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Theory and Practice of Illinois v. Rodriguez: Why an Officer's Reasonable Belief about a Third Party's Authority to Consent Does Not Protect a Criminal Suspect's Rights

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THE THEORY AND PRACTICE OF *ILLINOIS V. RODRIGUEZ*: WHY AN OFFICER'S REASONABLE BELIEF ABOUT A THIRD PARTY'S AUTHORITY TO CONSENT DOES NOT PROTECT A CRIMINAL SUSPECT'S RIGHTS

I. INTRODUCTION

A receptionist buzzes DEA agents into the offices at a small business, and the agents rummage through her bosses' offices.[1] A woman calls the police and lets them into her sleeping boyfriend's locked closet with keys which she removed from his pants.[2] Courts found these searches constitutional under the Fourth Amendment.

The courts in each of these cases determined that the police reasonably believed that the consenting party had authority to consent to the search, and thus, under *Illinois v. Rodriguez*,[3] the searches were valid. In *Rodriguez*, the United States Supreme Court held that if police reasonably believe that the person who consents to a search has common authority over the property, the search will be valid against a third party charged on the basis of the evidence seized.[4] Despite the long history of the reasonableness standard, in *Rodriguez*, the Court ignored the underlying reasons for the Fourth Amendment warrant requirement. Moreover, because of its doctrinal flaws, the reasonableness standard enunciated in *Rodriguez* has failed in application.

Both Justice Marshall and a student author have offered criticisms of the test,[5] but their alternative suggestions are incomplete and unworkable, respectively. Because of the problems surround-

[1] *See* United States v. Sudzus, No. 92 Cr 102, 1992 WL 162959 (N.D. Ill. July 2, 1992).

[2] *See* United States v. Kinney, 953 F.2d 863 (4th Cir. 1992), *cert. denied*, 112 S. Ct. 2976 (1992).

[3] 497 U.S. 177 (1990).

[4] *Id.*

[5] *See infra* notes 237-59 and accompanying text.

ing both the reasonableness test and the alternative proposals, this Comment suggests that the Court adopt a "common authority in fact" test. This test would require that a person who consents to the search actually have common authority over the place or item searched. Such a test would protect the rights of defendants from arbitrary and unexpected searches while simultaneously preventing defendants from shifting the burdens of their criminal activities onto innocent third parties. Additionally, such a test would not significantly impede law enforcement efforts.

This Comment will first trace the history of the Fourth Amendment including an analysis of the case law leading up to the *Rodriguez* decision. The *Rodriguez* decision will then be examined in detail. Next, this Comment will explore criticisms of the reasonableness standard and survey recent cases which demonstrate each of its shortcomings. Then, other possible tests will be explored. Finally, this Comment proposes a new "common authority in fact" test and applies it to some of the criticized cases.

II. BACKGROUND

This section explores the history of the Fourth Amendment, which provides the basis for all search and seizure case law. The amendment states:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.[6]

By its plain language, the amendment seems to be designed to guard the security of persons and their houses from searches not reasonably grounded in factual beliefs.[7] Over time, the Court has interpreted the language in a way that has continually placed more emphasis on reasonableness—especially in the case of warrantless searches.

In *Brinegar v. United States*,[8] an early case in which the reasonableness test was utilized, the Court held that while the police need not always be factually correct in conducting a warrantless search,

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6 U.S. CONST. amend. IV.

7 Alternatively, the word "reasonableness" could be used to address the scope of the search. In other words, such a reading would limit the extent to which a place or person could be searched before the Constitution requires a warrant. The Supreme Court's interpretations, however, seem to focus on the reasonableness of the government agent's beliefs and conclusions about the facts of the situation. *See, e.g.*, Terry v. Ohio, 392 U.S. 1 (1968).

8 338 U.S. 160 (1949).

such a search must always be reasonable. In *Brinegar*, the defendant had a reputation for illegally transporting liquor across state lines in violation of 27 U.S.C. § 223.[9] One day when the defendant's car passed an officer, who was parked on the edge of a highway, the officer recognized the defendant and noted that the defendant's vehicle looked "heavily loaded."[10] Upon stopping the vehicle, the officer could see one case of alcohol in the front seat of the car, but the defendant later denied that any liquor was visible.[11] The defendant was arrested for the 27 U.S.C. § 223 violation, and the officer seized the alcohol in the car as well as the alcohol he found in the trunk after the arrest. The defendant challenged the constitutionality of his arrest on the grounds that the officer did not have probable cause, and thus the seizure of the alcohol was not pursuant to a valid stop.[12]

The Supreme Court, in finding the arrest to be constitutional, stated that the officer had probable cause to stop the defendant's car.[13] The Court emphasized that "probable cause" was the standard for conducting the arrest, not "guilt beyond a reasonable doubt" as is required for criminal convictions.[14] The Court stressed that if the "beyond a reasonable doubt" standard were used in ordinary arrests, officers rarely could take "effective" action in protecting the public good because the standard would be too high to meet.[15] The Court noted that to require more than probable cause would harm law enforcement, while to allow less than probable cause would "leave law-abiding citizens at the mercy of the officers' whim or caprice."[16] Nonetheless, the Court cautioned, probable cause still requires "a reasonable ground for belief of guilt."[17] Thus, the Court announced that it would consider the reasonableness of an officer's belief when it evaluates a warrantless search.

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9 *Id.* at 162. 27 U.S.C. § 223 (1936) provided:

Whoever shall import, bring or transport any intoxicating liquor into any State in which all sales . . . of intoxicating liquor containing more than 4 per centum of alcohol by volume are prohibited, otherwise than in the course of continuous interstate transportation through such State, or attempt so to do, or assist in so doing, shall . . . if all importation, bringing, or transportation or intoxicating liquor into such State is prohibited by the law thereof; be guilty of a misdemeanor and fined not more than $1,000 or imprisoned not more than one year, or both. 27 U.S.C. § 223 (1936).

10 *Brinegar*, 338 U.S. at 162-63.

11 *Id.*

12 *Id.*

13 *Id.* at 170-71.

14 *Id.* at 174.

15 *Id.*

16 *Id.* at 176.

17 *Id.* at 175.

The boundaries of the reasonableness test for warrantless searches were made clearer a decade and a half after *Brinegar* in *Stoner v. California*.[18] In *Stoner*, the Court emphasized that the Fourth Amendment should not be infringed upon by "unrealistic doctrines of apparent authority," thus shifting the inquiry more toward defendants' rights.[19] The police trailed the defendants, who were suspects in a robbery, to a hotel in which they were staying.[20] The officers discovered that defendant Stoner was out of his room because his keys had been left at the hotel desk in accordance with hotel policy.[21] The officers explained their desire to search Stoner's room to the hotel clerk.[22] The clerk then led the officers to Stoner's room and let them in. The officers, upon entering the room, discovered evidence of the robbery which was later used to convict Stoner.[23]

In rejecting the government's arguments that the search was constitutional, the Supreme Court in *Stoner* dismissed the notion that the consent of the hotel clerk validated the search, stating that "[o]ur decisions make clear that the rights protected by the Fourth Amendment are not to be eroded by strained applications of the law of agency or by unrealistic doctrines of 'apparent authority.' "[24] The Court stressed that protection from search and seizure was the defendant's procedural right, not the clerk's or the hotel's.[25] Thus, only the defendant's word or deed could be used to waive the right, either personally or through an agent.[26] The Court acknowledged that, by staying in a hotel, a person gives implied or express consent to allow repairmen and maids to enter the room to conduct their ordinary duties. However, a guest at a hotel, like a boarder or tenant of a house, is entitled to protection against unreasonable searches and seizures, and that protection would be lost if "it were left to depend on the unfettered discretion" of a hotel employee.[27]

Thus, even though the clerk had the ability to enter the room as part of the ordinary procedures of hotel management, the police

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18 376 U.S. 483 (1964).

19 *Id.* at 488.

20 *Id.* at 484-85.

21 *Id.* at 485.

22 *Id.*

23 *Id.* at 485-86. Stoner was convicted in a jury trial, the conviction was affirmed by the intermediate court of review in California, and further review was denied by the Supreme Court of California before his appeal to the United States Supreme Court. *Id.* at 484.

24 *Id.* at 488.

25 *Id.* at 489.

26 *Id.*

27 *Id.* at 489-90.

were not allowed to rely on this as sufficient control to authorize a search. In short, the Court in *Stoner* effectively placed a limit on the reasonableness test, stating that apparent authority would not ordinarily be sufficient to validate a search.

In *Katz v. United States*,[28] decided shortly after *Stoner*, the Court stated that whether a warrantless search or seizure is reasonable may depend in part on the relationship of the parties, rather than the place searched. The Court considered the constitutionality of placing listening devices on the outside of a telephone booth to monitor a suspect's conversation.[29] In upholding this search, the Court in *Katz* noted that "the Fourth Amendment protects people, not places[, but w]hat a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection."[30] Thus, the Court concluded that one should not simply consider where the search took place but also the relationships among the consenter, the searcher, and the defendant.[31]

In *Terry v. Ohio*,[32] the Supreme Court expanded on the "relationship" theme discussed in *Katz*. The Court stated that in conducting a search, a police officer must consider his own safety interests, the protection of the public, and the defendant's privacy interests; thus, it clearly laid out the policies that courts should consider in making a determination about Fourth Amendment violations.[33]

In *Terry*, an officer observed two men peering in a store window and walking back and forth on a street, conferring occasionally.[34] After witnessing what he believed to be suspicious action, the officer approached them and performed a pat down search on defendant Terry, which revealed a gun. Terry was subsequently charged with carrying a concealed weapon.[35] At trial, Terry claimed that the search had not been performed incident to a lawful arrest. The trial court denied this claim, asserting that some interrogation could and should have been made because these men had been acting suspiciously.[36] The trial court held that a pat down search could lawfully be conducted for the protection of the officer because, based on the suspects' actions, the officer had reason to believe the suspects

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28 389 U.S. 347 (1967).
29 *Id.* at 348-49.
30 *Id.* at 351.
31 *Id.*
32 392 U.S. 1 (1968).
33 *Id.*
34 *Id.* at 5-6.
35 *Id.*
36 *Id.* at 7-8.

might be armed.[37]

The Supreme Court, in affirming the trial court, employed a reasonable person standard to determine whether the officer was justified in conducting the pat down search.[38] In asking whether the facts available to the officer at the moment of the seizure or search would "warrant a [person] of reasonable caution in the belief" that the action taken was appropriate, the Court focused on the reasonableness of the officer's belief that he and others may have been in danger.[39] The Court noted that the subjective good faith of the officer was not enough to justify the search, because, if subjectivity were the test, "the protections of the Fourth Amendment would evaporate, and the people would be 'secure in their persons, houses, papers and effects' only in the discretion of the police."[40] Thus, the Court emphasized that the reasonableness standard requires more than minimal suspicion when an officer is evaluating the risks that confront him and the public.

