

No. 05-0146

IN THE
SUPREME COURT OF THE UNITED STATES,
OCTOBER TERM, 2005

THE COMMONWEALTH OF PENNSYLVANIA,

Petitioner,

v.

EDMOND FITZGERALD,

Respondent.

On Writ of Certiorari to the Supreme Court of Pennsylvania,
Commonwealth v. Fitzgerald, 875 A.2d 1058 (Pa. 2005).

Before: REHNQUIST, C.J. and STEVENS, O'CONNOR, SCALIA, KENNEDY,
SOUTER, THOMAS, GINSBURG, and BREYER, J.J.

ORDER

The petition for writ of certiorari is hereby GRANTED. Probable jurisdiction is noted and a total of one half hour allotted for oral argument. The briefs of both parties are to be filed with the Clerk of the Court on or before 11:59 p.m. on **Friday, September 16, 2005**. The case is set for oral argument in the October 2005 term of this Court.

Supreme Court of Pennsylvania
COMMONWEALTH of Pennsylvania,
Appellee,

v.

Edmond FITZGERALD,
Appellant.

No. 12 EAP 2005

Argued January 20, 2005.
Decided February 28, 2005.

Allocatur to The Superior Court of
Pennsylvania, Eastern District.

Before CAPPY, C. J. and CASTILLE,
NIGRO, NEWMAN, SAYLOR,
EAKIN, and BAER, J.J.

CAPPY, C.J., delivered the opinion of
the court in which NEWMAN, NIGRO,
and EAKEN, J.J. joined. BAER, J. filed
a dissenting opinion in which
CASTILLE, and SAYLOR, J.J. joined.

OPINION

Mr. Chief Justice CAPPY.

We granted allocatur in this case to
decide whether the consent of a third
party to the search of a defendant's
home is valid in the face of the
defendant's continuing objection at the
time of the search.

The Commonwealth invites us to
affirm the decision of the Superior Court
and adopt the interpretation of *United
States v. Matlock* put forth by several
United States Courts of Appeals that a
search of a defendant's home, with the
voluntary consent of a third party, is
always valid, even if the subject of the

search is present and objects to it. This
we decline to do for the reasons that
follow.

I. FACTS AND PROCEEDINGS.

The facts of this case, as found by
the Court of Common Pleas, Columbia
County, at a suppression hearing held
before it on October 3, 2002 are not in
dispute.

Appellant, Edmond Fitzgerald
(hereinafter "Appellant" or "Fitzgerald")
was charged by information by the
District Attorney of Columbia County
for possession of cocaine and marijuana;
possession with intent to deliver cocaine
and marijuana; and possession of drug
related paraphernalia on August 27,
2001. Appellant moved to suppress the
drugs and paraphernalia, which had been
seized in a search of the residence he
shared with a roommate, Paul Jaworski,
a search to which his roommate had
consented, but for which he had denied
permission to search. Appellant claimed
at his suppression hearing that the search
of his residence, over his objection, was
illegal and violated his rights under the
Fourth Amendment to the United States
Constitution and the Pennsylvania
Constitution, Art. 1 § 8.

Evidence presented at the October 3,
2002 suppression hearing indicated that
Appellant's girlfriend, Jessica
Applewood, had called the police on the
morning of July 6, 2001 following a
domestic dispute. Applewood told
Officers Patton and Hutchinson she
thought Appellant was keeping a large
amount of drugs at his residence at 230
Market Street, located in Mifflinville,
PA. Applewood told the officers that she
herself had not seen the drugs, but she
had overheard several telephone
conversations between Appellant and

others in which Appellant had referred to “the stuff” and had said he had “some of the stuff” at his home. At the hearing, the officers testified Ms. Applewood sounded angry and agitated during the call.

Ms. Applewood testified at the hearing she had been dating Appellant on and off for about four years at the time of the incident and that, on the morning of July 6, Applewood and Appellant had argued over Applewood’s expenditure of money. Applewood had apparently purchased several new pairs of shoes the night before. Applewood told the officers that Appellant, upon discovering the new shoes, became incensed and threw some of the shoes out the window. A heated argument then ensued, culminating with Appellant ordering Applewood to leave his apartment. Applewood then left the 230 Market St. residence and called the police from her own home, which was located at 452 Ann St.

At the suppression hearing, Applewood testified she had told the police she was not currently living with Appellant at the 230 Market St. apartment, but that she kept several changes of clothes there along with other personal items, and would often spend the night. The evidence indicated that Applewood’s name was not on the lease for 230 Market St.

Rather than attempt to obtain a warrant based on Ms. Applewood’s statements to search Appellant’s home for the alleged narcotics, Officers Patton and Hutchinson proceeded immediately to the residence at 230 Market St. in order to attempt to obtain consent to conduct a search. At approximately 12:15 on the afternoon of July 6, the officers arrived at Appellant’s apartment, knocked on the door, and

stated they were police. Appellant answered the door and the officers told him that they had no warrant, but that they had received a report that Appellant was keeping illegal narcotics on the premises. The officers then asked Appellant for his consent to search the apartment. Appellant immediately refused consent to search.

After Appellant denied the officers his consent to search, however, Appellant’s roommate, Paul Jaworski, came to the door. Jaworski identified himself as Appellant’s roommate and represented to the officers that he lived in the apartment. The officers then asked Jaworski for his permission to search the apartment, though they did not tell Jaworski why they were there or for what they were searching. Jaworski then consented to allow the officers to search the apartment, whereupon Appellant immediately renewed his objection to the officers’ entry.

The evidence presented at the suppression hearing indicated Appellant and Jaworski had been sharing the apartment at 230 Market St. for two years and were both signatories to the lease. The apartment consisted of six rooms: two bedrooms, two bathrooms, one living area, and a kitchen. Appellant and Jaworski shared the common room and the kitchen, with respondent Appellant living in the east bedroom, with its bathroom attached, and Jaworski living in the west bedroom with its bathroom attached.

