

Whither the Fourth Amendment: An Analysis of *Illinois v. Rodriguez*

*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.*¹

I. Introduction.....	515
A. Preface	515
B. The Exclusionary Rule	518
C. Warrantless Search and Seizure Exceptions	521
D. Third Party Consent Searches.....	522
II. <i>Illinois v. Rodriguez</i>	526
A. The Issues Presented	526
B. The Question of Jurisdiction.....	527
C. The Question of Apparent Authority	530
1. The Participants	530
2. Arguments by and on Behalf of the State.....	531
3. Arguments by and on Behalf of Rodriguez	535
a. Arguments Presented by Rodriguez	535
i. Agency Relationship.....	535
ii. The Question of Waiver	536
b. Arguments Presented by Amicus	538
4. The Decision of the Court	539
5. The Dissent.....	544
III. Whither The Fourth Amendment.....	546
A. Analysis.....	546
B. A Suggested Approach for Defense Counsels	547
Appendix I.....	552
Appendix II.....	554

I. INTRODUCTION

A. Preface

On July 26, 1985, Edward Rodriguez broke the jaw of his girlfriend, Gail Fischer.² Gail went home to her mother, Dorothy Jackson, who

1. U.S. CONST. amend. IV.

2. Ms. Fischer's name is spelled "Gail Fischer" in the U.S. Supreme Court's opinion. The trial court used "Gayle Fisher" and the Illinois Appellate Court used "Gale

called the Chicago police.³ Rodriguez was arrested in his apartment and was charged with possession of illegal drugs, which the officers had observed in plain view while in the apartment.⁴ The officers did not have an arrest warrant or a search warrant authorizing entry. They gained entrance with the assistance of Gail Fischer, who had a key and referred to the apartment as “ours.” Rodriguez moved to suppress the evidence, arguing that Fischer had taken the key without his knowledge, and therefore, she did not have common authority over the apartment and her consent was invalid. The State of Illinois argued that even if Gail Fischer did not have actual common authority over the apartment, there was no violation of the fourth amendment if the police reasonably believed at the time of their entry that Fischer possessed the authority to consent. The trial court granted Rodriguez’s motion and the Appellate Court of Illinois affirmed.⁵ These events led to the United States Supreme Court’s first statement on third party consent searches, a recognized exception to the warrant requirement of the fourth amendment since *United States v. Matlock*.⁶

Fisher.” The petitioner also used “Gale Fisher.” The respondent used “Gail Fisher,” “Gale Fisher,” and finally “Gail Fischer” at various points in his Briefs. Ms. Fischer testified at the suppression hearing. At the hearing, she spelled her last name as “F-I-S-C-H-E-R.” Brief for Petitioner at 4, *Illinois v. Rodriguez*, 110 S. Ct. 2793 (1990) (No. 88-2018) [hereinafter Brief for Petitioner]. She did not spell her first name which is indicative of the common spelling “Gail.” The fact that the trial court later spelled her name “Gayle” is ironic because the third party in *Matlock*, the landmark third party consent case, was “Gayle” (Graff). See *United States v. Matlock*, 415 U.S. 164 (1974). In addition, an amici brief refers to Gail Fischer as respondent’s wife.

3. The opinions describe Gail Fischer as Dorothy Johnson’s daughter. The respondent’s brief uses the word “mother” and the phrase, “a law enforcement officer herself.” At oral argument, Dorothy Johnson was identified as Gail Fischer’s “stepmother” and as a deputy sheriff. Record at 4, 35, *Illinois v. Rodriguez*, 110 S. Ct. 2793 (1990). At the suppression hearing, she identified herself as Gail’s mother and a deputy sheriff. Joint Appendix at 35, *Illinois v. Rodriguez*, 110 S. Ct. 2793 (1990) (No. 88-2018) [hereinafter Joint Appendix]. Under cross-examination she testified that Gail was not her natural child and stated that she had adopted Gail when Gail was three days old. *Id.* at 56.

4. The Introduction, Statement of Facts, and Statement of the Case of *Illinois v. Rodriguez*, 110 S. Ct. 2793 (1990), as written by Justice Scalia is included *infra* at Appendix I.

5. Although the Supreme Court opinion provides a citation to the Illinois Appellate Court’s decision and the Illinois Supreme Court’s denial of leave to appeal, the text of the appellate court’s opinion is unpublished; the published portion simply states, “Affirmed.” *People v. Rodriguez*, 177 Ill. App. 3d 1154, 550 N.E.2d 65, *appeal denied*, 125 Ill. 2d 572, 537 N.E.2d 816, *rev’d*, 110 S. Ct. 2793 (1990). The Illinois Supreme Court’s decision states that leave to appeal is denied. *People v. Rodriguez*, 125 Ill. 2d 572, 537 N.E.2d 816 (1989), *rev’d*, 110 S. Ct. 2793 (1990). The Illinois Appellate Court’s opinion and the Illinois Supreme Court’s decision are included *infra* at Appendix II.

6. 415 U.S. 164 (1974).

The case presented the Court with an issue “expressly reserved in *Matlock*: whether a warrantless entry is valid when based upon consent of a third party whom the police, at the time of the entry, reasonably believe to possess common authority over the premises, but who in fact does not do so.”⁷ The Court, in a 6-3 decision, answered this question in broad terms. Justice Scalia, writing for the majority, stated that “[w]hat he [Rodriguez] is assured by the Fourth Amendment itself, however, is not that no government search of his house will occur unless he consents; but that no such search will occur that is ‘unreasonable.’”⁸ Justice Marshall, writing for the dissent, replied that “[w]here this free-floating creation of ‘reasonable’ exceptions to the warrant requirement will end, now that the Court has departed from the balancing approach that has long been part of our Fourth Amendment jurisprudence, is unclear.”⁹

In *Rodriguez*, Justice Scalia appears to simplify fourth amendment jurisprudence. No longer is it a matter of whether an applicable exception exists that will permit the admission of evidence seized without a warrant. It becomes a question of the reasonableness of police actions under the facts known to the police at the time of the seizure. This is a question of fact to be determined by the trial judge at a suppression hearing. Thus, the question of admissibility of evidence seized in a warrantless search is a question of fact, not a question of law, and the factual findings of the trial judge will not be reversed unless clearly erroneous.

It is immaterial whether or not we agree with this decision because the Court decided it 6-3, with Justice Brennan in the minority. With the elevation of Justice Souter and Justice Thomas to the Court, it is unlikely that this decision and its “reasonable” standard will change in the foreseeable future. Therefore, defense attorneys must look elsewhere

7. *Illinois v. Rodriguez*, 110 S. Ct. 2793, 2796 (1990) (citation omitted).

8. *Id.* at 2799.

9. *Id.* at 2806-07 (Marshall, J., dissenting). Justice Marshall explained the balancing approach as follows:

The Court has tolerated departures from the warrant requirement only when an exigency makes a warrantless search imperative to the safety of the police and of the community. . . . The Court has often heard, and steadfastly rejected, the invitation to carve out further exceptions to the warrant requirement for searches of the home because of the burdens on police investigation and prosecution of crime. Our rejection of such claims is not due to a lack of appreciation of the difficulty and importance of effective law enforcement, but rather to our firm commitment to the view of those who wrote the Bill of Rights that the privacy of a person’s home and property may not be totally sacrificed in the name of maximum simplicity in enforcement of the criminal law.

Id. at 2803 (Marshall, J., dissenting) (citations omitted). Thus, the Court balanced law enforcement interests against the right of a person to be secure from unreasonable searches in his home.

to protect clients from invasions of their right to be secure in their persons, houses, papers, and effects from warrantless searches and seizures.

The approach suggested by this Note is that defense counsels turn to their state constitutions and state constitutional law. The Court has set a national, minimum standard of protection under the fourth amendment to the United States Constitution. The states may not go below this standard, but they are free to grant more protection to their citizens than the federal Bill of Rights. However, the Court has set a strict standard to enable a state decision to stand on adequate and independent state grounds. If this standard is met, the state decision will not be reviewed by the Court.

Part I of this Note discusses the history of the fourth amendment exclusionary rule, the exceptions to this rule, the development of the third party consent exception, the theories that explain this exception, and the concept of third party apparent authority, the primary question presented in *Illinois v. Rodriguez*.¹⁰ Part II examines the rationale of the majority opinion by a presentation of the arguments submitted to the Court by the petitioner, respondent, and amici curiae in briefs and at oral argument. It attempts to show the rationale of the Court by identifying the arguments found most persuasive by the Court. It also provides the essence of Justice Marshall's dissent and Justice Scalia's response. Part III is both analytical and conclusionary. Part III (A) analyzes the relationship of the Court's opinion to other recognized exceptions to the warrant requirement of the fourth amendment, as well as the potential impact of *Rodriguez* upon future fourth amendment cases. Part III (B) concludes with a suggested approach for defense counsels in future fourth amendment cases and recommends an early Indiana case as a model for adequate and independent state grounds.

B. *The Exclusionary Rule*

In the thirty years since the Supreme Court's landmark decision of *Mapp v. Ohio*,¹¹ the fifty-four words of the fourth amendment have generated more litigation than any other provision of the Bill of Rights. In *Mapp*, the Court applied the judicially-created federal exclusionary rule¹² to the states, holding that "all evidence obtained by searches and

10. 110 S Ct. 2793 (1990).

11. 367 U.S. 643 (1961). See generally 1 W. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 1.1 (2d ed. 1987) [hereinafter 1 W. LAFAVE, SEARCH AND SEIZURE].

12. The exclusionary rule, by which illegally seized evidence is suppressed at trial, evolved in the federal court system in a series of cases beginning with *Boyd v. United*

seizures in violation of the Constitution is . . . inadmissible in a state court."¹³ The primary rationale of the exclusionary rule has been explained as deterrence of official misconduct, protection of judicial integrity, and encouragement of the people's trust in government.¹⁴ Two other justifications for the rule have also been offered: that the defendant has a personal right to the exclusion of unlawfully seized evidence or that exclusion is designed as a form of restitution.¹⁵ Of these justifications, deterrence of official misconduct by preventing the fruits of an unreasonable search or seizure to be used at trial, is considered to be the primary purpose of the exclusionary rule.¹⁶

In recent years, the Supreme Court has relied on a deterrence theory as evidenced by *United States v. Calandra*.¹⁷ The *Calandra* Court described the exclusionary rule as a "judicially-created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved."¹⁸ The Court has followed this approach in other cases such as *United States v. Janis*,¹⁹ *Stone v. Powell*,²⁰ and *United States v. Leon*.²¹ The deterrent view, although not popular with many academic

States, 116 U.S. 616 (1886). In *Boyd*, the fourth and fifth amendments were linked in the majority opinion, although a concurring opinion limited the decision to the fifth amendment privilege against self-incrimination. *Boyd* was followed by *Weeks v. United States*, 232 U.S. 383 (1914). The *Weeks* Court found that the fourth amendment required that illegally seized evidence by federal officials must be excluded, but allowed evidence obtained by state officials to be admitted because the fourth amendment was not directed to the misconduct of state officials. The Court next addressed the exclusionary rule in *Wolf v. Colorado*, 338 U.S. 25 (1949), in which a divided Court declined to apply the *Weeks* rule to state court proceedings. *Weeks* was overruled by *Mapp* in 1961. See generally, 1 W. LAFAVE, SEARCH AND SEIZURE, *supra* note 11, § 1.1(b)-(d).

13. *Mapp*, 367 U.S. at 655.

14. See generally 1 W. LAFAVE, SEARCH AND SEIZURE, *supra*, note 11, § 1.1(f).

15. Meltzer, *Deterring Constitutional Violations by Law Enforcement Officials: Plaintiffs and Defendants as Private Attorneys General*, 88 COLUM. L. REV. 247, 269-70 (1988).

16. See generally 1 W. LAFAVE, SEARCH AND SEIZURE, *supra* note 11, § 1.1(f); Meltzer, *supra* note 15, at 267-69.

17. 414 U.S. 338 (1974).

18. *Id.* at 347-48.

19. 428 U.S. 433 (1976). In *Janis*, the Court stated that the primary purpose of the exclusionary rule is to deter police misconduct. *Id.* at 446. The Court held that this purpose would not be served by prohibiting the use of evidence illegally seized by a state official in a federal civil tax proceeding. *Id.* at 459-60.

20. 428 U.S. 465 (1976). In *Stone*, the Court confirmed the statement that deterrence is the primary purpose of the exclusionary rule. *Id.* at 484. The Court denied the use of the fourth amendment exclusionary rule in a federal habeas corpus action, finding that the deterrent effect of exclusion at that stage would be minimal. *Id.* at 493.

21. 468 U.S. 897 (1984). *Leon* resulted in the "good faith" exception to the warrant

commentators,²² appears to be the prevailing explanation of the exclusionary rule.²³

The exclusionary rule has been the subject of much criticism.²⁴ However, in the absence of any other practical method of enforcing the fourth amendment prohibition against unreasonable searches and seizures, calls for its abandonment have been fruitless.²⁵ Instead of abandoning

requirement. The Court found that a police officer could reasonably rely on a warrant that later proved defective. The reasoning of the Court was essentially that the deterrent purpose of the exclusionary rule was aimed at police misconduct. The misconduct, if any, was by a "neutral and detached magistrate." Thus, there would be no deterrent effect to police misconduct by excluding evidence obtained by good faith reliance on a magistrate's error.