The Court placed a great deal of emphasis on the interests of law enforcement as compared to an individual's privacy interests.[41] First, the Court in *Terry* recognized the government's interest in crime detection and prevention.[42] The Court noted that the defendant's behavior was suspicious because he continually gazed in the same window.[43] In these situations, the Court decided that an officer should be able to inquire into a suspect's behavior to prevent what is most likely a crime waiting to happen.[44]

Second, the Court noted an officer's interest in protecting himself from the threat of injury from the person with whom he is dealing.[45] By patting down the defendant in *Terry*, the officer was making certain that Terry would not draw a weapon during the inquiry as to Terry's actions. The Court asserted that probable cause need not be required for officers to take actions to protect themselves and other potential victims of crimes from harm.[46]

Finally, even though a search of outer clothing is a violation of

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37 *Id.* at 8. The court of appeals affirmed the conviction and the Supreme Court of Ohio dismissed the appeal for lack of a "substantial constitutional question," after which Terry appealed to the United States Supreme Court. *Id.*

38 *Id.* at 21-22.

39 *Id.*

40 *Id.* at 22 (quoting U.S. CONST. amend. IV).

41 *Id.*

42 *Id.* at 22-23.

43 *Id.*

44 *Id.*

45 *Id.* at 23.

46 *Id.* at 24.

the "sanctity of the individual" and cannot be undertaken absent sufficient circumstances, the Court stated that a pat down is much less intrusive than the "seizure" of a suspect pursuant to an arrest, and thus is reasonable when the officer has reason to believe that he or others are potentially in danger.[47] A search of outer clothing is brief and necessary to protect the officer from potential danger while the officer gathers information to determine whether a valid reason for arrest exists.[48] Thus, the reasonableness inquiry shifted from a strict protection of defendants to a balance of protecting defendants, insuring the safety interests of officers and the public, and effecting law enforcement goals.

In the next significant case in this area, the Supreme Court expanded on its earlier concern for effective law enforcement.[49] It held that, absent coercion, personal liberty interests are adequately guarded when an individual consents to a search. Thus, a search to which a person consents is reasonable. In *Schneckloth*, an officer stopped a car because it had a burned out headlight.[50] Only one of the passengers, who was not the driver, could produce a license. He identified the car as belonging to his brother.[51] After two additional officers arrived, the officers asked this man if they could search the car. The man consented and unlocked both the trunk and the glove compartment.[52] The officers found three stolen checks and used them against the defendant, another passenger in the car, in a subsequent criminal trial.[53] The defendant was convicted by the trial court.[54]

In analyzing the constitutional validity of the search, the Court in *Schneckloth* accepted the trial court's finding that the consent was truly voluntary because no coercion was present in the officers' actions.[55] The Court elaborated on the importance of consensual searches, asserting that "it is not part of the policy underlying the

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47 *Id.* at 25-27.

48 *Id.*

49 Schneckloth v. Bustamonte, 412 U.S. 218 (1973).

50 *Id.* at 220.

51 *Id.*

52 *Id.*

53 *Id.*

54 The California Court of Appeals affirmed the conviction. The California Supreme Court denied review. Subsequently, the defendant sought a writ of habeas corpus in federal district court, which was denied; however, the Court of Appeals for the Ninth Circuit vacated this denial, stating that the standard the state must meet in California is to show that consent had not been coerced and that the consenting party gave it knowing that it could have been withheld. The Supreme Court granted review to determine if the Constitution required this showing. *Id.* at 220-22.

55 *Id.* at 228-32.

Fourth . . . Amendment[] to discourage citizens from aiding to the utmost of their ability in the apprehension of criminals."[56] Although it is not necessary to show valid consent, the suspect's knowledge that he had a right not to consent may be a factor considered by the court.[57] In the instant case, the Court noted that the Fourth Amendment is primarily concerned with an individual's right to be left alone.[58] However, the Court held there simply is nothing "constitutionally suspect in consenting to a search."[59] In fact, the Court continued, the community has a strong interest in securing such consent so that innocent people are not erroneously convicted in criminal proceedings as a result of an incomplete evidentiary base.[60]

The Court also considered the question of third-party consent and stated that third-party consent to searches could be reasonable where the requisite authority existed.[61] It cited several cases as examples of proper authority. First, the Court noted that by sharing a gym bag with a third party, one assumes the risk that the third party may consent to a search of the bag.[62] The Court also noted that a wife may turn over to the police clothes and guns belonging to her husband as long as the wife had not been coerced.[63] In each of these cases, unlike *Stoner*, the consenting party had shared authority over the area searched, and thus the searches were reasonable.

Additionally, the Court noted that there was no error in admitting evidence seized in a defendant's apartment when the police arrested a third party at that apartment believing him to be the defendant.[64] The search was upheld because the police had probable cause to arrest the defendant, and thus the search would have been valid pursuant to arrest had the actual suspect been seized.[65] Thus, *Schneckloth* provided the basis for evaluation of consensual searches that would be subsequently addressed in the context of third-party consents.

The reasonableness of a third party's consent to a warrantless search was addressed directly in *United States v. Matlock*.[66] In *Matlock*,

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56 *Id.* at 243 (citing Coolidge v. New Hampshire, 403 U.S. 443 (1971)).
57 *Id.* at 246-47.
58 *Id.*
59 *Id.* at 242-43.
60 *Id.* at 243.
61 *Id.* at 245.
62 *Id.* (citing Frazier v. Cupp, 394 U.S. 731 (1969)).
63 *Id.* (citing Coolidge v. New Hampshire, 403 U.S. 443 (1971)).
64 *Id.* at 245-46 (citing Hill v. California, 401 U.S. 797 (1971)).
65 *Id.* at 246.
66 415 U.S. 164 (1974).

the Court held that a search pursuant to the permission of a person who has common authority over premises or a piece of property is valid against constitutional attacks by an absent, nonconsenting defendant.[67] The defendant resided in a house that was rented by Marshall, her children and her grandson.[68] The trial court found that Marshall's daughter consented to a police search of the house for money and a gun. The daughter specifically permitted a search of a bedroom which she said she and the defendant jointly occupied.[69] The officers, during their search of the bedroom, discovered $4,995 in stolen currency in a diaper bag.[70] The defendant was subsequently arrested for robbery. The evidence was suppressed by the trial court as being seized in violation of the Fourth Amendment, and the government appealed to the Seventh Circuit, which affirmed.[71] The government then appealed to the Supreme Court.[72]

On appeal the Supreme Court asserted that, as a general matter, "the consent of one who possesses common authority over premises or effects is valid as against the absent, nonconsenting person with whom that authority is shared."[73] In defining common authority, the Court noted that common authority should not be assumed simply from a mere property interest:

> [The right of one with common authority to consent] rests rather on mutual use of the property by persons generally having joint access or control for most purposes, so that it is reasonable to recognize that any of the co-inhabitants has the right to permit the inspection in his own right and that the others have assumed the risk that one of their number might permit a common area to be searched.[74]

The Court noted that the defendant and Marshall's daughter had represented themselves as husband and wife and were known to be regularly sleeping together.[75] However, the Court remanded the case for the trial court to determine whether the evidence was sufficient to support the conviction after this opinion.[76] Significantly, a footnote in the Court's opinion expressly left open the question of whether a search would be valid under the Fourth Amendment if a third party who had apparent authority to consent to a search, but who in fact did not possess such authority, allowed the police to

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67 *Id.*
68 *Id.* at 166.
69 *Id.*
70 *Id.* at 166-67.
71 *Id.* at 167-69.
72 *Id.* at 169.
73 *Id.* at 170.
74 *Id.* at 171 n.7.
75 *Id.* at 168.
76 *Id.* at 177-78.

search the premises.[77]

III. *ILLINOIS V. RODRIGUEZ* AND THE REASONABLENESS STANDARD

Illinois v. Rodriguez,[78] the most recent case in which the Supreme Court has considered the reasonableness of third-party consent, addressed the issue left open by *Matlock*. In *Rodriguez*, the police were called to Dorothy Jackson's residence and were met by Jackson's daughter, Gail Fischer, who had apparently been beaten.[79] Fischer stated that the defendant had assaulted her earlier that day at an apartment where the defendant was currently asleep. She agreed to accompany the police to the apartment and let them in with her key.[80] While traveling to the apartment with the police, Fischer referred to the apartment as "our" apartment and admitted to having clothes and furniture there.[81] Upon arriving at the apartment, Fischer opened the door for the police, and the police noticed open containers of white powder in both rooms.[82] The defendant was arrested, and the substances were seized. At no time did the police obtain or seek to obtain a search warrant before proceeding to the defendant's residence.[83]

The defendant, charged with possession of a controlled substance, moved to have the evidence gathered during his arrest suppressed on the ground that Fischer had moved out of the apartment several weeks before the beating and did not have "common authority" over the residence.[84] The trial court found that Fischer was simply an "infrequent visitor," not a "usual resident," because her name was not on the lease, she did not help pay the rent, she did not have permission to invite others to the apartment without the defendant's consent, she did not have access to the apartment when defendant was away, and she had moved some of her belongings out of the apartment.[85] Furthermore, the trial court noted that the record was unclear as to whether she still resided at the apartment at the time of the beating.[86] Thus, the court granted the defendant's motion to suppress the evidence. The trial court's decision was up-

77 *Id.* at 177 n.14.
78 497 U.S. 177 (1990).
79 *Id.* at 179. The opinion does not state who placed the call.
80 *Id.*
81 *Id.*
82 *Id.* at 180.
83 *Id.*
84 *Id.*
85 *Id.*
86 *Id.* at 179.

held by the appellate court.[87] The Illinois Supreme Court denied the state's Petition for Leave to Appeal, and the United States Supreme Court granted certiorari.[88]

In *Rodriguez*, the Court expanded the ability of third parties to consent to searches and seizures by adopting a reasonableness test under which courts are to consider whether an officer reasonably believed that a third party had authority to consent to a search of the defendant's property.[89] Significantly, "reasonableness" was expanded to include the officer's reasonableness in belief about the identity and authority of a third party.[90] In other words, the Court changed the focus from simply reviewing the reasonableness of an officer's belief about a suspect's guilt to also considering the reasonableness of an officer's belief about the relation of a third party to a suspect.