Upon entering, the officers immediately began searching the common room and the kitchen. The officers found nothing in the common room. However, while searching the kitchen, the officers found five packages of white powder in the cabinet under the kitchen sink. Believing the white

substance to be cocaine, Officer Hutchinson returned to the patrol car for an evidence bag.

While Officer Hutchinson left to retrieve the evidence bag, Officer Patton observed that the door to the east bedroom was open. Officer Hutchinson asked Jaworski if the door to the east bedroom was often open as he had observed, to which Jaworski replied, "usually."

Looking through the door, Officer Patton noticed nothing remarkable. Officer Patton then entered the room, over Appellant's objection to, "stay the hell out of my bedroom," and began a search for drugs.

The evidence presented at the suppression hearing indicated the door to Appellant's bedroom had no lock. Additionally, Jaworski testified that Appellant often left the door to his bedroom open or ajar. However, Jaworski also testified he never entered Appellant's room without invitation or permission and Appellant and he shared an understanding that their bedrooms and adjoining baths were, "private areas that we don't go into unless asked to come in."

While searching a large box next to Appellant's bed, Officer Patton discovered a small pipe, which he believed, from its smell, had been used to smoke marijuana. Patton removed the pipe, and brought it into the common room to question Appellant about it. When asked if he had used the pipe to smoke marijuana, appellant denied that he had.

In the meantime, Officer Hutchinson had returned with the evidence bag and had seized the packages of white powder from the kitchen, which field tested positive for cocaine.

Officer Patton then returned to searching Appellant's bedroom. While searching Appellant's closet, Patton discovered several packages of what he believed, based on his experience, to be marijuana.

After seizing the marijuana, the officers placed Appellant under arrest, read him his *Miranda* rights and took him to the police station for booking. Appellant was charged with possession of cocaine; possession of marijuana; possession with intent to deliver both cocaine and marijuana; and possession of drug related paraphernalia.

Subsequent lab tests revealed that the white substance found under Appellant's kitchen sink weighed five kilograms and was cocaine. Additionally, the lab tests confirmed that the substance seized from Appellant's closet was ten kilograms of marijuana and that the pipe seized from Appellant's bedroom had been used to smoke marijuana.

Prior to trial, appellant brought a motion to suppress all the drugs and drug related paraphernalia. Appellant alleged that the drugs and paraphernalia had been seized during an illegal search of his house, which violated the Fourth Amendment of the United States Constitution and Art. 1 § 8 of the Pennsylvania Constitution.

Finding that a third party could not give valid consent over the objection of a present party, the Court of Common Pleas agreed with appellant and suppressed the drugs and paraphernalia.

The Commonwealth then took an interlocutory appeal to the Superior Court, Eastern Division. The Superior Court ruled, pursuant to its interpretation of *United States v. Matlock*, the Fourth Amendment to the United States Constitution did not require suppression of the evidence.

The Superior Court held consent by a third party with authority to consent to a search was valid, even over the objection of a present party with equal claim to the property. The Superior Court found this to be so because of the reduced expectation of privacy involved when a defendant allows a third party to share control of an area. The Superior Court agreed with several United States Courts of Appeals and found once appellant had assumed the risk that a third party could consent to a search by giving him common control over the apartment, any such consent was valid, notwithstanding appellant's objection. Consequently, the Superior Court reversed the suppression order of the Court of Common Pleas.

Appellant appealed to this Court and we granted allocatur to resolve the issue. As we find the Superior Court's holding to be based on an incorrect, if not majority, view of the requirements of *United States v. Matlock* and this Commonwealth's own Constitution, we reverse.

II. STANDARD OF REVIEW.

In the case at bar, Fitzgerald was successful before the Court of Common Pleas at having the evidence in question suppressed and it is the Commonwealth which took the initial appeal to the Superior Court. In such cases, the reviewing court will consider only the evidence presented by the defendant's witnesses, and so much of the prosecution's evidence as remains uncontradicted. *Commonwealth v. Hamlin*, 469 A.2d 137, 139 (Pa. 1983).

It is a well established principle in this Commonwealth that in reviewing a suppression court's ruling, the appellate court is bound by the factual findings of the suppression court that are supported

by the record. *Commonwealth v. Wiggins*, 371 A.2d 207, 211 (Pa. 1977). As such, the reviewing court may not substitute its own factual findings for those of the suppression court, *Commonwealth v. Davis*, 421 A.2d 179 (Pa. 1980), unless the findings of the suppression court are wholly lacking in evidence. *Commonwealth v. Hall*, 380 A.2d 1238 (Pa. 1977).

Therefore, we are bound, as was the Superior Court, by the facts found by the suppression court and may reverse its judgment only if the legal conclusions drawn from the facts were in error. *Commonwealth v. Queen*, 639 A.2d 443, 445 (Pa. 1994).

III. DISCUSSION.

A. THE VALIDITY OF JAWORSKI'S CONSENT OVER THE PRESENT APPELLANT'S CONTINUED OBJECTION.

We begin our analysis with the maxim that warrantless searches and seizures are unreasonable, and therefore prohibited, except for a few established exceptions pursuant to both the Fourth Amendment to the United States Constitution¹ and Article 1 § 8 of the Pennsylvania Constitution². *Schneckloth*

¹ The Fourth Amendment to the United States Constitution, incorporated against the states through the Fourteenth Amendment, mandates:

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

² Article 1 § 8 of the Pennsylvania Constitution requires that:

the people shall be secure in their persons, houses, papers and possessions from

v. Bustamonte, 412 U.S. 218 (1973); *Commonwealth v. Kohl*, 615 A.2d 308 (Pa. 1992); *Commonwealth v. Huges*, 836 A.2d 893, 898 (Pa. 2003).

