclusionary rule, declared six years prior to Mapp v. Ohio.

And this is the California consent rule, as stated by Justice Traynor:

"Whether in a particular case an apparent consent was in fact voluntarily given or was in submission to an expressed or implied assertion of authority, is a question of fact to be determined in the light of all the circumstances."

Here the California Court of Appeal concluded that the consent was voluntarily given, because it was verbally stated by Alcala, in response to a request for permission to search. There is no overt coercion, nor was there any implied assertion of authority. Indeed, the Court of Appeal

noted that the atmosphere at the time of the car stop was congenial.

The California Supreme Court then denied Mr. Bustamonte's petition for a discretionary hearing of the appeal.

In May 1969, Bustamonte filed in the United States District Court for the Northern District of California a petition for a writ of habeas corpus. The petition was denied on February 10, 1970, without an issuance of an order to show cause, but the reason that the District Court did recite, that the federal judge had before him the opinion of the California Court of Appeal.

The District Court also granted a certificate of probable cause, and leave to appeal to the Ninth Circuit.

In September 1971, the Ninth Circuit Court of Appeals vacated the order of the District Court and remanded the matter for further proceedings. That court held that California had failed to show that the consent was valid, because there was no specific showing that Alcala knew that he could refuse permission to search.

There we come to the crux of the problem.

California's consent rule, analogous to the rule articulated by this Court prior to Miranda for assessing the voluntariness of confessions, makes knowledge of one's rights one of the circumstances to be considered in

determining voluntariness. It is a relative fact, but it is not the determinative fact. It is only one of the circumstances. The Ninth Circuit opinion makes it determinative. It has substituted its waiver standard for California's voluntariness test.

In effect, it held that Justice Traynor's rule for assessing voluntariness was unconstitutional.

So the question before the Court today is not the relative merits of the Ninth Circuit waiver of rule, or the California voluntariness rule. The question is: Could the Ninth Circuit impose its Federal rule on the State, when the State had an equally valid rule?

Now, the Fourth Amendment is not absolute in its terms. This Court has said many times that it does not prohibit all searches, only unreasonable searches.

The conceptual basis of the California consent rule is simply this: It is not unreasonable for an officer to act on permission to search granted in response to a request therefor, under circumstances free from overt coercion or any implied assertion of authority.

No more than this is required. Since we're judging reasonableness under the Fourth Amendment -- it's not absolute; it's relative -- and reasonableness of governmental action cannot, and it should not, be judged solely by the affected party's subjective state of mind.

That a subjective waiver standard is inappropriate in Fourth Amendment cases becomes clear when we examine three distinct lines of authority.

The first of these is third-party consent cases. As recently as Coolidge v. New Hampshire, and Frazier v. Cupp, this Court, with little if any division on the point, held that a third party could consent to a search of a subject's property where the consent was given under circumstances showing it was voluntary.

This seems to me to militate against a waiver standard. If we were talking about Fifth and Sixth Amendment rights, surely this Court would not countenance a third party's waiver of a defendant's Miranda rights, his right to counsel, or his right to a jury trial. Indeed, the decision in Boykin v. Alabama indicates that these rights must be waived personally by the defendant.

The second line of authority consists of those cases including Hill v. California, which have held that the reasonableness of an officer's actions in making an arrest are to be judged on the basis of how they appear to him. And a reasonable mistake of fact will not invalide an arrest.

Significantly, in Stoner v. California, referred to in the earlier argument this morning, the Court rejected the purported action based on the consent of a hotel clerk, because

the Court specifically said that the police could not reasonably believe that the hotel clerk had authority to consent to the search of the room.

I think, conversely, this indicates that if the police had reasonably believed that the man had authority to consent, the Court would have sustained their actions.

And the third line of cases supporting our position are that overwhelming trend of authority which rejects the requirement of a specific warning in search and seizure cases. We've cited them in the brief, they are quite numerous.

Now, not only -- these cases are significant, because wherever this Court has imposed a waiver standard, the necessity of a warning has followed shortly thereafter.

And there are good reasons for not requiring warnings in consent to search cases.

For one thing, it certainly is not calculated to improve police-community relationships, because in some cases police do ask permission to search, and if they are refused, they are entitled to search on separate grounds. For example, exigency, or probable cause to search a moving vehicle.

Also, unlike a confession case, where the giving of a confession shortly after a waiver of Miranda rights is itself evidence that the rights were understood and waived. The mere existence of tangible products obtained in a search are no proof that a warning was given and a waiver obtained.

Third, the Miranda rule was intended to forestall conditions whichwould give rise to coerced confessions, the most unreliable kind of self-incriminating evidence. The exclusionary rule, on the other hand, does not go to the reliability of the fact-finding process.

Finally, although this was discounted by the Court of Appeals for the Ninth Circuit, it does make good sense to say, as did the California Court of Appeal in this case, that when permission is sought from a person of ordinary intelligence, the very fact that consent is given carries the implication that an alternative of refusal existed.

QUESTION: Mr. Granucci, you said that the existence of a confession is itself evidence that the Miranda right was understood and waived, whereas the production of tangible goods is not. I don't think I quite understand your position, at least stated that shortened.

MR. GRANUCCI: I think that perhaps I have to expand them a bit.

Where an officer testifies that he warned a suspect and gave him the Miranda rights, and shortly thereafter a confession is given by the man, by the suspect, I think the very fact of the confession being given is some evidence of a waiver.

Now, in Miranda, the Court said you can't presume waiver merely from a silent, from merely a silent record,

where a confession is given without a warning, but when it follows the warning I think it's reasonable to conclude that the confession is itself some evidence of what -- it may not be conclusive, but it's some evidence.

Whereas, when you have a tangible piece of property, that property is not going to tell you whether or not consent to search was given.

But the confession, the fact of the confession is itself some evidence of waiver.

QUESTION: As I understood your brief, your argument in part was that the very fact of a request by the officer gave -- amounted to an inference, an indication that the request could be denied.