22. See Meltzer, *supra* note 15, at 268-69. Professor Meltzer stated:

This [deterrent] view . . . is not popular with many academic commentators, particularly those who strongly support the exclusionary rule. Yet I believe the deterrent view's lack of academic popularity has less to do with its inherent defects than with the Burger Court's having followed it while cutting back on the scope of the rule. . . . I believe, nonetheless, that the deterrent rationale is the most persuasive explanation for the exclusionary remedy.

Id. at 268. See also 1 W. LAFAVE, SEARCH AND SEIZURE, *supra* note 11, § 1.1(f).

23. For a different view of the American exclusionary rule see Note, *Exclusion of Evidence: Exclusion of Illegally Obtained Evidence From the Prosecution's Case-In-Chief Under the Canadian Charter of Rights and Freedoms*, 4 CAN. AM. L.J. 57 (1988). Glover, the author of this Note, discusses the rationale behind the development of the American exclusionary rule from a Canadian viewpoint. Glover cites Appellate Justice Esson of the British Columbia Court of Appeals in *R. v. Strachan*, 25 D.L.R. 4th 567 (B.C.C.A. 1986), in which Justice Esson suggested that "Canada not apply the American exclusionary rule because it was developed to address problems of racism and police misconduct which are largely absent in Canada." *Id.* at 70.

24. Comment, *Third-Party Consent Searches, the Supreme Court, and the Fourth Amendment*, 75 J. CRIM. L. & CRIMINOLOGY 963, 986 n.92 (1984). See *supra* note 22.

25. See generally 1 W. LAFAVE, SEARCH AND SEIZURE, *supra* note 11, § 1.2(c); Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. CHI. L. REV. 665 (1970). Professor Oaks stated:

The exclusionary rule should not be abolished until there is something to take its place and perform its two essential functions. . . . It would be intolerable if the guarantee against unreasonable search and seizure could be violated without practical consequences. It is likewise imperative to have a practical procedure by which courts can review alleged violations of constitutional rights and articulate the meaning of those rights. The advantage of the exclusionary rule—entirely apart from any direct deterrent effect—is that it provides an occasion for judicial review, and it gives credibility to the constitutional guarantees.

Id. at 756. The above passage was quoted with approval by Professor Lafave. Professor Lafave stated that "I find wholly satisfactory the recommendation of Professor Oaks." 1 W. LAFAVE, SEARCH AND SEIZURE, *supra* note 11, § 1.2(c). However, Professor Oaks then stated:

As to search and seizure violations, the exclusionary rule should be replaced by an effective tort remedy against the offending officer or his employer. . . . A

the rule outright, the Supreme Court's approach to the actual application of the exclusionary rule regarding the warrant requirement of the fourth amendment has been to create exceptions to the rule.²⁶

C. Warrantless Search and Seizure Exceptions

Professor Meltzer stated that "the much-recited (and sometimes honored) doctrine [is] that, subject to only a few well-defined exceptions, the fourth amendment requires the police to obtain warrants."²⁷ His tongue-in-cheek remark is extremely accurate. Since the creation of the exclusionary rule, the "few well-defined exceptions" for searches of places and seizure of evidence have grown to include: searches under exigent circumstances,²⁸ searches incidental to an arrest,²⁹ seizure of items in plain view,³⁰ automobile searches,³¹ stop and frisk searches,³² admin-

practical tort remedy would give courts an occasion to rule on the content of constitutional rights . . . and it would provide the real consequence needed to give credibility to the guarantee.

Oaks, *supra*, at 756-57. Professor Oaks did not provide an example of what he considered to be "an effective tort remedy."

26. For an extensive review of recent exceptions to the warrant requirement of the fourth amendment in regard to searches of places and seizure of both evidence and persons, see Borucke, Buechler, Foley, Mejia, & Noe, *Investigation and Police Practices: Warrantless Searches and Seizures*, 77 GEO. L.J. 517 (1989) [hereinafter Borucke].

27. Meltzer, *supra* note 15, at 271. See also Katz, *In Search of a Fourth Amendment for the Twenty-first Century*, 65 IND. L. J. 549 (1990). Professor Katz stated, "Exceptions to the warrant requirement have grown so over the past two decades that the warrant requirement itself is fast becoming the exception. The formerly proclaimed judicial preference for a warrant is virtually non-existent." *Id.* at 588.

28. See, e.g., *Warden v. Hayden*, 387 U.S. 294 (1967); *Schmerber v. California*, 384 U.S. 757 (1966); *Ker v. California*, 374 U.S. 23 (1963).

29. *New York v. Belton*, 453 U.S. 454 (1981); *Michigan v. DeFillippo*, 443 U.S. 31 (1979); *United States v. Robinson*, 414 U.S. 218 (1973); *Chimel v. California*, 395 U.S. 752 (1969) (after a valid arrest, police may make a warrantless search of the suspect and the area under his immediate control to protect the police from harm and to prevent the destruction of evidence).

30. *Coolidge v. New Hampshire*, 403 U.S. 443 (1971) (police may seize evidence in plain view from a place where they are lawfully entitled to be). The plain view doctrine was extended to include an "open sky" exception. *Florida v. Riley*, 109 S. Ct. 639 (1989) (marijuana visible from a helicopter hovering 400 feet over the suspect's greenhouse was in "plain view"). See also *Dow Chem. Co. v. United States*, 476 U.S. 227 (1986) (aerial photos taken from an aircraft); *California v. Ciraolo*, 476 U.S. 207 (1986). The Court also created an "open barn" exception, *United States v. Dunn*, 480 U.S. 294 (1987), as well as an "open fields" exception, *Oliver v. United States*, 466 U.S. 170 (1984).

31. See, e.g., *Colorado v. Bertine*, 479 U.S. 367 (1987); *California v. Carney*, 471 U.S. 386 (1985); *Carroll v. United States*, 267 U.S. 132 (1925). Automobile searches led to the "inventory" exception. See, e.g., *Illinois v. Lafayette*, 462 U.S. 640 (1983); *South Dakota v. Opperman*, 428 U.S. 364, 369-70 (1976).

32. *Adams v. Williams*, 407 U.S. 143 (1972); *Terry v. Ohio*, 392 U.S. 1 (1963).

istrative searches,³³ private searches,³⁴ and searches based upon consent.³⁵ In addition, exceptions to the warrant requirement for the seizure of persons have also been created.³⁶ Each of these exceptions has been justified by balancing the interests of society in effective law enforcement against the fourth amendment right of an individual to be secure from unreasonable searches and seizures.³⁷

D. *Third Party Consent Searches*

The waiver theory (*i.e.*, that a person may waive her fourth amendment rights)³⁸ for the general consent search exception appears logical and generally, if not totally, accepted.³⁹ In contrast, the expansion of the general consent exception to consent given by a third party has not stood firmly on any single theoretical basis. The waiver theory does not explain how one person [the third-party] may waive the constitutional rights of another person.⁴⁰ Cases prior to *Matlock* turned upon the

33. *E.g.*, *New Jersey v. T.L.O.*, 469 U.S. 325, 340 (1985); *Camara v. Municipal Ct.*, 387 U.S. 523, 535-39 (1967). O.S.H.A. inspections are the latest example of warrantless administrative searches.

34. *United States v. Jacobsen*, 466 U.S. 109, 113 (1984) (fourth amendment applies to official actions and is inapplicable to actions of private parties).

35. *United States v. Mendenhall*, 446 U.S. 544, 557-59 (1980) (plurality opinion) (a court will look to the totality of the circumstances surrounding the consent to determine if it was freely and voluntarily given); *United States v. Matlock*, 415 U.S. 164, 167 n.2 (1974) (on remand, district court need not determine if lack of warning about right to refuse consent invalidates third party's consent); *Schneckloth v. Bustamonte*, 412 U.S. 218, 220 (1973) (consent must be voluntary, but need not be knowingly and intelligently given); *Bumper v. North Carolina*, 391 U.S. 542 (1968) (consent must be freely and voluntarily given). Consent to a search is considered to be a voluntary waiver of an individual's fourth amendment rights. *Schneckloth v. Bustamonte*, 412 U.S. 218, 219 (1973); *Davis v. United States*, 328 U.S. 582 (1946); *Zap v. United States*, 328 U.S. 624 (1946), *vacated*, 330 U.S. 800 (1947); *Amos v. United States*, 255 U.S. 313 (1921). For factors considered by courts in cases of consent searches, see Borucke, *supra* note 26, at 554-64, and for a discussion of waiver as a basis for consent searches, see Comment, *supra* note 24, at 985-94.

36. See generally Borucke *supra* note 26, at 529-36.

37. See *supra* note 9.

38. See *supra* note 35.

39. Comment, *supra* note 24, at 985-94. The author of this Comment argued that the Court has essentially abandoned the waiver theory as a basis for the general consent exception to the warrant requirement of the fourth amendment. She stated that "[b]oth exceptions [general and third party consent] can be supported by arguments based upon the convenience and efficiency of law enforcement officers. Efficiency, however, should not be a sufficient excuse for abandoning fourth amendment protections." *Id.* at 993. She then concluded that "the Court has left us with no theory at all to support either the general consent exception or the third party consent exception." *Id.*

40. *Id.* at 988-89.

presence or absence of an express or implied agency relationship⁴¹ or joint control.⁴² The implied agency theory was abandoned by the Supreme Court in *Stoner v. California*.⁴³ However, the *Stoner* Court also stated that an express agency relationship would support a waiver of the defendant's fourth amendment rights by a third party.⁴⁴ The "joint control/common authority" concept of *Frazier v. Cupp*⁴⁵ became the basis for the Supreme Court's decision in *Matlock*.

In *United States v. Matlock*,⁴⁶ the Supreme Court delivered its most recent statement on the third party consent search exception until *Illinois v. Rodriguez*. In *Matlock*, the Court determined that the police need only have the voluntary consent of a third party who possesses "common authority" or a "sufficient relationship" to the area to be searched.⁴⁷

41. *Bumper v. North Carolina*, 391 U.S. 543, 548 (1968) (consent by the third party grandmother to search of house and seizure of evidence against another valid if voluntarily given); *Stoner v. California*, 376 U.S. 483, 487-89 (1964) (consent by hotel clerk to search of guest's room invalid); *Chapman v. United States*, 365 U.S. 610 (1961); *Weeks v. United States*, 232 U.S. 383 (1914). An agency relationship is created when "authority to do an act can be created by written or spoken words or other conduct of the principal which, reasonably interpreted, causes the agent [third party] to believe that the principal desires him to so act." RESTATEMENT (SECOND) OF AGENCY § 26 (1958).

42. *Frazier v. Cupp*, 394 U.S. 731 (1969) (consent search of a duffle bag under control of third party held valid against owner of the bag based upon common/joint control).

43. 376 U.S. 483 (1964). In rejecting an implied agency relationship between the hotel and its guest, the Court stated, "Our decisions make clear that the rights protected by the Fourth Amendment are not to be eroded by strained applications of the law of agency. . . ." *Id.* at 488.

44. *Id.* at 489. The Court stated that the fourth amendment right of the petitioner [Stoner] was "a right, therefore, which only the petitioner could waive by word or deed, either directly or through an agent." *Id.* For a discussion of agency theory and consent searches, see Note, *The Problem of Third-Party Consent in Fourth Amendment Searches: Toward a "Conservative" Reading of the Matlock Decision*, 42 ME. L. REV. 159, 162 n.21 (1990).

45. 394 U.S. 731 (1969).

46. 415 U.S. 164 (1974). The Court upheld the consent to a police search of a bedroom by a third party, Gayle Graff, with whom the defendant had been sharing the bedroom. Noting that both parties' personal items were in the room, the Court held that her consent was based upon her mutual use of the room as well as her joint access and control of the room. In addition, the facts indicated to the Court that Matlock had assumed the risk that his co-inhabitant would allow a police search. *Id.* at 171.

47. *Id.* at 171 n.7. The Court stated:

Common authority is, of course, not to be implied from the mere property interest a third party has in the property. The authority which justifies the third-party consent does not rest upon the law of property, with its attendant historical and legal refinements. . . . but 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

Thus, under *Matlock*, the consent must be voluntary⁴⁸ and must be given by one having the requisite authority over, or common relationship to, the area to be searched. The Court, for the first time, stated that third party consent is based on the third party's "own right" over the premises⁴⁹ and thus, the third party's right to cooperate with a police investigation overcomes any invasion of the principal's area.⁵⁰ The policy of encouraging citizen cooperation with police inquiries is the justification for the third party consent exception.⁵¹ The concept that the principal assumes the risk that a third party will consent to a search is based upon the "reasonable expectation of privacy" test developed by the Court in *Katz v. United States*.⁵²

In *Katz*, the Court stated that the purpose of the fourth amendment is to "protect people, not places."⁵³ In a concurring opinion, Justice Harlan set forth a two part test for the "expectation of privacy"⁵⁴ of the principal: First, a person must exhibit an actual (subjective) expectation of privacy and second, the person's expectation must be one that society is prepared to accept as reasonable (objective).⁵⁵ Unless both tests are met, the defendant is deemed to have assumed the risk of a search and therefore is not entitled to fourth amendment protection.⁵⁶ To justify

the inspection in his own right and that the others have assumed the risk that one of their number might permit the common area to be searched.

