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I. Introduction

Last February marked the thirtieth anniversary of *United States v. Matlock*,[1] a Supreme Court case that many lower courts have cited to determine whether a party can legitimately refuse to be searched after a third party has already consented to the search.[2] Over the past three decades since *Matlock*, lower courts have disagreed about whether one co-occupant's refusal to consent to a search may trump another co-occupant's consent to search.[3]

Recently, this issue came to a head in two state court cases: An Indiana appellate court upheld a search of a defendant's premises in which officers requested permission to search from the defendant's roommate, even though the defendant was present at the time of the search.[4] Only a few months later, the Georgia Supreme Court affirmed an appellate court decision that one co-occupant's refusal trumps another co-occupant's consent.[5] Why the difference in outcome? Lower courts differ in their interpretation of *Matlock* and employ two different models of consent searches.[6]

Consider this hypothetical: police officers stop Luke for speeding. At the traffic stop, the officers discover cocaine in the car. When they question Luke about the cocaine he claims that it belongs to his roommate, Dave, and gives the officers permission to search the apartment that Luke and Dave share. The

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1. United States v. Matlock, 415 U.S. 164 (1974).

2. *See infra* Part III.A (discussing the *Matlock* case and its ramifications for third party consent cases where the primary party refuses to allow the search).

3. *See infra* Part V.A (considering the current circuit split on this issue).

4. *See* Primus v. State, 813 N.E.2d 370, 376 (Ind. Ct. App. 2004) (deciding that the search was reasonable under the totality of the circumstances). *See also* discussion *infra* Part V.A.1 (examining *Primus* in more detail).

5. *See* State v. Randolph, 604 S.E.2d 835, 836 (Ga. 2004), *cert. granted*, 125 S. Ct. 1840 (2005) ("[T]he consent to conduct a warrantless search of a residence given by one occupant is not valid in the face of the refusal of another occupant . . . ."); *see also* discussion *infra* Part V.A.2 (examining the Georgia appellate court's decision in *Randolph*).

6. *See infra* Part V.B (explaining the two factors that have led the lower courts to reach opposite conclusions).

police officers go to the apartment and find Dave, but do not ask him for his permission to search. Instead, relying on Luke's permission, the officers search the apartment and find more cocaine, as Luke claimed. Is this search, where Dave was present but the officers failed to ask him for permission to search, valid?[7] What if the officers arrested Dave and removed him from the scene before the police officers searched the apartment?[8] What if Dave voiced his objection to the search?[9] Are any—or all—of these searches valid under the Fourth Amendment?[10]

The Supreme Court has recognized that one co-occupant can grant police officers access to an area shared in common with other occupants.[11] If the police wish to search an apartment shared by two roommates, for example, the officers can validly search if either roommate consents to the search.[12] Occasionally, however, a situation arises in which one roommate consents to the search, but the other refuses to allow the search.[13] May the police go ahead with the search when they have valid third party consent, or must they defer to the wishes of the primary party? This question has important ramifications for police officers, officers of the court, and the citizenry alike.

Simply stated, can one co-occupant give valid consent for police to search common areas of a premises when another co-occupant who is present objects to the search? The Supreme Court has not yet directly ruled on this question.[14]

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7. These facts are similar to the facts in *Primus*, in which the court decided that the search based on the third party's consent was valid because "one's authority to give consent is not dependent upon one's location." *Primus*, 813 N.E.2d at 376.

8. This variation in the hypothetical mimics the facts of *United States v. Matlock*, in which the Supreme Court validated a third party consent search authorized by the defendant's roommate. *See* United States v. Matlock, 415 U.S. 164, 179 (1974) (Douglas, J., dissenting) (explaining that the police removed the defendant from the scene before asking the third party for permission to search).

9. This was the defendant's situation in *Randolph v. State*, 590 S.E.2d 834, 836 (Ga. Ct. App. 2003), *aff'd*, 604 S.E.2d 835 (Ga. 2004), *cert. granted*, 125 S. Ct. 1840 (2005).

10. For an answer to that question, see discussion *infra* Part VI.A (summarizing the current state of Fourth Amendment law on third party consent searches).

11. *See Matlock*, 415 U.S. at 169–70 (affirming the principle that one co-occupant may permit the police to search a shared area).

12. *Id.*

13. For convenience's sake, the person whose goods the police wish to search and seize will be referred to as the "primary party," and the co-occupant who consents to the search will be referred to as the "third party." In the hypothetical above, Luke is the third party and Dave is the primary party.

14. Almost every court that has addressed this issue has cited *Matlock* for the famous statement that "the consent of one who possesses common authority over premises or effects is valid as against the absent, nonconsenting person with whom that authority is shared." United States v. Matlock, 415 U.S. 164, 170 (1974). Lower courts usually consider whether the

Other courts in the United States, however, have considered this issue in many cases, using *Matlock* as the only nominally controlling authority.[15] Lower courts have split on the issue—some allow a primary party's refusal to trump a third party's consent, others allow a third party's consent to trump a primary party's refusal—thereby creating different rules in different jurisdictions.[16] This disparity among the courts is a problem because searches and seizures are governed by the Fourth Amendment of the Constitution, making third party consent searches a constitutional issue instead of a state law issue.[17] Because the Fourth Amendment dictates search and seizure issues, it has controlling authority over every court in the country, both state and federal.[18] This circuit split must be resolved.

Part II of this Note begins with an overview of search and seizure jurisprudence, and then examines the constitutional legitimacy and scope of consent searches under the Fourth Amendment. Following this background, Part III turns to third party consent searches, focusing on *Matlock*, then considers the disparate rationales behind third party consent searches. Before turning to the split among the lower courts, Part IV considers two models for third party consent searches. Part V observes the present split among the lower courts: what the courts are deciding, what rationales they are employing, and the relevance of the primary party being absent at the time of the third party consent search. Part VI begins with a synopsis of the current state of the law, and explains that under the current Supreme Court jurisprudence, the third party consent must triumph. The Note concludes with a proposal for a new test for third party consent searches—the "reasonable attempt" test—and offers arguments in support of the test. The reasonable attempt test requires police officers to take reasonable steps to obtain consent from the party at whom the search is directed, whether that party is present at the scene or not.[19] If the police do not take reasonable steps to obtain the primary party's consent, or the

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primary party's absence was determinative in *Matlock*, and thus whether the primary party's refusal may override the third party's consent. *See infra* Part V.A (considering some lower court decisions on this issue).

15. *See infra* Part V.A (considering the lower court decisions on the third-party-consent-versus-primary-party-refusal issue).

16. *See infra* Part V.A (examining the circuit split on this issue).

17. *See infra* Part II.C (presenting the constitutional background for third party consent searches).

18. The Constitution and its Amendments trump state law according to the Supremacy Clause of the U.S. Constitution. U.S. CONST. art. VI, cl. 2.

19. If the officers wish to search a shared apartment for goods when they suspect more than one individual, the officers would have to attempt to obtain the consent of all the individuals directly implicated in the search.

primary party refuses to consent, the officers would be required to obtain a warrant based on probable cause. Public policy supports this test because an individual's privacy should be respected.[20] Furthermore, this test is inherently based in reasonableness, which is one of the main requirements of the Fourth Amendment.[21] Finally, the test serves to reinforce the warrant preference inherent in the Fourth Amendment.[22]

It is important to recognize some limitations on the scope of this Note before embarking on the substantive analysis. This Note focuses exclusively on the third-party-consent-versus-primary-party-refusal issue as it relates to searches of the home—it does not deal with searches of any other private property, such as automobiles, or commercial property, such as businesses. Consideration of a search based on a minor's consent to search his parent's house is also beyond the scope of the Note.[23] Finally, although third party consent searches are inextricably intertwined with the Fourth Amendment, attempting to explain how the Reasonableness Clause and Warrant Clause of the Fourth Amendment are related could fill several shelves in a library.[24] Instead, this Note will limit its examination to the Supreme Court's interpretation of the Fourth Amendment over the past two hundred years.[25]

II. Fourth Amendment Background

Searches and seizures of an individual's property are governed by the two major clauses of the Fourth Amendment: the Reasonableness Clause and the Warrant Clause.[26] The Supreme Court has never satisfactorily explained how

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20. *See infra* Part VI.B (arguing for the reasonable attempt test based on public policy).

21. *See infra* Part VI.B (arguing for the reasonable attempt test based on the Reasonableness Clause).

22. *See infra* Part VI.B (arguing for the reasonable attempt test based on the Warrant Clause).

23. For a discussion of this issue, see generally Matt McCaughey, *And a Child Shall Lead Them: The Validity of Children's Consent to Warrantless Searches of the Family Home*, 34 U. LOUISVILLE J. FAM. L. 747 (1995).

24. For an insightful discussion of the Framers' original intent and the ramifications for modern Fourth Amendment interpretation, see Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 MICH. L. REV. 547 (1999).

25. *See infra* Part II.A (considering the Supreme Court's treatment of the relationship between the Reasonableness Clause and the Warrant Clause of the Fourth Amendment).

26. "The right of the people to be secure . . . against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause . . . ." U.S. CONST. amend IV.

the warrant requirement and the Reasonableness Clause are related.[27] Making the situation even more complicated, the Supreme Court's Fourth Amendment jurisprudence has evolved over time, moving from a strong preference for warrants to a more relaxed view that focuses on the reasonableness of the search and includes numerous exceptions to the Warrant Clause.[28] This Part begins with a brief overview of the Supreme Court's treatment of the Fourth Amendment. It then focuses on the Fourth Amendment background of consent searches, beginning with the Court's rules for searches under the Fourth Amendment, before moving on to the Supreme Court jurisprudence concerning consent searches and the permissible scope of consent searches.[29]

A. Reasonableness Is King

The Fourth Amendment promises that "[t]he 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."[30] Note the immediate tension between the two clauses: does the Reasonableness Clause control the Warrant Clause or vice-versa? Unfortunately, the text of the Fourth Amendment "does not indicate how [the two clauses] fit together."[31] The Supreme Court's jurisprudence on the Fourth Amendment has not made matters any clearer. In fact, the Supreme Court has added to the confusion by voicing a preference for warrants and—in virtually the same breath—creating numerous exceptions to the warrant requirement.[32]

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27. *See generally* Scott E. Sundby, *A Return to Fourth Amendment Basics: Undoing the Mischief of* Camara *and* Terry, 72 MINN. L. REV. 383, 383–84 (1988) (explaining that Fourth Amendment analysis will continue to be complex and riddled with exceptions until the Supreme Court suitably defines reasonableness and reconciles the Reasonableness Clause with the Warrant Clause).

28. *See, e.g.*, Craig M. Bradley, *Two Models of the Fourth Amendment*, 83 MICH. L. REV. 1468, 1472–75 (1985) (suggesting that the Supreme Court has abandoned its former adherence to the Warrant Clause in favor of numerous confusing exceptions); *see also infra* Part II.B (listing some of the more common exceptions to the warrant requirement).