MR. GRANUCCI: Yes, that's right,Mr. Chief Justice.

And the Ninth Circuit discounted that by saying that verbal assent is not enough. In argument, the implication apparently relied on by the California Courts can hardly suffice as a general rule. Under many circumstances, a reasonable person might read an officer's "may I?" as a courteous expression of a demand backed by force of law.

QUESTION: Did the Ninth Circuit comment on the fact that Bustamonte helped with the search, assisted the officers?

MR. GRANUCCI: No, Mr. Chief Justice, --

QUESTION: In their opinion?

MR. GRANUCCI: No, Mr. Chief Justice, they did not. And I might correct Your Honor, it was not Bustamonte who was assisting in the search, it was Mr. Alcala.

QUESTION: Alcala, yes.

MR. GRANUCCI: The one who had borrowed the car from his brother for this expedition.

QUESTION: I see. He was the one that had a driver's license, was he?

MR. GRANUCCI: He had the driver's license. Gonzales was sitting in the driver's seat, driving the car. Alcala was sitting in the middle. He had the driver's license. And Mr. Bustamonte was on his right hand.

QUESTION: I think I got the two parties confused, because I recall you have an argument that the conduct that followed the request for consent and giving of consent verbally demonstrated a consensual situation generally.

MR. GRANUCCI: Yes, and it did, because Alcala said, Sure, go right ahead. They searched the car. And they helped the officers search the car. And I can refer Your Honor to page 51 of our Appendix.

QUESTION: The thing that worries me is the officer comes up and says, "Would you let me see your driver's license?"

MR. GRANUCCI: Under California law, Your Honor, --

QUESTION: No, but if he says, "would you mind", don't

you usually understand that he means "you either show it to me or else"? Isn't that what you think?

MR. GRANUCCI: Your Honor, I can go beyond that, because under California law a driver is required to exhibit his license whenever an officer requests it.

QUESTION: That's not my question. But the nice, polite police officer says, "would you mind doing it?"

MR. GRANUCCI: Yes. That is --

QUESTION: That means "give it to me".

MR. GRANUCCI: That is --

QUESTION: That instant; that means "give it to me".

MR. GRANUCCI: That is, Your Honor, a polite assertion of authority.

QUESTION: Right. Right. Then he says, "Would you mind letting me see your registration?"

MR. GRANUCCI: Again a polite assertion of authority.

QUESTION: Then he says, "May I search your car?" Then. Now, what's the difference?

MR. GRANUCCI: No. There may or may not be an assertion of authority.

QUESTION: Well, what's the difference?

MR. GRANUCCI: I think the difference is twofold. It depends on the circumstances of the case, and it also, I think -- I also think you have to take into account the

knowledge of California drivers. You know, in our State, before you can get a driver's license, you have to take a rather comprehensive examination of the responsibility of drivers.

QUESTION: In most States.

MR. GRANUCCI: Mostly, yes. But there's nothing in any of the California driver's handbooks that say you have to consent to the search of an automobile, although they do say that the driver has to identify himself and produce his license when requested to do so.

QUESTION: Is there any other difference you can give for those three questions, other than that?

MR. GRANUCCI: Well, I think that's the first answer that comes to mind. We do feel that the real issue is, we don't preclude the possibility of unlawful assertion of authority. The real question is how you judge it. Do you focus on the affected party's state of mind as the Ninth Circuit did, or can you take Justice Traynor's point of view and look at all the circumstances of the case?

And we say it's perfectly valid to take the voluntariness approach. We take the same approach in California that this Court took in Bumper v. North Carolina. There, based upon the circumstances of the case, the court found there was an implied assertion of authority. They did not -- the court did not focus on the lady's subjective state

of mind. They just said that under these circumstances they have an implied assertion of authority.

QUESTION: Does this record show in what words or in what form the request to exhibit the driver's license was made?

MR. GRANUCCI: It's in the Appendix. It's in the Appendix, Your Honor.

QUESTION: All right, you won't have to stop for it.

MR. GRANUCCI: The Appendix contains the -- a hearing outside the presence of the jury, on the objection to these three checks.

Now, we say that the California objective voluntariness rule is constitutional, and when the Ninth Circuit held it unconstitutional and imposed its federal standard, it not only raised a question about the correctness of that rule, but about the particular jurisprudence that makes that kind of thing possible.

This leads us to our second argument.

QUESTION: Excuse me. Before you go on with that, am I correct that, at page 30, the question is "Did you ask the driver of the vehicle for a license?

"Yes, I did.

"And was he able to produce the license?

"No."

It doesn't show the precise words used, as it does

with respect to the searching of the car.

MR. GRANUCCI: I must have misunderstood Your Honor's question.

QUESTION: I was just looking to see whether the two situations were comparable. Apparently, on this record, they're not.

MR. GRANUCCI: On our second point, it's agreed by both proponents and critics of the exclusionary rule that its primary purpose is to deter unreasonable police action. Whether application of the exclusionary rule at the trial is a hotly debated question. But we insist most strongly that whatever deterrent value the rule may have on trial and on direct review, its deterrent effect is totally attenuated by the time we get to collateral attack.

Basically, in our second argument, what we ask the Court to do is to tailor the impact on the State of the exclusionary rule, to fit the purposes it was intended to serve.

QUESTION: Now, you're talking about the exclusionary rule as it was in Weeks v. United States or Cahan against -- People v. Cahan, whatever the case was, when it was just a rule. The trouble is, since Mapp v. Ohio it's been part of the Fourth Amendment of the Constitution of the United States. Up until then it had been generally understood, at least by me and I think by other people, that it's simply a rule of

evidence.

But Mapp told us we were wrong in that understanding.

MR. GRANUCCI: Well, conceptually I think that the Fourth Amendment of the Constitution itself contains no explicit exclusionary rule.