Id.

48. See *supra* note 35.

49. See *supra* note 47.

50. Note, *supra* note 44, at 162.

51. *Coolidge v. New Hampshire*, 403 U.S. 443, 488 (1971) ("[I]t is no part of the policy underlying the Fourth . . . Amendment to discourage citizens from aiding to the utmost of their ability in the apprehension of criminals."). *Schneekloth v. Bustamonte*, 412 U.S. 218, 231 (1973). ("[C]onsent searches are part of the standard investigatory techniques of law enforcement agencies.").

52. 389 U.S. 347 (1967).

53. *Id.* at 351. Thus, the fourth amendment protects privacy interests, not property interests.

54. *Id.* at 361 (Harlan, J., concurring). Justice Harlan explained:

As the Court's opinion states, the "Fourth Amendment protects people, not places." The question, however, is what protection it affords to those people. Generally, as here, the answer to that question requires reference to a "place." My understanding of the rule that has emerged from prior decisions is that there is a twofold requirement, first that a person have exhibited an actual (subjective) expectation of privacy, and, second, that the expectation be one that society is prepared to recognize as "reasonable." Thus a man's home is, for the most purposes, a place where he expects privacy, but objects, activities, or statements that he exposes to the "plain view" of outsiders are not "protected" because no intention to keep them to himself has been exhibited.

Id.

55. *Id.*

56. Note, *supra* note 44, at 182.

third party consent searches, the *Matlock* Court combined the *Katz* "reasonable expectation of privacy" test with requirements that the third party have "common authority over" and "sufficient relationship to the area." However, courts split dramatically on the meaning of these terms with contradictory results.⁵⁷

The *Matlock* Court expressly reserved the issue of the apparent authority of a third party to consent to a search, stating "we do not reach another major contention of the United States . . . that the Government in any event only had to satisfy the District Court that the searching officers reasonably believed that Mrs. Graff [the third-party] had sufficient authority [to consent]."⁵⁸ Courts that addressed the question of apparent authority, prior and subsequent to *Matlock*, also split. Some courts held that the government must always prove actual authority of the party consenting, no matter what the appearances.⁵⁹ Others held that for apparent authority to be effective, the officer must take some affirmative action prior to the search to ascertain the basis of the third party's authority.⁶⁰ The majority of courts, both state and federal, who considered the question of apparent authority to consent, adopted an objective test: The reasonable appearance of authority to consent, from the viewpoint of the officers, under the circumstances facing the officers, at the time the third party consents to a search.⁶¹

57. See generally Note, *supra* note 44, at 167-87. Deschene, the author of this Note, stated that courts have split over the meaning of the phrases: "(1) 'common authority' vs. 'other sufficient relationship,' (2) 'mutual use' vs. 'joint access,' (3) inspection 'in his own right,' (4) 'co-inhabitants,' (5) assumption of risk, (6) 'the [extent of] common area,' and (7) 'reasonable to recognize' [apparent vs. actual authority]." The Note provides an extensive discussion of cases illustrating each of these topics. *Id.* at 167.

58. *United States v. Matlock*, 415 U.S. 164, 177 n.14 (1974).

59. *United States v. Warner*, 843 F.2d 401, 404-05 (9th Cir. 1988) (refusing to extend the *Leon* "good faith" exception to warrantless searches when the police officer has a reasonable basis for his actions); *United States v. Harris*, 534 F.2d 95, 96-97 (7th Cir. 1976) (*Matlock* requires both actual and apparent authority); *United States v. Cook*, 530 F.2d 145, 147 (7th Cir. 1976); *People v. Vought*, 174 Ill. App. 3d 563, 528 N.E.2d 1095 (1988), *cert. denied*, 109 S. Ct. 3228 (1989); *People v. Bochniak*, 93 Ill. App. 3d 575, 417 N.E.2d 722 (1981), *cert. denied*, 455 U.S. 938 (1982); *People v. Miller*, 40 Ill. 2d 154, 238 N.E.2d 407 (1968), *cert. denied*, 393 U.S. 961 (1968); *State v. Carsey*, 59 Or. App. 225, 650 P.2d 987 (1982), *aff'd*, 295 Or. 32, 664 P.2d 1085 (1983).

60. *United States v. Sealey*, 830 F.2d 1028, 1031 (9th Cir. 1987) (police asked wife several questions to determine her control of the area); *United States v. Sledge*, 650 F.2d 1075, 1079 (9th Cir. 1981) (police attempted to ascertain landlord's authority).

61. See, e.g., *United States v. Rodriguez*, 888 F.2d 519 (7th Cir. 1989) (not related to Edward Rodriguez); *United States v. Yarbrough*, 852 F.2d 1522 (9th Cir. 1985), *cert. denied*, 109 S. Ct. 171 (1988); *United States v. Isom*, 588 F.2d 858 (2d Cir. 1978); *United States v. Peterson*, 524 F.2d 167 (4th Cir. 1975); *Nix v. State*, 621 P.2d 1347 (Alaska 1981); *People v. Gorg*, 45 Cal. 2d 776, 291 P.2d 469 (1955); *People v. Adams*, 53 N.Y.2d

A final question regarding common authority, not clearly defined by the *Matlock* Court, involves the legal status of "common authority": Whether "common authority" is a question of fact or a question of law.⁶² The distinction becomes vital if the determination of "common authority" at a suppression hearing is raised on appeal. If "common authority" is a question of fact, the standard for appellate review is "clearly erroneous."⁶³ If "common authority" is a question of law, de novo review is warranted.⁶⁴ Courts also split regarding this question, with the majority holding that "common authority" is a question of fact,⁶⁵ although some courts consider "common authority" to be a mixed question of fact and law.⁶⁶ One recent commentator argued that "the issue of authority to consent ought to be considered at least a mixed question of law and fact."⁶⁷ Thus, the stage was set for the Court to consider the issues that had developed since the *Matlock* decision in 1974. The opportunity arose in the persons of Ed Rodriguez, Gail Fischer, and Officers Jim Entress and Ricky Gutierrez of the Chicago police in the case of *Illinois v. Rodriguez*.

II. ILLINOIS V. RODRIGUEZ

A. *The Issues Presented*

The parties in *Illinois v. Rodriguez* presented the Supreme Court with three issues. The petitioner, the State of Illinois, first argued that the *Matlock* third party consent exception to the warrant requirement should apply because Gail Fischer had common authority over the premises.⁶⁸ Alternatively, the State argued that even if Gail Fischer did not in fact have actual authority to consent, the entry of the officers was proper because the officers reasonably believed that she did.⁶⁹ The respondent, Edward Rodriguez, disagreed with the position of the State.

1, 422 N.E.2d 537, 439 N.Y.S.2d 877, *cert. denied*, 454 U.S. 854 (1981). *See also* Brief for Petitioner, *supra* note 2, at 13; 3 W. LAFAVE, SEARCH AND SEIZURE, *supra* note 11, § 8.3(g).

62. *Matlock*, 415 U.S. at 169-72.

63. *See, e.g.*, *United States v. McMurtrey*, 534 F.2d 1321 (8th Cir. 1976). "Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous. . . ." FED. R. CIV. P. 52(a). *See also* Note, *supra* note 45, at 189.

64. *United States v. McConney*, 728 F.2d 1195 (9th Cir. 1984).

65. *See, e.g.*, *United States v. Baswell*, 792 F.2d 755, 758 (8th Cir. 1986) ("We now expressly hold that such determinations are factual issues. . .").

66. *United States v. Guzman*, 852 F.2d 1117 (9th Cir. 1988).

67. Note, *supra* note 44, at 189.

68. *Illinois v. Rodriguez*, 110 S. Ct. 2793, 2797 (1990).

69. *Id.*

Furthermore, Rodriguez argued that the decision of the Illinois courts rests upon the Illinois Constitution, which provides him greater protection than the fourth amendment.⁷⁰ Thus, because the decision of the Illinois courts rests upon adequate and independent state grounds, the Supreme Court should not review it.⁷¹

The issue of actual authority to consent was conceded by the State at oral argument.⁷² Therefore, the Court essentially adopted the findings of the Illinois Appellate Court,⁷³ stating that “the Appellate Court’s determination of no common authority over the apartment was obviously correct.”⁷⁴ Two issues remained: (1) the question of jurisdiction and (2) the question of apparent authority.

B. *The Question of Jurisdiction*

Citing *Michigan v. Long*,⁷⁵ Justice Scalia wrote that “[w]hen a state court decision is clearly based on state law that is both adequate and independent, we will not review the decision.”⁷⁶ He then stated, “[b]ut when a ‘state court decision fairly appears to rest primarily on federal law, or to be interwoven with federal law,’ we require that it contain a ‘plain statement’ that rests upon adequate and independent state grounds.”⁷⁷ Justice Scalia then quoted the *Long* Court stating,

70. *Id.* at 2798.

71. *Id.*

72. Record at 3, *Illinois v. Rodriguez*, 110 S. Ct. 2793 (1990) (No. 88-2018). Joseph Claps, First Assistant Attorney General of Illinois stated the issue before the Court as follows: “Illinois asks this Court to find that the court below committed error when it affirmed the trial court’s suppression of evidence by failing to recognize that a police officer’s reasonable reliance on a third party’s apparent authority to allow consensual entry is a valid exception to the warrant requirement.” *Id.* During the argument of James W. Reilley, Attorney for the Respondent, the following exchange occurred:

CHIEF JUSTICE REHNQUIST: Well, but I don’t —I don’t think that the — the petitioner is really contending that there was actual authority to consent. . . .

MR. REILLEY: Yes. So, all right. If the — if there—if they concede, which they obviously do. . . .

Id. at 38.

73. See Appendix II.

74. *Illinois v. Rodriguez*, 110 S. Ct. 2793, 2798 (1990).

75. 463 U.S. 1032 (1983). In *Long*, the Court admitted that “we have thus far not developed a satisfying and consistent approach for resolving this vexing issue [the question of independent and adequate state grounds].” *Id.* at 1038. The Court had taken a number of approaches, none of which had proven satisfactory to it. Therefore, in *Long*, the Court developed a clear, simple standard for independent and adequate state grounds, a standard that, if met, precluded review of a state court decision by the Supreme Court. *Id.* at 1040-41.

76. *Rodriguez*, 110 S. Ct. at 2798.

77. *Id.* (citing *Long*, 463 U.S. at 1040, 1042).

“[O]therwise, ‘we will accept as the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it to do so.’”⁷⁸

Rodriguez argued that while the Illinois Appellate Court clearly relied upon federal law in deciding the question of actual authority, “it is readily apparent that both the trial court and the Illinois Appellate Court considered only state law in turning aside the State’s ‘apparent authority’ arguments.”⁷⁹ Illinois courts insist that only actual authority can suffice for a consent search, a position deeply rooted in Illinois state constitutional law.⁸⁰ Thus, there is clearly a “‘bona fide separate, adequate and independent’ state law ground for the rulings in this case.”⁸¹ In citing the trial court record, Rodriguez stated there was “no doubt that the rulings of the Illinois courts rejecting the State’s arguments regarding ‘apparent authority’ . . . have been based *exclusively* on . . . Illinois Supreme Court decisions.”⁸²

Rodriguez then argued that the appellate court also adhered to Illinois case law in rejecting the apparent authority argument presented by the State. Rodriguez quoted the appellate court as follows:

[W]e note that the trial court properly rejected the State’s contention that Fisher [sic] had the apparent authority to consent. This conclusion is consistent with prior Illinois cases rejecting the argument that warrantless entries and searches may be upheld if the party who consented to the entry had apparent authority to do so but lacked actual authority.⁸³

Rodriguez then argued, “Finally, and significantly, the Illinois Supreme Court declined to review the Appellate Court’s decision notwithstanding

78. *Id.* (citing *Long*, 463 U.S. at 1041).

79. Brief for Respondent at 17, *Illinois v. Rodriguez*, 110 S. Ct. 2793 (1990) (No. 88-2018) [hereinafter Brief for Respondent].

80. *Id.*

81. *Id.* at 17-18.

82. *Id.* at 19 (emphasis in original). Respondent quoted the trial court record as follows:

I think I am obliged to follow the present situation in Illinois which would not allow for police to act on the apparent authority of the person in allowing the search of an apartment, the person in this case being Gayle [sic] Fischer. . . . It might change tomorrow.

The present state of the law does not allow for it and *Adams* [*People v. Adams*, 53 N.Y.2d 1, 422 N.E.2d 537, 439 N.Y.S.2d 877 (1981), *cert. denied*, 454 U.S. 854 (1981)] can only be instructive and I think can only really be acted on and adopted by a reviewing court and not by the trial court, given the fact that there are Illinois reviewing court opinions on the subject.