The Court began its analysis by citing *Schneckloth* for the proposition that Fourth Amendment prohibitions do not apply when consent to a search has been obtained, and by citing *Matlock* for the theory that a third party who possesses common authority may also consent to a search.[91] In *Rodriguez*, the Court found that Fischer did not possess common authority over the premises.[92] She had moved out of the apartment almost a month before the call, taking her children's clothes with her but leaving behind some of her personal belongings.[93] Furthermore, almost four weeks had passed since she had last spent the night at Rodriguez's apartment, invited friends there when he was not home, or entered when he was not present.[94] She also admitted that she had taken a key without Rodriguez's knowledge.[95] Thus, under *Matlock*, Fischer did not possess the authority to consent to the search of the defendant's house. Moreover, the Court found that there was no waiver by the defendant of his right to consent to the search.[96]

Although the Court stressed that the decision to waive *trial rights* must be "knowing and intelligent," it noted that nothing in the

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87 *Id.* at 180.

88 *Id.* at 180-81.

89 *Id.* at 188-89.

90 *Id.* at 181.

91 *Id.* (citing Schneckloth v. Bustamonte, 412 U.S. 218 (1973); United States v. Matlock, 415 U.S. 164, 171 (1974)).

92 *Id.* at 181-82.

93 *Id.* at 181.

94 *Id.*

95 *Id.* However, she had stated in a preliminary hearing that Rodriguez had given her the key.

96 *Id.*

purposes or practical application of a "knowing or intelligent" waiver of trial rights suggests that the same standard should be applied to the issue of third-party consent to searches and seizures.[97] The Court said *Schneckloth* stands for the idea that, "where it applies, . . . no evidence seized in violation of the Fourth Amendment will be introduced at trial . . . unless a person consents."[98] However, what is guaranteed by the Fourth Amendment, according to the Court, is not that no search of the person's house may occur without his consent, but simply that no such search may occur that is unreasonable.[99] The Court then concluded that one factor that will make the search of a house reasonable is the consent of a co-tenant.[100]

The Court then expanded this reasonableness standard to allow a person who is not a co-tenant to consent if the officers reasonably believe that this person possesses the authority of a co-tenant.[101] In support, the Court noted that since warrants only require "probable cause," no more than "a proper assessment of probabilities in particular contexts" should be required.[102] It also noted that a search would be reasonable if it were conducted pursuant to a valid warrant, but that "reasonableness" does not preclude error with respect to the factual judgments about the area subject to the warrant.[103] Finally, the Court noted that a search pursuant to an arrest is not discredited simply because the police arrested the wrong person under the reasonable belief that the person was actually the suspect.[104]

The Court then cited *Brinegar* for the proposition that, under the Fourth Amendment, searches need not always be correct, but they must always be reasonable, thus stressing the entrenched notion that reasonableness is the focal point in Fourth Amendment jurisprudence. A reasonableness standard, the Court observed, would allow officers some room for mistakes, but would also require them to act "on facts leading sensibly to their conclusions of probability."[105] Thus, in *Rodriguez*, the Court concluded that police searches pursuant to the consent of one who does not in reality have authority to consent, but whom the police reasonably believe has this authority, is no more violative of the Fourth Amendment than

97 *Id.* at 183.
98 *Id.*
99 *Id.*
100 *Id.* at 183-84.
101 *Id.*
102 *Id.* (citing Illinois v. Gates, 462 U.S. 213, 232 (1983)).
103 *Id.* at 184-85 (citing Maryland v. Garrison, 480 U.S. 79 (1987)).
104 *Id.* at 185 (citing Hill v. California, 401 U.S. 797 (1971)).
105 *Id.* (citing Brinegar v. United States, 338 U.S. 160, 176 (1949)).

when police reasonably, but incorrectly, believe they are in pursuit of a violent felon who is about to escape.[106]

The Court also presented two possible readings of *Stoner*, in which the Court said that "the rights protected by the Fourth Amendment are not to be eroded . . . by unrealistic doctrines of 'apparent authority.' "[107] The Court explained that this term could be read as saying that all reliance on apparent authority is *per se* unrealistic or as saying that the Court frowned on apparent authority only when it is unrealistic.[108] The Court favored the latter interpretation. It emphasized that the issue in apparent authority cases is not *waiver* of the right to be free of unreasonable searches, but *violation* of the right to be free of such searches.[109] The Court found significance in the fact that in *Stoner* the record contained no information at all to suggest that the police had a basis to believe the night clerk had authority to authorize the search.[110] The *Rodriguez* Court stated that *Stoner* did not stand for the sole proposition that the appearance of authority could never validate a search.[111] Rather, the Court explained, the *Stoner* decision may have been left vague intentionally. Thus, *Stoner* can reasonably and preferably be read to mean that in that case no reasonable basis to uphold the search existed, given the facts the police encountered.[112] The *Rodriguez* Court stressed that it did not intend to validate every search at a person's invitation, even when the person claims to live in at a certain place, because in some cases "the surrounding circumstances could conceivably be such that a reasonable person would doubt its truth and not act upon it without further inquiry."[113] The Supreme Court instead adopted an "objective" inquiry: "[w]ould the facts available to the officer at the moment . . . 'warrant a man of reasonable caution in the belief' that the consenting party had authority over the premises?"[114] The Court then remanded the case because

106 *Id.*

107 *Id.* at 187 (citing Stoner v. California, 376 U.S. 483, 488 (1964)).

108 *Id.*

109 *Id.*

110 *Id.* at 187-88.

111 *Id.* at 188.

112 *Id.*

113 *Id.* The Court may have misspoken here and inadvertently changed the standard, as there is an apparent difference in whether a person has reason to *doubt* the authority of a party to consent to a search and whether a person has reason to *believe* that a person has authority to consent. The difference is that the first implies a specific reason to doubt authority must be found, while the latter suggests that a positive reason to believe authority exists must be present.

114 *Id.* (citing Terry v. Ohio, 392 U.S. 1, 21-22 (1968)).

the lower courts had not addressed that question.[115]

IV. THE FAILURE OF *RODRIGUEZ* AS A DOCTRINAL MATTER

This section of this Comment will show how *Rodriguez* has stepped outside the existing precedent and policies set forth in the Fourth Amendment cases previously discussed. In *Brinegar v. United States*,[116] the Supreme Court dealt with suspicion about an individual's violation of law. It held that "probable cause" was "reasonable" for Fourth Amendment search purposes. The decision did not consider what would be reasonable when a third party was involved.[117] In *Rodriguez*, however, the Court not only dealt with suspicion as to the individual defendant's guilt, but also considered questions regarding the honesty of the consenter. As a result, the Court has added a greater risk to the Fourth Amendment calculus. In addition to the risk that an officer's beliefs about the defendant's guilt could be wrong, there is a risk that the officer will be mistaken in his perception as to whether a third party has authority to consent to a search. This added risk of incorrectness is a serious reduction in a defendant's right to be free from unreasonable search.

Rodriguez was similarly untrue to *Stoner v. California*,[118] in which the Court noted that only the defendant can waive his right to privacy. Admittedly, there should be cases where the defendant's actions impliedly waive this right, such as a search of areas jointly occupied in a cohabitation situation. However, if a third party who is not in reality a common owner or occupant is involved, the defendant has not had the opportunity to choose whether to waive his rights. Therefore, any consent granted by such a third party lacks authority *per se*. The Court in *Rodriguez* mistakenly took *Stoner* to say that only apparent authority which is unreasonable is intolerable. This reading, however, entirely neglects those policies underlying the Fourth Amendment pertaining to a defendant's right to be free from a warrantless search in most cases.

The Court made a similar observation in *Katz v. United States*,[119] in which it decided that the validity of a warrantless search depends on the relationship of the parties. Thus, when there is no direct consensual relationship (actual or implied), the defendant should not be deemed to accept the risks of a search, because there can be no reasonable consent to an unknown party.

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115 *Id.* at 189.
116 338 U.S. 160 (1949).
117 For further discussion, see *Rodriguez*, 497 U.S. at 196-98 (Marshall, J., dissenting).
118 376 U.S. 483 (1964).
119 389 U.S. 347 (1967).