QUESTION: I know that, and you know that; but Mapp says that the exclusionary rule is part of the Fourth Amendment as incorporated in the Fourteenth. It has to say that, doesn't it, or we would have no power to decide Mapp the way we decided it.

QUESTION: Am I right in thinking that at least part of your contention here is that even though the exclusionary rule is constitutionally derived, in a case such as Harris, decided a couple of years ago, there was a limitation on its application in some aspects of the production of testimony?

MR. GRANUCCI: Exactly.

QUESTION: Are you suggesting that that limitation be broadened to cover the writ of habeas corpus?

MR. GRANUCCI: Exactly, Mr. Justice Rehnquist. One of the reasons that I think Kaufman -- I respectfully submit that Kaufman was wrong is because Kaufman didn't have the advantage of the reasoning of this Court in Harris v. New York. But Miranda may be constitutionally compelled, too.

But the Court still held that in assessing the use

of the evidence --

QUESTION: You don't really mean that!

MR. GRANUCCI: Oh, I think I do. I ask the Court to take a balancing test, weigh deterrent value against real substantial deterrect involved in the case on collateral attack.

It would take much more time than the rules of this Court allow to fully illustrate all of the disadvantages. They're cited by the commentators. They're cited in our brief.

But one of the real disadvantages that I wasn't aware of until it came up in this case was that it gives the Federal Courts an opportunity to impose Federal standards on the State in place of their equally valid State standards for judging constitutional questions.

Now, I can conclude the prepared portion of my argument in no better way than referring this Court to the late Associate Justice Harlan, who described collateral attack on exclusionary rule grounds as imposing a burden on the judiciary and on society at large, which results in no legitimate benefit to the habeas petitioner and does nothing to serve the interest of justice.

And I respectfully ask that the remainder of my time be kept for rebuttal.

QUESTION: Is it your submission that the Court

should retreat from Kaufman at least to the extent of the Thorton case in the District of Columbia Circuit, or would you have us go all the way and just say this is not open to collateral attack, at least when it's been considered by the State Courts?

MR. GRANUCCI: I would go all the way and say it's not only Thorton --

QUESTION: The Thorton case was discussed a good deal in the Kaufman opinion, Judge Leventhal's opinion in Thorton.

MR. GRANUCCI: Yes, I think I recall that. I would go all the way and say it shouldn't be raised.

QUESTION: Shouldn't be opened?

MR. GRANUCCI: Shouldn't be opened.

QUESTION: No matter how unreasonable the search and seizure was?

MR. GRANUCCI: That's the position I'd have to take.

But to ameliorate that, I would point out to Your Honor that the decisions of this Court in the early 1960's almost guaranteed adequate State process for the vindication of Federal claims, by providing each defendant with an attorney, with a specific procedure for raising constitutional questions. I refer to the New York confessions case. With counsel on appeal, with a record on appeal.

Basically, opponents of our position have made some

very delicately phrased arguments, mainly to the effect that you have to ultimately vindicate Federal rights in a Federal tribunal.

But when they boil it down to the essentials, they mean this and only one thing, that State Courts cannot be trusted with Federal rights. And that assumption is wrong.

QUESTION: Well, how broad is your argument. From what you just said, I suppose, it would militate against all Federal habeas corpus jurisdictions.

MR. GRANUCCI: No. It would. Federal habeas jurisdiction is also a very controversial thing. But -- and a stronger case can perhaps be made for it, where the error complained of goes to guilt or innocence; but the exclusionary rule does not go to guilt or innocence. Its purpose is totally collateral to the criminal trial.

When a habeas petitioner, by exerting the exclusionary rule, wins a reversal or a new trial, he gets something that has nothing to do with guilt or innocence, or his rehabilitation, or any personal merit of his. One would think that, you know, you'd expect to find enormous compensating benefits, in order to tolerate such a miscarriage of justice. Because that's what it is, when a man gets out on -- it has nothing to do with guilt or innocence.

I'll save the rest of my time for rebuttal.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Granucci.

Mr. Tobisman.

ORAL ARGUMENT OF STUART P. TOBISMAN, ESQ.,

ON BEHALF OF THE RESPONDENT

MR. TOBISMAN: Mr. Chief Justice, and may it please the Court:

The two issues presented in this case are: first, can a consent search be valid in the absence of a showing of any knowledge of the Fourth Amendment right being relinquished; the second issue is, can State prisoners continue to use Federal habeas corpus to waive their Fourth Amendmant claims.

With respect to the consent search issue, it seems to me that there are two questions to be answered.

The first question is: What are the elements of a waiver of fundamental constitutional rights?

As recently as last June, in Barker vs.Wingo, this Court defined a wavier of constitutional rights as an intentional relinquishment or abandonment of a known right or privilege and courts are to indulge every reasonable presumption against the existence of such a surrender.

QUESTION: Doesn't that suggest a totality of circumstances concept?

MR. TOBISMAN: Mr. Chief Justice, I don't believe so. I think that the essential elements are, first, the voluntariness, the fact that it is in effect an intentional

act; and, second, that the right be known.

I would submit that I don't frankly understand how a man can be found to have surrendered a right unless he knows it exists. I mean, what has he done?

It seems to me that to surrender the right means that he was aware of its existence, and decided, for any of a number of reasons, to give it up.

I believe that the central question is really one that you've alluded to, sir, namely, should a consent search be deemed the equivalent of a waiver of Fourth Amendment rights, so that all waiver elements, including knowledge, must be demonstrated to validate the search.

Contrary to the State's position, good faith on the part of the police is not an acceptable criteria for determining whether a search is valid under the Fourth Amendment. Rather, the criteria under the Fourth Amendment is one of reasonableness, and this concept of reasonableness is embedded in history and context of the evils the Fourth Amendment was intended to prevent.

The primary aim of the Fourth Amendment is to protect each individual's privacy from arbitrary governmental intrusion. It is a focus on the right of the victim, not on the good faith, subjective state of mind, I may say, of the police officer conducting the search.