29. *See infra* Part II.B–D (focusing on the Fourth Amendment background of consent searches).

30. U.S. CONST. amend IV.

31. Davies, *supra* note 24, at 551. As mentioned above, the actual relationship between the clauses is beyond the scope of this Note. *See supra* notes 23–25 and accompanying text (limiting the scope of the Note).

32. *See* Bradley, *supra* note 28, at 1472–75 (detailing "over twenty" exceptions).

Professor Thomas Davies succinctly summarizes the Court's relationship with the Fourth Amendment.[33] Until the past few decades, the "warrant preference" reigned supreme, meaning that "the use of a valid warrant—or at least compliance with the warrant standard of probable cause—[was] the salient factor in assessing the reasonableness of a search or seizure."[34] Reasonableness was subservient to the Warrant Clause.

During the past fifty years, though, the interpretation has flipped: The Supreme Court now uses reasonableness as an independent test for valid searches, bypassing the warrant requirement altogether.[35] The Court's new reasonableness approach devalues the warrant and determines "the constitutionality of a search or seizure . . . simply by making a relativistic assessment of the appropriateness of police conduct in the light of the totality of the circumstances."[36] There are currently so many exceptions to the warrant requirement that reasonableness is now king.[37]

B. Searches Under the Fourth Amendment

Katz v. United States[38] established the basic test for legitimate searches

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33. *See* Davies, *supra* note 24, at 558–60 (explaining how the Supreme Court has dealt with the relationship between the two clauses).

34. *Id.* at 559.

35. *See, e.g.*, Terry v. Ohio, 392 U.S. 1, 30–31 (1968) (affirming the constitutionality of a reasonable warrantless search). The Court went even further in *New Jersey v. T.L.O.*, which proclaimed that "the legality of a search of a student should depend simply on the reasonableness, under all the circumstances, of the search"; reasonableness is now at the center of the Fourth Amendment universe. New Jersey v. T.L.O., 469 U.S. 325, 341 (1985).

36. Davies, *supra* note 24, at 559. *See, e.g.*, United States v. Rabinowitz, 339 U.S. 56, 66 (1950) ("The relevant test is not whether it is reasonable to procure a search warrant, but whether the search was reasonable.").

37. *See* Bradley, *supra* note 28, at 1472–75 (listing the exceptions). The end of the next subpart deals with searches and the Fourth Amendment warrant requirement.

38. Katz v. United States, 389 U.S. 347 (1967). In *Katz*, FBI agents eavesdropped on phone calls Katz made from a public telephone booth. *Id.* at 348. The FBI agents placed electronic surveillance equipment *outside* the booth to listen in on Katz's side of the conversation. *Id.* The trial court, over the objection of the defendant, allowed the government to introduce the conversations into evidence. *Id.* On appeal, the court of appeals affirmed the defendant's conviction and found no Fourth Amendment violation because the government agents did not physically enter the telephone booth to record the defendant's conversations. *Id.* at 348–49.

The Supreme Court addressed two issues in *Katz*: 1) whether the government's recording of the defendant's conversations constituted a search and seizure and, if so, 2) whether that search and seizure was constitutionally permissible. *Id.* at 353–54. The Court first rejected the idea that the Fourth Amendment creates a general constitutional "right to privacy." *Id.* at 350.

under the Fourth Amendment.[39] In fact, Justice Harlan's concurrence provides the standard for determining whether an individual has a right to privacy under the Fourth Amendment.[40] Harlan's two-prong test asked (1) whether the individual had "an actual (subjective) expectation of privacy" and, if so, (2) whether society would deem this a reasonable expectation of privacy.[41] If the police invade this limited right to privacy, then a search has taken place for Fourth Amendment purposes.[42]

In general, police officers are required to obtain a warrant before conducting a search of an individual's property.[43] If the officers do not obtain a warrant before searching a suspect's property, the trial court will exclude the evidence from the suspect's trial.[44] On the other hand, the Supreme Court has long recognized certain exceptions to the Warrant Clause of the Fourth Amendment under exigent circumstances, such as safety, hot pursuit, and a search incident to arrest.[45] These are all valid searches and seizures under

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Although both the defendant and the government based their arguments on whether the telephone booth was a "constitutionally protected area," the Court declined to analyze the Fourth Amendment issue in that way. *Id.* at 351. Instead, the Court began its analysis with the now famous axiom that "the Fourth Amendment protects people, not places." *Id.* The government's actions constituted a "search and seizure" because Katz expected that when he entered the phone booth to make his phone calls, his conversations would be private. *Id.* at 353. The Court overruled those portions of its earlier decisions that had made constitutionality hinge upon a physical intrusion by the state; therefore, the fact that the electronic surveillance equipment was not physically inside the booth had "no constitutional significance." *Id.*

After the Court decided that the government carried out a search, it addressed whether that search was constitutionally permissible. *Id.* at 354. The Court decided that while the government would have been able to obtain a warrant, its failure to obtain a warrant was fatal to the search and the conversations should not have been allowed into evidence. *Id.* at 356–59. Therefore, the Court reversed the decision of the court of appeals. *Id.* at 359.

39. *See id.* at 361 (Harlan, J., concurring) (explaining the rule).

40. *Id.* (Harlan, J., concurring).

41. *Id.* (Harlan, J., concurring).

42. *Id.* at 353 (ruling that the government's intrusion into Katz's conversation constituted a search).

43. *See id.* at 357 ("[S]earches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions.").

44. This is the exclusionary rule, which states that evidence obtained in violation of a suspect's constitutional rights cannot be used against him at trial. Mapp v. Ohio, 367 U.S. 643, 648 (1961). The exclusionary rule applies equally to the states. *See id.* at 657, 660 (holding that "the exclusionary rule is an essential part of both the Fourth and Fourteenth Amendments" and that it is enforceable against the states).

45. *See* Chimel v. California, 395 U.S. 752, 762–63 (1969) (authorizing the police to search both a suspect and the area within the suspect's "immediate control" when they arrest the suspect); Warden v. Hayden, 387 U.S. 294, 298–99 (1967) ("The Fourth Amendment does not require police officers to delay in the course of an investigation if to do so would gravely

the Fourth Amendment, despite the fact that the officers did not possess a warrant at the time of the search.[46] Consent searches, in which a party affirmatively permits an officer to search her property, are another valid exception to the warrant requirement.[47] Because consent searches are part and parcel of Fourth Amendment searches and seizures, Supreme Court jurisprudence on the third-party-consent-versus-primary-party-refusal issue is critical to resolving the current split among the courts.[48] The next subpart examines the requirements for a valid consent search.[49]

C. Consent Searches Under the Fourth Amendment

The Supreme Court considered the requirements for a valid consent search in *Schneckloth v. Bustamonte*.[50] The issue before the Court was the prosecution's burden to prove that the defendant voluntarily consented to the search.[51] The lower courts used two disparate tests for determining this issue.[52] The California Supreme Court's rule required a court to take into account all the surrounding factors to judge voluntariness: a totality of the circumstances

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endanger their lives or the lives of others.").

46. *See* cases cited *supra* note 45 (holding the respective searches constitutional).

47. *See* United States v. Sumlin, 567 F.2d 684, 687 (6th Cir. 1977) ("It is well settled that a search conducted pursuant to a voluntarily obtained consent comes within an exception to the general warrant requirement of the [F]ourth [A]mendment.").

48. *See infra* Part II.C (explaining consent searches under the Fourth Amendment by examining relevant Supreme Court cases).

49. *See infra* Part II.C (demarcating the requirements for a valid consent search under the Fourth Amendment).

50. *See* Schneckloth v. Bustamonte, 412 U.S. 218, 248–49 (1973) (holding that the validity of an individual's consent is to be determined by a totality of the circumstances test). In *Bustamonte*, police officers pulled over a car in which defendant Bustamonte was a passenger. *Id.* at 220. Another passenger, whose brother owned the car, permitted the police to search the car. *Id.* Police officers found some stolen checks, which were used as evidence against Bustamonte at trial. *Id.* Defendant moved to suppress the checks at trial, but his motion was denied by the trial court; the California Court of Appeal and the Supreme Court of California both upheld the trial court's ruling, finding that the consent was constitutionally valid. *Id.* at 220–21. Defendant's writ of habeas corpus was denied by the federal district court, but the Court of Appeals for the Ninth Circuit took the appeal. *Id.* at 221. The Ninth Circuit reversed the California Supreme Court, ruling that consent was valid only if "given with an understanding that it could be freely and effectively withheld." *Id.* at 222. The Supreme Court granted certiorari to decide what the prosecution must prove to show that consent was voluntary. *Id.* at 223. The Court overruled the Ninth Circuit and used the totality of the circumstances test to evaluate Bustamonte's consent. *Id.* at 227.

51. *Id.* at 223.

52. *See id.* at 223 (explaining that state and federal views on the subject were conflicting).

test focusing on coercion.[53] The Ninth Circuit Court of Appeals, however, reversed the California Supreme Court, ruling that a party can give voluntary consent only when she knows that she is allowed to refuse consent.[54] The United States Supreme Court considered whether a lack of coercion equaled voluntary consent or whether true voluntariness required a waiver.[55]

The Supreme Court analyzed the meaning of "voluntariness" in criminal confession cases and determined that although the definition of voluntariness was too elusive to pin down, each case involving a determination of voluntariness "reflected a careful scrutiny of all the surrounding circumstances."[56] The touchstone of voluntariness was whether the consent was coerced.[57] Therefore the Supreme Court, like the California Supreme Court before it, applied the totality of the circumstances test to Fourth Amendment consent searches to determine whether the subject of the search consented of his own free will and not under duress or coercion.[58]

In *Bustamonte*, the Supreme Court rejected the "waiver" notion of consent searches promulgated by the Ninth Circuit.[59] The Court considered, by analogy, that it would be "inconceivable that the Constitution could countenance the waiver of a defendant's right to counsel by a third party."[60] Furthermore, a waiver theory of consent searches would be utterly inconsistent with third party consent searches.[61] The waiver theory cannot be applied to consent searches in general because it is not applicable to third party consent searches in particular.[62]

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53. *See id.* at 221, 223 (describing the standard established by the California Supreme Court).

54. *See id.* at 221–22 (explaining the Ninth Circuit's conclusion that the prosecution must demonstrate that any consent was "given with an understanding that it could be freely and effectively withheld").

55. *See id.* at 223 (describing the issue).

56. *Id.* at 226.

57. *See id.* at 233–34 (analyzing prior Supreme Court decisions that turned on coercion).

58. *Id.* at 227. The Court rejected the notion that the police officer would need to advise the subject of the search of the subject's right to refuse. *Id.* at 231–32.