In *Terry v. Ohio*,[120] the Court emphasized the importance of effective law enforcement and the need to protect officers and third parties. Certainly, it can be argued that reasonableness as a standard to govern third-party authority to consent to a search will lead to more effective law enforcement at a lower cost. However, *Terry* requires a balancing, and there is always a line that must be drawn if the Fourth Amendment is to have any effect. Denying officers the right to search without a warrant, without consent, and not pursuant to an arrest or exigent circumstances seems to be a reasonable place to draw that line.[121] The fact that consent frequently turns out to be effective provides no answer: the Fourth Amendment does not protect individuals from unreasonable searches "most of the time." Additionally, unlike *Terry*, in *Rodriguez* there was no immediate risk to the officer or to a third party's safety. Finally, it should be noted that because in *Terry* the officers (and later the Court) were dealing with the suspect directly, the case did not involve the inherent "reasonableness of belief" risks of dealing with a third party in addition to the defendant.[122]

Schneckloth v. Bustamonte[123] stressed that voluntary individual consent satisfied the Fourth Amendment.[124] Clearly, such voluntariness cannot exist in situations like *Rodriguez*, in which authority is actually lacking. It is hard to imagine why an individual would voluntarily consent to searches at the whim of a person with whom she does not have a strong relationship. The defendant simply has nothing to gain in letting strangers or persons she does not trust have authority over her space or belongings.

The reasoning in *United States v. Matlock*[125] was also misapplied by the *Rodriguez* majority. A third party was able to consent to a search of the defendant's room in *Matlock* because the defendant had given authority to consent to a search by sharing his room with

120 392 U.S. 1 (1968).

121 This is a reasonable place for such a line, as it protects a defendant's right to be free from searches before an arrest is made and before a defendant is given the opportunity to permit or deny a search. Moreover, this line guards society's interest in quick law enforcement when the defendant poses the threat of immediate harm or may slip away before a warrant can be obtained. Finally, this line allows a person with whom the defendant implicitly or explicitly shares common authority to permit a search of common property. Tracey Maclin, *The Central Meaning of the Fourth Amendment*, 35 WM. & MARY L. REV. 197, 203-05 (1993).

122 *See supra* note 117 and accompanying text.

123 412 U.S. 218 (1973).

124 Even though consent was by a third party in *Schneckloth*, the defendant who voluntarily occupied the car with the consenter can be considered to have authorized other passengers to consent to a search under *Matlock* and *Katz*.

125 415 U.S. 164 (1974).

a third party. The defendant thus consented to common occupancy and authority over the area. An individual can assess the risks of implied or actual consent. However, the risks become near limitless when the risk of a search depends not on the conduct of the individual target of a search, but on the reasonable beliefs of a police officer about a third person.

Cases such as *Illinois v. Gates*,[126] *Hill v. California*,[127] and *Maryland v. Garrison*,[128] which the *Rodriguez* majority cited, are not dispositive in the context of third-party consents to searches. These cases dealt with probable cause for arrest of a defendant, which is the standard for making a seizure of a defendant reasonable. However, in the area of reasonableness of third-party authority, probable cause is not relevant: the issue of reasonableness goes to the officer's beliefs about the authority of the third party, not to the officer's beliefs about the defendant's guilt or threat.[129]

As is apparent from the preceding discussion, *Rodriguez*, with its focus on the reasonableness of officers' beliefs rather than on defendants' rights to be free from unreasonable searches, has significantly changed the "reasonableness" landscape. In previous cases, such as *Matlock*, the defendant's consent was a controlling factor. Now, due to a perceived need for more effective law enforcement, the defendant's consent is a secondary consideration. *Rodriguez* is thus untrue to precedent doctrinally because it shifts the focus more than ever to the officer's beliefs and, also because it deals incorrectly with the reasonableness of an officer's beliefs about a third party's relationship to the defendant.

V. The Failure of *Rodriguez* in the Lower Courts

The doctrinal problems of the *Rodriguez* reasonableness test are further illustrated by the fact that lower court application of the test fails to protect individuals. A significant number of cases demonstrate the shortfalls of the Supreme Court's test, which sacrifices the very rights the Fourth Amendment sought to protect in the name of effective law enforcement.

This section will illustrate three inadequacies of the *Rodriguez* test as applied by lower courts. First, a defendant loses her right to not have her property searched by someone who has an insufficient relation to the property as a result of incomplete questioning by

126 462 U.S. 213 (1983). *See supra* note 102 and accompanying text.
127 401 U.S. 797 (1971). *See supra* note 104 and accompanying text.
128 480 U.S. 79 (1987). *See supra* note 103 and accompanying text.
129 *Id.*

government agents. Second, a defendant loses the ability to foresee such searches and adequately prepare herself. Third, third party rights are not incrementally protected.[130]

A. LOSS OF PROTECTION OF ONE'S PROPERTY AS A RESULT OF INSUFFICIENT INQUIRY BY GOVERNMENT AGENTS

The defendant in a criminal proceeding may lose the right to not have her home invaded when a third party who has no authority to do so authorizes a search. The Supreme Court's rule tends to discourage government agents from conducting an extensive investigation of the facts before entering property. If the agents can show "reasonable belief," there is no incentive to take further measures to determine whether the person who claims shared authority has actual authority over the premises.[131] Because of their training and jobs, the police will naturally have a superior ability to ask questions which, when read to the jury, will make it appear as if the police were reasonable in believing that the consenting party had authority to allow the search. Additionally, the police will know which questions not to ask—especially those which may reveal that a party does not have the requisite authority to allow a search.[132] If the agents actually discover that the third party does not have authority, investigation will be delayed while the necessary warrants are prepared. Thus, the rule places the target of a search in jeopardy.

A flagrant abuse of the Supreme Court's reasonableness stan-

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130 While individual cases are used to illustrate particular problems, often they serve as relevant examples of the other flaws and will be thus noted in the footnotes.

131 Another problem might occur if police simply accept a third party's claim of authority. An extreme example would occur if the police drove up to a house and encountered a person standing in front of the house who said, "Yes, that's my house. You may search it with my blessing." Obviously, an occurrence such as this is more than highly unlikely; nonetheless, it does illustrate the potential for a third party to "set up" a defendant.

A more likely "set up" scenario might occur in this manner: a neighbor calls the police pretending to be the husband of the defendant. He knows that she is at work and that the house is otherwise empty. He claims that the defendant left home in a rage and locked him out of the house because she was on drugs, which he claims are in the house. Police break down the door after questioning him and find contraband that is used against the defendant, because the police "reasonably" believed the man was the defendant's husband and had the power to consent.

This scenario also raises a foreseeability problem, because a defendant has no way to foresee such a "set up." *See infra* Part V.B.

132 In her note discussed below, Tammy Campbell discussed the negative incentive on police that this holding may have. Tammy Campbell, Note, *Illinois v. Rodriguez: Should Apparent Authority Validate Third-Party Consent Searches?*, 63 U. COLO. L. REV. 481, 498-500 (1992).

dard is exemplified by *United States v. Sudzus*,[133] in which a court used the *Rodriguez* reasonableness test to hold that the police reasonably believed that a receptionist had sufficient authority over her bosses' offices to consent to a search.[134] In *Sudzus*, Drug Enforcement Agency agents entered an office building in which a sale of cocaine had been previously arranged. After passing through the outer doors, the agents were stopped by glass doors leading into the inner offices.[135] When defendant Barbra Sudzus refused to "buzz" the agents into the inner offices, they entered forcibly and secured the premises. One of the agents asked her if she had access to the building and "control over the premises" and if the agents could search for "money, narcotics and guns."[136] She responded in the affirmative, stating that the office had "nothing to hide" and agreed to sign a consent form at the agent's request.[137] The agents found cocaine during their search and Barbra and several other individuals in the office were charged with conspiring to possess, with intent to distribute, approximately five kilograms of cocaine.[138] At trial, the defendants challenged the evidence gathered during the search, and Barbra claimed that she did not have the authority to consent. She further stated that she did not sign the form until an hour after the search when the agents told her that signing was a mere formality and that, if she refused, they would simply obtain a warrant anyway.[139] The court nonetheless denied motions to suppress the evidence.[140]

The court in *Sudzus* methodically applied the *Rodriguez* test and found that even if an individual lacked actual authority to consent to a search, the search would be valid if the agents reasonably believed that the occupant had "common authority over the premises."[141] In finding that defendant Barbra reasonably appeared to have such authority, the court initially found that she occupied a space directly behind the window and "monitored the entry of customers and others."[142] Coupled with the claim that she maintained control over the building, including access to the inner offices, the agents could reasonably infer that she had the requisite common authority over

133 No. 92 Cr 102, 1992 WL 162959 (N.D. Ill. July 2, 1992).
134 *Id.* at *1.
135 *Id.*
136 *Id.*
137 *Id.*
138 *Id.*
139 *Id.* at *2.
140 *Id.* at *1.
141 *Id.* at *3.
142 *Id.*

the space to allow the search.[143] Thus, the search was upheld.[144]

This case clearly demonstrates how government agents can gain access to incriminating material even when the individual does not have an interest in or authority over the area searched. The management of most businesses would not ordinarily grant the authority to consent to a search to a receptionist such as Barbra. Had the police asked questions to clarify Barbra's authority, they would have determined her lack thereof and would have had to pursue a warrant.[145]

A lack of sufficient relationship to the property searched also appeared in *State v. Charles*.[146] In that case, the police had reason to believe that a murder suspect was staying at his cousin's home.[147] When the police went to the house, they found that neither the suspect, Charles, nor his cousin were present. However, the cousin's wife was home, and allowed the police to search the house.[148] The police saw a closed suitcase in the den and the woman identified it as the suspect's. Her husband then returned and both consented to the search of the suitcase.[149] The police seized the suspect's gun, found inside the suitcase, as evidence that he was the murderer.[150] The suspect claimed this evidence was seized in violation of the Fourth Amendment.[151] In pretrial motions, the suspect moved that the evidence be suppressed, but the court declined. The suspect then appealed to the Louisiana appellate court.[152]

In applying *Rodriguez* to uphold the reasonableness of the officers' belief about the cousin's ability to consent, the appellate court focused on the reduced privacy expectations that the defendant had when he left his suitcase in a highly traveled area.[153] The court noted that Charles stayed in the den of his cousin's house. His cousin's family ate, played and watched television in the den. His cousin's two children went through the den to get to the backyard. As a result, the court concluded that Charles could not expect much

143 *Id.*

144 *Id.*

145 Alternatively, the police could have tried to justify the warrantless search on other grounds, such as exigent circumstances.