This Court has repeatedly reiterated that the

Fourth Amendment is among the most fundamental of our constitutional safeguards, and, over the years, many cases have come before this Court, which have resulted in the establishment of safeguards and very, very elaborate procedures to validate a search.

I would call the Court's attention to its recent statement in Coolidge vs. New Hampshire, that warrantless searches are deemed per se unreasonable under the Fourth Amendment, subject to a few very limited, well defined exceptions.

I would further submit --

QUESTION: Of course, one of the exceptions explicitly enumerated in Coolidge --

MR. TOBISMAN: Pardon me, sir?

QUESTION: One of the exceptions explicitly enumerated in Coolidge, as well as in Katz and other cases, if you want to call it an exception, was that the search, when there is consent to the search, doesn't present a Fourth Amendment problem.

MR. TOBISMAN: Well, I perfectly agree that consent searches are permissible under the Constitution. My point would be that consent searches purport to make all of these other safeguards irrelevant.

QUESTION: Yes.

MR. TOBISMAN: As a matter of fact, let's look at

this case. If the search is valid in this particular case, that means that the search is constitutionally permissible, even though there is no warrant, no probable cause, no one has been questioned about any specific crime, no one is under arrest. There is no threat or danger to the police from the searched premises. There is no testimony in the record from Mr. Alcala, the individual who allegedly consented to this search. And, last, there is not even the remotest effort made to determine if he had any notion at all of his right to resist the search.

This record discloses one fact about Mr. Alcala. He was approximately twenty years old. That's all.

QUESTION: Well, how much would you require?

MR. TOBISMAN: Well, I would say that I would require that there be a showing that he did in fact understand his right to request that the police obtain a search warrant.

QUESTION: You wouldn't require that there be probable cause, would you?

MR. TOBISMAN: No, not at all, sir. I concede that he could in fact waive his right to the production of a warrant.

My point is, in this particular case, if this search is constitutionally permissible, it's permissible without regard to any of the traditional safeguards that this Court has developed.

QUESTION: Would it satisfy your standard, counsel, if the policeman had said, in addition to what he did say, "You are not required by law to consent, you may refuse your consent if you wish; but if you refuse, we will be obliged to detain you here until we can get a search warrant"? Would that satisfy your standard?

MR. TOBISMAN: Well, I think one question underlying that is whether, in fact, the police could detain them under those circumstances.

It seems to me that if there were sufficient --

QUESTION: Well, I'm not going to --

MR. TOBISMAN: I'm sorry.

QUESTION: -- the appraisal of that question, counsel, I'm just suggesting if the policeman had made that statement, in those words, and then sometime later someone would have to decide whether he lawfully could have given the implication of the threat to hold them until he got the search warrant. But if he gave that warning, would that be adequate?

MR. TOBISMAN: I believe that such a warning would be adequate, but I would premise that, if I may, by saying that in my mind that appears to me to constitute possibly an arrest.

QUESTION: You think that's a coercion at that point?

MR. TOBISMAN: I think that it is, and I think that, on that basis, a search could be approved, so long as the justification for the detention is appropriate at that time.

QUESTION: If he placed the man under arrest, could he search the entire car then and there?

MR. TOBISMAN: I believe that under the Court's recent decisions dealing with searches incidental to arrest, a search of the entire automobile at that time might not be constitutionally justified.

My point here is that no one was under arrest. The Appendix clearly states, at page 40, when the officer was asked, no one was under arrest, he had not asked any questions at all about a specific crime.

As a matter of fact, it's doubtful that he was aware of the existence of the particular crime at the time the search was undertaken.

QUESTION: Could he have been arrested for operating a motor vehicle without a license?

MR. TOBISMAN: Under California law, I frankly don't know the answer to that. But assuming he could, I think that there would be -- I would doubt that there would be a sufficient basis, as a result of that particular arrest, to search the entire automobile.

I'd like to point out, if I may, sir, that at that time all of the individuals were out of the car, there was

no one in the car, there was no threat or danger to the policemen at that moment. The sole justification was Mr. Alcala's alleged invitation to the police: come in, search my car.

QUESTION: Mr. Tobisman, as a practical matter, with the consent standard that you're seeking to have upheld here, does that mean that the police would have to give warnings much as they do in the Miranda situation now?

MR. TOBISMAN: Well, I would say that the decision affirming the Ninth Circuit's disposition in this case would not necessarily require that affirment of admonition is to be given in all Fourth Amendment cases. It's true that such admonitions are required in the context of Fifth and Sixth Amendments, but I would respectfully call the Court's attention to the lower court decision cited in my brief, which give examples of courts considering this particular question without regard to -- in instances where there were not affirmative warnings given.

I'd like to go on, if I may, because I think, in all candor, I should admit that were I a police administrator, under the existing state of the law, I would instruct my officers to make it clear to the individual that the sole justification for a search of the house or automobile, as it may be, is their consent.

And I would not want to lose convictions because my

officers failed to apprize the individual of his rights, and put me to obtaining a search warrant.

However, I think that one of the problems is that there are many cases that appear to turn on minor technicalities, people, I notice a lot of hostility to cases dealing possibly with some of the elements of search warrants and things of that sort, or hostility in terms that -- pardon me, hostile reactions in terms of decisions dealing with the content of a warrant.

I don't think that this is a case that deals only with the minor technicality. This case, I really believe, goes to the fundamental question of: Who is entitled to Fourth Amendment protection? Is it only the man who is sophisticated and educated and knows of his rights, and who will not consent; or is it all of the citizens, including the poor person, the uneducated person, the person who fears the police?

If they are all to be entitled to the Fourth Amendment's protections, I don't see how they can be deemed to have given up that right, unless there is some showing in the record that they were aware of it at the time they allegedly surrendered it.

QUESTION: Was there a hearing here on the question?

MR. TOBISMAN: My understanding is that the question was raised at trial, and that testimony was taken in chambers.