One exception to the warrant requirement is when the police obtain voluntary consent to search the premises in question. Indeed, it is not even required that the defendant consent to the search because both the Pennsylvania and Federal Constitutions permit a third party to validly consent to a search. *Schneckloth*, 412 U.S. at 219; *Commonwealth v. Latshaw*, 392 A.2d 1301 (Pa. 1978).

Whenever the police obtain the voluntary consent of a third party who has the authority to give consent, they are not required to obtain a search warrant based upon probable cause. *Schneckloth*, 412 U.S. at 219. However, the government always bears the burden of proof to establish the existence of effective consent. *Florida v. Royer*, 460 U.S. 491 (1983).

A consent search is fundamentally different in nature from the waiver of a trial right. *Coolidge v. New Hampshire*, 403 U.S. 443, 487-490 (1971). Consequently, whenever the government seeks to justify a warrantless search by proof of voluntary consent, it is not limited to proving consent was voluntarily given by the defendant, but may also show that consent to search was given by a third party who possessed common authority over or other sufficient relationship to the premises or effects sought to be

inspected. *United States v. Matlock*, 415 U.S. 164, 171 (1974).

A third party consent search is reasonable under the Fourth Amendment because, in sharing possession of the thing or premises that is searched with a third party, the defendant has assumed the risk the third party might allow someone else to look inside or search the place or item in question. *Matlock*, 415 U.S. at 171; *Frazier v. Cupp*, 394 U.S. 731, 740 (1969).

The general rule, then, which emerges from *Matlock* is, “the consent of one who possesses common authority over premises or effects is valid as against the absent, non-consenting person with whom that authority is shared.” *Matlock*, 415 U.S. at 170. The question that remains, and which is presented in this case, is whether the consent of one who possesses common authority over premises or effects is valid as against the *present*, non-consenting person with whom that authority is shared.

The Commonwealth argues whether a defendant is present or not when a third party consents to a search of the defendant’s property is of little constitutional moment. The reason, argues the Commonwealth, is the defendant has already assumed the risk the third party might consent to allow the police to search their shared property. Consequently, neither the defendant’s presence, nor his refusal to consent, no matter how plain or how adamant, is sufficient to reverse the fact that he has already assumed the risk associated with sharing the use of his property with another, namely that the third party may validly consent to a search of his shared property.

Under the interpretation espoused by the Commonwealth, there is nothing a

unreasonable searches and seizures, and no warrant to search any place or to seize any person or things shall issue without describing them as nearly as may be, nor without probable cause, supported by oath or affirmation subscribed to by the affiant.

defendant may do to prevent a third party consent search of his property once he has shared its possession with another person save revoke all rights the third party has to the property. In the case of a shared home, as here, the interpretation urged by the Commonwealth would mean a roommate would be unable to prevent, in any way, a valid consent to search the shared areas of his home by the person he is sharing it with unless he chose to move out and live alone with his windows covered and his doors locked.

As this is a matter of first impression in Pennsylvania, the Commonwealth has cited what can only be described as a voluminous body of case law from the several states and the United States Courts of Appeals adopting their position in an effort to convince us that it is the correct constitutional interpretation. Nevertheless, we feel the interpretation urged on us by the Commonwealth is incorrect, both as a matter of Fourth Amendment law and under the Pennsylvania Constitution.

There is a sharp divide over the exact meaning of *Matlock* in both the case law and among the commentators:

On the one hand, the theory that *Matlock* is intended to leave the joint occupant with “freedom to act in his own or the public interest” is said to extend even to the point where that freedom must prevail when the defendant is “present and objecting.” The contrary position is that the consent of both is required when both are present because, “ordinarily, persons with equal ‘rights’ in a place would accommodate each other by not admitting persons over another’s objection while he was present.”

3 W. LaFave, *Search and Seizure* § 8.3(d), at 251-252 (2d ed. 1987). In his treatise, however, LaFave noted that, “though there is merit to both positions, the latter has somewhat greater appeal.” 3 W. LaFave, at 252. We agree.

In 1984, when the Ninth Circuit first considered the meaning of *Matlock* it had this to say:

Matlock thus leaves open three possible variables in the consent calculus. First, the third party may not generally have “joint access...for most purposes”; ... Second, the objector may not be an “absent...person”; he may be present at the time the third party consent is obtained. Finally, the objector may not simply be “non-consenting”; he may actively oppose the search.

United States v. Impink, 728 F.2d 1228, 1233 (9th Cir. 1984).³

In *Impink*, the Ninth Circuit did not find any of the three factors, standing alone, to be determinative as to the ultimate reasonableness of the search, rather it viewed the three factors together to determine the reasonableness of the

³ We are as aware as the dissent of the fact the Ninth Circuit has seemingly “overruled” *Impink* in *United States v. Morning*, 64 F.3d 531 (9th Cir. 1995).

In *Morning*, the Ninth Circuit said:
we noted the three factors that we had considered in *Impink*...The latter two factors were not involved, and we determined that the landlord did not have an equal right of access.

Id. at 535.

This is, of course, an incorrect reading of *Impink* as is apparent from this analysis. The Ninth Circuit in *Impink* relied on a totality of the circumstances test to reach its decision, a decision that very much involved the other factors. We think, as *Schneekloth* makes clear, a totality of the circumstances test is the proper way to approach the *Matlock* problem.

search based on the totality of the circumstances as the United States Supreme Court requires. *Impink*, 728 F.2d at 1234; *Schneckloth v. Bustamonte*, 412 U.S. 218, 227 (1973).

Viewing the above three factors together, the Ninth Circuit concluded effective consent was precluded in *Impink* based on the totality of the circumstances where, “a suspect is present and objecting to a search,” and the consent was given by a third party with an inferior privacy interest. *Impink*, 728 F.2d at 1234.

While *Impink* dealt with a fact pattern involving a lessor with a lesser privacy interest in the property searched and a lessee with a superior privacy interest in the searched areas, the Florida Supreme Court has dealt with a case, such as the one here, where the privacy rights of the consenting and non-consenting parties in the searched premises were equal.