59. *See id.* at 246–48 (disposing of the argument that knowledge of a right to refuse was an indispensable element of a valid consent).

60. *Id.* at 246.

61. *See id.* at 245–46 (declaring that a waiver approach does not comport with prior decisions).

62. *See id.* at 246 n.34 ("[T]he constitutional validity of third-party consents demonstrates the fundamentally different nature of a consent search from the waiver of a trial right.").

D. Scope of Consent Searches

The Supreme Court thoroughly examined the scope of consent searches in *Florida v. Jimeno*.[63] In *Jimeno*, the defendant gave a police officer permission to search his car for narcotics, which the officer found inside a paper bag on the floor.[64] Defendant moved to suppress the evidence, arguing that he never gave specific consent to search any closed containers in his vehicle.[65] Although the trial court granted his motion, and both the Florida Court of Appeals and the Florida Supreme Court affirmed,[66] the United States Supreme Court granted review "to determine whether consent to search a vehicle may extend to closed containers found inside the vehicle."[67]

In reversing the lower courts' rulings, the Court noted that "the scope of a suspect's consent . . . is . . . 'objective' reasonableness."[68] In this instance, the Court determined that it was reasonable for the officer to conclude that the suspect's consent to search for narcotics extended to a search of closed containers because they could easily contain narcotics.[69] The Court's rationale was that "[t]he scope of a search is generally defined by its expressed object."[70] Thus, while a person may affirmatively limit the scope of a consent search, the nature of the object for which the officer is searching intrinsically defines the scope of the search.[71]

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63. *See* Florida v. Jimeno, 500 U.S. 248, 249 (1991) (ruling that the Fourth Amendment allows an officer to open a closed container in an automobile when the officer reasonably believed that "the suspect's consent permitted [the officer] to open" that container).

64. *Id.* at 249–50.

65. *Id.* at 250.

66. *Id.*

67. *Id.*

68. *Id.* at 251 (explaining that the standard is based upon what a reasonable person would have thought of the interaction "between the officer and the suspect").

69. *See id.* (illustrating the reasonableness of the officer's conclusion). Because a suspect is already able to limit the scope of a search to which she consents, the Supreme Court concluded that the failure to receive specific consent to search the closed container was not dispositive and reversed the decision of the Florida Supreme Court. *Id.* at 252.

70. *Id.* at 251. Although this case involved the search of an automobile, the opinion is relevant to consent searches generally for the proposition that a person who consents to a search may limit its scope. *See id.* at 251–52 (declaring that "[a] suspect may of course delimit . . . the scope of the search to which he consents").

71. *See id.* at 251 (explaining that the consent to search for narcotics included containers that could reasonably be thought to contain narcotics).

III. Third Party Consent Searches at the Supreme Court Level

Third party consent searches are a unique subset of consent searches. The Supreme Court allows a third party to consent to a search of an area—or an item—over which she has authority.[72] This Part deals with the legitimacy of third party consent searches, the requirements for valid third party consent searches, and the justifications for these searches.

A. United States v. Matlock

The most important Supreme Court case on the question of primary party refusal in third party consent searches is *United States v. Matlock*.[73] The question before the Court in *Matlock* was whether the third party's consent for the police to search the defendant's house was "legally sufficient" to render the evidence admissible at trial.[74] Police officers arrested the defendant in his front yard, but did not request his permission to search the house.[75] Instead, some of the police officers approached the house and requested permission to search from Mrs. Graff, who lived in the house with defendant.[76] Mrs. Graff consented to the search and the officers found nearly $5,000 in cash in a closet.[77] Both the district court and the court of appeals excluded the evidence from the trial, finding that Mrs. Graff did not have the authority to consent to the search.[78] The Supreme Court granted certiorari to settle this evidentiary issue.[79]

Justice White, for the Court, espoused the "generally . . . applied" rule that "voluntary consent of any joint occupant of a residence to search the premises jointly occupied is valid against the co-occupant."[80] The *Matlock* Court stated, in its now-famous line, that "the consent of one who possesses common

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72. *See infra* Part III.D (discussing the rationales behind third party consent searches).

73. United States v. Matlock, 415 U.S. 164 (1974). Whether *Matlock* actually addresses the situation when a primary party is present is disputed. *See infra* Part V.B.2 (discussing how much bearing defendant Matlock's presence or absence actually had on the Supreme Court's decision).

74. *Id.* at 166.

75. *Id.*

76. *Id.* at 166–67. Also living in the house with defendant and Mrs. Graff were Mrs. Graff's three year old son, her mother, and several of her siblings. *Id.* at 166.

77. *Id.* at 166–67.

78. *See id.* at 167–69 (discussing the conclusions of both courts).

79. *Id.* at 166.

80. *Id.* at 169–70.

authority over premises or effects is valid as against the absent, nonconsenting person with whom that authority is shared."[81] After making this statement, widely considered to be the holding of *Matlock*, the Court analyzed Mrs. Graff's relationship to the defendant to determine whether she had authority to consent to a search.[82] The Supreme Court ruled that she had authority to consent to the search.[83]

The real issue in *Matlock* was whether Mrs. Graff had the requisite authority to permit a search.[84] Oddly enough, lower courts consistently cite it as the controlling authority in those cases where a present primary party refuses to consent to the search,[85] even though the Court only mentions the third party consent issue briefly.[86] Nevertheless, *Matlock* remains the key Supreme Court decision on this issue precisely because the defendant was absent when the police obtained Mrs. Graff's consent to search.[87] Whether the primary party's absence was a deciding factor for the Court is discussed below in Part V.B.2.[88] The *Matlock* Court's rationale behind allowing this third party consent search is also discussed below.[89]

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81. *Id.* at 170.

82. *See id.* at 171–78 (contemplating the extent of Mrs. Graff's authority to consent). In fact, most of *Matlock* concerns whether Mrs. Graff had authority to consent to the search, not whether Matlock's presence or absence had any bearing on the validity of Mrs. Graff's consent. *Id.*

83. *See id.* at 177 (concluding that Mrs. Graff's consent was legally sufficient). The Court did not decide whether apparent authority would have been sufficient, but instead analyzed the consent in terms of actual authority. *Id.* at 177 n.14.

84. *See id.* at 167 (explaining that "[t]he issue came to be whether Mrs. Graff's relationship to [the location searched] was sufficient to make her consent to the search valid against" the defendant).

85. *See infra* Part V.A.2 (discussing those lower court decisions that have held that the primary party's refusal trumps the third party's consent).

86. United States v. Matlock, 415 U.S. 164, 169–70 (1974) (providing a limited summation of the rules on third party consent searches).

87. *See id.* at 179 (Douglas, J., dissenting) (emphasizing the defendant's absence at the time the police obtained consent to search).

88. *See infra* Part V.B.2 (discussing the importance of the primary party's location at the time of the search).

89. *See infra* Part III.D (discussing the rationale behind the Supreme Court's third party consent search decisions).

B. Apparent Authority in Third Party Consent Searches

Illinois v. Rodriguez[90] is the leading Supreme Court case on apparent authority: *Rodriguez* established that if the police reasonably believed that a third party had the authority to consent to a search, the consent will stand despite the fact that the third party did not have actual authority to permit the search.[91] In *Rodriguez*, Gail Fischer told police officers that the defendant had assaulted her and she led the officers to his apartment so that they could arrest him.[92] Fischer referred to defendant's apartment as "our" apartment, and told the officers that she kept some of her personal items there.[93] Using her key, Fischer opened the apartment for the police, who entered and arrested the defendant.[94] The officers discovered cocaine in the living room, which they seized.[95] Defendant moved to suppress the evidence based on the fact that Fischer had no authority to allow the police into his apartment.[96] The Illinois trial court granted his motion to suppress, and the appellate court affirmed.[97]

The Supreme Court agreed with the Illinois appellate court that Fischer did not have actual authority over the apartment at the time of the search.[98] Nevertheless, the Court granted certiorari to determine whether a third party's consent to a search is valid when the police "reasonably believe [that the third party] . . . possess[es] common authority over the premises," even if the third party has no actual authority at all.[99] The Court's analysis hinged upon the reasonableness requirement of the Fourth Amendment, which does not demand that police officers' decisions "always be correct, but demands that they always be reasonable."[100] The Court decided that the issue was not

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90. Illinois v. Rodriguez, 497 U.S. 177 (1990).

91. *See id.* at 188–89 (declaring that the dispositive question is whether the officer reasonably believed that the consenting party had authority to consent to a search).

92. *Id.* at 179.

93. *See id.* (recounting Fischer's declaration that she kept "clothes and furniture" in the apartment).

94. *Id.* at 180.

95. *Id.*

96. *Id.*

97. *See id.* (explaining the trial court's conclusion that exclusion was appropriate because Fischer "did not have common authority over the apartment" at the time when she allowed the police into defendant's apartment).

98. *Id.* at 182.

99. *Id.* at 179.

100. *Id.* at 185–86.

whether defendant had waived his right to be free from searches,[101] but "whether the right to be free of *unreasonable* searches [had] been *violated*."[102] The touchstone here, as in other Fourth Amendment cases, was whether the police officers acted reasonably based on all the information they had at the time.[103]

C. Summary of Third Party Consent Searches

The few Supreme Court cases that deal with third party consent searches offer valuable lessons. In *Stoner v. California*,[104] the Court established the rule that a hotel clerk does not have the authority to consent to a search of a

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101. A waiver standard would clearly fail under *Bustamonte*. *See* Schneckloth v. Bustamonte, 412 U.S. 218, 246–48 (1973); *see also supra* notes 50–62 and accompanying text (discussing *Bustamonte*).

102. *Rodriguez*, 497 U.S. at 187.

103. *See id.* at 188 (explaining the objective determination of whether consent was sufficient). The Court did not decide whether the police officers could have reasonably believed that Fischer had authority over the apartment, but remanded for a decision on that question. *Id.* at 189. For a discussion of the rationale used to justify the third party search in *Rodriguez*, see *infra* notes 118–21 and accompanying text.

104. Stoner v. California, 376 U.S. 483 (1964). In *Stoner*, the Supreme Court granted certiorari to decide whether the police unlawfully obtained evidence admitted against the defendant at trial. *Id.* at 484. The police suspected that the defendant had robbed a grocery store and they tracked him to a room at the Mayfair Hotel. *Id.* Upon their arrival at the hotel, the police officers questioned the hotel clerk about the defendant. *Id.* at 485. The clerk admitted that he recognized the defendant and explained to the officers that the defendant was not in his room at that time. *Id.* The police officers asked the clerk if he would allow them into the room, explaining that the defendant was a robbery suspect who might have a weapon. *Id.* The clerk gave them permission to enter the room, took the officers to the room, and unlocked the door. *Id.* The police officers found and seized a pair of glasses, a gray jacket, and a gun—the evidence at issue on appeal. *Id.* at 485–86.