The officer involved gave his testimony, and I believe that there was other testimony given by Joe Gonzales, the man who was driving the automobile. And they --

QUESTION: The defendant didn't testify there?

MR. TOBISMAN: No, the defendant did not testify. And Mr. -- as I mentioned before, Mr. Alcala did not testify.

QUESTION: I suppose it would be enough to satisfy your rule if it were clearly shown that the defendant knew what his rights were, even though he wasn't informed? Even though someone hadn't -- even though the officer hadn't given him some warning?

MR. TOBISMAN: Well, if I may backtrack a little bit. The actual consent was given by Mr. Alcala. I would be quite satisfied with the result if there were a showing that he was aware of his right at the time it was relinquished.

QUESTION: Well, did the driver say he didn't know what his rights were?

MR. TOBISMAN: No, the actual -- the man that gave the consent was Joe Alcala. He apparently had borrowed the car from his brother.

QUESTION: Well, he testified, didn't he?

MR. TOBISMAN: He did not testify. But he was the man who did give the consent. All of the evidence involved with the actual conversation is based upon the testimony of the police officer on the one hand, and the testimony of

Joe Gonzales on the other hand.

QUESTION: Well, was there testimony anywhere at the hearing that the defendant put on any testimony for the defendant, saying that the fellow who gave the consent did not know what his rights were?

MR. TOBISMAN: There was -- at the time the motion was made, there was some suggestion by counsel for the defendant that the search was not properly authorized, that Mr. Alcala was not aware of his rights, and that it was conducted in a -- the search was conducted in a coercive atmosphere.

QUESTION: Does California have an expression hearing?

MR. TOBISMAN: I'm afraid I can't answer that, sir. I don't know.

QUESTION: Alcala, then, didn't take the stand to enlighten anybody about the state of his knowledge about his rights?

MR. TOBISMAN: Alcala never testified at all.

QUESTION: Nor was he called by the defendant?

MR. TOBISMAN: He was not called by the defendant.

My understanding, and I've tried to communicate with the attorney who handled the case at trial, is that he could not be located. They made an effort, but could not locate him at the time of the trial.

QUESTION: You would say, then, on this record, then, you also would have to go on and say that California has the burden?

MR. TOBISMAN: Oh, yes. Oh, clearly. Clearly. I think that the elements --

QUEDSTION: You think that's constitutionally required?

MR. TOBISMAN: Yes, I do. I believe that in order to make any of the other safeguards meaningful and worthwhile, a right should not be surrendered unless there's some showing that the individual knew it existed.

QUESTION: Incidentally, were any of the other five convicted of anything?

MR. TOBISMAN: Not to my knowledge. The only -- there were citations issued, traffic citations issued to the driver. So far as I know, Mr. Alcala was never convicted of anything. Mr. Gonzales, who provided the main testimony in connection with the search, other than that provided by the officer, was never convicted.

I believe that, as I mentioned, the effect of the consent was to make all of the traditional Fourth Amendment safeguards, including the emphasis on search warrants irrelevant.

QUESTION: Mr. Tobisman, could we just go back?

MR. TOBISMAN: Yes, sir.

QUESTION: Do I understand your position to be that if Mr. Alcala knew that he did not have to, that would be sufficient, whether or not Bustamonte did?

MR. TOBISMAN: Yes, that's my position.

QUESTION: And how about the other side? If Bustamonte knew that it was not necessary to consent, even though Alcala didn't, then what would your position be?

MR. TOBISMAN: That question, I think, is obviously a difficult one. I would say that Mr. Bustamonte was riding in the car, presumably as the guest of -- pardon me, Mr. Bustamonte was the guest of Mr. Alcala.

I think that Mr. Alcala's control over the premises could be deemed satisfactory so that if he consented to the search, the search would be valid.

One thing I would point out --

QUESTION: Would that be the extent, then, of California's burden on consent?

MR. TOBISMAN: Yes. Yes. In my case --

QUESTION: Bustamonte's trial would have to show that Alcala knew he didn't have to consent?

MR. TOBISMAN: That's right. I believe that otherwise it would require that all six people be questioned, and I think again, viewing this --

QUESTION: But you're not sure that it would be sufficient if California proved at Bustamonte's trial that

Bustamonte knew that he didn't have to consent to that?

MR. TOBISMAN: No. I believe that the authorization for this search resulted from Mr. Alcala's alleged consent. That was --

QUESTION: So California could satisfy its burden only by proving Alcala knew he didn't have to?

MR. TOBISMAN: That would be my position.

QUESTION: You would say that the Constitution would not permit a rule on California to the effect the defendant must first put on some testimony that Alcala didn't know?

MR. TOBISMAN: No, I believe that the justification for the search, the constitutional basis for the search must be presented by the State. The State is required to establish the basis for the search, and I think that what it must do is demonstrate the elements of a waiver of the Fourth Amendment right.

QUESTION: You don't think California makes a prima facie case of consent by showing that he said, as he did here, "Go right ahead; just go right ahead"?

MR. TOBISMAN: No, I don't. I think the same question could be asked in a case where, for example, the police officer says, "Can I see your driver's license?" And you answer "Sure". I don't think that the fact that you say "sure" in any way indicates whether you've made a judgment based on your knowledge of the alternatives available to you

at that time.

QUESTION: You don't think that's reinforced any by the fact that the speaker who said these words then proceeded to help the officer with the search?

MR. TOBISMAN: Well, I believe that the assistance rendered by Mr. Alcala is partially overstated. After all, the police officer asked, according to Mr. Gonzales, I believe it's around page 52, he asked, "Does the trunk open?" And Mr. Gonzales said that Mr. Alcala said, "Yes, it does", and walked over and opened it.

There's another statement where he says, "How about opening the trunk?" I mean these are the statements of Gonzales, not the man who opened the trunk, not the man who consented to the search. The statement of Gonzales, the man who was driving the car. The man, at that point, was 17 or 18 years old, and is talking about a conversation that he overheard.