146 602 So. 2d 15 (La. Ct. App. 1992); *writ granted in part on other issue, denied in part, judgment affirmed,* 607 So. 2d 566 (1992); *appeal after remand,* 617 So. 2d 895 (La. Ct. App. 1993).

147 *Id.* at 16.

148 *Id.*

149 *Id.*

150 *Id.*

151 *Id.*

152 *Id.*

153 *Id.* at 17-18.

privacy in such an area.[154]

In addition, the court noted that Charles had not been given a closet for his things, nor did he tell others to stay away from them. His suitcase was latched, but it was not kept locked, and Charles had shown his cousin the hand gun but said it came from a junkyard.[155] The court thus concluded that suspect's expectation of privacy was diminished.[156]

The court explained that a co-inhabitant has "the right to permit an inspection in his own right and that others have assumed the risk that one of number might permit the common area to be searched."[157] The court relied on *Rodriguez* and held that the search was justifiable under the reasonable beliefs of the officers about the cousin's ability to consent.[158] The court pointed to the fact that others knew the suspect was at the scene of the murder, had gone to stay with his cousin, and had taken the gun with him. Thus, the court concluded the search was valid.[159]

Here, the suspect should have had a right to not have his belongings sifted through by government authorities because the people with whom he was staying had no "joint access or control for most purposes"[160] in the property searched. The defendant's cousin and his wife specifically told the officer that the suitcase belonged to someone else, which should have been enough to indicate that it was likely that access was not shared. Moreover, the police may have been able to determine that the cousin did not have the authority to permit a search of the suitcase by simply asking enough or proper questions. If the answers were incomplete or otherwise unsatisfactory, the police could have secured a warrant.[161] As a result, the suspect's protection against having his belongings searched was sacrificed.

In *United States v. Whitfield*,[162] the district court and the D.C. Circuit applied the "reasonableness" test differently to a situation in which the police wanted to search the defendant's room when the defendant lived with his mother. In *Whitfield*, the defendant had sto-

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154 *Id.*

155 *Id.*

156 *Id.* at 18.

157 *Id.*

158 *Id.* at 19.

159 *Id.*

160 United States v. Matlock, 415 U.S. 164, 171 n.7 (1974).

161 If the officers were concerned that the defendant would escape or destroy evidence, presumably the exception to the warrant requirement for exigent circumstances would validate the nonconsensual search.

162 747 F. Supp. 807 (D.D.C. 1990), *rev'd* 939 F.2d 1071 (D.C. Cir. 1991).

len $43,000.[163] FBI agents assigned to the case went to the defendant's home to talk to him, but when they discovered that the defendant was not at home, they talked to his mother, Farrie Whitfield, instead.[164] Farrie said that she lived at the home with her daughter and two sons.[165] In attempting to determine the housing relationship between the defendant and his mother, the agent asked if the defendant paid rent and his mother responded, "Get real—that boy's been unemployed."[166] Farrie later denied making the statement and claimed rather that she told the agent her son ordinarily paid $500 per month, but had only been able to pay $100 in recent months.[167] At this point, Agent Salter asked whether the defendant's room was open, and when Farrie responded that it was, he asked to see it.[168] Although the defendant's mother consented to the search, she refused to sign a consent form.[169] The agents discovered $16,000 in the defendant's jacket, but before searching any further, the defendant's brother, Willie Whitfield, came home and told his mother to ask the agents to leave.[170] The defendant turned himself over to the authorities not long after this occurrence, but questioned the validity of the search.[171]

At trial, Agent Salter said he did not leave the scene to get a warrant because he was afraid the defendant might return to the residence and remove the money.[172] The agent did note, however, that a warrant could ordinarily be obtained in under four hours, but rarely over the phone.[173] He conceded that one agent could have left the scene while the other monitored the situation, but said he chose to conduct the search nonetheless because he considered the mother's consent to be sufficient.[174]

The trial court stated that while a person with common authority over an area has the right to consent to a search of the area, a landlord does not ordinarily have the power to authorize a search of a tenant's space.[175] It found that the "defendant had something in

163 *Id.* at 808.
164 *Id.*
165 *Id.* at 809.
166 *Id.*
167 *Id.*
168 *Id.*
169 *Id.* A consent form provides additional evidence of consent at trial.
170 *Id.* at 809.
171 *Id.* at 809-10.
172 *Id.* at 809.
173 *Id.*
174 *Id.*
175 *Id.* at 810. *See also* Chapman v. United States, 365 U.S. 610 (1961)(landlord not authorized to allow police to search defendant's home).

the nature of landlord-tenant relationship with his mother," but said that the relevant issue in this case was a balance between the extent of the defendant's expectation of privacy and the scope of his mother's authority over his belongings.[176] The court noted that *Rodriguez* requires that the FBI agents reasonably believed that the defendant's mother had power to authorize the search, despite the fact that "in the abstract" the search of the defendant's jacket may have been unreasonable.[177] The court stated that Agent Salter reasonably believed that the defendant was not paying rent at the time of the search and "gave no thought" to the fact that the defendant paid when he had the means to pay.[178] Thus, the trial court concluded that the agents reasonably believed Farrie could consent to the search and denied the defendant's motion to suppress the money found in his jacket pockets.[179]

The D.C. Circuit reversed the lower court's decision.[180] The appellate court began its analysis by invoking *Rodriguez* and noted that "it is not clear whether the district court thought the agents had the facts straight but were confused about the law, or whether it thought the agents had operated under some factual misconception."[181] The appellate court stated that, although the district court found reasonable not only a search of the defendant's room but also of his jacket, the FBI "agents simply did not have enough information to make that judgment."[182] The court noted that the fact that the room was unlocked and that Farrie had "mutual use" of it may have indicated that she could consent to a search of the room, but found that the agents asked no questions which suggested that Farrie had access to her son's closet or jacket.[183] The court added that the agents never asked her if "she cleaned her son's room, visited with him there, stored any of her possessions in the room, watched television there, or made use of the room at any time for any purpose."[184] The court emphasized that it is the government's burden to show that a third party had authority to consent to a search under *Rodriguez* and held that the government had failed to meet the burden in this case.[185]

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176 *Whitfield*, 747 F. Supp. at 809, 812.
177 *Id.* at 812.
178 *Id.*
179 *Id.*
180 United States v. Whitfield, 939 F.2d 1071 (D.C. Cir. 1991).
181 *Id.* at 1073-74.
182 *Id.* at 1074.
183 *Id.*
184 *Id.*
185 *Id.* at 1075.

The court decided that whether an adult child pays rent may not be a dispositive factor: a child who does not pay rent may very exclusively use a room and expect privacy, whereas an adult child who does pay rent may, nonetheless, choose to not keep anything out of the family's general access.[186] The court pointed to the fact that, under *Matlock* and *Rodriguez*, agents who are faced with ambiguous situations must make further inquiries before conducting a warrantless search.[187] In conclusion, the court reiterated the importance of the underlying policy goals: "[i]f the information gleaned from those inquiries is insufficient to establish apparent authority, the Fourth Amendment demands that the agents procure a warrant."[188]

Despite the D.C. Circuit's favorable decision, the differing conclusions on the same facts applying the same legal test indicate the inherent unreliability of the *Rodriguez* test. Agents continue to lack the incentive to adequately investigate and discover the true state of affairs. Whether officer questions are reasonable is not the issue so much as whether they can convince a jury that their questioning was reasonable. Defendants' rights are further endangered, even in the D.C. Circuit, by police officers' ability to ask the questions they believe will elicit a favorable response rather than ones which are aimed at determining the actual relationship between the consenter and the suspect. Thus, the Supreme Court's reasonableness test has occasionally led to protection of third-party interests when the third party has no relationship to the property searched.

B. SUSPECTS CANNOT ADEQUATELY FORESEE AND PREPARE THEMSELVES FOR SEARCHES

A defendant may not even know when a search is possible under the *Rodriguez* rule. Presumably, a defendant would have some idea that her spouse might consent to a search of common areas without her presence. However, a defendant cannot know that a stranger or party in whom no common authority rests may consent to a search. In tort law, such lack of foreseeability frequently leads to a denial of liability, because to impose liability under such conditions is seen as "fundamentally unfair" and not within the risk assumed.[189] At a deeper level, the reason that such a label has been placed on unforeseeable occurrences is simply that the defendant

186 *Id.*
187 *Id.*
188 *Id.*
189 *See generally* William Shepard McAninch, *Unreasonable Expectations: The Supreme Court and the Fourth Amendment*, 20 STETSON L. REV. 435 (1991).

could do little or nothing to prevent the situation or to remedy it at its early stages. Similarly, a criminal defendant has no ability to shield his privacy interests because he cannot know when someone who lacks sufficient authority over his property will permit a search.[190] The relationship between a third party who lacks authority and the defendant is, by definition, too attenuated for the defendant to recognize the risk of a search.