The question before the Court was whether the hotel clerk's consent validated the search. *Id.* at 487–88. The Supreme Court ruled that the clerk's consent did not render this a valid search because the clerk had no authority to allow the police to enter the room. *Id.* at 488–89. Specifically, "a guest in a hotel room is entitled to constitutional protection against unreasonable searches and seizures," and a hotel clerk is not the sort of third party who has the authority to consent to such a search. *Id.* at 490. The Court rejected the apparent authority argument that because the police reasonably believed the hotel clerk had authority, the search is valid, and noted that "the rights protected by the Fourth Amendment are not to be eroded by . . . unrealistic doctrines of 'apparent authority.'" *Id.* at 488. Strikingly, the Court went on to say that the defendant's right to be free from unreasonable searches was one "which only the [defendant] could waive by word or deed." *Id.* at 489. Of course, the Court later rejected the idea that a consent search was based on the waiver of one's constitutional rights. *See* Schneckloth v. Bustamonte, 412 U.S. 218, 246–48 (1973) (analogizing the waiver of the constitutional right to be free from searches to the waiver of a trial right). For a discussion of *Bustamonte*, see *supra* notes 50–62 and accompanying text.

guest's room, thus limiting which third parties have the authority to consent to a search.[105] Next, *Frazier v. Cupp*[106] decided that if a third party has access to one compartment of a duffel bag, he holds the authority to consent to a search of the entire bag.[107] As discussed above,[108] the main Supreme Court case in this area is *Matlock*, which clearly established the right of a third party to consent to a search of any "premises or effects" shared in common.[109] Finally, *Illinois v. Rodriguez* addressed the validity of a search when the third party consenting to the search did not actually have common authority over the area or items searched.[110] In *Rodriguez*, the Supreme Court ruled that the validity of a third party's consent depended upon whether the police reasonably thought that the third party had authority over the area or items to be searched.[111]

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105. *See Stoner*, 376 U.S. at 490 (ruling that "a guest in a hotel room is entitled to constitutional protection against unreasonable searches and seizures").

106. Frazier v. Cupp, 394 U.S. 731 (1969). Defendant Frazier was convicted of second degree murder. *Id.* at 732. Defendant and his cousin (Rawls) were jointly indicted. *Id.* at 733. While the police were arresting Rawls, he consented to a search of a duffel bag in his possession—a duffel bag that belonged to the defendant. *Id.* at 740. On appeal, the defendant raised three issues: the misconduct of the prosecutor, the admissibility of his confession, and the consent given by a third party to allow the police to search his duffel bag. *Id.* at 733, 737, 740. The Court dismissed the allegation of prosecutorial misconduct because the judge gave the jury a limiting instruction that was sufficient to diffuse any harm to defendant. *Id.* at 735. Likewise, the Court ruled that the defendant's confession was properly admitted into evidence. *Id.* at 738–39.

However, the important issue for the purposes of this Note is whether the items taken during the search of the duffel bag the defendant shared with his cousin were properly admitted into evidence. *Id.* at 740. Rawls consented to a search of the duffel bag. *Id.* The Court acknowledged, and the defendant agreed, that Rawls "clearly had authority to consent to its search." *Id.* Nevertheless, defendant argued that because he had allowed his cousin to use only one compartment of the bag, his cousin should have been permitted to consent only to a search of that compartment and not the entire bag. *Id.* The Court rejected the defendant's argument as a "metaphysical subtlet[y]" and stated that the defendant "assumed the risk" when he let his cousin have access to the duffel bag. *Id.*

107. *See id.* at 740 (stating that the defendant's cousin had authority to consent to a search of the bag). This demonstrates how far the primary party can limit the third party's control over shared personal property. By analogy, it demonstrates a co-occupant's relationship with areas in a house or apartment—a primary party may put entire rooms or closets off limits, but probably not a certain part of a shared room (for example, the primary party could not allow a third party access to the living room, but forbid the third party to look under the couch cushions).

108. *See supra* Part III.A (discussing *Matlock* and its ramifications for cases where the primary party refuses to consent to a search but the third party consents).

109. United States v. Matlock, 415 U.S. 164, 170 (1974).

110. Illinois v. Rodriguez, 497 U.S. 177, 181–89 (1990) (considering the challenged search in light of the "obviously correct" conclusion that the individual giving consent lacked the authority to do so).

111. *Id.* at 188–89.

Despite this roster of Supreme Court cases, there are no cases directly on point for the third-party-consent-versus-primary-party-refusal issue.[112] Therefore, the most important consideration from the Supreme Court's jurisprudence is its rationale in the various cases: from searches, to consent searches more specifically, to third party consent searches most specifically. The following subpart focuses on the Supreme Court's rationale behind third party consent searches.

D. Rationales Behind Third Party Consent Searches

The two main reasons offered for allowing third party consent searches are (1) common authority and (2) assumption of the risk.[113] To understand each of these theories, imagine that Ryan and Steve are roommates who share a common living room and that the police ask Steve to allow a search for Ryan's narcotics. Common authority means that when each co-occupant has independent authority over shared areas, any one co-occupant individually has the authority to permit a search: Steve may permit the police to search the shared living room because he has independent authority to allow the search.[114] Assumption of the risk, a doctrine based in tort law, means that when two or more co-occupants share a space in common, each one accepts the possibility that another may permit a search: Ryan may not stop Steve from allowing the police to conduct their search because Ryan accepted this risk when he agreed to share his living space.[115]

Nailing down the Supreme Court's rationale behind third party consent searches is critical because the entire discussion of third-party-consent-versus-primary-party-refusal may hinge upon the answer to the rationale question. The

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112. *See* cases cited *supra* notes 104–11 (discussing the Supreme Court jurisprudence on third party consent searches and the corresponding lack of any Supreme Court case addressing the third-party-consent-versus-primary-party-refusal issue).

113. *See* Sharon E. Abrams, *Third-Party Consent Searches, the Supreme Court, and the Fourth Amendment*, 75 J. CRIM. L. & CRIMINOLOGY 963, 966–76 (1984) (discussing these rationales in light of *Matlock*). The waiver theory of consent searches is no longer valid since *Bustamonte*, in which the Court stated that a waiver theory would be inconsistent with third party consent searches. Schneckloth v. Bustamonte, 412 U.S. 218, 245–46 (1973).

114. *See, e.g.*, Primus v. State, 813 N.E.2d 370, 376 (Ind. Ct. App. 2004) (ruling that a primary party's presence or absence has absolutely no bearing if a third party with common authority over a premises consents to a police search).

115. *See, e.g.*, United States v. Sumlin, 567 F.2d 684, 688 (6th Cir. 1977) (finding that if two parties share a premises, each "assumes the risk of his co-occupant exposing their common private areas to such a search"). However, as usually happens in these cases, the court also speaks of common authority as a basis for the third party's valid consent. *Id.*

overarching problem for third party consent search analysis is that the Supreme Court has never precisely defined which rationale it relies on for third party consent searches.[116] Both *Matlock* and *Frazier* discussed third party consent searches in terms of common authority, but then, in practically the next sentence, they switched to the assumption of the risk theory.[117]

The answer, however, may be much simpler than it seems. These seemingly disparate theories are actually closely intertwined: The key is that the third party has common authority. The answer to the question, "why has one joint occupant assumed the risk that another joint occupant might consent to a search?" is "because each joint occupant has common authority to consent to a search." The third party has common authority over the premises or effects; therefore, the primary party has assumed the risk. The primary party takes upon himself a risk that the third party might consent, but how could there be a risk unless the third party has some independent authority to consent? In other words, assumption of the risk is part and parcel of the rationale that the third party can consent because she has common authority over the searched item or area.

Unfortunately, there is a snag in this conflation of the common authority and assumption of the risk theories: *Illinois v. Rodriguez*. The Supreme Court in *Rodriguez* seems to have eliminated the notion that assumption of the risk can be a valid basis for a third party consent search when it allowed the police to search a primary party's apartment based solely on the apparent authority of the third party.[118] Clearly, the primary party did not assume the risk that this third party might permit a search. Of course, it is also true that the third party had no common authority over the area searched, but common authority is the only remaining option:[119] The search was valid when the police reasonably

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116. The Court has been frustratingly unclear as to which theory actually controls its third party consent search jurisprudence. In fact, the Supreme Court has not even stated its rationale for consent searches in general, let alone for third party consent searches. Clearly, the Court does not rely on a waiver rationale to justify third party consent searches. *See Bustamonte*, 412 U.S. at 245–48 (rejecting the waiver argument). However, both *Matlock* and *Frazier* seem to rely equally on common authority and assumption of the risk, treating them as if they were interchangeable. *See* United States v. Matlock, 415 U.S. 164, 170–71 (1974) (listing both common authority and assumption of the risk as rationales for upholding the third party consent search); Frazier v. Cupp, 394 U.S. 731, 740 (1969) (same).

117. *See Matlock*, 415 U.S. at 170–71 (leaving unclear the question of which rationale carried the day); *Frazier*, 394 U.S. at 740 (same).

118. *See* Illinois v. Rodriguez, 497 U.S. 177, 188–89 (1990) (validating a search based on the reasonable conclusion that the consenting party had authority).

119. As the great (and fictional) Sherlock Holmes has said, "when you have excluded the impossible, whatever remains, however improbable, must be the truth." ARTHUR CONAN DOYLE, THE ADVENTURES OF SHERLOCK HOLMES 268 (Owen Dudley Edwards ed., Oxford University

believed that the third party had common authority over the area.[120] *Rodriguez* cuts the legs out from under the assumption of the risk theory. Since *Rodriguez*, common authority is the only legitimate basis for third party consent searches under the Fourth Amendment.[121]

IV. Two Models for Consent Searches

Before considering the circuit split on third party consent searches, it would be wise to step back for a moment. What is the best way to think about the situation of two persons who share a common living area? Consider this hypothetical: Dee Ann and Steph, two young graduates of Ivy League University, share an apartment in Muncie, Indiana. Although each has her own private bedroom, they share a living room, kitchen, and bathroom. Late one night, while Dee Ann is flossing her teeth and getting ready for bed, the doorbell rings. Who could it be at such a late hour? Why, one of Steph's friends, Allison, whom Steph has invited over to watch television and have a few drinks. As Steph attempts to answer the door, Dee Ann quickly steps to intercept her. A brief argument ensues: Dee Ann has no desire to have a guest—who may be quite loud—in her living room while she is trying to sleep. Of course, Steph is equally adamant that she has a right to have a guest visit her in her living room any time she so desires. In this situation, who has the upper hand? Does Dee Ann have the right to keep Allison out of the shared living room, or does Steph have the right to allow Allison into the living room?