Id. at 19-20.

83. *Id.* at 20 (citing Joint Appendix, *supra* note 3, at 103). See Appendix II.

the State's request for the court to consider whether 'apparent authority' to consent would justify a search."⁸⁴ Rodriguez concluded, "Thus the record in this case shows a consistent application of *state* law requiring nothing less than actual common authority for consent to search."⁸⁵

Rodriguez recognized that "the Illinois Appellate Court's opinion does not contain an explicit statement, per *Michigan v. Long*, that its rejection of any consideration of 'apparent authority' arguments is based exclusively on state law."⁸⁶ However, Rodriguez argued that such a statement is not necessary because "it is *impossible*" for the court's decision to rest on its interpretation of federal law.⁸⁷ Rodriguez noted that the court's opinion cites only a single federal case, *Matlock*, and argued that the court's discussion of *Matlock* is limited to the question of common authority to support a consent search.⁸⁸ Rodriguez argued that the Illinois courts could not have gained any guidance regarding the question of apparent authority from *Matlock* because "*Matlock explicitly declines to address that question.*"⁸⁹

The State argued that the Illinois Appellate Court clearly decided the case "solely under precedents from this [Supreme Court] and other courts applying the Fourth Amendment."⁹⁰ The State noted that the lower court opinion "did not cite any Illinois constitutional provision or statute, nor did it cite any case applying any Illinois constitutional provision or statute."⁹¹ In addition, the "respondent [Rodriguez] never mentioned the Illinois Constitution in either the trial court or the Appellate Court."⁹² The cases cited by the Illinois Appellate Court refer only to the fourth amendment.⁹³ None of these cases mention the Illinois Constitution.⁹⁴ The only precedent discussed at length or quoted in the Illinois Appellate Court opinion is *Matlock*.⁹⁵

The State agreed that "*Matlock* did not resolve the precise issue in this case."⁹⁶ However, the State argued that "the fact that the Illinois

84. *Id.*

85. *Id.*

86. *Id.*

87. *Id.*

88. *Id.* at 21.

89. *Id.* (citing *United States v. Matlock*, 415 U.S. 164, 177 n.14 (1974)) (emphasis in original).

90. Reply Brief for Petitioner at 16, *Illinois v. Rodriguez*, 110 S. Ct. 2793 (1990) (No. 88-2018) [hereinafter Reply Brief for Petitioner].

91. *Id.* at 17.

92. *Id.*

93. *Id.*

94. *Id.* at 18.

95. *Id.* at 17.

96. *Id.* (citing *United States v. Matlock*, 415 U.S. 164, 177 n.14 (1974)).

Appellate Court announced that it was guided by . . . *Matlock* . . . and quoted extensively from it, establishes that this case was decided under the Fourth Amendment.”⁹⁷ The State argued that to succeed with his jurisdictional argument under *Michigan v. Long*, Rodriguez “must show some ‘plain statement’ by the lower court that it decided the case on the basis of state law.”⁹⁸ Rodriguez failed to do this because there is “no statement in the opinion . . . plain or otherwise,” that the case was decided on the basis of the Illinois Constitution or a statute or even “any precedent decided on state law grounds.”⁹⁹ The Court agreed with the State:

Here, the Appellate Court’s opinion contains no “plain statement” that its decision rests on state law. The opinion does not rely on (or even mention) any specific provision of the Illinois Constitution, nor even the Illinois Constitution generally. Even the Illinois cases cited by the opinion rely upon no constitutional provisions other than the Fourth and Fourteenth Amendments of the United States Constitution.¹⁰⁰

The Court concluded that “the Appellate Court of Illinois rested its decision on federal law” and therefore, the Court had jurisdiction.¹⁰¹

C. *The Question of Apparent Authority*

1. *The Participants.*—The question of “apparent authority to consent” attracted the interest of a number of parties not directly involved in the case. Consequently, the Court granted leave for amicus curiae briefs on behalf of both the State and Rodriguez. The Solicitor General of the United States, the Attorney General of California, and the Americans For Effective Law Enforcement, Inc.¹⁰² filed on behalf of the State. The Assistant to the Solicitor General of the United States also participated in oral argument on behalf of the State by special leave of

97. *Id.* at 17-18.

98. Reply Brief for Petitioner, *supra* note 90, at 19.

99. *Id.*

100. *Illinois v. Rodriguez*, 110 S. Ct. 2793, 2798 (1990).

101. *Id.*

102. Joined by: The International Association of Chiefs of Police, Inc., The Lincoln Legal Foundation, The National District Attorneys Association, Inc., The National Sheriff’s Association, Inc., The Chicago Crime Commission, and the Illinois Association of Chiefs of Police. Amici identified Gail Fischer as the wife of Edward Rodriguez. Brief of the Americans for Effective Law Enforcement, *Illinois v. Rodriguez*, 110 S. Ct. 2793 (1990) (No. 88-2018). Consequently, the arguments presented by Amici discuss a case quite different from that of a girlfriend who had a key (e.g., “[T]he police belief that defendant’s wife had “common authority” over the premises was well grounded.”). *Id.*

the Court.¹⁰³ The National Association of Criminal Defense Lawyers filed on behalf of Rodriguez.

2. *Arguments by and on Behalf of the State.*—The State presented two arguments in support of its position: (1) that a search pursuant to consent given by one who reasonably appears to have actual authority to give consent, on the basis of the information known to the police at the time consent is given, is reasonable and thus constitutional and (2) “in the alternative, the good faith exception to the exclusionary rule should apply if the warrant requirement of the Fourth Amendment is not excused.”¹⁰⁴ Thus, the State requested the Court to create either another exception to the warrant requirement (reasonable reliance on apparent authority) of the fourth amendment or to extend the *Leon* “good faith” exception to third party consent searches.¹⁰⁵

The State argued that the Court, in considering fourth amendment questions, had “been guided at all times by reasonableness.”¹⁰⁶ The State then quoted the Court in *United States v. Chadwick*,¹⁰⁷ in which the Court said, “Our fundamental inquiry concerning Fourth Amendment issues is whether or not a search or seizure is reasonable under all circumstances.”¹⁰⁸ “The test for apparent authority should be whether the police . . . reasonably believe that the third party possesses the requisite authority to consent.”¹⁰⁹ This test ignores the subjective beliefs of the officers, looking only to objective facts which the officers had available to them at the time consent was given.¹¹⁰ This test makes the legality of all searches dependent on the facts and circumstances known at the time, not on facts determined much later in the clear view of hindsight.¹¹¹

Such a position is consistent with the approach taken by the Court in *Hill v. California*¹¹² and *Maryland v. Garrison*.¹¹³ “In *Hill*, the

103. *Rodriguez*, 110 S. Ct. at 2796.

104. Reply Brief for Petitioner, *supra* note 90, at 1.

105. *See supra* note 22.

106. Reply Brief for Petitioner, *supra* note 90, at 1.

107. 433 U.S. 1 (1977).

108. Reply Brief for Petitioner, *supra* note 90, at 1 (quoting *Chadwick*, 433 U.S. at 9).

109. Brief for Petitioner, *supra* note 2, at 14.

110. *Id.*

111. Reply Brief for Petitioner, *supra* note 90, at 3.

112. 401 U.S. 797 (1971). In *Hill*, the police went to Hill’s apartment to arrest him. Miller answered the door. Miller matched the description of Hill, and the police arrested him, even though he produced identification. Evidence seized in the subsequent search incidental to the arrest was held admissible against Hill because the arrest was lawful, though mistaken. *Id.* at 804-05.

113. 480 U.S. 79 (1987). In *Garrison*, the police were executing a warrant search of an apartment when they unknowingly entered a second apartment. The physical layout of

officers mistakenly, but reasonably, arrested the wrong man.”¹¹⁴ The Court held that the arrest was valid and evidence seized in a search incidental to the arrest was admissible against another party, *Hill*.¹¹⁵ In *Garrison*, the police searched the wrong apartment in the mistaken belief that the apartment searched was the particular one described in a warrant. No warrant actually authorized the search conducted by the officers. Nevertheless, the Court “held that the search was justified by the reasonable belief of the officers that a warrant, which actually was for different premises, authorized the search.”¹¹⁶

The State noted that this Court had “ruled that the legality of a warrantless search of an automobile is to be determined by the facts known to the police at the time they searched the vehicle.”¹¹⁷ This Court also ruled that a “stop and frisk” of a subject based upon a reasonable suspicion that the subject is engaged in a criminal activity is constitutional, based upon the facts known to the officer at the time of the “stop and frisk.”¹¹⁸ Similarly, this Court held in *Maryland v. Buie*¹¹⁹ that a warrantless “protective sweep” search, for the protection of police officers, is “justified by the apparent danger to the officers [at the time of the sweep] rather than by facts that later become known after the search.”¹²⁰ The State argued that “[t]hus, the general test applied under a recognized exception to the warrant requirement is that the legality of the search will be determined by the information known by the police at the time of the search, whether that information later turns out to be true or false.”¹²¹

Amicus Curiae United States agreed that “the principles announced in *Hill* and *Garrison* controlled in this case.”¹²² “Under those principles, a search based on consent is justified when it is supported by a reasonable, but mistaken, belief that a consenting party is authorized to consent. . . .”¹²³ A search based upon consent does not require a “waiver”

the building was such that the police had no way of knowing that they were in the wrong apartment.

114. Reply Brief for Petitioner, *supra* note 90, at 3.

115. *Id.*

116. *Id.* at 4.

117. *Id.* (citing *Michigan v. Long*, 463 U.S. 1032 (1983)). “In *Long*, the police saw a hunting knife in a car and then searched the car for additional weapons. There were no other weapons in the automobile, but some marijuana was found.” *Id.* The Court found the search to be constitutional.

118. *Id.* (citing *Terry v. Ohio*, 392 U.S. 1 (1968)).

119. 499 U.S. 325 (1990).

120. Brief for Petitioner, *supra* note 2, at 5.

121. *Id.*

122. Brief for the United States as Amicus Curiae Supporting Petitioner at 7, *Illinois v. Rodriguez*, 110 S. Ct. 2793 (1990) (No. 88-2018).

123. *Id.*

of a person's fourth amendment rights; consent can validly be provided by a third-party."¹²⁴

The United States argued that apparent authority should be held sufficient for three reasons. "First, a rule requiring a showing of apparent authority adequately restricts the discretion of [the police] by requiring that they comply with objective, ascertainable rules."¹²⁵ "Subjective good faith is not enough."¹²⁶ Second, invalidating consent searches that at the time appeared reasonable would impose a substantial burden on all consent searches and would deter the police from "acting on consents that appear (and are) perfectly valid."¹²⁷ Third, a strict requirement of actual authority is excessive and is more than "what is required to protect reasonable expectations of privacy."¹²⁸ The United States then stated, "[T]o the extent that freedom from official invasion is safeguarded by the Fourth Amendment, that interest is qualified by the need for tolerance of reasonable mistakes in order to protect the ability of our police to discharge their mission."¹²⁹

The United States argued that an apparent authority rule would be consistent with the Court's decision in *Stoner v. California*.¹³⁰ The police reliance on the consent of a hotel clerk was unreasonable because they were aware that the clerk was a clerk and that the room was rented by Stoner.¹³¹ In addition, *Stoner* involved a mistake of law, not a mistake of fact, which does not come under the apparent authority concept.¹³² That factor distinguishes *Stoner* from cases in which police "make a reasonable mistake of fact about a third-party's apparent authority."¹³³

Amicus Curiae State of California stated the issue before the Court succinctly: "Does a police officer's reasonable reliance upon a third party's apparent authority to consent to an entry or search constitute 'unreasonable' conduct within the meaning of the Fourth Amendment, thereby invoking the exclusionary rule?"¹³⁴ In noting that the doctrine originated in a California case,¹³⁵ California stated that "a doctrine which

124. *Id.* (citing *United States v. Matlock*, 415 U.S. 164 (1974)).

125. *Id.* (citing *Delaware v. Prouse*, 440 U.S. 648, 654 (1979)).

126. *Id.*

127. *Id.*

128. *Id.*

129. *Id.* at 16.

130. *Id.* at 18.

131. *Id.* at 18 nn.13 & 14.

132. *Id.* at 18-19 n.14.

133. *Id.* at 18-19.

134. Brief for the People of the State of California as Amicus Curiae, Question Presented, *Illinois v. Rodriguez*, 110 S. Ct. 2793 (1990) (No. 88-2018) [hereinafter Amicus Brief of California].

135. *People v. Gorg*, 291 P.2d 469, 473 (1955).

recognizes that mistakes made by policemen acting reasonably cannot be deterred by the exclusionary rule and may not fairly be characterized as 'unreasonable' conduct under the Fourth Amendment."¹³⁶

California argued that *Hill v. California*¹³⁷ and *Maryland v. Garrison*¹³⁸ "teach that a policeman's reasonable mistake of fact is not 'unreasonable' conduct within the meaning of the Fourth Amendment."¹³⁹ California then stated:

"The question whether the exclusionary rule's remedy is appropriate in a particular context has long been regarded as an issue separate from the question whether the Fourth Amendment rights of the party seeking to invoke the rule were violated by police conduct."