I dont' think that that in any way indicates Alcala's state of mind at that particular point.

I'd also like to mention that the record is quite clear that Alcala was well aware that the checks were in the car, either on the possession of someone in the car or in the car; and it just see-s to me if he was aware of his rights, it's curious that he would so readily authorize the police to search that car, when they would not have any other basis to

do so.

QUESTION: Mr. Tobisman, incidentally, was any attempt to come here by certiorari from the appeal after the conviction in the State Court?

MR. TOBISMAN: No, sir, there was not. Not that I'm aware of.

What happened is Mr. Bustamonte, on his own, after the California Supreme Court denied the petition for hearing, filed a petition for a writ of habeas corpus in the District Court. He did this without the assistance of counsel, and I was not called upon to assist him until after the ruling of the District Court in the matter.

Again I think that --

QUESTION: Do you think that that's significant at all?

MR. TOBISMAN: No, I don't, sir. I think that -- although I'd like to reserve some discussion of that point on the second part of the argument, I think that this Court in Fay vs. Noia held that certiorari is not the equivalent of a normal appellate channel, and it is not necessary that a petition for a writ of certiorari be filed as a precondition to seeking federal habeas corpus.

I think that the --

QUESTION: Actually Fay v. Noia overruled Dar v. Burford.

MR. TOBISMAN: That's right, overruled Dar vs. Burford, which had, as I understand it, required that such a petition be filed prior to seeking habeas corpus.

Again, I don't believe that that has a real direct bearing on this particular case.

I would like to emphasize, once again, what I think to be the most important aspect to this case. That is that I'm not seeking to impose what I feel to be an undue burden on law enforcement officers. After all, consent searches do not involve probable cause, they do not involve emergencies, they do not involve dangers to the police. The sole justification for the search is the suspect's invitation.

Therefore, I submit that the Court should make the effort to determine whether a knowledgeable surrender of constitutional rights was present at the time such consent is given.

Furthermore, it is my understanding that federal agencies, such as the Bureau of Narcotics and Dangerous Drugs, and the F.B.I., do obtain written consents before conducting a search, and I have seen one of the forms that is used by the Bureau of Narcotics and Dangerous Drugs, and it does contain a statement to apprize the suspect of his rights under the Fourth Amendment.

Again, I don't believe that this is an undue burden on the one hand for the police; on the other hand, I think that

to reject the waiver test would be to in effect substantially dilute the effectiveness of the Fourth Amendment, and actually remove it actually from the protection of many citizens of this country, who simply are not aware of their constitutional rights.

QUESTION: Mr. Tobisman, it's my understanding that your opponent takes the position that the giving of warning for a Fourth Amendment situation would be much, much more complicated, since the right protected is the right to be free from unreasonable search and seizure, rather than just an absolute right to counsel. Do you have any comment on what I understand to be his point?

MR. TOBISMAN: Yes, I do. I think that we have to look at this in terms of what are the police most likely to do.

If the police have a probable cause to seek a warrant, I think that this Court's decisions indicate that they should take that tack. That's the preferred way to do it. At a time when they're seeking consent, if it is, in fact, a search that can only be justified by consent, there is no other basis. There is no other basis for the search under the Fourth Amendment.

I don't believe that it creates a difficulty for them if they are seeking consent, because they have no other basis for the search to make it, to find out for themselves or

to somehow be able to demonstrate the individual's awareness of his rights at the time they conduct the search.

QUESTION: But a judgment as to whether probable cause exists or whether the circumstances are exigent is necessarily not a very firm one and in many doubtful cases I actually think a police officer might be approaching with the thought, "I think I've got probable cause, but I'm going to see if I can get consent."

MR. TOBISMAN: Well, I think he may in fact do that on many occasions, and frankly that concerns me, because that means that whereas the police officer could not conduct that search against me, for example, or maybe against other people who are aware of their rights, he would be able, as a matter of law, to conduct that search against many citizens in this country who are not aware of their rights.

I do recognize the fact that there are ambiguities and difficulties that the police officer must face up to, but I believe that unless the waiver test is applied with respect to the Fourth Amendment, the result would be that, as a matter of law, the police can conduct searches against vast segments of the society that, as a matter of law, they cannot otherwise conduct.

And they could not conduct, for example, against people who are aware of their Fourth Amendment rights.

QUESTION: The essence of your case is that the

California test is not a fair test of reasonableness.

MR. TOBISMAN: That's correct. My position is that Ker vs. California, although it did not establish supervisory authority over the State courts, U. S. Supreme Court supervisory over the State courts, it did clearly indicate that certain basic, fundamental criteria must be met in the application of the Fourth Amendment.

I think that this is one of the most basic elements, one of the most basic aspects of the Fourth Amendment that I could possibly conceive of, is the right to be available to all citizens, no matter if they're uneducated, educated, sophisticated or unsophisticated, or is it not?

I think that that's the essential question and it's fundamental -- it reaches the level of a Ker vs. California fundamental criteria in my opinion.

QUESTION: I thought you were attacking the California rule as to what is consent, as consent vel non, not reasonableness vel non, aren't you?

MR. TOBISMAN: Well, I think that -- I can't conceive, in my own mind, how you can have consent to something unless you know it exists. I don't understand how you can surrender something unless you know it exists.

QUESTION: So you are attacking the California test of consent --

MR. TOBISMAN: That's right. Pardon me, I'm sorry.

QUESTION: -- not the reasonableness.

MR. TOBISMAN: Pardon me, I misunderstood the question. That's right.

My argument is that with respect to their interpretation of what is consent, they do not comply with the requirements of Ker vs. California.

In truth, --

QUESTION: Mr. Tobisman, --

MR. TOBISMAN: Yes, sir.

QUESTION: -- then you feel that Ker v. California cuts down in your favor or against you?