The answer to this question—and how one reaches the answer—may shed some light on various courts' rulings on the third-party-consent-versus-primary-party-refusal issue. How does one decide who has the authority in this situation? Is this authority the result of a pre-determined arrangement? How would two roommates resolve this issue in real life?

From the hypothetical, it appears that there are two ways of thinking about roommates who have common authority over a given premises: a "veto" model

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Press 1998) (1892).

120. *See Rodriguez*, 497 U.S. at 179 (describing the facts that would validate a warrantless entry). One other possible explanation is the Court did not intend for *Rodriguez* to eliminate assumption of the risk as a basis for a third party consent search, but merely to create an exception to it. However, because assumption of the risk stems from common authority, this distinction is probably irrelevant. *See supra* notes 116–19 and accompany text (discussing the theories behind third party consent searches).

121. For the justification behind this statement, see the discussion on *Illinois v. Rodriguez* that appears *supra* notes 90–103.

and an "agency" model.[122] How one thinks about roommate rights will hugely impact the determination of the third-party-consent-versus-primary-party-refusal issue. Under the veto model, Dee Ann would have the right to keep Allison out of the shared living room at such a late hour.[123] Under the agency model, however, because Steph has common authority over the living room, she has the absolute right to admit whomever she wants at whatever time she pleases. These distinctions are thoroughly explored in the following subparts.

A. Veto Model

The veto model, as its name suggests, means that one roommate retains the right to exclude whomever he wishes from shared areas of a premises. Recall that in the hypothetical above, Dee Ann did not wish Steph's friend, Allison, to come in and watch television late in the evening. Under the veto model, Dee Ann would have the right to keep Allison out of the shared areas of the apartment.[124]

The key factor in this hypothetical is the private citizen—the government's involvement only raises the stakes.[125] In fact, introducing a government agent into the mix entirely changes the situation. For example, the Fourth Amendment protects the citizenry only against "unreasonable searches and seizures" conducted by the government, not against the exact same searches or seizures conducted by a private citizen.[126] In the scenario above, if Dee Ann is in fact a well-known drug dealer who keeps her cocaine hidden behind the television, she has good reason to want to exclude government agents from searching the shared areas of her apartment. Whether Steph ignores Dee Ann's

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122. I am immensely grateful to Professor Scott Sundby for suggesting these models to me.

123. Of course, Steph would have a similar right to keep Dee Ann's friends out of their shared areas at her discretion.

124. Steph would still retain the right to let Allison into her room.

125. Whether Dee Ann has the right to exclude Allison or Steph has the right to allow Allison inside is not, constitutionally speaking, a critical matter; most likely, the roommates will have worked out an agreement on such issues beforehand. For example, Dee Ann and Steph might agree that their friends may be in the shared areas of the apartment late at night only on the weekends.

126. *See* United States v. Jacobsen, 466 U.S. 109, 113 (1984) (explaining that the Fourth Amendment "proscrib[es] only governmental action," and not a search undertaken by a private citizen). In fact, the government may introduce at trial information a private citizen obtains from another citizen, even if it would have been illegal for a government agent to obtain the information in the exact same way. *See id.* at 115 ("Whether those invasions were accidental or deliberate, and whether they were reasonable or unreasonable, they did not violate the Fourth Amendment because of their private character.").

stated desire for privacy and lets Allison in anyway pales in comparison to allowing a government agent to come in and conduct a search for Dee Ann's hidden cocaine.

The real focus for both the veto and the agency models is the government. Under the veto model, an individual retains his right to privacy against the government, despite the actions of any other individual—including an individual with common authority over a shared area. The main idea is that one individual cannot surrender to the government another individual's rights.[127] Under the veto model, if a police officer shows up on the doorstep of the hypothetical apartment and requests consent to search for Dee Ann's narcotics, Dee Ann is allowed to veto the search, even if Steph consents.[128]

B. Agency Model

The agency model is the opposite of the veto model: under this model, one roommate has the right to admit anyone she likes, despite the objections of the other roommate. In the hypothetical above, Steph would have the right to admit anyone into the shared areas of the apartment at any time, despite Dee Ann's objections. This agency right to admit any party into a shared area at any time includes permitting a government agent to perform a search of the shared areas. Part V.B.1 inserts the lower courts' decision into the framework of these models.

V. Current Circuit Split

This Part focuses on the lower court decisions on the third-party-consent-versus-primary-party-refusal issue since the Supreme Court's ruling in *Matlock*. It first considers courts that allow third party consent to carry the day, and then it examines court decisions that have allowed the primary party to win. Finally, this examination of the current circuit split closes with a careful analysis of the courts' rationales behind their disparate decisions.

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127. Of course, if the police came while Dee Ann was away, Steph would have the right to consent to a search, for the usual third party consent search rules still apply.

128. This veto right works both ways, regardless of whose goods the police seek: even if Dee Ann wished to allow the police officers to search, Steph has the right to veto the search.

A. Split Decisions

Courts are split into two camps on the issue of whether primary party refusal can trump third party consent. Two recent state court cases demonstrate the opposite conclusions that lower courts have reached in their analysis of *Matlock*.[129] The next two sections take a closer look at the lower courts' decisions and the reasons behind the rulings. Note that the cases that allow third party consent to carry the day tend to follow the agency model more closely, while courts that allow a primary party's refusal to trump are usually in accord with the veto model.[130]

1. Third Party Consent Trumps Primary Party Refusal

The most recent case allowing a third party's consent to trump a primary party's refusal is *Primus v. State*.[131] The Court of Appeals of Indiana decided this interlocutory appeal in August 2004.[132] In *Primus*, police officers stopped the defendant's roommate, Labroi, and discovered cocaine in her car.[133] She told the detective at the scene that the cocaine belonged to Primus and that there was more in their house.[134] She also gave the detective permission to search the house for cocaine.[135] The detective and other officers went to Primus's residence; they located Primus himself down the block from his house.[136] They ascertained that Labroi and Primus were roommates, but they

129. *See* Primus v. State, 813 N.E.2d 370, 376 (Ind. Ct. App. 2004) (ruling that a third party's consent will trump a primary party's refusal). *But see* Randolph v. State, 590 S.E.2d 834, 837 (Ga. Ct. App. 2003) (requiring police to "honor a present occupant's express objection to a search of his dwelling"), *aff'd*, 604 S.E.2d 835 (Ga. 2004), *cert. granted*, 125 S. Ct. 1840 (2005).

130. Of course, none of the courts use these specific terms. *See supra* Part IV (discussing the two models for consent searches).

131. *See Primus*, 813 N.E.2d at 376 (Ind. Ct. App. 2004) ("[O]ne's authority to give consent is not dependent upon one's location."). Although the defendant was present at the time of the search in *Primus*, he did not actually voice his refusal, probably because the officers conducting the search never asked him for his consent. *Id.* at 373. Nevertheless, this case deserves its place in the pantheon of primary-party-refusal-versus-third-party-consent cases because of the court's analysis of the effect of Primus's location on the validity of the search; the court concluded that even if Primus had objected to the search, it would have had no bearing on the outcome of the case. *Id.* at 376.

132. *Id.* at 372.

133. *Id.* at 372–73.

134. *Id.* at 373.

135. *Id.*

136. *Id.*

did not ask Primus for consent before conducting the search, which eventually yielded a quantity of cocaine.[137]

The trial court denied Primus's motion to suppress the cocaine,[138] and the appellate court granted an interlocutory appeal to address whether Labroi had the authority to consent to the search.[139] The court focused on why it was reasonable both for the officers to believe that Labroi had common authority—using a totality of the circumstances test—and for them to conduct their search.[140] The court did not spend much time dealing with Primus's argument that "his right to refuse consent, as the party present, should outweigh Labroi's right to give consent."[141] Although the court included the famous statement from *Matlock* that third party consent is valid against an absent, nonconsenting party who shares common authority,[142] it did not base its decision on Primus's presence at the scene.[143] Instead, the appellate court summarily dismissed the argument, stating that "one's authority to give consent is not dependent upon one's location."[144]

Primus differs from most primary-party-refusal-versus-third-party-consent cases because, although Primus was present at the scene, the officers never asked him for his consent, presuming that the consent already given by the third party was sufficient.[145] Why then should a discussion of cases in which the primary party voices his refusal include *Primus*? The court's rationale was that a third party with common authority may consent to a search, the primary party's location, activities, or statements notwithstanding.[146] The court's analysis at the end of *Primus* made it clear that Primus's whereabouts had no

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137. *Id.*

138. *Id.*

139. *See id.* at 372–73 (expressing the issue presented on appeal).

140. *See id.* at 373–76 (discussing searches generally and common authority in particular).

141. *Id.* at 376.

142. *See id.* at 376 (explaining the validity of consent against an absent party); United States v. Matlock, 415 U.S. 164, 170 (1974) ("[T]he consent of one who possesses common authority over premises . . . is valid as against the absent, nonconsenting person with whom that authority is shared.").

143. *See Primus*, 813 N.E.2d at 376 (calling physical location "irrelevant").

144. *Id.* at 376. The court did allow that a party's location could have some bearing on a police officer's reasonable determination that the third party possessed apparent authority. *Id.* However, that analysis has no weight when the third party has actual authority.

145. *See id.* at 373 (detailing the failure to request consent from Primus).

146. *See id.* at 376 ("Either a party has authority to consent to a search . . . or he or she does not.").

bearing on the validity of the search: Even if Primus had objected to the search, the outcome would have been the same.[147]

Primus is the most recent in a long line of cases allowing third party consent to trump primary party refusal.[148] An older, important lower court case is *United States v. Sumlin*.[149] After the defendant robbed a bank and was arrested, the police obtained permission from the defendant's roommate to search their apartment.[150] Defendant Sumlin claimed that police first asked him for permission to search and he refused; while the trial court made no finding on this issue, the appellate court assumed that the defendant's version was correct for purposes of their analysis.[151]

Although the defendant argued that his initial refusal distinguished his situation from that of the defendant in *Matlock*, his argument did not impress the Sixth Circuit Court of Appeals.[152] The court reasoned from *Matlock* that the third party's authority to permit a search did not depend upon the defendant's presence or absence, or upon his consent or refusal.[153] Instead, the *Sumlin* court stated that a third party consent search is warranted—or not—based on common authority: If two parties share a premises, each "assumes the risk of his co-occupant exposing their common private areas to such a search."[154] Therefore, the primary party's refusal is immaterial; each party has independent authority to consent to a search of the shared areas of her property.[155]

Like its Supreme Court precursors, *Sumlin* employed common authority and assumption of the risk interchangeably.[156] *Primus* did the

147. *See id.* at 376 (making it plain that any party who has common authority over a premises or item has the requisite authority to consent, even if another party with common authority objects).