The Illinois court incorrectly resolved both questions. First, in holding that official reliance upon a third party's consent given without actual authority automatically violates the Fourth Amendment, the court below focused exclusively on the existence of a constitutional right of privacy, without considering whether the police intrusion into protected privacy was "unreasonable" within the meaning of the Fourth Amendment. This approach forgets that "the Fourth Amendment does not proscribe all searches and seizures, but only those that are unreasonable." . . . Second, the state court suppressed evidence without considering the propriety of imposing the exclusionary rule, thereby ignoring the teaching of *United States v. Calandra*, that "[a]s with any remedial device, the application of the rule has been restricted to those areas where its remedial objectives are thought most efficaciously served."¹⁴⁰

California then argued that the Illinois courts also misinterpreted *Stoner*. "The actions of the police in *Stoner* were not constitutionally unreasonable because their mistake was one of law, rather than of fact; instead, their conduct was unreasonable in the tort law sense, i.e., it fell below the behavioral norm of a reasonably well trained officer."¹⁴¹ Amicus explained that "*Stoner* simply rejects an officer's subjective good faith as an excuse for his unreasonable mistake of constitutional law."¹⁴²

136. Amicus Brief of California, *supra* note 134, at 2.

137. 401 U.S. 797 (1971).

138. 480 U.S. 79 (1987).

139. Amicus Brief of California, *supra* note 134, at 3.

140. *Id.* at 4-5 (citations omitted).

141. *Id.* at 11.

142. *Id.* at 12.

California concluded by quoting the Court in *Michigan v. Tucker*¹⁴³ in which the Court stated, “The deterrent purpose of the exclusionary rule necessarily assumes that the police have engaged in willful, or at the very least, negligent conduct which has deprived the defendant of some right. . . . Where official action was pursued in complete good faith, however, the deterrence rationale loses much of its force.”¹⁴⁴ Therefore, a decision suppressing evidence may instruct police as to the law they must follow in the future, “but such a decision cannot alter their perception of facts in future cases” of similar nature.¹⁴⁵

3. *Arguments by and on Behalf of Rodriguez.*

a. *Arguments presented by Rodriguez*

Rodriguez raised two arguments to support his position: (1) that Gail Fischer did not have “apparent authority” to consent to entry¹⁴⁶ and (2) that “the search cannot be justified on the ground that Gail Fisher [sic] appeared to have authority to consent in the eyes of the police.”¹⁴⁷ His first argument is based upon the law of agency. The second argument, as restated by the Court, is that “permitting a reasonable belief of common authority to validate an entry would cause a defendant’s Fourth Amendment rights to be ‘vicariously waived.’”¹⁴⁸

i. *Agency relationship*

Rodriguez argued that the terms “apparent authority” to consent and “appearance of authority,” are not synonymous, contrary to their use by the State and the United States.¹⁴⁹ “[A]n agent cannot create apparent authority by his own representations; rather, apparent authority can only be created by the manifestations the principal makes to the third party.”¹⁵⁰ Rodriguez stated that “apparent authority” has been used in some decisions “because the third-party who consents to a search typically is a person with some type of formal relationship to the defendant — usually a spouse — which might be viewed as giving rise

143. 417 U.S. 433, 447 (1974).

144. Amicus Brief of California, *supra* note 134, at 13 (citing *Tucker*, 417 U.S. at 447).

145. *Id.*

146. Brief for Respondent, *supra* note 79, at 22.

147. *Id.* at 25.

148. *Illinois v. Rodriguez*, 110 S. Ct. 2793, 2798 (1990).

149. Brief for Respondent, *supra* note 79, at 22.

150. *Id.* at 23 (citing RESTATEMENT (SECOND) OF AGENCY § 27 (1958)) (emphasis in original).

to a colorable agency relationship.”¹⁵¹ Rodriguez quoted *Stoner v. California*¹⁵² in which the Court stated that “[t]he rights protected by the Fourth Amendment are not to be eroded by strained *applications of the law of agency* or unrealistic doctrines of ‘*apparent authority*.’”¹⁵³

Rodriguez noted that his case did not require the Court to “address the question of whether or how agency law applies to a third-party consent search.”¹⁵⁴ There was “absolutely no plausible agency relationship”¹⁵⁵ between the defendant and Gail Fischer. Rodriguez never represented to the police that Fischer was his agent nor “is there any marriage relationship from which even a ‘strained’ argument of an ‘agency’ relationship could conceivably be made.”¹⁵⁶ Thus, “the doctrine of apparent authority is totally inapplicable to this case.”¹⁵⁷

ii. *The question of waiver*

In addressing the issue of waiver, Rodriguez quoted Justice Stewart in *Stoner* where the Court said, “It is important to bear in mind that it was the petitioner’s constitutional right which was at stake, here, and not the night clerk’s nor the hotel’s. It was a right, therefore, which only the petitioner could waive by word or deed. . . .”¹⁵⁸ Rodriguez argued that the same consideration applies in his case because his “Fourth Amendment rights are at stake, not Gail Fischer’s.”¹⁵⁹ Only he had a legitimate expectation of privacy in the apartment; therefore, only he should be permitted to waive that privacy.¹⁶⁰ Rodriguez noted that the “Court has stressed the personal nature of Fourth Amendment rights,” quoting the Court in *Rakas v. Illinois*,¹⁶¹ in which the Court held that “Fourth Amendment rights are personal rights which . . . may not be vicariously asserted.”¹⁶² Rodriguez argued that “[i]t would be incongruous if rights that cannot be vicariously asserted can be vicariously waived.”¹⁶³ “The Fourth Amendment was written to protect the privacy interests

151. *Id.*

152. 376 U.S. 483 (1964).

153. Brief for Respondent, *supra* note 79, at 23 n.15 (quoting *Stoner*, 376 U.S. at 488) (emphasis in original).

154. *Id.* at 24.

155. *Id.*

156. *Id.*

157. *Id.*

158. Brief for Respondent, *supra* note 79, at 31-32.

159. *Id.* at 32.

160. *Id.*

161. 439 U.S. 128 (1978).

162. Brief for Respondent, *supra* note 79, at 32 (quoting *Alderman v. United States*, 394 U.S. 165, 174 (1969)).

163. *Id.*

of individual citizens.”¹⁶⁴ Therefore, the reasonable expectations of privacy of citizens “are not protected when police fail to make reasonable inquiries into the validity of a third-party’s ‘consent’ to search.”¹⁶⁵

In rebutting the arguments by the State and the United States, Rodriguez argued that their reliance on the “reasonable-factual-mistake approach set forth in *Maryland v. Garrison*¹⁶⁶ and *Hill v. California*”¹⁶⁷ was misplaced.¹⁶⁸ *Garrison* and *Hill* involved “genuine *unavoidable* factual errors made by police in the course of executing searches or arrests.”¹⁶⁹ In contrast, Rodriguez argued that his case “involved an unwarranted police decision to bypass constitutionally favored procedures¹⁷⁰ and conduct a . . . warrantless search on the basis of an obviously dubious ‘consent’ by a third-party known to be hostile to the resident of the apartment.”¹⁷¹ Unlike the situation in *Garrison* and *Hill*, the police had three options to a warrantless search of the apartment and the seizure of Rodriguez: (1) they could have obtained an arrest warrant for Rodriguez based upon Gail Fischer’s complaint; (2) they could have obtained a search warrant for drugs based upon probable cause using Gail Fischer’s statements; and (3) they “could have simply knocked on the apartment door . . . and made a front-door arrest when [Rodriguez] answered”¹⁷² as occurred in *Hill*. They instead chose to enter on the basis of a “dubious third-party ‘consent.’”¹⁷³ “In short, there is simply no comparison between the . . . factual errors in *Garrison* and *Hill* and the police decision in this case. . . .”¹⁷⁴

Furthermore, “the need for the police to make reasonable efforts to inform themselves before accepting the validity of a third-party’s consent is particularly strong given the especially sensitive nature of third party consent issues.”¹⁷⁵ If there was indeed an error here, as opposed to outright bad faith, “the police clearly had the opportunity and the

164. *Id.*

165. *Id.*

166. *See supra* note 113.

167. *See supra* note 112.

168. Brief for Respondent, *supra* note 79, at 25.

169. *Id.* (emphasis in original).

170. *Id.* at 26. Brief of Amicus Curiae, The National Association of Criminal Defense Lawyers, *Illinois v. Rodriguez* 110 S. Ct. 2793 (1990) [hereinafter Amicus Brief of Lawyers] (“one of the most venerable principles of fourth amendment law is that warrantless searches and seizures ‘are per se unreasonable . . . subject only to a few specifically established and well-delineated exceptions’”).

171. Brief for Respondent, *supra* note 79, at 26.

172. *Id.* at 26-27.

173. *Id.* at 27.

174. *Id.* at 28.

175. *Id.* at 31.

means to avoid it.”¹⁷⁶ A simple question such as “‘Do you *currently* reside at this apartment’ is hardly burdensome” to the police and barely constitutes an “investigation” by the police.¹⁷⁷

b. Arguments presented by amicus

Amicus National Association of Criminal Defense Lawyers (Lawyers) argued that accepting the concept of apparent authority in this case would be equal to creating “an ignorance is bliss exception,”¹⁷⁸ which was rejected by the Supreme Court of Oregon in *State v. Carsey*.¹⁷⁹ The Oregon Supreme Court stated that the fourth amendment “was not enacted for the primary purpose of encouraging police to act in good

176. *Id.*

177. *Id.*

178. Amicus Brief of Lawyers, *supra* note 170, at 14 (quoting *State v. Carsey*, 295 Or. 32, 44, 664 P.2d 1085, 1094 (1983)). At oral argument, the Court asked whether the officers had asked Gail Fischer if she lived in the apartment at the time. Attorney for the State, Claps, conceded that they did not. The following exchange then occurred between the Court and Attorney Claps (Note: The Official Transcript does not identify the Justice asking questions. At numerous places it is easily determined who is speaking by Counsel’s response. In the following exchange, the Criminal Law Reporter (46 Cr. L. 3192, 3193) summary of oral argument identifies the Justices as Justice O’Connor followed by Justice Scalia. The hand annotated copy of the transcript provided to the writer notes that the questions were asked by Justice Scalia):

THE COURT: Do you think that under some apparent authority doctrine that there would be an obligation on the part of the police if there is any ambiguity present to ask appropriate questions to determine the basis of the person’s assumption of authority?

MR. CLAPS: We believe that the test should be an objective test of what the police officers knew and should have known in light of the facts and circumstances at the time. In this particular case —

THE COURT: Well, can they proceed on the assumption that ignorance is bliss or do they have some obligation to inquire?

MR. CLAPS: They have — they cannot proceed on the fact that ignorance is bliss. I think that’s primarily the ruling in *Stoner v. California*. You can’t ignore the fact that a person who is a motel clerk does not have the ability to gain — to give entry into an apartment. . . .

And so it was reasonable under the information given to the police, including the fact that most of her belongings were still in the apartment, that we don’t have in this case a situation where ignorance is bliss.

Record at 4-6.

THE COURT: So it’s just not what they know. It’s — it’s — they do have some positive obligation to make inquiry, don’t they?

MR. CLAPS: Yes, they do. . . . They have — you have to review in terms of what they knew or should have known in light of the facts and circumstances.

Id. at 7.

179. 295 Or. 32, 664 P.2d 1085 (1983).

faith. It was enacted to protect people in their homes against unreasonable, warrantless searches.”¹⁸⁰ The Lawyers stated:

Any decision fashioning an apparent authority doctrine will have disastrous consequences in police practice and the administration of justice. Once police obtain a colorable consent to search, they will have little incentive to conduct any further investigation to determine whether the person has actual authority. . . . Police will have little incentive to invoke the warrant procedure. Indeed, where probable cause is lacking or obtaining a warrant would be inconvenient, police would have substantial incentive to seek out someone lacking in actual authority but whose circumstances might provide them with the appearance of authority.¹⁸¹

They then argued that the extension of the *Leon* exception¹⁸² to “the case of searches based on a police officer’s reasonable reliance on a third party’s apparent authority to consent must be rejected.”¹⁸³ The instant case is unlike *Leon* in which the police relied upon a warrant issued by a neutral and detached magistrate.¹⁸⁴ “[S]uppressing evidence seized based on an officer’s erroneous belief [in a third-party’s apparent authority] . . . will deter that officer and others from deciding to base a search on the consent of persons lacking [actual] authority.”¹⁸⁵

The Lawyers concluded that the apparent authority doctrine fashioned by the State is a mirage that “purports to authorize searches for which no authority to search exists. It creates an illusion of reasonableness while permitting, and even encouraging, the very type of police misconduct the fourth amendment was intended to prevent.”¹⁸⁶ Adoption of an apparent authority exception or extending the *Leon* “good faith” exception to this scenario “would constitute an all too dangerous step toward elimination of the warrant requirement.”¹⁸⁷

4. *The Decision of the Court.*—The Court did not address Rodriguez’s agency law argument because, as noted by the State, his argument was based upon a misinterpretation of *Stoner v. California*.¹⁸⁸ The State argued that *Stoner* dealt only with the question of actual authority and

180. Amicus Brief of Lawyers, *supra* note 170, at 15 (quoting *Casey*, 295 Or. at 45, 664 P.2d at 1094).

181. *Id.* at 18-19.