MR. TOBISMAN: I believe that Ker vs. California would be in my favor, if only because it requires that certain fundamental safeguards are -- certain fundamental criteria are met in viewing the elements of a constitutional right. The State has --

QUESTION: That's the difference that Mr. Justice Clarke, as I read it, tried to draw between Federal and State review.

MR. TOBISMAN: Offhand I can't remember the passage that you're referring to. But, again, I cite Ker for the propqsition that certain minimal criteria must be met by the State. They can go beyond it, but they can't fall below it.

QUESTION: Suppose they stop a car and say, "What have you got in there? Have you got any contraband in your

car?" And the owner of the car says, "Go ahead and look." How about that one?

MR. TOBISMAN: Well, I would be afraid that that represents some sort of coercion, just a suggestion to the individual that "we know you've got it" or "do you have it"; that would concern me.

QUESTION: That's not what I said. My question was, "What have you got in your car? Do you have any contraband in it?"

It's a question. And the guy says, "Well, be my guest; look. Let me open up the trunk."

MR. TOBISMAN: Well, I would say that at the time the evidence, if in fact --

QUESTION: I think you'd be in trouble, myself.

MR. TOBISMAN: Well, I think that if --

QUESTION: Of course that's not a question of consent. That's a question of invitation.

MR. TOBISMAN: Well, I think that if I'm inviting, if I'm inviting an officer, for example, to search my car, if it's a true invitation, it can only be based on my understanding of my right to say "It's none of your business." "If you've got a basis to search my car, go ahead." But I don't have to let you.

I think that that's really the underlying question in this case. And I think that to really be an invitation

means that I know I can say no.

If I don't know I can say no, I'm being forced to do it.

QUESTION: So if it gets to that point, the police officer can say, "You don't have to let me look." At that stage, that's what you'd require?

MR. TOBISMAN: Well, I'm saying that either at that stage or at trial some evidence would have to be adduced to demonstrate that the individual knew he could say no.

QUESTION: And that's the burden on the State?

MR. TOBISMAN: Yes, I believe it is.

If I may, I'd like to turn to the second issue, which is: should State prisoners continue to have access to Federal habeas corpus to raise Fourth Amendment claims?

The State requests the Court to turn its back on the extensive, historical development of habeas corpus as a remedy to vindicate fundamental constitutional protection.

In 1969, in Kaufman vs. United States, this Court held that Federal prisoners can use Federal habeas corpus to raise Fourth Amendment claims, even though such claims have been previously considered in a Federal court.

State prisoners have an even greater need for Federal habeas corpus, since it will probably be their first opportunity to raise a Federal constitutional claim in a Federal court.

Since 1916, certiorari has been the only direct appellate access to Federal courts which is available to State prisoners under normal -- under most criminal convictions. Again, in 1963, in Fay vs. Noia, this Court indicated that since certiorari is by no means the equivalent of a normal, direct appellate channel, there is no need to file a petition for a writ of certiorari as a precondition to seeking Federal habeas corpus.

Today, with the increased workload of this Court, certiorari is even less of an effective direct appellate channel than it was when Fay vs. Noia was decided back in 1963.

Thus it seems to me to be quite clear that the State's real goal is to deprive State prisoners of any meaningful access to Federal courts in connection with their Fourth Amendment rights.

The Court indicated its firm refusal to do this in Kaufman, and I respectfully urge the Court to continue to reject the State's position in this case.

Federal habeas corpus is the main opportunity for careful, consistent Federal court review of State court decisions regarding the Fourth Amendment.

The fifty State Supreme Courts can develop, and have developed in the past, inconsistent or erroneous rules regarding fundamental constitutional protections. Federal

habeas corpus provides an efficient, effective remedy to correct those errors. It guarantees the fair and equal treatment for all citizens, wherever tried, with respect to their fundamental constitutional protections, including those of the Fourth Amendment.

Clearly, then, Federal habeas corpus is the principal remedy available to implement the rule of Ker vs. California, as I previously stated my understanding of that rule.

Moreover, and although I will admit that this possibly goes beyond the narrow scope of this issue, I believe that Federal habeas corpus decisions have the same general deterrent effect on progressive law enforcement departments as decisions at pretrial, at trial, or on direct appeal.

It seems to me it's one thing for a police officer who conducted the particular search, or the particular seizure, to see that he lost the case as a result of his conduct; possibly that will affect his conduct, possibly it will not.

I think the more important aspect of this is the general deterrent value of all court decisions dealing with the Fourth Amendment.

QUESTION: Well, what do you think about your argument that's in the context of the State court having already approved the search? And found it reasonable.

MR. TOBISMAN: I think that --

QUESTION: Then what's the deterrent effect of a later Federal habeas corpus?

MR. TOBISMAN: I think that, in effect, the Court is saying that the standard of reasonableness, a standard based on vindicating the individual's right to be free from unreasonable governmental intrusions, that standard of reasonableness prescribes certain rules, certain conduct that the police must comply with.

QUESTION: Well, I understand that it would have to do that, but I'm talking about deterrents, not about whether it would help the defendant have his conviction set aside. Of course it would. But what about deterrents?

MR. TOBISMAN: With respect to deterrents, if this Court, in this case, affirms the decision of the Ninth Circuit, I am confident that all around the country police officers will recognize that in order to sustain a conviction it is going to be necessary to demonstrate knowledge on the part of the individual who --

QUESTION: That really isn't my question. Let's assume a law enforcement officer, who is -- just like these law enforcement officers, there's a set of regulations issued that says you need only to be worried about consent, you need not worry about waiver standards or Miranda warnings in getting consent in searches. That's the rule.

And the State court approves it. And you think that

adds really to -- for those officers, for the officers involved in this case, it would be much of a deterrent, if later, in Federal habeas, the search is set aside?

MR. TOBISMAN: I think absolutely. I think that the fact is that -- what we're really talking about is conforming conduct to a set of criteria, to a set of standards. If this Court holds that a conviction cannot be sustained on the basis of --

QUESTION: I agree with you for the future.