United States v. Kinney,[191] in which the Fourth Circuit validated a search of a locked closet by the police at the request of the defendant's girlfriend, illustrates the unforeseeability problem. The defendant's girlfriend, Akers, waited until the defendant had fallen asleep and took his keys out of his pants pocket. The keys opened a locked closet in the apartment where they both lived.[192] Inside the closet she found guns with which, she later testified, the defendant had threatened her.[193] Because Akers believed that the guns might be stolen and because the defendant had threatened her with them, she called the police. When they arrived, she asked the officers to open the closet and take the guns. The officers asked if she lived there and if her name was on the lease.[194] When they did not take further action after she told them that she had lived there four months and that she was unsure whether her name was on the lease, she again took the defendant's keys and opened the closet herself.[195] The officers called in the serial numbers on the guns and discovered that a warrant for a parole violation was outstanding on the defendant and arrested him.[196] At that point Akers asked the police to clear the closet. When the police cleared the closet, they found stolen guns and drug paraphernalia. Based on the items found in the closet, the police obtained a search warrant for the apartment and found two more guns and seventy-two packets of cocaine.[197] The defendant challenged all of the evidence obtained during the warrantless search. After a conviction on drug and firearm offenses, he appealed to the Fourth Circuit.[198]

The Fourth Circuit concluded that Akers definitely did not have

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190 It should be remembered that in Fourth Amendment cases, the issue is not the ultimate guilt of the individual, but the protection society wishes to have against various searches and seizures. *See infra* note 246 and accompanying text.

191 953 F.2d 863 (4th Cir. 1992), *cert. denied*, 112 S. Ct. 2976 (1992).

192 *Id.* at 864.

193 *Id.*

194 *Id.*

195 *Id.* at 864-65.

196 *Id.*

197 *Id.*

198 *Id.* at 864-65.

authority to allow the search of the closet.[199] Even though she had shared the apartment with the defendant, he had kept the closet locked at all times, and Akers had not seen the inside of the closet until the day of the search.[200] However, using the *Rodriguez* test, the court nonetheless decided that the officers' beliefs were reasonable because Akers was a co-inhabitant of the residence, had a key in her possession, and opened the door for the officers. The court also noted that the closet's proximity to the front door implied general access.[201] As a result, it would not be unreasonable for the officers to believe that Akers "ordinarily had authority" to enter the closet, even though the police knew she had taken the key while the defendant was asleep. Therefore, the Fourth Circuit upheld the search of the closet.[202]

This decision erodes the protection granted by the Fourth Amendment. The defendant in *Kinney* could not foresee the warrantless invasion of his privacy by police because the closet was locked and he had no reason to suspect his girlfriend would call the police. If Kinney's girlfriend had usual access to this part of the apartment, the outcome would have been easily justified under common authority over a space; however, the court specifically held that she did not have such access.[203] As a result, the defendant could not take steps to comply with the law or at least prepare himself for this invasion of his privacy.

In *People v. Smith*,[204] the defendant had rented a house from Robinson in February on a month-to-month basis.[205] When the defendant missed his April payment, Robinson looked in the windows of the house and, seeing that some of the defendant's belongings were gone, assumed he had moved out.[206] He also noticed that a new padlock, for which he had no key, had been attached to the front door and that the back door had been nailed shut.[207]

The police told Robinson that during April they were trying to contact the defendant. On May 4, the police again talked with Robinson, who again said that he had not had contact with the defendant and that another month's rent was past due.[208] When the

199 *Id.* at 866.
200 *Id.*
201 *Id.* at 867.
202 *Id.*
203 *See id.* at 864-65.
204 561 N.E.2d 252 (Ill. App. Ct. 1990).
205 *Id.* at 254.
206 *Id.*
207 *Id.* at 255.
208 *Id.*

police asked Robinson if he intended to remove the defendant's belongings, Robinson responded that he was going to the residence that day and that he would allow the officers to enter with him. He also signed a form acknowledging consent to the search.[209] When they entered, the apartment smelled, the power was turned off, the house was a mess, and some furniture had been removed.[210] The officers found evidence which was used in the defendant's murder trial.

During trial, the defendant objected to the inclusion of evidence discovered during the search of his home on the ground that he was still the lawful resident of the house and therefore his landlord could not consent to a search of the premises.[211] To show that he had not abandoned the residence, he pointed to the fact that he had installed a new padlock on the door and explained that the house was a mess like any "untidy bachelor['s]" house might be.[212] Robinson also stated that he had never served the defendant with an eviction notice nor tacked one on the defendant's door, nor had he taken any legal steps to remove the defendant.[213] However, the defendant admitted to having moved out of the residence shortly after the shooting because his power had been turned off.[214] In an unrelated traffic case on May 10, the defendant listed his address as different from that of the house.[215]

The trial court found that the police had talked to Robinson several times from April to May 4 regarding the defendant's whereabouts and, in light of the spoiled food, even if defendant had been using the house for storage, the defendant could have contacted Robinson about the late rent payments to prevent Robinson from entering the premises and removing the defendant's property. The trial court found this to be ample evidence of abandonment. The court thus denied his motion to suppress, and he was convicted. He then appealed to the Illinois appellate court.[216]

In dicta, the appellate court specifically addressed the implications of *Rodriguez* in this case.[217] The appellate court stated that if the defendant had not abandoned the premises in question, and if the police, "based on the totality of the circumstances before them,"

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209 *Id.* at 254.
210 *Id.* at 155.
211 *Id.* at 255.
212 *Id.*
213 *Id.* at 254-55.
214 *Id.* at 255.
215 *Id.*
216 *Id.*
217 *Id.* at 259.

reasonably believed that the defendant had abandoned the premises, the evidence from the search would be admissible.[218] The court noted that agents of the government need not always be correct in this regard; rather, they simply must always be reasonable.[219] Thus, although the appellate court agreed that abandonment had occurred in this case, the appellate court concluded that the police search based only on a reasonable belief of abandonment would have nonetheless been reasonable based on the facts in this case.[220]

In situations like *Smith*, the defendant cannot foresee the invasion of his living space. That defendant in *Smith* had placed a new lock on his door and may have had a right to an eviction notice before his landlord entered his residence without his permission.[221] Thus, even if he had not paid the rent, the court stated that the police would have been reasonable in their belief that the landlord could enter the defendant's apartment, while the defendant would not expect such an entry. Although the landlord could have properly entered the property for routine maintenance work,[222] that fact does not imply that the police may enter in connection with such typical landlord duties.[223]

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218 *Id.*

219 *Id.* at 260.

220 *Id.*

221 *See also* Chapman v. United States, 365 U.S. 610 (1961) (landlord not authorized to allow police to search defendant's home).

222 *See, e.g.*, Stoner v. California, 376 U.S. 483 (1964) (repairmen permitted to enter hotel rooms without a warrant to conduct ordinary repairs).

223 Several other cases also illustrate why lack of foreseeability is a potential problem when third parties who do not have actual authority are permitted to consent to a search. *See, e.g.*, State v. Charles, 602 So. 2d 15 (La. Ct. App. 1992), *writ granted in part on other issue, denied in part, judgment affirmed*, 607 So. 2d 566 (1992), *appeal after remand*, 617 So. 2d 895 (La. Ct. App. 1993); Cowart v. State, 579 So. 2d 1 (Ala. Crim. App. 1990); United States v. Whitfield, 747 F. Supp. 807 (D.D.C. 1990), *rev'd*, 939 F.2d 1071 (D.C. Cir. 1991); Davis v. State, 414 S.E.2d 902 (Ga. Ct. App. 1992) *rev'd*, 422 S.E.2d. 546 (1992), *on remand* 432 S.E.2d 273 (Ga. Ct. App. 1993). In *Davis*, using an actual authority test and reinforcing its statements with the reasonableness standard of *Rodriguez*, the court upheld the validity of a search of the home of a mother and step-father, conducted pursuant to consent granted by their ten-year-old son. The appellate court noted that, in finding the ten-year old had authority to allow the search, the trial court said that the child was "bright, articulate and educated." *Id.* at 903. Moreover, the court said that because the child was a "latch-key" child who often stayed at home alone after school for an hour and a half, let himself into the house with his own key, and called his mother from her bedroom telephone to alert her that he was home, he possessed adequate authority to allow the search. *Id.* The trial court had, nonetheless, admitted evidence that tended to show that the child could not have friends over when his parents were not at home but that his parents did allow him to have visitors when they were at home. *Id.* Furthermore, the parents had told the child to call 911 if there were ever a problem when they were not at home. *Id.* The Georgia court said that the factors to be considered are whether the minor had reached age 18, whether he lived on the premises, whether the minor had access to the premises or could invite others thereto, whether he

C. NO SIGNIFICANT INCREMENTAL PROTECTION OF THIRD PARTIES' RIGHTS

The *Rodriguez* reasonableness test does little to advance the policy of protecting a third party's right to consent to a search of the premises in his own right as a co-inhabitant. This problem should be prima facie clear. If a person in reality does not have authority over the premises, what rights in the property does that person have to protect? If a person is concerned about illegal activity in his neighbor's house, he should exercise his right to complain to the police and "swear out" a warrant to protect his safety.

In *Cowart v. State*,[224] the court applied the *Rodriguez* test to uphold a search where an officer reasonably believed that a third party shared authority over a gym bag with the defendant. Believing that a murder suspect was staying at Laura Whitney's apartment, an officer went to her place of business and began talking to her about the murder.[225] Noticing her uneasiness, he asked if she would be more comfortable talking at her own home and she responded affirmatively. She invited the officer inside at which time he noticed a gym bag lying on the floor of the apartment. When he asked her to whom it belonged, she said it was hers and Cowart's.[226] The officer then picked up the bag, set it on the couch and was able to see a knife which Whitney denied was hers.[227] The defendant was subsequently arrested for felony murder.[228]

The defendant moved to suppress the evidence because the knife had been recovered from the gym bag in Whitney's apartment as part of an illegal search. At the suppression hearing, both Whitney and Cowart denied they had common ownership of the bag and stated that it belonged solely to the defendant. The court, however, denied Cowart's request for suppression. He was convicted of

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was at an age where he could exercise some level of discretion, and "whether the officers acted reasonably in believing that the minor had sufficient control over the premises to give a valid consent to search." *Id.* at 903-04. In considering these factors, the court found that adequate authority existed. *Id.* Moreover, it mentioned *Rodriguez* in its analysis to show the reasonableness of the officers' actions in assuming the child had control over the premises. *Id.* at 904.