148. *See, e.g.*, United States v. Hendrix, 595 F.2d 883, 885 (D.C. Cir. 1979) (holding that the search of defendant's apartment was legitimate based on a third party's consent despite the defendant's objection to the search).

149. *See* United States v. Sumlin, 567 F.2d 684, 687–88 (6th Cir. 1977) (holding that refusal by a primary party is constitutionally insignificant where a third party with common authority consents to a search).

150. *Id.* at 685–86.

151. *Id.* at 686, 687 n.8.

152. *See id.* at 687–88 (declaring that the additional fact had no constitutional significance).

153. *See id.* (explaining the significance of the *Matlock* holding).

154. *Id.* at 688.

155. *See id.* at 687–88 (concluding that consent of a co-occupant is effective notwithstanding any prior refusal by the other co-occupant).

156. *See id.* at 688 (stating that assumption of the risk is the rationale behind the common authority doctrine).

same.[157] Both cases demonstrate that one co-occupant's common authority carries the day: when one co-occupant has independent authority over an area, no other co-occupant can veto the search.[158] Thus, *Primus* and *Sumlin* exemplify the agency model of consent searches.[159]

2. *Primary Party Refusal Trumps Third Party Consent*

On the opposite side of the coin is *Randolph v. State*,[160] which recently decided that refusal by the primary party trumps consent given by a third party.[161] Defendant Randolph's wife told police officers that her husband had cocaine in the house.[162] When an officer asked Randolph for his consent to search the house, he flatly refused.[163] The officer then promptly turned and asked the defendant's wife, who consented to the search.[164] The officer collected a "piece of cut straw" that had cocaine residue on it; with this piece of evidence, he was able to obtain a search warrant that led to the discovery of "numerous drug-related items."[165] The trial court quashed the defendant's motion to suppress the drug evidence.[166] This case, like *Primus*, was an interlocutory appeal taken up by the state appellate court to decide the evidentiary issue.[167]

The issue in *Randolph* was "whether it is reasonable for one occupant to believe that his stated desire for privacy will be honored, even if there is another occupant who could consent to a search."[168] Clearly, the defendant

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157. *See* Primus v. State, 813 N.E.2d 370, 374 (Ind. Ct. App. 2004) (basing assumption of the risk upon the third party's common authority over the shared premises).

158. *See* United States v. Sumlin, 567 F.2d 684, 687 (6th Cir. 1977) ("It is equally well settled that a third person . . . can consent to a search of a defendant's premises or effects if that third person has common authority over the premises or effects."); *Primus*, 813 N.E.2d at 376 (declaring that a third party's common authority is sufficient to permit the search, regardless of primary party's words or actions).

159. *See supra* Part IV.B (explaining the agency model of consent searches).

160. Randolph v. State, 590 S.E.2d 834 (Ga. Ct. App. 2003), *aff'd*, 604 S.E.2d 835 (Ga. 2004), *cert. granted*, 125 S. Ct. 1840 (2005).

161. *See id.* at 837 (requiring police to "honor a present occupant's express objection to a search of his dwelling").

162. *Id.* at 836.

163. *Id.*

164. *Id.*

165. *Id.*

166. *Id.*

167. *See id.* (describing the procedural history of the case).

168. *Id.*

wished his privacy to be honored, despite his wife's consent to the search.[169] The court first considered whether there was any controlling precedent on this question, beginning with *Matlock*'s statement about the consent of an "absent nonconsenting" party, but rejected it as nonprecedential because here the defendant was certainly present—and even objecting—when the search occurred.[170] Nevertheless, the court briefly distinguished *Randolph* from *Matlock*, explaining that the latter case "stand[s] for the proposition that, *in absence of evidence to the contrary*, there is a presumption that a co-occupant has waived his right of privacy as to other co–occupants."[171] The defendant in *Randolph* clearly rebutted that presumption by voicing his objection to the search.[172]

The *Randolph* court's theory was that common authority works both ways: Just as one co-occupant may exercise consent rights for all, so another co-occupant may exercise privacy rights for all.[173] In a non-third-party-consent search, the subject of the search is allowed to set limits and even withdraw consent at any time.[174] Therefore, when there are two or more co-occupants, the court found it "inherently reasonable" that when one co-occupant grants consent, another co-occupant may exercise his right to terminate the search.[175] The court also advanced a public policy rationale for its holding, explaining that police officers need a bright-line rule for when they may conduct a search.[176] If an officer's request for consent is refused, the officer should be required to obtain a search warrant based on probable cause.[177] For all the foregoing reasons, the appellate court reversed the decision of the trial court and excluded the evidence.[178]

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169. *See id.* (recounting the defendant's unequivocal rejection of a request to search).

170. *See id.* at 836–37 (explaining that *Matlock* does not discuss the precise issue presented).

171. *Id.* at 837–38 (emphasis added).

172. *Id.* at 838. In such a situation, the issue becomes "whether [Mrs. Randolph] may waive her husband's right to be free from the search," not whether she had the "right to consent to a search." *Id.* The same reasoning applies to an assumption of the risk analysis: "[T]he risk assumed by a co-occupant is that, *in the absence of evidence to the contrary*, the other co-occupant might grant consent to search." *Id.* (emphasis added).

173. *See id.* at 837 ("Inherent in the power to grant consent is the power to vitiate that consent.").

174. *Id.* at 837; *see also* Florida v. Jimeno, 500 U.S. 248, 252 (1991) ("A suspect may of course delimit as he chooses the scope of the search to which he consents.").

175. *Randolph*, 590 S.E.2d. at 837.

176. *See id.* (explaining the need for the court to provide clear guidance to law enforcement personnel).

177. *Id.*

178. *Id.* at 840. The Georgia Supreme Court subsequently affirmed this appellate court

The *Randolph* decision was merely the most recent among the cases that have allowed a primary party's refusal to trump a third party's consent.[179] An earlier case supporting this position is *Silva v. Florida*.[180] In *Silva*, the defendant and the third party, Mrs. Brandon, had been living together and holding themselves out as husband and wife.[181] After the defendant hit Mrs. Brandon in the mouth one day, she walked to a convenience store and called the police, telling them that the defendant was a felon and had guns in his closet.[182] When police arrived at the house, Mrs. Brandon let them in and told them that "the guns were in the hall closet."[183] Defendant, who was also present, strenuously objected to the search of the closet.[184] Over the defendant's objection—but with Mrs. Brandon's consent—the police conducted the warrantless search, found the guns, and arrested the defendant.[185]

The Florida Supreme Court addressed "the validity of a warrantless search when two parties having joint dominion and control are present, and one consents but the other objects."[186] The *Silva* court's main focus, in considering

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decision. State v. Randolph, 604 S.E.2d 835, 836 (Ga. 2004), *cert. granted*, 125 S. Ct. 1840 (2005).

179. *See Randolph*, 604 S.E.2d at 836 (affirming the appellate court decision).

180. Silva v. Florida, 344 So. 2d 559 (Fla. 1977). Interestingly, this case was decided the same year as *Sumlin*, which reached the opposite result. *See* United States v. Sumlin, 567 F.2d 684, 688 (6th Cir. 1977) (holding that refusal by a primary party is constitutionally insignificant where a third party with common authority consents to a search). For a discussion of *Sumlin*, see *supra* notes 149–56 and accompanying text.

181. *See Silva*, 344 So. 2d at 560 (noting that the couple had leased an apartment as Mr. and Mrs. Silva).

182. *Id.*

183. *Id.*

184. *Id.*

185. *Id.*

186. *Id.* at 562. Before reaching this issue, the court first considered how and whether the lack of a marital relationship would have any bearing on the issue. *Id.* at 560–62. Under Florida law in force at the time of this case, nonmarried individuals could waive one another's constitutional rights (i.e., by consenting to a search), but a married individual did not have a similar ability with respect to the rights of his or her spouse. *Id.* at 561. The theory behind this law was that "the husband and wife relationship was of such a nature as to prevent either spouse from acting against the family's interest by consenting to a warrantless search of the other's property," whereas nonmarried persons were acting as individuals and could act in their own interest. *Id.* In this situation, when the primary party is "present and objecting" while the third party is consenting, the court decided that "the validity of search should not hinge on the marital status of the parties." *Id.*

Similarly, in *Randolph*, the third party and primary party were husband and wife. Randolph v. State, 590 S.E.2d 834, 837 (Ga. Ct. App. 2003), *aff'd*, 604 S.E.2d 835 (Ga. 2004), *cert. granted*, 125 S. Ct. 1840 (2005). The Georgia Appellate Court did not give much weight to this factor, however, merely noting in passing that "Georgia courts strive to . . . avoid

prior cases, was the defendant's presence at the time of the search: The court cited *Matlock* as one of the main Supreme Court cases where the defendant was absent at the time of the search.[187] The *Silva* court stressed that the primary party's absence was the key to upholding a valid third party consent search.[188] The reasoning behind this decision was that "a present, objecting party should not have his constitutional rights ignored" simply because he shares his property with another.[189] Therefore, where the primary party is present, the court determined that he should have "controlling authority" to refuse a consent search.[190]

Since *Primus* and *Sumlin* both fit into the agency model,[191] it should come as no surprise that *Randolph* and *Silva* both embody the veto model. These latter cases, which allowed a primary party's refusal to trump a third party's consent, both stressed that an individual does not relinquish any constitutional rights simply by sharing his premises with another.[192] Both *Randolph* and *Silva* considered common authority and found that the party at whom the search is directed ought to be able to cast a controlling veto over the consent search.[193]

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circumstances that create adversity between spouses." *Id.* In *Randolph*, the marriage between the third party and primary party became merely another factor that tipped the scales in favor of allowing the defendant's refusal to override the third party's consent. *Id.*

187. *Silva*, 344 So. 2d at 562.

188. *See id.* (emphasizing the importance of the absence of the party against whom the search is directed and declaring that "evidence obtained in a search is inadmissible against a person having equal rights in the premises if he is present at the time of the search and does not consent . . . .") (citing United States v. Robinson, 479 F.2d 300, 303 (7th Cir. 1973)).

189. *Id.* This is *especially* true when the police know that it is the primary party's constitutional rights at stake, and not the third party's. *Id.* at 563. Note, though, that the *Silva* court couches part of its discussion in waiver language. *See id.* at 561 ("[T]he husband and wife relationship . . . does not authorize one spouse to waive the constitutional rights of the other by consenting to a warrantless search."). The waiver theory is no longer a valid theory for consent searches. *See* Schneckloth v. Bustamonte, 412 U.S. 218, 248–49 (1974) (rejecting the notion that consent to search is a waiver of constitutional rights); *supra* notes 50–62 and accompanying text (discussing *Bustamonte*).