MR. TOBISMAN: Oh, oh, I'm sorry. My statement is intended as a statement of deterring the improper conduct in the future. I don't -- I think that that's the essential element of this case.

QUESTION: All right.

MR. TOBISMAN: Pardon me, I misunderstood the question.

QUESTION: Suppose, Mr. Tobisman -- I'll try to restate my thought on Mr. Justice White's question -- suppose we hadn't granted certiorari in this case, and you have a judgment from the Supreme Court of California that says this search is perfectly valid, you got a judgment in the Ninth Circuit that says it's not valid, and this Court hasn't passed on it. I take it that's a typical habeas situation, where your lower Federal courts are in conflict with your State courts.

Now, where does the police officer look for guidance in that situation?

MR. TOBISMAN: I think the ultimate result in that context would be that the conviction would be overturned, presumably, if in fact we had all of the other elements.

QUESTION: Certainly, but we're not talking about the conviction.

MR. TOBISMAN: No, no, I'm sorry.

QUESTION: But where the police officer looks for guidance.

MR. TOBISMAN: I believe that the police officer would ultimately look for guidance to the court that is at the end of the line, that's going to, in effect, say whether this conviction can stand or not.

QUESTION: The Federal court?

MR. TOBISMAN: That's right.

QUESTION: Your whole position assumes that, as a practical matter -- I'm not suggesting it isn't correct; but I suggest your whole position assumes that if the police officer had pursued the proposition after he said, "Yes, go ahead, help yourself", and then the police officer said, "It's my duty to inform you that you don't have to consent. Now, do you still consent?"

As a practical matter, do you think the man is going to withdraw his consent?

MR. TOBISMAN: Well, I think --

QUESTION: Without drawing great suspicion on himself that would lead to further detention?

MR. TOBISMAN: It may draw great suspicion on him to do that, but I frankly would be satisfied, assuming there is a showing that it was in fact a voluntary act, and freely he decided to say, "No, you can't search the car".

QUESTION: Is it any more voluntary?

MR. TOBISMAN: Well, you know, I think that we're talking again about the other side of the issue, which is: can you voluntarily give up something you don't know about? That's one side. The other side is: are you really voluntarily saying yes, when the policeman says, "I want to search your car."

I assume that you can in fact make a voluntary decision to let the police search your home,let the police search your car. I assume that that can in fact be done.

But my position is that it can only be done if you are aware of your right to say no.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Tobisman, your time is up.

Mr. Granucci, you have four minutes remaining.

REBUTTAL ARGUMENT OF ROBERT R. GRANUCCI, ESQ.,

ON BEHALF OF THE PETITIONER

MR. GRANUCCI: Thank you, Your Honor.

I commence by noting that Mr. Justice Rehnquist's last question is not a hypothetical one. It describes a real and very disturbing situation in the Ninth Circuit, where that court, in some of the cases cited in our brief, has applied its own waiver standard in cases brought by State prisoners.

Whereas the highest court of the State of California has declared that consent to search is to be judged by a voluntariness standard.

Now, let me step back and clarify one thing, if I haven't done so.

We do not say that simple consent to search is sufficient. California courts are concerned about the possibility of an implied assertion of authority. They are very concerned about it.

The question is, how do we judge. How do we -- what means do we invoke to judge the question of implied assertion of authority? California uses objective circumstances, and it's a constitutional rule.

Now, counsel observed that Alcala wouldn't have consented to this search if he thought he could refuse. Well, I would suggest to the Court that there are some good

reasons why Alcala might want to consent, even if he knew the checks were in the car. He could very well feel,"well, they stopped us and they've got us. And if they find the checks, they won't find them on me, and I can always say later on I didn't know they were in the car."

And the consent, "the fact that I consented would be some indication that I didn't know."

Now, --

QUESTION: So you're saying that on the evidence in this record there was a prima facie case for consent?

MR. GRANUCCI: Yes.

QUESTION: And that the California rule was it depends on the facts?

MR. GRANUCCI: That's right.

QUESTION: And as long as the officer asks, and he consents, then at least the burden of going forward with the evidence shifts?

MR. GRANUCCI: I think that's right, Your Honor. Although I would say this, that if you had drawn guns or something like that, that's --

QUESTION: Well, obviously.

MR. GRANUCCI: You see, in other words, we look for --

QUESTION: But that isn't in this case?

MR. GRANUCCI: No, sir, it isn't.

Verbal expression of permission to search. Then you look for no implied assertion of authority, and of course no overt coercion.

QUESTION: So you would say that if Alcala had been called to the stand and he had testified he did not know that he could have refused, or he testified that he thought he had to consent, this might be a different case then?

MR. GRANUCCI: It might be a different case. This would be another of the factors that we would throw into the equation of measuring voluntariness. Knowledge of one's rights is a relevant fact, but it's not a determinant fact.

QUESTION: Once again, can you tell me why they asked to search the car?

MR. GRANUCCI: Well, it's in the record, Mr. Justice Marshall. The officer, on his instinct, thought, "Well, here we are, it's 2:45 in the morning, we have three young men in the front seat, three older men in the back seat, nobody has got any identification except Alcala, and they've all given inconsistent stories about who picked who up, and where they were going."

Some instinct told him that things were exactly all right, although he couldn't pin it down to a specific crime. So he asked permission to search.

He pretty well articulated his mental thinking. It

was a policeman's hunch.

We don't say that it would have justified the search of the car without consent, but it certainly made it reasonable for the officer to ask Mr. Alcala for permission.

Now, -- I'll respectfully submit the matter. My time is up, Your Honor.

MR. CHIEF JUSTICE BURGER: Mr. Tobisman, you served at the Court's request and by the Court's appointment. I want to thank you for your assistance to not only your client but your assistance to the Court.

MR. TOBISMAN: Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen, the case is submitted.

[Whereupon, at 2:04 o'clock, p.m., the argument in the above-entitled matter was submitted.]