The Georgia Supreme Court recognized the appellate court's error and concluded that there was not actual or implied authority to consent under *Matlock*. Davis v. State, 422 S.E.2d 546 (1992), *on remand* 432 S.E.2d 273 (Ga. Ct. App. 1993). The court did not discuss whether a reasonable belief by police could have cleansed the search.

See also supra note 131 discussing the possibility of a set-up by one's neighbor.

224 579 So. 2d 1 (Ala. Crim. App. 1990).

225 *Id.* at 2.

226 *Id.*

227 *Id.* at 2-3.

228 *Id.* at 1.

murder and appealed the admission of the knife to the appellate court.[229]

The appellate court relied on the *Rodriguez* reasonableness test to uphold the search.[230] In stressing that the beliefs of the police were reasonable, the court observed that Whitney claimed to have "common authority" over the bag and that the bag was open for all to see its contents.[231] Additionally, the court stated that she opened the bag wider when the officer asked her to do so.[232] Moreover, the court noted that the officer was apprehensive as to the truth of Whitney's statements when he found the knife, but found that these statements were relevant to Whitney's knowledge of the crime rather than her ownership of the athletic bag.[233] Finally, like in *Charles*, the court also stated that as a temporary guest at Whitney's apartment, the defendant had a diminished expectation of privacy.[234] On these factors, the court concluded that the search was a reasonable exercise of a police search and upheld the search as valid.[235]

An approach requiring true third-party authority could protect third parties just as effectively as the reasonableness test of *Rodriguez*. If the girlfriend had a fear of the contents of the bag, she could have had the officers remove the bag—a solution which would not have caused a reduction in the defendant's rights. The officers simply could not examine the contents until they procured a warrant. The lack of increased protection of third parties' rights can also be seen in several other cases discussed previously.[236] Because there is no significant increase in third-party protection, another of the policies for permitting warrantless searches is not furthered when true shared authority of a third party is not present.

VI. Alternative Tests

In response to the perceived problems of the majority's test in *Rodriguez*, Justice Marshall, joined by Justices Brennan and Stevens, claimed that reasonable authority would not adequately protect the accused's rights.[237] His proposition has been supported (as well as,

229 *Id.* at 3.
230 *Id.* at 3-4.
231 *Id.* at 4.
232 *Id.*
233 *Id.*
234 *Id.* at 5.
235 *Id.*
236 *See* United States v. Kinney, 953 F.2d 863 (4th Cir. 1992), *cert. denied*, 112 S. Ct. 2976 (1992); People v. Smith, 561 N.E.2d 252 (Ill. App. Ct. 1990).
237 Illinois v. Rodriguez, 497 U.S. 177, 189 (1990) (Marshall, J., dissenting).

to some degree, misinterpreted) by Tammy Campbell, who viewed the dissent as suggesting an actual authority standard.[238] This section will demonstrate that an "actual authority" test does not adequately respond to the problems of third-party consent and will suggest that the Court replace the *Rodriguez* reasonableness test with a "common authority in fact" test.

A. MARSHALL'S DISSENT

While not stating a test, Justice Marshall, writing for the dissent, argued that only if a defendant voluntarily chooses to limit her rights will the Fourth Amendment not be violated by a third-party consent to a search.[239] This focus on the defendant's conduct stands in stark contrast to the majority's opinion, which focused on the reasonableness of the officer's beliefs.[240] Marshall argued that the majority's decision rested on a faulty interpretation of the basis for third party consents.[241] He explained that, under the majority's reading, the validity of such searches would rest on the reasonableness of the officers' beliefs about consent under the Fourth Amendment, not on the premise that a third party may voluntarily give up some of his rights over the property by choosing to share it with another.[242] Marshall noted that searches inside houses are presumptively unreasonable without a warrant unless necessary for compelling law enforcement goals.[243] He continued:

> [b]ecause the sole law enforcement purpose underlying third-party consent searches is avoiding the inconvenience of securing a warrant, a departure from the warrant requirement is not justified simply because an officer reasonably believes a third party has consented to a search of the defendant's home.[244]

Thus, Marshall directly attacked the majority's premise that reasonableness of belief and minor police error can justify an infringement on a defendant's rights and implied that it promoted lazy police procedure.[245]

Marshall also observed that a warrant serves an important function:

> [T]he Fourth Amendment has interposed a magistrate between the citizen and the police. This was done not to shield criminals nor to make

238 Campbell, *supra* note 132, at 492-94.
239 *Rodriguez*, 497 U.S. at 190 (Marshall, J., dissenting).
240 *Id.* at 189.
241 *Id.*
242 *Id.* at 189-90.
243 *Id.* at 190.
244 *Id.*
245 *Id.* at 190-91.

> the home a safe haven for illegal activities. It was done so that an objective mind might weigh the need to invade that privacy in order to enforce the law.[246]

Marshall criticized the majority for downplaying the fact that the judgment of a zealous investigator may be clouded by the situation.[247] The Court, Marshall explained, has generally rejected most exceptions to the Fourth Amendment protection because the Bill of Rights was intended to protect the privacy of a person's home and property from sacrifice in the name of simplifying law enforcement.[248] In other words, Marshall asserted that human and constitutional rights outweigh the pragmatic concerns of the majority in providing effective police protection. Thus, in balancing the interests of the government and the individual, he concluded that the weight clearly falls on the side of protecting defendant's rights.[249]

Nonetheless, he defended at length the "assumption of the risk" nature of third-party consent to police searches of shared property.[250] Marshall noted that the Court's decisions "demonstrate that third-party consent searches are free from constitutional challenge only to the extent that they rest on consent by a party empowered to do so."[251] Thus, he attacked the reasonableness test that the majority proposed because it allows third-party consent when no agreement between the defendant and the consenting party exists regarding the third party's ability to consent, as a co-inhabitant or otherwise. He concluded that police should get a warrant, rather than rely on third-party consent, and "must therefore accept the risk of error should they instead choose to rely on consent."[252] Unfortunately, Marshall proposed no alternative test as a part of his criticism of the majority's opinion. This stopping point provides the basis for the common authority in fact test proposed below.

B. THE ACTUAL AUTHORITY APPROACH

Campbell supported Justice Marshall's opinion and asserted that "actual authority" should be present to validate a search.[253] Because Fourth Amendment case law suggests that it protects persons (as opposed to places) from unreasonable searches, Campbell

246 *Id.* at 191.
247 *Id.*
248 *Id.* at 192.
249 *Id.* at 192-93.
250 *Id.* at 194.
251 *Id.* at 198.
252 *Id.* at 193.
253 Campbell, *supra* note 132, at 494.

suggested that a "knowing and intelligent waiver" should be necessary to validate a third-party consent to search.[254] While she acknowledged that certain situations, such as exigent circumstances, may permit warrantless searches, she asserted that no exigent circumstances were present in *Rodriguez*, and therefore the search was invalid.[255] She distinguished situations where a reasonable belief in the exigent circumstances may lead to the need to conduct a search without a warrant from a situation where there is reasonable belief in a party's ability to consent.[256] Campbell then criticized the possible results of apparent authority tests.[257] Using *Rodriguez* itself as an example, she noted that the defendant was present in the residence at the time of the search and could have been awakened.[258] Thus, she concluded that the potential for police misuse of the test could be a true threat to the accused.[259]

C. WHY ACTUAL AUTHORITY FAILS

Campbell, like the *Rodriguez* majority, has missed the mark. Her proposed test of actual authority carries with it a host of new problems. First, actual authority will never work in practice. Second, since third parties cannot satisfy an actual authority standard, legally astute criminals will have an incentive to use common spaces to store criminal evidence. Finally, this practice would allow criminals to shift some of the costs of their acts onto innocent parties. Each of these shortcomings will be discussed in more detail.

Actual authority will simply never work in practice. According to Campbell, the search of a common area under the actual authority rule would require an express waiver by the defendant. No sensible criminal would permit his co-inhabitant to allow a search by the police of a common area. While a person would retain the right, insofar as the property was hers, to allow a search, if the police ever actually entered the house they would be violating the accused's rights, insofar as he had not given actual authority to search an area. Thus, the unworkable nature of such a test is clear.

However, an even more troublesome aspect of this test is its practical effect. If a criminal does not wish to consent to a search of an area, and knows that his wife cannot permit a search of the area because he has not given her actual authority to do so, he has every

254 *Id.*
255 *Id.* at 494-95.
256 *Id.* at 494-96.
257 *Id.* at 494-500.
258 *Id.* at 499.
259 *Id.* at 498-500.

incentive to use common space to store the equipment used in, and the profits from, his criminal activity. Since he has not expressly granted authority over the area to anyone, he will be protected from a search.

As a result, beyond the harm that the accused has caused society through the commission of a crime, his property rights will be protected at the expense of an innocent person's rights in the property. The co-inhabitant will almost definitely not be compensated for lost use of the property. Thus, the accused will get use of more than his share of the property, effectively rent-free. The co-inhabitant, on the other hand, is, in effect, made to subsidize the defendant's criminal behavior because she has paid for use of the common space but must bear the cost of losing protection of her rights in it.

On a less theoretical level, short of a warrant, the innocent co-inhabitant cannot even summon police protection. Thus, she may even be implicated in the crime and be forced to bear the expense of clearing her name from a criminal charge which she should not have to face. Thus, the actual authority test does not appear to protect rights more clearly than the reasonableness test.

VII. Common Authority in Fact

In light of the problems discussed above, this Comment proposes a new test designed to advance the various policies underlying the Fourth Amendment, while avoiding the shortcomings of other tests. This test is a test of common authority in fact. Courts using such a test would ask whether a person actually has express or implied common authority over the premises and is thus able to consent to a search of the premises. The protections afforded by this test balance the rights of defendants and third parties. This test focuses the inquiry on the defendant and the officer's beliefs about the defendant's guilt and consent to searches. This stands in contrast to the *Rodriguez* Court's focus on the officer's beliefs about the statements of a third party who may not have a sufficient relationship with the defendant. Further, the test corrects some of the other doctrinal concerns with the reasonableness test.