190. *Silva*, 344 So. 2d at 562. After it decided this issue, the court considered whether Mrs. Brandon had authority over the closet necessary to authorize a consent search; the court decided that she did not. *Id.* at 564. However, this issue is moot in light of the court's sweeping pronouncement that the defendant's refusal trumped the police officers' right to search despite Mrs. Brandon's consent. *Id.* at 562.

191. *See supra* Part V.A.1 (analyzing these third party consent cases and how they fit into the models).

192. *See Silva*, 344 So. 2d at 562 (noting that one co-occupant does not forfeit her constitutional rights because she shares her property with another); Randolph v. State, 590 S.E.2d 834, 838 (Ga. Ct. App. 2003) (judging that co-occupants assume the risk that another co-occupant might permit a search in their absence, but not the risk that another co-occupant may override their constitutional "right to be free from police intrusion").

193. *See Silva*, 344 So. 2d at 562 ("[A] present, objecting party should not have his

Finally, both cases stated that the primary party's absence in *Matlock* was a deciding factor in that case.[194]

B. Arguments and Rationales

The lower courts that have decided the third-party-consent-versus-primary-party-refusal issue deal primarily with common authority and assumption of the risk.[195] Though all four lower court cases—*Primus*, *Sumlin*, *Randolph*, and *Silva*—argued from common authority, they reached opposite results.[196] There are two main reasons for this disparity: First, and more importantly, the courts espoused different models for third party consent searches.[197] Second, the courts relied on two different interpretations of *Matlock*.[198]

1. Where the Cases Fit into the Models

As mentioned at the beginning of this Part, the courts on both sides of the issue unconsciously subscribe to either the veto model or the agency model. *Primus*, a pro-third-party-consent case, exemplified the agency model when it

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constitutional rights ignored because of a . . . property interest shared with another."); *Randolph*, 590 S.E.2d at 838 (deciding that where the primary party is present, the third party may not waive the primary party's right to refuse the search).

194. *See* Silva v. Florida, 344 So. 2d 559, 562 (Fla. 1977) (noting that all the Supreme Court cases on the issue involved the primary party's absence); *Randolph*, 590 S.E.2d at 836 (explaining that no Supreme Court decisions involve the primary party's presence at the time of the search).

195. For example, the recent decisions in *Primus* and *Randolph* spent a good deal of time discussing the defendant's assumption of the risk that a co-occupant might permit a search, though they came to opposite conclusions. *See* Primus v. State, 813 N.E.2d 370, 374 (Ind. Ct. App. 2004) ("[I]t is reasonable to recognize that any of the cohabitants has the right to permit the inspection in his or her own right and that the others have assumed the risk that one of their number might permit the common area to be searched."). *But see* Randolph v. State, 590 S.E.2d 834, 838 (Ga. Ct. App. 2003) ("[T]he risk assumed by a co-occupant is that, in the absence of evidence to the contrary, the other co-occupant might grant consent to search.").

196. *See Primus*, 813 N.E.2d at 376 (finding that a when a third party has common authority, her consent will always validate a search, a primary party's objection notwithstanding); United States v. Sumlin, 567 F.2d 684, 687–88 (6th Cir. 1977) (same). *But see* Silva v. Florida, 344 So. 2d 559, 562 (Fla. 1977) (ruling that a third party cannot waive a primary party's rights if the primary party is present); *Randolph*, 590 S.E.2d at 837 (disallowing a third party's consent to stand where the primary party is present and voicing his objection to the search), *aff'd*, 604 S.E.2d 835 (Ga. 2004), *cert. granted*, 125 S. Ct. 1840 (2005).

197. *See infra* Part V.B.1 (explaining where the cases fit into the veto and agency models).

198. *See infra* Part V.B.2 (examining the lower courts' analyses of *Matlock*).

stated that common authority carries the day, refusal notwithstanding.[199] This is the essence of the agency model. Likewise, *Sumlin* based its decision on the third party's authority, ignoring any dissent from a primary party.[200] Because they ruled that a third party's consent will always be sufficient to justify a search, both of these cases accepted—though not in so many words—an agency model for co-occupants.

On the other side of the issue are those courts for which primary party refusal reigns supreme. The *Randolph* court offered a shining example of the veto model: *Randolph* explicitly stated that even if one co-occupant gives consent to a search, another co-occupant has the absolute right to withdraw this consent.[201] This is the veto model come to life. *Silva* followed the veto model to an extent, though the *Silva* court made the party at whom the search is directed an all-important factor by giving the primary party controlling authority to withhold consent—or to override consent already given by a third party.[202] Nevertheless, *Silva* remains firmly entrenched in the veto model.

The split between the models explains the courts' diametrically opposed interpretations of common authority. Whereas the agency model—and the *Primus* and *Sumlin* courts—gives the third party the independent authority to consent to a search, the veto model—demonstrated by the *Randolph* and *Silva* courts—gives the primary party the right to override the third party's authority.[203] However, there is another important factor to consider in these cases: the presence of the primary party.

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199. *See Primus*, 813 N.E.2d at 376 (supporting a search based solely on common control of the premises).

200. *See Sumlin*, 567 F.2d at 687–88 (allowing a search based on the consent of a co-occupant).

201. *See* Randolph v. State, 590 S.E.2d 834, 837 (Ga. Ct. App. 2003) (explaining that a co-occupant may exercise his competing right to be free of a search authorized by another co-occupant), *aff'd*, 604 S.E.2d 835 (Ga. 2004), *cert. granted*, 125 S. Ct. 1840 (2005).

202. *See* Silva v. Florida, 344 So. 2d 559, 562 (Fla. 1977) (giving the primary party the power to refuse a consent search).

203. The veto model probably also gives a third party the right to veto a search. *Contra Silva*, 344 So. 2d at 562 ("It is only reasonable that the person whose property is the object of a search should have controlling authority to refuse consent."). In other words, it is unclear from *Silva*'s decision whether a third party's refusal to consent would be controlling if the primary party consented. *Id.* at 562–63. Although the court clearly stated that a "present, objecting party should not have his constitutional rights ignored" simply because he shares an area in common with another, it affirmed only that this is "particularly true" where the objecting party is "the one whose constitutional rights are at stake," leaving unclear the situation where a third party desires to prohibit the search. *Id.*

2. How Important Is the Primary Party's Absence?

For lower courts trying the third-party-consent-versus-primary-party-refusal issue, the heart of *Matlock* is its language about the validity of a third party consent search against the "absent, nonconsenting person."[204] The crux of the issue comes down to whether the primary party actually needs to be absent for a third party to give valid consent. Courts that allowed third party consent to trump the primary party's refusal concentrated on the fact that the defendant was actually present in his front yard, though the police failed to ask his permission to search, and, instead, received permission from a co-occupant of the house.[205] Thus, under *Matlock*, the courts reasoned, it mattered not whether the defendant was present or absent at the time of the search, and it was likewise immaterial whether he would have consented or refused.[206]

However, Justice Douglas's dissent in *Matlock* includes some important details about what actually happened immediately prior to the search.[207] In that case, the police officers arrested the defendant, who "was restrained in a squad car a distance from the home."[208] Only after the officers removed the defendant from his front yard and placed him in the back of the police car did they approach the house and ask Mrs. Graff for permission to search the residence.[209] In other words, the defendant was actually absent from the scene when the police officers obtained permission from the third party.[210]

This fact presents a troubling situation for courts that would require police officers to obtain consent from a primary party who is present at the scene. It appears that the police could circumvent the "ask the present primary party" rule simply by taking the primary party into custody and removing him from the scene, as they did in *Matlock*.[211] Thus, if Sarah and Laura shared an apartment and the police desired to search a common room for Sarah's marijuana, her

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204. United States v. Matlock, 415 U.S. 164, 170 (1974).

205. *See, e.g.*, United States v. Sumlin, 567 F.2d 684, 687 (6th Cir. 1977) ("*Matlock* did not depend on the defendant's absence for the defendant there had just been arrested in the front yard of the residence when the third person's consent to search was procured.").

206. *See, e.g.*, Primus v. State, 813 N.E.2d 370, 376 (Ind. Ct. App. 2004) ("Either a party has authority to consent to a search . . . or he or she does not.").

207. *See Matlock*, 415 U.S. at 178–79 (Douglas, J., dissenting) (detailing the facts of the case). Justice Douglas's main point is not that the defendant's absence is dispositive on this issue, but rather that "the crucial finding in the case" is that the police had time to obtain a warrant, which they should have done. *Id.* at 180 (Douglas, J., dissenting).

208. *Id.* at 179 (Douglas, J., dissenting).

209. *Id.* (Douglas, J., dissenting).

210. *Id.* (Douglas, J., dissenting).

211. *Id.* (Douglas, J., dissenting).

constitutional rights would depend entirely on serendipity:[212] If Sarah is home when the police come to search, she may freely withhold her consent, but if Sarah is out, Laura's consent will clearly suffice.[213]

The importance of the primary party's presence or absence hinges upon two things: the Supreme Court's rationale behind third party consent searches and the model one accepts in thinking about the authority of co-occupants. If common authority is the basis for third party consent searches, then the primary party's location is irrelevant. Even under an assumption of the risk analysis, as soon as Sarah leaves the shared apartment, she has taken the risk that Laura might betray her privacy interest to the government. This sort of common authority—or assumption of the risk—analysis fits perfectly into the scheme of the agency model. The agency model means that in Sarah's absence, Laura may act as her agent to permit or exclude governmental intrusion as she sees fit.

The veto model, on the other hand, gives a twist to the agency interpretation of common authority.[214] Common authority remains the authority of one occupant to consent; however, another occupant may override this consent by withdrawing consent to search. The veto model's version of common authority posits that no one co-occupant may trump the privacy right of another occupant. Nevertheless, the presence or absence of the primary party will still be dispositive: if the primary party is absent, the third party may grant consent, which will go uncontested.[215] Under current Supreme Court jurisprudence, only when both the primary party and the third party are present do the veto and the agency models come into play.

VI. Resolution

This concluding Part begins by recapping the rationale behind third party consent searches. Instead of ending with a summation of where the law is today, it

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212. A rule making Sarah's constitutional rights hinge upon her presence would doubtless encourage the police to wait for the opportune moment when she has left her shared apartment or, if the officers had probable cause, they might simply arrest Sarah and then ask Laura for her consent.

213. The problem, under both the veto and the agency model, is that this is the exact situation today: The police may simply wait for the primary party to leave, then obtain consent from the third party. This is one reason for the reasonable attempt test proposed in Part VI.B *infra*.

214. However, assumption of the risk remains untouched—the veto model dictates situations where two or more parties are present, not where one occupant consents in the absence of any or all other affected parties. Consider that since *Illinois v. Rodriguez*, common authority may be the only real basis for third party consent searches. *See supra* notes 118–21 and accompanying text (discussing *Rodriguez*'s effect on the basis for consent searches).