182. *See supra* note 21.

183. Amicus Brief of Lawyers, *supra* note 170, at 21.

184. *Id.* at 20.

185. *Id.* at 21-22.

186. *Id.* at 23.

187. *Id.* at 24.

188. Reply Brief for Petitioner, *supra* note 90, at 7.

did not “decide or discuss the question of whether a search may be justified by consent from a person with apparent authority.”¹⁸⁹ The Court apparently agreed with the State that Rodriguez’s argument was misplaced and thus saw no need to address the issue.

In addressing Rodriguez’s second argument, Justice Scalia wrote, “respondent asserts that permitting a reasonable belief of common authority to validate an entry [search] would cause a defendant’s Fourth Amendment rights to be ‘vicariously waived.’ We disagree.”¹⁹⁰ This Court would not permit evidence seized in violation of the fourth amendment to be admitted based solely on “a trial court’s mere ‘reasonable belief’—derived from statements by unauthorized persons—that the defendant has waived his objection.”¹⁹¹ However, “one must make a distinction between . . . trial rights that *derive* from the violation of constitutional guarantees and . . . the nature of those constitutional guarantees themselves.”¹⁹²

Justice Scalia then quoted the Court in *Schneckloth v. Bustamonte*:¹⁹³

There is a vast difference between those rights that protect a fair criminal trial and the rights guaranteed under the Fourth Amendment. Nothing, either in the purposes behind requiring a “knowing” and “intelligent” waiver of trial rights, or in the practical application of such a requirement suggests that it ought to be extended to the constitutional guarantee against unreasonable searches and seizures.¹⁹⁴

Justice Scalia further explained:

What Rodriguez is assured by the trial right of the exclusionary rule, where it applies, is that no evidence seized in violation of the Fourth Amendment will be introduced at his trial unless he consents. *What he is assured by the Fourth Amendment itself, however, is not that no government search of his house will occur unless he consents; but that no such search will occur that is “unreasonable.”* U.S. Const. Amdt. 4. There are various elements, of course, that can make a search of a person’s house

189. *Id.* (citing 3 W. LAFAYE, SEARCH AND SEIZURE 262 n.96 (2d ed. 1987)).

190. *Illinois v. Rodriguez*, 110 S. Ct. 2793, 2798 (1990).

191. *Id.*

192. *Id.* (emphasis in original).

193. 412 U.S. 218 (1973).

194. *Rodriguez*, 110 S. Ct. at 2799 (citing *Schneckloth*, 412 U.S. at 241). The Court appeared to be differentiating between express trial rights (e.g., rights expressly granted under the fifth and sixth amendments), and rights which derive from a judicially created remedy (the exclusionary rule) of a violation of privacy under the fourth amendment.

“reasonable”—one of which is the consent of the person or his cotenant.¹⁹⁵

Thus, Justice Scalia determined that “the essence of respondent’s argument is that we should impose on this element . . . [a] requirement that their [the officers] judgment [in regard to facts] be not only responsible but correct.”¹⁹⁶

Justice Scalia explained that “the fundamental objective that alone validates all unconsented searches is . . . the seizure of persons who have committed or are about to commit crimes, or of evidence related to crimes.”¹⁹⁷ “But ‘reasonableness’ . . . does not demand that the government be factually correct.”¹⁹⁸ For example, “[w]arrants need only to be supported by ‘probable cause.’”¹⁹⁹ Another element often required to render an unconsented search “reasonable” is that the search be authorized by a valid warrant.²⁰⁰ However, even here the Court has not held that “reasonableness” precludes errors of judgment in respect to factual issues,²⁰¹ as shown by *Garrison* in which the Court said, “[T]he validity of the search . . . depends on whether the officers’ failure to realize the overbreadth of the warrant was objectively understandable and reasonable. . . . The objective facts available to the officers at the time suggested no distinction between [the suspect’s] apartment and the third-floor premises.”²⁰² The warrant requirement is sometimes supplanted by other elements that render an unconsented search reasonable even when the person arrested is the wrong person.²⁰³ To illustrate, Justice Scalia quoted the *Hill* Court:

[T]he officers in good faith believed that Miller was Hill and arrested him. They were quite wrong . . . and subjective good-faith would not in itself justify either the arrest or the subsequent search. But sufficient probability, not certainty, is the touchstone of the Fourth Amendment . . . the officers’ mistake was understandable and the arrest a reasonable response to the situation facing the officers at the time.²⁰⁴

195. *Id.* (emphasis added).

196. *Id.*

197. *Id.*

198. *Id.*

199. *Id.* (citing *Illinois v. Gates*, 462 U.S. 213, 232 (1983)).

200. *Id.*

201. *Id.* (citing *Maryland v. Garrison*, 480 U.S. 79 (1987)).

202. *Id.*

203. *Id.* at 2799-2800 (discussing *Hill v. California*, 401 U.S. 797 (1971)). *See supra* note 112.

204. *Id.* at 2800.

Justice Scalia then wrote that “[i]t would be superfluous to multiply these examples. It is apparent that . . . to satisfy the ‘reasonableness’ requirement of the Fourth Amendment, what is generally demanded of the many factual determinations . . . made by agents of the government . . . is not that they always be correct, but that they always be reasonable.”²⁰⁵ Thus, the Court saw

no reason to depart from this general rule with respect to facts bearing upon authority to consent to a search. Whether the basis for such authority exists is the sort of recurring factual question to which [police officers] must be expected to apply their judgment; and all the Fourth Amendment requires is that they answer it reasonably.²⁰⁶

Justice Scalia next addressed the language in *Stoner v. California*²⁰⁷ that “the rights protected by the Fourth Amendment are not to be eroded . . . by unrealistic doctrines of ‘apparent authority.’”²⁰⁸ Justice Scalia wrote:

It is ambiguous, of course, whether the word “unrealistic” is descriptive or limiting—that is, whether we were condemning as unrealistic all reliance upon apparent authority, or whether we were condemning only such reliance upon apparent authority as is realistic. Similarly ambiguous is the opinion’s earlier statement that “there [is no] substance to the claim that the search was reasonable because the police . . . had a reasonable basis for the belief that the clerk had authority to consent to a search.” Was there no substance to it because it failed as a matter of law, or because the facts could not possibly support it? . . .

“It is important to bear in mind that it was the petitioner’s constitutional right which was at stake here, and not the night clerk’s nor the hotel’s. It was a right, therefore, which only the petitioner could waive by word or deed, either directly or through an agent.” *Id.* But as we have discussed, what is at issue when a claim of apparent consent is raised is not whether the right to be free of searches has been *waived*, but whether the right to be free of *unreasonable* searches has been *violated*. . . . “But there is nothing in the record to indicate that *the police had any basis whatsoever to believe that the night clerk had been*

205. *Id.*

206. *Id.*

207. 376 U.S. 483 (1964).

208. *Illinois v. Rodriguez*, 110 S. Ct. 2793, 2800 (1990) (citing *Stoner*, 376 U.S. at 488).

authorized by the petitioner to permit the police to search the petitioner's room."

The italicized language should have been deleted, of course, . . . if the statement . . . meant that an appearance of authority could never validate a search.²⁰⁹

Thus, Justice Scalia determined that "the rationale of *Stoner* was ambiguous—perhaps deliberately so."²¹⁰ It is a reasonable reading of *Stoner*, perhaps a preferable one, that the police could not rely upon the consent of the hotel clerk because they knew he was a clerk, and they knew that the room was rented by Stoner.²¹¹ The police "could not reasonably have believed that the [clerk] had general access or control over [Stoner's room]."²¹² Therefore, the Court was correct in *Matlock* when it regarded the present issue as unresolved.²¹³

In conclusion, Justice Scalia stated that as *Stoner* demonstrates, the decision in this case does not mean that police officers may always accept a person's invitation to enter.²¹⁴ Even if such an invitation is accompanied by an explicit statement that the person lives there, the facts and circumstances facing the officers could conceivably be that a reasonable person would doubt the statement and not act without further inquiry.²¹⁵ "As with other factual determinations bearing upon search and seizure, determination of consent to enter [search] must be judged against an objective standard. . . ."²¹⁶ The standard is "would 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?"²¹⁷ "If not, then warrantless entry without further inquiry is unlawful unless authority actually exists. But if so, the search is valid."²¹⁸

The Court noted that the Illinois Appellate Court "found it unnecessary to determine [if] the officers reasonably believed Fischer had the authority to consent [to their entry] because it ruled as a matter of law that a reasonable belief could not validate the entry."²¹⁹ Therefore, the Court remanded to the trial court for consideration of that question.²²⁰

209. *Id.* at 2800-01 (emphasis in original) (citations omitted).

210. *Id.* at 2801.

211. *Id.*

212. *Id.*

213. *See id.*

214. *Id.*

215. *Id.*

216. *Id.*

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

218. *Id.*

219. *Id.*

220. *Id.*

5. *The Dissent*.—Justice Marshall, joined by Justice Brennan and Justice Stevens, dissented. Justice Marshall argued that the majority's position is based upon "a misconception of the [legal] basis for third-party consent searches."²²¹ Such searches are not unconstitutional because they are "reasonable," but "a person may voluntarily limit his expectation of privacy."²²² "If a [person] has not so limited his expectation of privacy, the police may not dispense with the safeguards [of] the Fourth Amendment."²²³ "The baseline for the reasonableness of a search or seizure in the home is the presence of a warrant."²²⁴ This Court has "further held that a 'search or seizure carried out on a suspect's premises without a warrant is *per se* unreasonable, unless . . . it falls within one of a carefully defined set of exceptions."²²⁵

Justice Marshall stated that the Court only allowed exceptions to the warrant requirement under exigent circumstances, that is, the safety of the police or of citizens.²²⁶ The Court has rejected exceptions to the warrant requirement because of the burdens on police investigation and criminal prosecutions.²²⁷ This is due to the Court's firm commitment that the privacy of one's home should not be sacrificed to the interest of efficiency in law enforcement.²²⁸ Therefore, "[i]n the absence of an exigency . . . warrantless home searches and seizures are unreasonable under the Fourth Amendment."²²⁹ Third party consent searches are not based upon an exigency; therefore, when the police are faced with the choice of relying on a third party's consent or securing a warrant, they should secure a warrant, or accept the risk of error if they choose to rely on consent.²³⁰

Justice Marshall argued that the cases cited by the majority "provide no support for its holding."²³¹ *Brinegar v. United States*²³² only confirmed the "unremarkable proposition that police only need probable cause, not absolute certainty."²³³ In *Maryland v. Garrison*, the police had

221. *Id.* at 2802 (Marshall, J., dissenting).

222. *Id.*

223. *Id.*

224. *Id.* (citing *Skinner v. Railway Labor Executives' Ass'n.*, 109 S. Ct. 1402 (1989)). See *Payton v. New York*, 445 U.S. 573 (1980) (zone of privacy is nowhere more clearly defined than when it is bounded by the dimensions of an individual's home).

225. *Illinois v. Rodriguez*, 110 S. Ct. 2793, 2803 (1990) (citing *Coolidge v. New Hampshire*, 403 U.S. 443, 474 (1971)).

226. *Id.*

227. *Id.*

228. *Id.*

229. *Id.*

230. *Id.* at 2804.

231. *Id.* at 2805.

232. 338 U.S. 160 (1949).

233. *Illinois v. Rodriguez*, 110 S. Ct. 2793, 2805 (1990)

obtained a valid warrant. "Because searches based upon warrants are generally reasonable, the officers' reasonable mistake of fact did not render their search 'unreasonable.'"²³⁴ Thus, the "majority's glib assertion that '[i]t would be superfluous to multiply' its citations" to such cases is correct, but not for the reason given by the majority.²³⁵ "Those cases provide no illumination of the issues raised in this case, and further citation to like cases would be as superfluous as the discussion upon which the majority's conclusion presently depends."²³⁶ Justice Marshall concluded:

Instead of judging the validity of consent searches, as we have in the past, based on whether a defendant has in fact limited his expectation of privacy, the Court today carves out an additional exception to the warrant requirement for third party consent searches. . . . Where this free floating creation of "reasonable" exceptions to the warrant requirement will end, now that the Court has departed from the balancing approach that has long been part of our Fourth Amendment jurisprudence, is unclear. But by allowing a person to be subjected to a warrantless search in his home without his consent and without exigency, the majority has taken away some of the liberty that the Fourth Amendment was designed to protect.²³⁷

Justice Scalia addressed Justice Marshall's dissent in a footnote. Justice Scalia said:

Justice Marshall's dissent rests upon a rejection of the proposition that searches pursuant to valid third-party consent are "generally reasonable." . . . Only a warrant or exigent circumstances, he contends, can produce "reasonableness"; consent validates the search only because the object of the search thereby "limit[s] his expectation of privacy," . . . so that the search becomes not really a search at all. We see no basis for making such an artificial distinction. To describe a consented search as a non-invasion of privacy and thus a non-search is strange in the extreme. And while it must be admitted that this ingenious device can explain why consented searches are lawful, it cannot explain why seemingly consented searches are "unreasonable," which is all that the Constitution forbids.²³⁸

234. *Id.* at 2806.