The Florida Supreme Court concluded:

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...

Silva v. Florida, 344 So 2d 559, 562 (Fl. 1977); citing *United States v. Robinson*, 479 F.2d 300, 303 (7th Cir. 1973).

The Florida Supreme Court concluded that, while a joint occupant should have the ability to consent to a search of the equally shared premises if the object of the search is unavailable or does not object, “a present objecting party should not have his constitutional rights ignored because of a leasehold or other property interest shared with another.” *Silva*, 344 So. 2d at 562. The Florida Court concluded this was

especially so in a situation, like the one we face here, where the police are aware that the person objecting is the one whose constitutional rights are at stake. *Id.* at 563. See also *State v. Leach*, 782 P.2d 1035, 1038-1039 (Wash. 1989).

The Commonwealth and the dissent have argued here that to hold, as we do, that the refusal to allow a search by the present subject of the search must be honored over the otherwise valid consent of a third party with equal control over the premises to be searched does violence to the very notion of equal control of the property. In defense of their position, they cite *United States v. Matlock*, which holds that the very idea of joint access or control is that it is reasonable to recognize that any of the co-inhabitants has the right to permit the inspection in his own right. 415 U.S. 164, 172 (1974).

The Commonwealth argues Jaworski, as a co-lessee, had a right to grant entry to the apartment to whomever he wished, including the police, for whatever purpose. The Commonwealth argues to allow Fitzgerald’s refusal to consent to control in this situation destroys, or at least holds empty, Jaworski supposed equal right to use the property and admit guests as a co-lessee.

What the Commonwealth, and the dissent, fail to realize is the shortsightedness of their own argument. After all, to allow Jaworski, or any third party’s consent to enter, to always control even when his equal cotenant, Fitzgerald, refuses such consent is to similarly elevate the rights of the third party over the defendant and similarly destroy, or hold empty, any rights enjoyed by the defendant.

We agree that this is a close question. However, we also recognize

that there is no constitutionally protected right to allow admission to one's home. Such a right, if it exists, is not based in either the Federal Constitution nor that of this Commonwealth but is instead a creature of the property laws of the several states.

On the other hand, Fitzgerald's right to be free from unreasonable searches and seizures in his home is a right protected by both the Fourth Amendment and the Pennsylvania Constitution. Consequently, in a close case such as this, we, like the Supreme Court of Georgia, prefer to tip the scales in favor of the constitutional right, instead of in favor of the mere property interests of Jaworski. See *Randolph v. State*, 604 S.E.2d 835, 837 (Ga. 2004).

The Commonwealth also argues that our holding flies in the face of *Illinois v. Rodriguez*, 497 U.S. 177, 183 (1990), and provides Fitzgerald, not with a right to be free from unreasonable searches and seizures pursuant to the Fourth Amendment, but with a non-existent right to be free from all government searches of his home unless he consents. We disagree.

The Commonwealth would have us hold that the police, when faced with a situation where one equal joint occupant refuses consent to a search but another grants consent, are always reasonable in presuming that the consent is valid and the resulting search is legal. Such a holding could be described as nothing short of nonsense upon stilts.

When faced with a situation where one joint occupant refuses consent to search and another grants permission, it is not reasonable for the police to plow ahead with their search ignoring the refusal to consent by the one joint occupant as if such an event had never occurred.

We are sympathetic to the Commonwealth's argument that, in the field, things are rarely black and white and that there are potentially times where a search under the circumstances that are here presented could still be reasonable. While this could be so, we prefer to draw a bright line for the benefit of the police in the field.

When one joint occupant refuses consent and another grants permission, such a situation should, at the very least, make the issue of whether the consent is valid ambiguous. In such situations, we prefer to resolve any such ambiguities in favor of the defendant, not the police, especially since both the Fourth Amendment and the Pennsylvania Constitution have a built in mechanism for resolving any such ambiguities, the search warrant.

The Commonwealth and the dissent also argue Jaworski's consent to search the shared residence must be valid, even in the face of Fitzgerald's objection, because Fitzgerald, in sharing the apartment with Jaworski, had a reduced expectation of privacy in the premises. The Commonwealth, in support of this proposition cites three cases from the United States Court of Appeals: *United States v. Morning*, 64 F.3d 531 (9th Cir. 1995); *United States v. Shelton*, 337 F.3d 529 (5th Cir. 2003); and *United States v. Donlin*, 982 F.2d 31 (1st Cir. 1992).

In all three cases, the Courts of Appeals determined that third party consent to search a jointly held area remains valid even in the face of a present defendant co-occupant's refusal to consent to the search. The courts reasoned that the defendant's mere presence could not be determinative, since the defendant in *Matlock* was, in fact, present in the police squad car in his front yard when the third party in that

case was asked for her consent to search the jointly held premises. *Morning*, 64 F.3d at 534-535.

The courts also determined that the express refusal to consent to a search by the defendant in the face of a third party's consent to search was of no constitutional moment. The courts explained this reasoning thus:

We find it helpful to borrow from the well-established "search standard," by asking whether [the defendant] showed a subjective expectation of privacy that society is prepared to accept...we find this approach useful...because it highlights the abandonment of privacy rationale that underlies and fundamentally justifies consensual searches.

Shelton, 337 F.3d at 536.

The rationale behind [the *Matlock*] rule is that a joint occupant assumes the risk of his co-occupant exposing their common private areas to such a search. There is no reasonable expectation of privacy to be protected under such circumstances. We cannot see how the additional fact of Appellant's initial refusal to consent in any way lessened the risk assumed that his co-occupant would consent. This additional fact does not increase a reasonable expectation of privacy.

Morning, 64 F.3d at 535.