First, this test avoids the hazards of the reasonableness test by allowing only a party who has actual or implied shared authority over the premises to consent to a search. Thus, a defendant does not have to be concerned about the possible retaliation of neighbors or people who are not foreseeable "consenters" putting his procedural rights in danger. By the same token, the defendant will know who can consent and can take steps to adequately protect his privacy

if he believes a co-inhabitant is endangering his privacy. In the most extreme case, he could simply move out.

Second, the test does not go so far as actual authority, and thus may be a more workable standard since there will rarely, if ever, be an express grant of authority given by a co-inhabitant. While there may be some difficulties in determining in court that common authority in fact existed, this, like the reasonableness of an officer's belief, would be a determination left to the jury, or the judge in a motion to suppress. Even if it is a more difficult standard for officers to meet in practice, in theory it upholds Fourth Amendment policies better than *Rodriguez* because it protects against the theoretical problems of guarding potential defendants against unreasonable searches as discussed above. Moreover, the common authority in fact test does nothing to impede the procurement of a warrant should authority be an issue for an officer.

Third, the common authority in fact standard protects a third party's interest in the property. While not allowing just any person on the street to consent to a search of the house, this test does recognize the costs of criminal behavior on a co-inhabitant and shifts the burden back to the criminal's shoulders. If a criminal chooses to use common space for his criminal activities, a third party with whom he shares authority will still retain the option of summoning authorities to conduct a search. This test only eliminates the ability of third parties, with whom the defendant did not voluntarily choose to share space, to authorize a search. In short, a third-party co-inhabitant should not be forced to submit to a loss of property rights, safety and ability to call the police, while a criminal uses common space as a veritable warehouse for criminal supplies and earnings.

Fourth, the test tends to encourage police to seek out a warrant if they are unsure whether the party with whom they have spoken has authority over the premises. Consistent with Justice Marshall's suggestion, police may take the risk of a third party not being authorized to permit a search, and the resulting suppression of evidence after the search.[260] With the history of the Fourth Amendment's preference for search warrants,[261] little remains to justify why police should not seek a warrant if doubt exists. A search warrant will better protect the accused's rights because it has to be sworn for a specific item. This, as a result, tends to protect the accused from wholesale invasion of privacy from those who may in reality not have common authority. Thus, at the very least, if rights

260 *See generally* Maclin, *supra*, note 121.

261 *See, e.g.*, United States v. Lefkowitz, 285 U.S. 452 (1932).

are violated incorrectly, this restricts the violation to a limited area. Significantly, if there is a doubt over the authority—for example, the authority of a small child to give consent—a search warrant provides the solution. Lastly, if there remains a fear that the accused will sneak away or dispose of evidence in the interim, an officer may be stationed outside the accused's house while the warrant is being secured.[262] If the accused is a sufficient threat to the community, the cost of stationing an officer should be considered minimal compared to the net benefit to society. Under the common authority in fact test, these mechanisms, which already exist under current law and police practice, will be used to help balance defendants' rights against the worthy goal of effective law enforcement.

Fifth, if there are concerns that the possessor of property would lie to the police in order to have the evidence revealed and subsequently barred from use against the suspect, the possessor may be prosecuted as an aider and abettor in a felony. Also, obstruction of justice charges could possibly be issued against the possessor who wrongfully consents. It is presumed that the possessor would not often choose to "take the fall" for the criminal, and with harsh enough penalties for these crimes, the incidence of such behavior should be significantly reduced. Moreover, the evidence could still be used against the lying possessor, to the extent that he was involved in the criminal activity.

Admittedly, the common authority in fact test does have shortcomings, but none great enough to bar its usage altogether. The time and expense required to secure a lawful arrest will increase because police must investigate and ask numerous questions to be certain whether common authority in fact exists and a warrant would be necessary. In fact, it will require a warrant in almost every third-party consent case unless the police are absolutely certain of the authority. Even though the test would slow down law enforcement activities, this is a relatively small price to pay for the added protection to criminal defendants' rights which the test provides.

VIII. Application to Selected Cases

In *Cowart v. State*,[263] in which the defendant left his gym bag at Whitney's residence and the police officer opened it up to examine the contents, the common authority in fact test would lead to sup-

262 Presumably, if the situation is sufficient to constitute an exigent circumstance, the search may be executed without a warrant despite the lack of consent. Warren, Md. Penitentiary v. Hayden, 387 U.S. 294 (1967).

263 579 So. 2d 1 (Ala. Crim. App. 1990). *See supra* notes 224-35 and accompanying text for a full discussion of the case.

pression of the knife found in the bag. The officer in that case admitted to being a bit wary about opening the bag when Whitney identified the bag as hers and the defendant's. Even though Whitney lied in this case, since it turned out the bag belonged only to the defendant, this is an insufficient reason to allow the evidence to be used against the defendant. Nevertheless, it might have been possible to charge Whitney with obstruction of justice.

If Whitney had wanted the bag removed, that would not have been a problem. While she could not have authorized a search of the bag, she could have authorized a search of the apartment. Thus, the police could have confiscated the bag, but not have examined or used the contents without the defendant's consent or a warrant. As a result, both Whitney's rights and those of the defendant would have been protected. The common authority in fact test would have enabled the court to adequately protect the defendant's rights without significantly impeding law enforcement or endangering public safety.

In *United States v. Sudzus*,[264] the receptionist who allowed the DEA agents to search her bosses' offices did not have common authority in fact. The burden on the agents to get a warrant would have been slight.[265] Further, this is a classic example of why reasonableness fails. The agents asked the receptionist if she had control over the premises and if she had access to the building. When she responded affirmatively, the agents scoured the offices. Although a receptionist would probably be unlikely to possess such authority, a test like reasonableness in this case encourages agents to get only as much information as is necessary so that the court or jury will find that the agents had "reasonable beliefs." Common authority in fact would solve such dilemmas. The test may avoid what are actually "unreasonable searches" because the question of whether the third party had the requisite authority would be decided at trial. This would remove the incentives to lie with regard to the questions asked of the third party and to only seek out favorable information during the investigation because even if the agents said they asked questions sufficient to determine the third party's authority, whether the third party claimed to have authority would be irrelevant to the determination of whether common authority in fact existed.

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264 No. 92 Cr 102, 1992 WL 162959 (N.D. Ill. July 2, 1992). *See supra* notes 133-44 and accompanying text for a full discussion of the case.

265 The agents knew a drug sale was occurring. Furthermore, they already had the premises secured before they received consent from Barbra Sudzus. Thus, there was not a risk of destruction of evidence or escape while other agents procured a warrant. *Id.* at *1.

The common authority in fact test would also alleviate situations such as the ten-year-old who "told on" his parents in *Davis v. State*.[266] While the child clearly had an interest in his own safety, few adults would look at such a child as a figure of authority, even if the only object over which he exercised such power was a house. There is also a significant chance for impure motives in a case such as this, in which the child may have disliked his stepfather. In addition, mature choices, such as whether to allow police into a residence, are likely to be beyond the comprehension of many children. If the police truly believed the child was in danger, nothing would have prevented them from removing him from his household until the situation was resolved. Further, the law does not prevent a ten-year-old from giving a sufficiently detailed description for a court to issue a warrant to recover contraband of which he has personal knowledge. Moreover, the accused parties would be protected from having their entire home invaded with such a warrant requirement. Instead, only the areas and items which the child could describe in particularity would be open to inspection. Thus, both the child's and the parents' rights would be better protected.

The test would also avoid the situation that caused the district court to decide for one party and the appellate court to rule for the other in *United States v. Whitfield*.[267] This was the case in which the son "rented" a room in the house from his mother, but only paid rent when he could afford it. Whether the mother had common authority to allow the search was unclear, but again an agent could have waited at the door to the defendant's room until a warrant was obtained, since the mother freely allowed the agents in the house. Thus, monitoring the room would not have been a problem. Further, under the reasonableness standard, agents are more likely to "try" to believe the Farrie Whitfields of the world in cases like this, since they are interested in gathering evidence and making the arrest. Moreover, while factors such as whether the third party had authority are very difficult to evaluate in the heat of the moment, in this case there was little justification for rushing to secure the evidence.[268] No one else in the house was in danger, and surely the agents could have secured the room from the outside until a warrant

266 414 S.E.2d 902 (Ga. Ct. App.), *rev'd*, 422 S.E.2d 546 (Ga. 1992), *on remand* 432 S.E.2d 273 (Ga. Ct. App. 1993). *See supra* note 223 for a discussion of this case.

267 747 F. Supp. 807 (D.D.C. 1990), *rev'd*, 939 F.2d 1071 (D.C. Cir. 1991). *See supra* notes 162-88 and accompanying text for a full discussion of the case.

268 If there were a rush, it would likely be due to hot pursuit and thus fall directly under the long recognized exigency exception to the Fourth Amendment. *See, e.g.*, Warden, Md. Penitentiary v. Hayden, 387 U.S. 294 (1967).

could be issued. In short, to validate the search in a case such as this strikes at the core of the Fourth Amendment. If a person cannot expect her own jacket in her own closet in her own rented room to be safe from anyone who consents, the heart of the Fourth Amendment is lost.

IX. CONCLUSION

Unlike the reasonableness test enunciated by the Court in *Rodriguez*, the common authority in fact test offers a solution through which both accuseds' and third parties' rights are protected. The test takes into account the policies underlying the Fourth Amendment described in cases like *Matlock* and *Katz*, as well as those discussed by Marshall in his *Rodriguez* dissent. The test would prevent a defendant's right to security in his home or property from being violated without some notice, and would protect a third party's interest in shared property from being imposed upon by a criminal coinhabitant. Furthermore, this test would not significantly reduce law enforcement effectiveness. In conclusion, because the reasonableness standard will not adequately protect defendant's rights, the common authority in fact test should be adopted by the Supreme Court.

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