235. *Id.*

236. *Id.*

237. *Id.* at 2806-07.

238. *Id.* at 2800, n.*.

Justice Scalia then stated that "the only basis for contending that the constitutional standard could not possibly have been met here is the argument that reasonableness must be judged by the facts as they were, rather than the facts as they were known."²³⁹ Such a hindsight "argument has long since been rejected."²⁴⁰

III. WHITHER THE FOURTH AMENDMENT

A. Analysis

Contrary to Justice Marshall's statement, the Court did not create "an additional exception to the warrant requirement for third-party consent searches."²⁴¹ The Court was invited to create either another exception to the warrant requirement, an "apparent authority exception," or to extend the *Leon* "good faith" exception to encompass third party apparent authority to consent.²⁴² However, the majority did not do so, instead presenting the sweeping "reasonable" test for all fourth amendment questions. Nowhere in the opinion does Justice Scalia limit the "reasonable" test to the question of consent searches, third party consent, or to apparent authority. Nor does Justice Scalia even mention *Leon* or a "good faith" exception. Throughout the opinion he refers to the word "unreasonable" as used in the fourth amendment.

It appears that Justice Scalia recognized that fourth amendment jurisprudence has created more exceptions to the warrant requirement than there are words in the fourth amendment itself.²⁴³ In a manner of speaking, all exceptions to the warrant requirement have a common nexus; either society finds the conduct of the police reasonable or society finds the conduct of the defendant unreasonable. Searches under exigent circumstances are accepted by society as reasonable to protect the police, the community, or both. On the other hand, if something is left in plain sight, society finds it unreasonable to protect an interest that the defendant himself has shown no desire to protect. A person expects that telephone calls made from an enclosed public phone are private; thus, it is unreasonable for the police to invade that privacy.²⁴⁴ Is it reasonable for a police officer to believe that a hotel clerk can allow the search of an occupied room? Obviously not, as *Stoner* so states. Is it reasonable for the police to rely on a warrant that is valid

239. *Id.*

240. *Id.*

241. *Id.* at 2806 (Marshall, J., dissenting).

242. See *supra* text accompanying notes 104-45.

243. See *supra* note 27.

244. E.g., *Katz v. United States*, 389 U.S. 347 (1967).

on its face? Obviously it is, as *Leon* illustrates. In other words, to answer Justice Marshall, it is not a matter of where this reasonableness test will lead us; it is an explanation of how we got to where we are today.

Justice Scalia also answered the “question of law” or “question of fact” issue.²⁴⁵ He clearly stated that determinations of consent are factual questions.²⁴⁶ He also stated that “as with other factual determinations bearing upon search and seizure, determinations of consent to enter must be judged by an objective standard.”²⁴⁷ This statement, of course, implies that all fourth amendment determinations bearing upon the validity of a warrantless search or seizure under the “reasonable” test are factual determinations. Thus, they are the province of the trial court and will only be overruled if “clearly erroneous.”²⁴⁸ Therefore, it appears that Justice Scalia has attempted a simplification of fourth amendment jurisprudence. It is no longer a matter of what exception applies or if there is an applicable exception to the warrant requirement, it is a matter of determining the reasonableness of the behavior of the police under the facts of the case at the time of the police action. Such a determination is a question of fact and is to be determined by the finder of fact; in the case of an evidentiary question, the determiner of law is also the finder of fact, the trial judge.

Whether we agree with this decision or not is immaterial. What is important is that the Court decided this case 6-3. With the retirement of Justice Brennan and the elevation of Justices Souter and Thomas to the Court, it is likely that a similar case will result in a similar vote, even as great as an 8-1 vote. Thus, it is likely that *Rodriguez* will be fourth amendment precedent for the foreseeable future. Therefore, in addressing future fourth amendment cases, it is wise to remember the words of Justice Jackson: “We are not final because we are infallible, but we are infallible only because we are final.”²⁴⁹ The Court may not be always right, but in questions of federal constitutional law, it is always final.

B. A Suggested Approach For Defense Counsels

As confirmed by *Rodriguez*, “whether or not a violation of the Fourth Amendment occurs [is] a matter of federal constitutional law, and a state court [may] not substitute its own judgment on this matter

245. See *supra* notes 57-67 and accompanying text.

246. *Illinois v. Rodriguez*, 110 S. Ct. 2793, 2800 (1990).

247. *Id.* at 2801.

248. See *supra* note 63.

249. *Brown v. Allen*, 344 U.S. 443, 540 (1953).

for that of the Supreme Court.”²⁵⁰ In state criminal actions, the prosecution will prefer to rely on decisions such as *Rodriguez* on questions regarding the admissibility of evidence. The defense will most likely prefer a higher standard.

State courts are free to adopt, under state law, exclusionary sanctions for violations of state constitutional, statutory, and even administrative law.²⁵¹ “Where this is done, both the decision as to whether a violation of the underlying requirement has occurred and as to whether exclusions of resulting evidence is required are matters of state law, not subject to review by the Supreme Court.”²⁵² Most states have state constitutional provisions similar to the fourth amendment of the United States Constitution.²⁵³ “In those few states lacking a state equivalent of the Fourth Amendment, other state constitutional language may provide a basis for finding protected rights similar to those protected by the Fourth Amendment.”²⁵⁴

Justice Scalia carefully analyzed the jurisdictional question raised by *Rodriguez*, even though the lower court opinion is unpublished. He set forth the standard for review of a state court decision by the Supreme Court as established in *Michigan v. Long*.²⁵⁵ “[W]e require that it contain a ‘plain statement’ that rests upon adequate and independent state grounds.”²⁵⁶ The *Long* Court stated that “[w]e believe that such an approach will provide state judges with a clearer opportunity to develop state jurisprudence unimpeded by federal interference.”²⁵⁷ The *Long* Court then quoted *Minnesota v. National Tea Co.*,²⁵⁸ in which it stated, “It is fundamental that state courts be left free and unfettered by us in interpreting their state constitutions.”²⁵⁹ This is the final lesson of *Rodriguez*. It appears that the Court is saying: “Defense Counsel: Your state constitution probably gives your client more protection than the Fourth Amendment. We are a national, minimum standard (and not a very high one at that). Base your

250. E.W. CLEARY, MCCORMICK ON EVIDENCE 452 (3d ed. 1984).

251. *Id.*

252. *Id.*

253. *Id.* See, e.g., ALASKA CONST. art. I, § 14; CAL. CONST. art. 1, § 19; ILL. CONST. art. 1, § 6; IND. CONST. art. 1, § 11; ME. CONST. art. I, § 5; N.J. CONST. art. 1, par. 7; N.Y. CONST. art. 1, § 12; PA. CONST. art. 1, § 8; TEX. CONST., art. 1, § 9. See also E.W. CLEARY, *supra* note 250, at 4562 n.24.

254. See E.W. CLEARY, *supra* note 250, at 452 n.24.

255. See *supra* note 75.

256. *Illinois v. Rodriguez*, 110 S. Ct. 2793, 2798 (1990).

257. *Long*, 463 U.S. at 1041.

258. 309 U.S. 551 (1934).

259. *Long*, 463 U.S. at 1041 (citing *National Tea Co.*, 309 U.S. at 557).

arguments on adequate and independent state grounds and we will not review it.”

The Court seems to return to federalism which is consistent with the approach in *Webster v. Reproductive Health Services*.²⁶⁰ In *Webster*, the Court appeared to say that some questions regarding abortion are best handled by the states. The Constitution and Bill of Rights do not expressly recognize a right of privacy. Some states do.²⁶¹ Thus, this writer believes that the Court is saying that rights of privacy protected by the fourth amendment are questions best handled by the states.²⁶² The Court has set a national, uniform minimum standard. The states may not go below this standard, but they are free to grant more protection to their citizens than the federal Bill of Rights. Because the majority of criminal actions are brought by the states in state courts, perhaps questions of criminal law that relate to an individual’s right of privacy are best handled by the states. There is no guarantee that state courts will grant more protection than the federal constitution, but at least it is clear that the states cannot grant less than the federal constitution.

A hornbook example of how a state decision should be written so that it will “rest on upon adequate and independent state grounds” was provided by the Indiana Supreme Court in 1922, fully sixty-one years prior to *Michigan v. Long*. In *Callender v. State*,²⁶³ thirty-eight years before *Mapp v. Ohio*,²⁶⁴ the Indiana Supreme Court adopted the exclusionary rule, prohibiting evidence seized in violation of Article 1, section 11 of the Indiana Constitution. Judge Willoughby, writing for a unanimous court and relying solely on Article 1, section 11²⁶⁵ and section

260. 492 U.S. 490 (1989).

261. In 1980, Florida voters amended the state constitution to provide: “Every natural person has the right to be let alone and free from government intrusion into his private life except as otherwise provided herein. This section shall not be construed to limit the public’s right of access to public records and meetings. . . .” FLA. CONST. art. I, § 23. Alaska, California, and Montana also have express state constitutional provisions guaranteeing an independent right to privacy.

262. In *Katz v. United States*, the Court stated: “But the protection of a person’s general right to privacy—his right to be let alone by other people—is, like the *protection of his property* and of his very life, left largely to the law of the individual states.” *Katz v. United States*, 389 U.S. 347, 350-51 (1967) (emphasis added). Thus the states, not the federal government, are the final guarantors of personal privacy.

263. 193 Ind. 91, 138 N.E. 817 (1923).

264. 367 U.S. 643 (1961).

265. “The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable search, or seizure, shall not be violated; and no warrant shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the person or thing to be seized.” IND. CONST. art. I, § 11. It is apparent that what is important is the meaning given these words by the Indiana Supreme Court, not the actual words themselves.

14²⁶⁶ of the Indiana Constitution said:

If the property was secured by search and seizure under the pretext of a search warrant, which was invalid for any reason, then the property so seized could not be used as evidence against the appellant and its admission over his objection was prejudicial error. . . .²⁶⁷

There being no evidence to support the verdict except that procured by the illegal search warrant, and improperly admitted, it is not supported by sufficient evidence and is contrary to law. The judgment is reversed. . . .²⁶⁸

In discussing the above statement from *Callender*, Chief Justice Randall T. Shepard of the Indiana Supreme Court wrote the following: “[T]hese words were written nearly forty years before *Mapp v. Ohio*, at a time when the exclusionary rule was so unpopular that Professor Wigmore was moved to call it revolutionary and against all rules of evidence theretofore pertaining to the subject.”²⁶⁹ Turning to the Indiana Constitution, Chief Justice Shepard said that “the Indiana Constitution provides a great variety of protections for citizens which are not contained in the Federal Bill of Rights. . . . [T]here are a great many parts of Indiana’s Bill of Rights which simply have no federal counterpart.”²⁷⁰ However, the ability of the Court to apply the Indiana Constitution effectively depends upon the ability of the attorneys who appear before it.²⁷¹ “The Indiana Supreme Court has signaled twice this year [1988] that we will not take Indiana constitutional claims to be serious ones when litigants themselves treat them lightly.”²⁷² “In short, our ability to make good law frequently depends on counsel, and I solicit your help.”²⁷³

Chief Justice Shepard concluded with the following:

The rights of Americans cannot be secure if they are protected only by courts or only by one court. Civil liberties protected only by a U.S. Supreme Court are only as secure as the Warren Court or the Rehnquist Court wishes to make them. The pro-

266. “No person shall be put in jeopardy twice for the same offense. No person, in any criminal prosecution, shall be compelled to testify against himself.” IND. CONST. art. I, § 14.

267. *Callender*, 193 Ind. at 96, 138 N.E. at 818.

268. *Id.* at 99, 138 N.E. at 819.

269. Shepard, *Second Wind for the Indiana Bill of Rights*, 22 IND. L. REV. 575, 578 (1989) (citing J. WIGMORE, EVIDENCE, §§ 2183-84 (2d ed. 1923)).

270. *Id.* at 580.

271. *Id.* at 584.

272. *Id.*

273. *Id.* at 585.

tection of Americans against tyranny requires that state supreme courts and state constitutions be strong centers of authority on the rights of the people. I am determined that the Indiana Constitution and the Indiana Supreme Court be strong protectors of those rights.²⁷⁴

There are forty-nine other state supreme courts. This writer firmly believes that the sentiments expressed by Chief Justice Shepard are not unique to the Indiana Supreme Court. However, as Chief Justice Shepard stated, a state supreme court's "ability to make good law frequently depends on counsel."²⁷⁵ It is up to us, the lawyers, to make the arguments in such a manner that the rights guaranteed by our state constitutions benefit our clients to the fullest extent possible.

In *Rodriguez* and in *Long*, the Court has shown us what is required by the U.S. Supreme Court. Chief Justice Shepard has told us that the state supreme courts are prepared to answer the challenge. It is now up to us, the lawyers, to provide the quality arguments which will enable our state supreme courts to answer the challenges that face the civil liberties of our nation today.