To begin with, we disagree with the proposition that *Matlock* must condone third party consent searches over the objection of the present object of the search because the defendant in *Matlock* was, in fact, present and the Court upheld the search in that case.

First, we disagree that *Matlock* was present when the police requested consent to search his house from a third party. *Matlock* was under arrest in a police car parked across from his residence and out of earshot when the police requested consent to search his home.⁴ Our understanding is that a defendant who has been legitimately arrested and placed in a squad car is no longer "present" for the purposes of obtaining consent. In such a situation, the defendant would likely be physically out of earshot of the officers who were seeking consent and could also be removed by the police and transported to the station at any time.

Furthermore, the assertion that the defendant in *Matlock* was present and not absent, and, consequently, that the defendant's presence is of no constitutional moment to the third party consent search equation does violence to the very plain language of *Matlock* which says, "the consent of one who possesses common authority over premises or effects is valid as against the *absent*, non-consenting person with whom that authority is shared." *United States v. Matlock*, 415 U.S. 164, 170 (1974)(emphasis added).

It is true, however, the defendant's mere presence without more is not enough to invalidate a third party consent search under *Matlock*. It is where the defendant's presence combines with his refusal to consent to a search of the shared premises that a third party's consent to search over his objection becomes invalid. This is a situation not faced in *Matlock*. Even if,

⁴ We assume without so holding that the police may not arrest an individual in order to avoid obtaining his consent to search a location, so that they can bypass the defendant and seek consent from a third party.

as the Courts of Appeals argue, Matlock was present, he at no time objected to a search of his home by police.

In the situation of a present objecting defendant, the situation presented here, the Courts of Appeals have argued a valid consent by a third party co-occupant is valid, even over the defendant's objection, because the defendant has assumed the risk that the person with whom he shares his living quarters might consent to such a search and, consequently, once that third party consents he no longer has a reasonable expectation of privacy in the premises in question. We believe this position misinterprets the risk a defendant assumes in allowing access to his home to a joint co-occupant.

To begin with, the risk that a defendant assumes in allowing joint access to a third party is, "merely an inability to control access to the premises during one's absence." *In re D.A.G.*, 484 N.W.2d 787, 790 (Minn. 1992); *State v. Randolph*, 604 S.E.2d 835, 837 (Ga. 2004); 3 W. LaFave, *Search and Seizure* § 8.3(d) at 252 (2d ed. 1987).

We agree with the Supreme Courts of Georgia and Minnesota in holding the risk that one co-inhabitant might permit the common area to be searched in the absence of another is qualitatively different from the risk that a warrantless search will be conducted over the objection of a present joint occupant. The reason for this, we believe, is while one co-tenant is absent, the other co-tenant has full control over the premises in question. However, when both co-tenants are present, they share equal control. To ignore the objection of a present equally controlling co-tenant in such a situation would be, as discussed

above, to completely ignore his property and privacy rights in the premises.

Because we disagree with the Courts of Appeals that the risks assumed by joint occupancy are the same, regardless of the presence of the defendant, we also disagree that a present defendant's objection to search of his jointly occupied premises has no constitutional significance because he has already waived any reasonable expectation of privacy concerning the premises with respect to the possible consent of a third party.

As should be apparent from the above analysis, when a joint occupant is present and able to object to a search of his home, he has as full and reasonable an expectation of privacy in his home as he would if he lived alone. Only when a joint occupant is absent is his expectation of privacy in his home reduced in any way.

In this case, Fitzgerald was present at his home when the police initially arrived with the hope of conducting a search for drugs. The police initially sought consent to search the home from Fitzgerald, who refused, and only then sought consent from his roommate Jaworski, who granted consent to search over Fitzgerald's continued and adamant objection.

Pursuant to the above reasoning, it is our opinion Jaworski's consent to search the home located at 230 Market St. in the face of his present roommate's objection was invalid under the Fourth Amendment and Article 1 § 8 of the Pennsylvania Constitution.

Because Jaworski's consent was invalid, the officer's subsequent entry and search of the apartment, and their seizure of the cocaine, pipe, and marijuana was illegal.

Consequently, the suppression court was correct in suppressing this evidence because the Fourth Amendment and Article 1 § 8 of the Pennsylvania Constitution forbid the use of evidence procured by the government as the result of an illegal search and seizure against a defendant in a criminal trial. *Mapp v. Ohio*, 367 U.S. 643 (1961); *Commonwealth v. Mason*, 637 A.2d 251, 254 (Pa. 1993). The Superior Court erred in overturning the ruling of the Court of Common Pleas.

B. THE SCOPE OF JAWORSKI'S CONSENT.

Even if we were to agree with the Commonwealth that Jaworski's consent to search the apartment at 230 Market St. was valid in the face of the present Fitzgerald's objection, we would still find that Jaworski lacked the authority to consent to a search of Fitzgerald's private bedroom because he was not a "joint occupant with control for most purposes" of the bedroom.

Under the *Matlock* standard, for the consent of a third party to be valid, that third party must have the authority to consent to the search. A third party has actual authority to consent to a search when they "...possess common authority over or [have] other sufficient relationship to the premises or effects sought to be inspected." *United States v. Matlock*, 415 U.S. 164, 171 (1974).

In footnote seven of his opinion, Mr. Justice White went on to explain what is meant by common authority:

Common authority is, of course, not to be implied from the mere property interest a third party has in the property. The authority which justifies the third-party consent does not rest upon the

law of property...but rests rather on mutual use of the property by persons generally having joint access or control for most purposes...

Matlock, 415 U.S. at 172. This is the standard that has also been adopted by this Court for actual third party authority under Article 1 § 8 of the Pennsylvania Constitution. *Commonwealth v. Garcia*, 387 A.2d 46 (1978).