215. *See supra* notes 213–14 (introducing the "serendipity problem").

argues for a change: the reasonable attempt test. This test requires the police officers to take reasonable steps to obtain consent from the party at whom the search is directed. If the police do not take reasonable steps to obtain the primary party's consent, or the primary party refuses to consent, the officers would be required to obtain a warrant based on probable cause. Under this new test, refusal by the primary party would trump a third party's consent because this is the optimal outcome for society: allowing one co-occupant to veto the consent of another co-occupant upholds the individual's privacy interest. Moreover, the reasonable attempt test comports with the Reasonableness Clause in the Fourth Amendment. If the party at whom the search is directed objects to a consent search, the police will have to obtain a warrant to carry out their search, which would reinforce the warrant preference inherent in the Fourth Amendment.

A. The State of the Law Today

Given the current Supreme Court jurisprudence in this area, third party consent to a search must trump refusal by a primary party. *Matlock* teaches that a third party's consent may validate a search made against a co-occupant.[216] *Rodriguez* goes even further by allowing searches consented to by a third party who only appeared to possess authority over a primary party's premises.[217] The rationales behind these cases are the key to determining the outcome of the third-party-consent-versus-primary-party-refusal issue. *Matlock* clearly relies on the theories of common authority and assumption of the risk to justify third party consent searches;[218] allowing primary party refusal to trump consent given by a third party does not make sense under either theory.[219]

How would *Matlock* have turned out if the defendant had been present at the time of the search? Under an assumption of the risk analysis, the Court probably would have allowed the search because the primary party knew that a

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216. United States v. Matlock, 415 U.S. 164, 169–70 (1974).

217. *See* Illinois v. Rodriguez, 497 U.S. 177, 188–89 (1990) (holding that an officer's reasonable belief that third party has authority validates a search).

218. *See Matlock*, 415 U.S. at 170–71 (discussing both common authority and assumption of the risk); *supra* notes 113–21 and accompanying text (discussing these rationales). Whether *Rodriguez* actually undercuts assumption of the risk or merely creates an exception to it is not dispositive of the issue, for common authority alone could underpin the Supreme Court's decisions. *See supra* note 120 (discussing *Rodriguez*).

219. *Matlock* implies that common authority equals independent authority, meaning that the third party would have been able to consent even if the primary party had been present. *See* discussion *infra* notes 220–22 and accompanying text (considering the effect of the primary party's presence).

third party might permit the police to search any shared areas.[220] Similarly, if the Court wanted to base its decision in common authority, it might reason that the third party's authority precludes any other co-occupant from trumping that authority: as in *Primus*, the third party's authority is an independent, unalterable basis for permitting a search.[221] In other words, the Supreme Court's interpretation of common authority seems to parallel the agency model for co-occupants, in that one party may consent to a search of any shared area, refusal by another party notwithstanding.[222] If the Supreme Court granted certiorari to a case with facts such as those in *Primus*, the third party's consent would almost certainly be enough to validate a search, even if the primary party were standing there and objecting.

B. The Reasonable Attempt Test

The Supreme Court jurisprudence on this issue precludes a rule that would allow a primary party's refusal to trump a third party's consent.[223] One must consider, however, as the *Randolph* and *Silva* courts did, whether this is the most desirable result for society. When someone with a clear privacy interest says "no" to a consent search, the justice system ought not to consider this a valid search under the Fourth Amendment. In this situation, the person whose property the police wish to search ought to have controlling authority to consent to—or to refuse—such a search. This Note proposes a reasonable attempt test for police officers who wish to do a consent search of another's property. Under this new test, the police officers must take reasonable steps to obtain consent from the party at whom the search is directed, whether or not that party

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220. This is analogous to the situation in *Frazier*, where the defendant should have known that by letting his cousin borrow his duffel bag, he assumed the risk that his cousin might permit someone to search the duffel bag. Frazier v. Cupp, 394 U.S. 731, 740 (1969).

221. *See* Primus v. State, 813 N.E.2d 370, 376 (Ind. Ct. App. 2004) (stating that the primary party may not overrule the consent of a third party who has authority to consent to a search).

222. *See supra* Part IV.B (explaining the agency model for consent searches). As a sidenote, even if the Court decided that, under current Supreme Court jurisprudence, primary party refusal ought to carry the day, it could not rely on either an assumption of the risk or a common authority analysis because this would implicate the waiver right. The idea is that if a primary party gets to veto a third party, it is because that third party is waiving the primary party's constitutional rights. However, this rule would fail because the waiver standard of constitutional rights has no place in third party consent searches under the *Bustamonte* totality of the circumstances test. *See* Schneckloth v. Bustamonte, 412 U.S. 218, 227, 245–48 (1973) (establishing the test and rejecting the waiver argument).

223. *See supra* Part VI.A (discussing the current state of the law on this issue).

is present at the scene.[224] If the police do not take reasonable steps to obtain the primary party's consent, or the primary party refuses to consent, the officers would be required to obtain a warrant based on probable cause.[225]

There are many reasons for implementing such a test. First, a party does not immediately give up her constitutional rights to the government simply because she shares a living space with another: this is the essence of the veto model.[226] Although the veto model would still allow ordinary third party consent searches to stand—so long as the police first reasonably attempted to obtain the primary party's consent—whenever a primary party is present at the scene, her veto has controlling authority. The veto model is preferable to the agency model precisely because it upholds an individual's rights against government intrusion.[227]

Second, under current Supreme Court jurisprudence, all searches and seizures must be reasonable.[228] This new reasonable attempt test is, as the name implies, based in reasonableness, for it requires government agents to obtain the consent of the party against whom the search is directed, if possible. *Rodriguez*, the Supreme Court case that allowed police officers to search based on the apparent authority of a third party, strongly stated that reasonableness is the test against which searches must stand or fall.[229] If reasonableness is the basis for a third party consent search, surely it is inherently reasonable that the police officers first make an attempt to locate the primary party before conducting their search based on the consent of a third party—especially when that third party might not have actual authority over the premises.

Finally, the Warrant Clause in the Fourth Amendment lends support to the reasonable attempt test. Although the Supreme Court focuses more on the Reasonableness Clause of the Fourth Amendment these days, the Warrant Clause is still in force and using a search warrant is the easiest way for the police to

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224. As mentioned at the beginning of the Note, if the officers wish to search a shared apartment for goods when they suspect more than one individual, the officers would have to attempt to obtain the consent of all the individuals directly implicated in the search. *Supra* note 19.

225. This Note does not attempt to define what makes an attempt "reasonable."

226. *See supra* Part IV.A (explaining the veto model). Moreover, the reasonable attempt test avoids the serendipity problem—that a primary party loses her constitutional rights as soon as she steps out the door—by requiring police officers to make a reasonable attempt to locate the primary party before conducting a consent search. *See supra* notes 213–14 (discussing the serendipity problem).

227. *See supra* Part IV.A (explaining the veto model).

228. *See* New Jersey v. T.L.O., 469 U.S. 325, 337 (1985) ("[T]he underlying command of the Fourth Amendment is always that searches and seizures be reasonable . . . .").

229. *See* Illinois v. Rodriguez, 497 U.S. 177, 185–86 (1990) (requiring police officers' searches to "always be reasonable").

ensure that the evidence from their search will be admitted at trial.[230] The reasonable attempt test seeks to reconcile the two clauses of the Fourth Amendment: first, by acknowledging the Supreme Court's leanings toward reasonableness, in requiring the police to make a reasonable attempt to locate the primary party, and second, by the fall back position that the police must acquire a search warrant from a neutral and detached magistrate.

The reasonable attempt test balances the government's need to obtain evidence with the individual's right to privacy. So long as the government agents make a reasonable attempt to obtain permission from the primary party, they may search based on third party consent. However, when the agents do not make a reasonable attempt, or when the primary party refuses to consent, they must obtain a search warrant. This test ensures that an individual does not relinquish his right of privacy with respect to the government simply because he shares a premises with another.[231]

C. Conclusion

Under current Supreme Court jurisprudence, a third party's consent will always trump a primary party's refusal.[232] However, a number of lower court

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230. *See supra* notes 43–47 and accompanying text (explaining that any evidence will be kept out of the trial because of the exclusionary rule unless the search falls under one of the numerous exceptions to the Warrant Clause).

231. *But cf.* Hoffa v. United States, 385 U.S. 293, 303 (1966) ("The risk of being . . . betrayed by an informer . . . is probably inherent in the conditions of human society."). In *Hoffa*, the defendant confided in a man who was a government agent, though the defendant was unaware of this fact. *Id.* at 300, 302. The Court declared that this was not a Fourth Amendment search, and that the defendant assumed the risk that his confidant might betray him. *Id.* at 303. *Hoffa* is distinguishable from the third-party-consent-versus-primary-party-refusal cases because of 1) the nature of a search and 2) the different interests involved.

First, *Hoffa* stated that this betrayal of information by the agent was not a search: There is no such thing as a verbal search. *Id.* at 300. A consent search clearly is a Fourth Amendment search. *See supra* Part II.C (introducing consent searches and explaining how they fit into the Fourth Amendment). Second, while government agents can illegally search via eavesdropping, they commit no such illegal search where they plant an informer with whom the defendant shares information. *Hoffa*, 385 U.S. at 303; *see also* Katz v. United States, 389 U.S. 347, 353 (1967) (ruling that the government's wiretapping of a phone booth constituted an illegal search). *Hoffa* involved spoken words, while third party consent searches involve physical property. *See Hoffa*, 385 U.S. at 300 (explaining the contention that listening to the petitioner's conversation was an illegal search for verbal evidence). A party who shares information with a third party immediately gives up his right of secrecy to that information, whereas a party who shares property with another does not automatically give up his right of privacy with respect to the government. *Id.* at 303.

232. *See supra* Part VI.A (explaining the state of the law on the third-party-consent-versus-primary-party-refusal issue).

cases, emphasizing the individual's privacy right against the government, have allowed the primary party's refusal to override a third party's consent.[233] Under *Matlock* and other Supreme Court progeny, these lower court cases that favor the primary party must fail.[234] Therefore, this Note suggests a new, reasonable attempt test: a government agent must make a reasonable attempt to locate the party at whom the search is directed, else the search must fail.[235] This test would both uphold the individual's privacy right and satisfy the requirements of the Fourth Amendment.[236] Simply stated, the Court ought not consider it a valid Fourth Amendment search when someone with a clear privacy interest refuses to consent to a warrantless search.

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233. *See supra* Part V.A.2 (giving two examples of lower court cases that found for the primary party).

234. *See supra* Part VI.A (detailing why the theories of common authority and assumption of the risk do not allow this result).

235. *See supra* Part VI.B (setting out the reasonable attempt test in more detail).

236. *See supra* Part VI.B (arguing these very reasons for implementing the reasonable attempt test).