FRANK C. CAPOZZA*

274. *Id.* at 586.

275. *Id.* at 585.

* B.S., 1964, St. Lawrence Univ.; M.A., 1967, Indiana Univ.; J.D., December, 1991, Indiana University—Indianapolis.

APPENDIX I

The following is the Introduction, Statement of Facts, and Statement of the Case of *Illinois v. Rodriguez*, 110 S. Ct. 2793 (1990).

Justice SCALIA delivered the opinion of the Court.

In *United States v. Matlock*, 415 U.S. 164, 94 S. Ct. 988, 39 L. Ed. 2d 242 (1974), this Court reaffirmed that a warrantless entry and search by law enforcement officers does not violate the Fourth Amendment's proscription of "unreasonable searches and seizures" if the officers have obtained the consent of a third party who possesses common authority over the premises. The present case presents an issue we expressly reserved in *Matlock*, see *Id.*, at 177, n. 14, 94 S. Ct. at 996: whether a warrantless entry is valid when based upon the consent of a third party whom the police, at the time of the entry, reasonably believe to possess common authority over the premises, but who in fact does not do so.

Respondent Edward Rodriguez was arrested in his apartment by law enforcement officers and charged with possession of illegal drugs. The police gained entry to the apartment with the consent and assistance of Gail Fischer, who had lived there with respondent for several months. The relevant facts leading to the arrest are as follows.

On July 26, 1985, police were summoned to the residence of Dorothy Jackson on South Wolcott in Chicago. They were met by Ms. Jackson's daughter, Gail Fischer, who showed signs of a severe beating. She told the officers that she had been assaulted by respondent Edward Rodriguez earlier that day in an apartment on South California. Fischer stated that Rodriguez was then asleep in the apartment, and she consented to travel there with the police in order to unlock the door with her key so that the officers could enter and arrest him. During this conversation, Fischer several times referred to the apartment on South California as "our" apartment, and said that she had clothes and furniture there. It is unclear whether she indicated that she currently lived at the apartment, or only that she used to live there.

The police officers drove to the apartment on South California, accompanied by Fischer. They did not obtain an arrest warrant for Rodriguez, nor did they seek a search warrant for the apartment. At the apartment, Fischer unlocked the door with her key and gave the officers permission to enter. They moved through the door into the living room, where they observed in plain view drug paraphernalia and containers filled with white powder that they believed (correctly, as later analysis showed) to be cocaine. They proceeded to the bedroom, where they found Rodriguez asleep and discovered additional containers of white powder in two open attache cases. The officers arrested Rodriguez and seized the drugs and related paraphernalia.

Rodriguez was charged with possession of a controlled substance with intent to deliver. He moved to suppress all evidence seized at the time of his arrest, claiming that Fischer had vacated the apartment several weeks earlier and had no authority to consent to the entry. The Cook County Circuit Court granted the motion, holding that at the time she consented to the entry Fischer did not have common authority over the apartment. The Court concluded that Fischer was not a "usual resident" but rather an "infrequent visitor" at the apartment on South California, based upon its findings that Fischer's name was not on the lease, that she did not contribute to the rent, that she was not allowed to invite others to the apartment on her own, that she did not have access to the apartment when respondent was away, and that she had moved some of her possessions from the apartment. The Circuit Court also rejected the State's contention that, even if Fischer did not possess common authority over the premises, there was no Fourth Amendment violation if the police *reasonably believed* at the time of their entry that Fischer possessed the authority to consent.

The Appellate Court of Illinois affirmed the Circuit Court in all respects. The Illinois Supreme Court denied the State's Petition for Leave to Appeal, 125 Ill. 2d 572, 130 Ill. Dec. 487, 537 N.E.2d 816 (1989), and we granted certiorari. 493 U.S. 110 S. Ct. 320, 107 L. Ed. 2d 311 (1989).

APPENDIX II

The following is from the Joint Appendix filed with the United States Supreme Court by Counsel for Petitioner and Counsel for Respondent.

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,
Plaintiff-Appellant,
EDWARD RODRIGUEZ,
Defendant-Appellee.

ORDER

The defendant, Edward Rodriguez, was arrested on July 26, 1985, and charged with possession of a controlled substance with the intent to deliver. He was charged on the basis of certain items of physical evidence seized during a warrantless search of his apartment that was conducted pursuant to the consent of a third-party. The trial court granted defendant's motion to quash his arrest and suppress evidence, holding that the party who consented to the entry into defendant's apartment was without authority to do so. The State appeals from this order questioning whether consent to enter was properly given.

The trial court heard defendant's motion to suppress evidence on the grounds that the party who consented did not have the authority to consent because she was not living at defendant's apartment at the time that she consented to the entry. At the hearing, Officer James Entress testified that on July 26, 1985, at about 2:30 p.m. he and his partner, Officer Ricky Gutierrez, received a call from Officer Tenza asking for assistance at a residence located at 3554 South Wolcott. Upon arriving, Officer Entress had a conversation with Gale Fisher. Also present during this conversation were Officer Tenza, Officer Gutierrez, and Dorothy Jackson (Fisher's mother). Fisher told Officer Entress that earlier in the day defendant had beaten her at their apartment at 3519 South California and that she wanted to make a complaint. She also indicated that she had been living at that apartment, that her clothes and furniture were in that apartment, that defendant was presently asleep there, and that she had a key to the apartment and would let the officers enter to arrest defendant.

During direct examination, Officer Entrees acknowledged that he had testified at a preliminary hearing that Fisher had told him that she used to live at the apartment on South California. However, he went on to say that it was his impression that she was still living there at the time she agreed to let them into the apartment. Officer Entress testified that during his conversation with Fisher he told her that they

would only arrest the defendant if Fisher was certain that she wanted to press charges against him, and that she seemed hesitant about signing a complaint. Having recalled a conversation with someone a year earlier concerning the involvement of an individual named Edward Rodriguez with narcotics, Officer Entress asked Fisher if defendant was involved with narcotics and Fisher would not respond to that question.

Officer Entress testified that he, Officer Gutierrez, Fisher, and her mother proceeded to the apartment on South California. Fisher opened the door with her key and allowed the officers to enter. Officer Entress first entered the living room where he observed containers of a substance he believed to be cocaine and drug paraphernalia including pipes and scales. He then proceeded to the bedroom where he observed defendant sleeping on a bed. In the course of waking defendant, Officer Entress saw two open briefcases at the side of the bed that contained a white substance that he believed to be cocaine. Defendant was subsequently arrested. On cross-examination, Officer Entress testified that Fisher used the term "our" and "their" when referring to the apartment on South California.

Dorothy Jackson testified that on July 1, 1985, she drove her daughter to the apartment on South California at the latter's request so that she could remove her clothes from the apartment. She removed several bags of clothing and left behind her stove, refrigerator and some furniture. Ms. Jackson testified that her daughter told her that she was staying with her because defendant wanted one of their two children toilet trained. She stated that since there was no agreement that Fisher and the children would stay with the witness, Fisher would have to return to her apartment on South California after the child was trained. According to Ms. Jackson, her daughter and her children stayed with Jackson from July 1 through July 26, 1985. During that time Fisher visited defendant and, on approximately two or three occasions, spent the night at his apartment. She also stated that the apartment on South California was Ms. Fisher's home. In the afternoon of July 26, Fisher went to Ms. Jackson's house and told her that defendant had beaten her, whereupon Ms. Jackson telephoned the police and Officer Tenza arrived a few minutes later.

Fisher testified that she lived with defendant at the apartment on South California from December 1984 through June 1985, and that she moved in with her mother on July 1, 1985. When she moved in with her mother, she left the key at defendant's apartment. She stated that she did not have a key to defendant's apartment from July 1 to July 26 and that defendant would let her into the apartment when she went to visit him during that time. She did take a key from defendant's dresser on July 26, after she and defendant had argued. During July 1985 she never had any friends at the apartment on South California,

she only went there to visit defendant, and she never went there when defendant was not in the apartment. According to Fisher, she did not remove her stove, refrigerator and furniture that her name was not on lease and that defendant always paid the rent on the apartment. Fisher stated that although she did tell Officer Entress that she had a key to the apartment and agreed to let him inside, she also indicated that she did so because the police told her that is what she had to do if she wanted to press charges. She denied telling Officer Entress on July 26 that she was living in the apartment on South California.

Our review of the trial court's decision to grant defendant's motion to suppress, recognizes that its ruling will not be set aside unless clearly erroneous. (*People v. White* (1987), 117 Ill. 2d 194, 512 N.E.2d 677). We note at the outset that this case involves a consent to enter and not a consent to search, and that case law regarding third party consent commonly involves consent to search. However, the concept of consent to search is fundamentally intertwined with the concept of consent to enter since the validity of a warrantless seizure of evidence in plain view depends on the validity of the entry by the officers seizing the evidence. Therefore, the application of that case law to the instant case is both proper and relevant.

In determining whether Fisher had the authority to consent to the warrantless search of defendant's apartment, we are guided by the rule set forth in *United States v. Matlock*, (1974), 415 U.S. 164, 171, 39 L. Ed. 2d 242, 94 S. Ct. 988, which involved a consent to search. In that case, the United States Supreme Court ruled that "when the prosecution seeks to justify a warrantless search by proof of voluntary consent, it is not limited to proof that consent was given by the defendant, but may show that permission to search was obtained from a third party who possessed common authority over or other significant relationship to the premises or effect sought to be inspected." The Supreme Court explained the term "common authority" as follows:

"Common authority is, of course, not to be implied from the mere property interest a third party has in the property. The authority which justifies the third-party consent does not rest upon the law of property, . . . but 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 that risk that one of their number might permit the common area to be searched." *United States v. Matlock*, (1974), 415 U.S. 164, 171, n.7.

The Illinois Supreme Court adopted this common authority doctrine for cases involving third-party consent in *People v. Stacey* (1974), 58 Ill. 2d 83, 317 N.E.2d 24. In that case the defendant's wife who was jointly occupying a house with the defendant, allowed police to remove

a shirt from defendant's dresser drawer that was located in their bedroom. The court concluded that the mere fact that the defendant alone may have used a dresser drawer while his wife may have used another did not indicate that the wife was denied the mutual use, access to or control of the drawer.

The application of this doctrine requires a determination as to whether the consenting party had sufficient common authority to consent to the entry of the premises where the evidence was found in plain view. (*People v. Callaway*, (1988), 167 Ill. App. 3d 872, 522 N.E.2d 337); (*People v. Posey* (1981), 99 Ill. App. 3d 943, 426 N.E.2d 209.) The third-party consent to enter must be made from a person who has control over the premises. (*People v. Daugherty* (1987), 161 Ill. App. 3d 394, 514 N.E.2d 228.)

In reviewing the record in the instant case, we note that the trial court properly rejected the State's contention that Fisher had the apparent authority to consent. This conclusion is consistent with prior Illinois cases rejecting the argument that warrantless entries and searches may be upheld if the party who consented to the entry had apparent authority to do so but lacked actual authority. (*People v. Vought* (1988), 174 Ill. App. 3d 563, 528 N.E.2d 1095); *People v. Bochniak* (1981), 93 Ill. App. 3d 575, 417 N.E.2d 722.

We also agreed with the trial court's finding that Fisher lacked sufficient authority to justify the police action because under the common authority doctrine set out in *Matlock* her consent was not valid. In reaching its determination the trial court mentioned the following factors established by the evidence as controlling: (1) Ms. Fisher's name was not on the lease and she did not contribute to the rent; (2) defendant's apartment was not her exclusive or even her usual place of residence, rather, she was an infrequent visitor, guest or invitee; (3) she did not have access to the apartment when defendant was not there and, like a guest, she only had access when defendant was present; (4) she never brought people over to the apartment; and (5) she moved her clothes; and more importantly, her children to her mother's residence. All of these factors indicate that Fisher did not have the common authority over the defendant's apartment that was necessary to make her consent to enter valid.

The fact that the evidence seized was in plain view does not change the outcome of this case because the plain view doctrine is dependent upon an original lawful entry (*People v. Patrick* (1981), 93 Ill. App. 3d 830, 417 N.E.2d 1056), and we have held the evidence does not contravene the conclusion that the original entry was unlawful. Therefore, the trial court's decision to grant defendant's motion to suppress was proper.

For the reasons set forth above, the judgment of the circuit court is affirmed.

Judgement [sic] affirmed.

FREEMAN, P.J., with MCNAMARA and WHITE, JJ., concurring.

ILLINOIS SUPREME COURT
JULEANN HORNYAK, CLERK
SUPREME COURT BUILDING
SPRINGFIELD, ILL. 62706
(217) 782-2035
April 5, 1989

Hon. Richard M. Daley
State's Attorney, Criminal Appeals Div.
309 Richard J. Daley Center
Chicago, IL 60602

No. 68295 - People State of Illinois, petitioner, v. Edward Rodriguez,
respondent. Leave to appeal, Appellate Court, First District.

The Supreme Court today DENIED the petition for leave to appeal
in the above entitled cause.

The mandate of this Court will issue to the Appellate Court on April
27, 1989.