Consequently, for Mr. Jaworski to have had actual authority to consent to a search of appellant's private bedroom, the Commonwealth must demonstrate more than that he had a property interest to the entire premises as a signatory to the lease. The Commonwealth must also show that Jaworski had "mutual use" of and "joint access for most purposes" to Fitzgerald's room. *Illinois v. Rodriguez*, 497 U.S. 177, 181 (1990); *United States v. Davis*, 332 F.3d 1163, 1169 (9th Cir. 2003); *Silva v. Florida*, 344 So. 2d 559, 563 (Fl. 1977). We believe the Commonwealth has failed to meet its burden.

The evidence presented to the suppression court in this case indicates Fitzgerald possessed the sole right to use and control his private bedroom. Jaworski maintained his own separate and private suite of rooms where he slept and used the bathroom. There is no evidence Jaworski kept any of his own possessions in either Fitzgerald's private bed or bathroom, nor, as he testified, did he ever enter the room outside of Fitzgerald's presence and without his invitation.

In this case, we find that Jaworski did not have actual authority to consent to a search of Fitzgerald's bedroom or private bath. Jaworski did not have "mutual" or equal use of the room and certainly did not "jointly occupy it for

most purposes.” Indeed, the record shows that Jaworski only ever entered the room at very limited times at Fitzgerald’s invitation. In such circumstances, we find that Fitzgerald retained exclusive control over his private bedroom and bath within he and Jaworski’s jointly occupied residence.

We believe the law is clear in cases like this one that:

One who has an equal right of control or possession of premises generally does not thereby have authority to consent to a search of an area on the premises which is set aside for the exclusive use of others.

United States ex rel. Cabey v. Mazurkiewicz, 431 F.2d 839, 843 (3d Cir. 1970); *United States v. Robinson*, 479 F.2d 300, 302 (7th Cir. 1973)(for the rule stated in the negative); *Silva v. Florida*, 344 So. 2d 559, 563 (Fl. 1977).

In an attempt to show Fitzgerald did not have exclusive use of his bedroom and bathroom and that Jaworski had joint access and control of those areas, the Commonwealth has cited *People v. Nunn*, 304 N.E.2d 81 (Ill. 1973), *Commonwealth v. O’Neal*, 429 A.2d 1189 (Pa. Super 1980); and *Commonwealth v. Lowery*, 451 A.2d 245 (Pa. Super. 1982). The Commonwealth argues Fitzgerald did not maintain exclusive control of his rooms, as in the above cited cases, because he did not lock his door and allowed it to remain open.

The Commonwealth has argued Fitzgerald would have needed to manifest in a clear and overt manner his expectation of exclusive use as the defendants in *O’Neal*, *Nunn*, and *Lowery* did by locking or closing their doors. We are not persuaded.

Nunn and *Lowery* are distinguishable from the present case because they involved the consensual search of a child’s room by a parent in a house which the parent owned. *O’Neal* is distinguishable because it involved a consensual search of the room of an overnight guest by his host who owned the property.

In a family setting or with an overnight guest the need for an overt manifestation of the expectation of privacy and exclusive use is necessary because society’s reasonable and general understanding is that a parent may consent to a search of any of the rooms of her house and so too with a host of an overnight guest. *Commonwealth ex rel. Cabey v. Rundle*, 248 A.2d 197 (Pa. 1968)(family setting with consent of defendant’s wife).

However, we find that in a roommate relationship such as the one between Jaworski and Fitzgerald where the roommates are unrelated and have separate rooms no such overt manifestation is required. In these cases, as in landlord-tenant relationships, no such overt manifestation is necessary because the expectation of exclusive use and privacy is understood. See *Chapman v. United States*, 365 U.S. 610 (1961).

Our conclusion Jaworski lacked actual authority to consent to a search of Fitzgerald’s private bed and bathrooms does not end our inquiry, however. Under the Federal Constitution, a third party consent search may be valid if the consenter had *apparent authority* to consent to the search. *Illinois v. Rodriguez*, 497 U.S. 177 (1990).

Whether there exists an apparent authority exception under Article 1 § 8 of the Pennsylvania Constitution is a question that has not been entirely answered. This Court has recognized

such an exception at least in terms of parolees, but has never come to a conclusion as to the applicability of the rule to third party consent searches against the general population. *Commonwealth v. Hughes*, 836 A.2d 893, 904 (Pa. 2003).

Nevertheless, we find that we need not decide whether an apparent authority exception exists under the Pennsylvania Constitution in this case because we find the Commonwealth has failed to sustain its burden under even the federal standard.

Otherwise valid consent to search is not invalidated under the Fourth Amendment by the fact that the third party did not have actual authority to consent to the search so long as, “judged against an objective standard:...the facts available to the officer at the moment...’warrant a man of reasonable caution in the belief’ that the consenting party had authority over the premises.” *Illinois v. Rodriguez*, 497 U.S. 177, 188 (1990).

Reasonableness does not demand that the officers be factually correct in their assessment that the consenting party had actual authority to consent to the search. *Rodriguez*, 497 U.S. at 185.

Because many situations which confront officers in the course of executing their duties are more or less ambiguous, room must be allowed for some mistakes on their part. But the mistakes must be those of reasonable men, acting on facts leading sensibly to their conclusions of probability.

Rodriguez, 497 U.S. at 186 citing *Brinegar v. United States*, 338 U.S. 160, 176 (1949).

Nevertheless, the police may not always accept a person’s invitation to

enter premises, even when that invitation is accompanied by that person’s assertion that he or she lives there, if the surrounding circumstances could conceivably be such that a reasonable person would doubt its truth. *Rodriguez*, 497 U.S. at 188.

In situations where the police should reasonably have doubts as to the actual authority of the third party to consent to a search, they are required not to act upon the third party’s consent without further inquiry. *Rodriguez*, 497 U.S. at 188.

In this case, given what the officers knew at the time of Jaworski’s consent, we do not believe they were objectively reasonable in believing that Jaworski had authority to consent to a search of Fitzgerald’s private room.

The officers were aware that Jaworski and Fitzgerald shared the apartment as roommates and were aware that the east bedroom, in which they found the pipe and marijuana, was Fitzgerald’s room from his assertion to, “stay the hell out of my room.”

As discussed above, it is common for unrelated roommates living together to defray the cost of living expenses to often set aside their own private space, typically a bedroom. Given the roommate situation in this case, and the fact that the officers knew they were about to enter Fitzgerald’s private bedroom, objectively reasonable persons would have had doubts as to Jaworski’s ability to consent to a search of his roommates room.

In a situation such as the one here, the officers were under a duty to inquire into the living arrangement between Jaworski and Fitzgerald in order to satisfy themselves that Jaworski had “joint occupancy for most purposes” of

the east bedroom and could legitimately consent to a search of it.

Because the officers made no attempt to inquire into the living situation between Fitzgerald and Jaworski, beyond Officer Hutchinson's question as to whether Fitzgerald's bedroom door normally remained open, we find their reliance on Jaworski's authority to consent to a search of Fitzgerald's private room was unreasonable. As such, we find that Jaworski had neither actual nor apparent authority to consent to a search of Fitzgerald's private room and that the Court of Common Pleas was correct in suppressing the pipe and marijuana recovered from Fitzgerald's room pursuant to the officers' illegal search.

IV CONCLUSION

Based upon the foregoing, we hold that the Court of Common Pleas correctly suppressed the evidence obtained from Fitzgerald's apartment pursuant to the invalid consent search under the Fourth Amendment and Article 1 § 8 of the Pennsylvania Constitution. Consequently, the Superior Court erred when it reversed the findings of the Court of Common Pleas and found that the consent search violated neither the Fourth Amendment nor the Pennsylvania Constitution. Accordingly, we reverse the holding of the Superior Court and remand this case for further proceedings not inconsistent with this opinion.

SO BE IT.

Mr. Justice BAER with whom CASTILLE, and SAYLOR, J.J. join dissenting.

We granted allocatur in this case to resolve the question of whether an otherwise valid consent to search a jointly occupied residence given by a third party remains valid in the face of the present co-occupants objection. Because I believe that this Court is abandoning the near uniform interpretation of *United States v. Matlock*, 415 U.S. 164 (1974), that such a search is permissible under the Fourth Amendment for a distinctly minority and outdated contrary interpretation, I respectfully dissent.

As the majority correctly admits, valid consent is one of the well recognized exceptions to the warrant requirement. *Illinois v. Rodriguez*, 497 U.S. 177 (1990). So too, consent to search may be obtained either from the defendant or from a third party who has "mutual use" and "joint access and control for most purposes." *United States v. Matlock*, 415 U.S. 164 (1974).

Here, Appellant's roommate validly consented to a search of his apartment. The facts of the case indicate that Jaworski's name was on the lease, and that he lived in the apartment as Appellant's roommate. This is enough to establish that Jaworski had joint access and control for most purposes.

The majority makes much of the fact that Jaworski could not have had joint access to Appellant's bedroom. However, the facts of the case indicate that Appellant did not lock the door to his bedroom, nor did he often keep it shut. I agree with the Illinois Supreme Court that a more explicit manifestation of an expectation of exclusive use of the east bedroom on the part of Appellant

would have been necessary to establish exclusive, instead of joint, occupancy. *People v. Nunn*, 304 N.E.2d 81 (Ill. 1973), *Commonwealth v. O'Neal*, 429 A.2d 1189 (Pa. Super 1980).

Under the current fact pattern, Jaworski could have gone into Appellant's bedroom at any time, thus vitiating any reasonable expectation of privacy Appellant may have had in the east bedroom. Simply because Jaworski, as he testified, chose not to enter Appellant's bedroom and exercise his joint control over the room does not mean that he, in fact, did not possess joint control.

I also agree with the majority of the United States Courts of Appeals in their interpretation of *Matlock* that the real question of whether a third party can consent over the objection of a present defendant should not hinge on that defendant's presence or refusal to consent, but instead on whether that defendant assumed the risk that the third party who possessed common authority over the premises would permit inspection in his own right. *United States v. Shelton*, 337 F.3d 529 (5th Cir. 2003); *United States v. Aghedo*, 159 F.3d 308 (7th Cir. 1998)(co-occupant's access and control of room gives defendant reduced expectation of privacy in premises or shared items); *United States v. Canada*, 527 F.2d 1374, 1379 (9th Cir. 1976); *United States v. Morning*, 64 F.3d 531 (9th Cir. 1995)(limiting *Impink* and holding valid consent of person with common authority justifies search although co-

occupant physically present and objects); *Lenz v. Winburn*, 51 F.3d 1540, 1548 (11th Cir. 1995)(*Matlock* third-party consent rule "applies even when a present subject of the search objects"); *United States v. Donlin*, 982 F.2d 31 (1st Cir. 1992)(third-party consent remains valid even when defendant specifically objects); *United States v. McAlpine*, 919 F.2d 1461 (10th Cir. 1990); *United States v. Bethea*, 598 F.2d 331, 335 (4th Cir. 1979)(by sharing common area defendant assumed the risk co-occupant might consent to search even when he, himself, was present).

Because Jaworski had joint access and control for most purposes over the apartment he leased and shared with Appellant, Appellant assumed the risk that, because of his diminished expectation of privacy he had in an apartment he shared with his roommate, Jaworski might permit a search of their apartment in his own right and that his objection to the presence of police would not override Jaworski's valid consent.

Therefore, I would agree with the judgment of the Superior Court so far as it concluded that, even though Appellant was present and objected to a search of his apartment, once Jaworski had given valid consent to search the apartment he shared with Appellant, that was sufficient under the Fourth Amendment to authorize a search. As the majority has cited no case law that convinces me that Article 1 § 8 of our Constitution requires otherwise, I would affirm the holding of the Superior Court.

I DISSENT.

Superior Court of Pennsylvania

COMMONWEALTH of Pennsylvania,
Appellant,

v.

Edmond FITZGERALD,
Appellee.

No. 3089 EDA 2004

Argued November 12, 2004.
Decided December 30, 2004.

Appeal from the Order to Suppress imposed
by the Court of Common Pleas of Columbia
County, Criminal Division, No. 78-2002.

Before: PANELLA, BOWES, and
ELLIOTT, J.J.

ELLIOTT, J. delivered the opinion of the
Court in which PANELLA and BOWES,
J.J. joined.

OPINION

ELLIOTT, J.

The Commonwealth of Pennsylvania
appeals from the adverse decision of the
Court of Common Pleas, Columbia County
in an October 2, 2002 suppression hearing.
The suppression court, interpreting *United
States v. Matlock*, found that a co-tenant
could not give valid consent for law
enforcement officials to search shared
premises when the other co-tenant was
present and made a clear objection to the
search. The court found that Columbia
County law enforcement officials' search of
the Appellee's residence on July 6 of 2001
violated the Fourth Amendment of the
United States Constitution and Pennsylvania

Constitution, Art 1 § 8. The Court ordered
suppression of 5 kilograms of cocaine, 10
kilograms of packaged marijuana, and one
item of drug paraphernalia seized at the
residence of Appellee Edmond Fitzgerald
(hereinafter called "Appellee" or
"Fitzgerald") at 230 Market Street,
Mifflinville, Pennsylvania, which he shared
with co-tenant and roommate Paul Jaworski.

For the reasons that follow, we reverse
the judgment of the court and find the
evidence admissible in all proceedings
against Fitzgerald.

I. Introduction

The Facts

The facts of this case, as found by the
Court of Common Pleas, Columbia County,
at a suppression hearing held before it on
October 3, 2002 are not in dispute.

Appellee, Edmond Fitzgerald was
charged by information by the District
Attorney of Columbia County for possession
of cocaine and marijuana; possession with
intent to deliver cocaine and marijuana; and
possession of drug related paraphernalia on
August 27, 2001. Appellee moved to
suppress the drugs and paraphernalia, which
had been seized in a search of the residence
he shared with a roommate, Paul Jaworski, a
search to which his roommate had
consented, but for which he had denied
permission to search. Appellee claimed at
his suppression hearing that the search of his
residence, over his objection, was illegal and
violated his rights under the Fourth
Amendment to the United States
Constitution and the Pennsylvania
Constitution, Art. 1 § 8.

Evidence presented at the October 3,
2002 suppression hearing indicated that
Appellee's girlfriend, Jessica Applewood,
had called the police on the morning of July
6, 2001 following a domestic dispute.
Applewood told Officers Patton and
Hutchinson she thought Appellee was

keeping a large amount of drugs at his residence at 230 Market Street, located in Mifflinville, PA. Applewood told the officers that she herself had not seen the drugs, but she had overheard several telephone conversations between Appellee and others in which Appellee had referred to “the stuff” and had said he had “some of the stuff” at his home. At the hearing, the officers testified Ms. Applewood sounded angry and agitated during the call.

Ms. Applewood testified at the hearing she had been dating Appellee on and off for about four years at the time of the incident and that, on the morning of July 6, Applewood and Appellee had argued over Applewood’s expenditure of money. Applewood had apparently purchased several new pairs of shoes the night before. Applewood told the officers that Appellee, upon discovering the new shoes, became incensed and threw some of the shoes out the window. A heated argument then ensued, culminating with Appellee ordering Applewood to leave his apartment. Applewood then left the 230 Market St. residence and called the police from her own home, which was located at 452 Ann St.

At the suppression hearing, Applewood testified she had told the police she was not currently living with Appellee at the 230 Market St. apartment, but that she kept several changes of clothes there along with other personal items, and would often spend the night. The evidence indicated that Applewood’s name was not on the lease for 230 Market St.

Rather than attempt to obtain a warrant based on Ms. Applewood’s statements to search Appellee’s home for the alleged narcotics, Officers Patton and Hutchinson proceeded immediately to the residence at 230 Market St. in order to attempt to obtain consent to conduct a search. At approximately 12:15 on the afternoon of July 6, the officers arrived at Appellee’s

apartment, knocked on the door, and stated they were police. Appellee answered the door and the officers told him that they had no warrant, but that they had received a report that Appellee was keeping illegal narcotics on the premises. The officers then asked Appellee for his consent to search the apartment. Appellee immediately refused consent to search.

After Appellee denied the officers his consent to search, however, Appellee’s roommate, Paul Jaworski, came to the door. Jaworski identified himself as Appellee’s roommate and represented to the officers that he lived in the apartment. The officers then asked Jaworski for his permission to search the apartment, though they did not tell Jaworski why they were there or for what they were searching. Jaworski then consented to allow the officers to search the apartment, whereupon Appellee immediately renewed his objection to the officers’ entry.

The evidence presented at the suppression hearing indicated Appellee and Jaworski had been sharing the apartment at 230 Market St. for two years and were both signatories to the lease. The apartment consisted of six rooms: two bedrooms, two bathrooms, one living area, and a kitchen. Appellee and Jaworski shared the common room and the kitchen, with Appellee living in the east bedroom, with its bathroom attached, and Jaworski living in the west bedroom with its bathroom attached.

Upon entering, the officers immediately began searching the common room and the kitchen. The officers found nothing in the common room. However, while searching the kitchen, the officers found five packages of white powder in the cabinet under the kitchen sink. Believing the white substance to be cocaine, Officer Hutchinson returned to the patrol car for an evidence bag.

While Officer Hutchinson left to retrieve the evidence bag, Officer Patton observed

that the door to the east bedroom was open. Officer Hutchinson asked Jaworski if the door to the east bedroom was often open as he had observed, to which Jaworski replied, “usually.”

Looking through the door, Officer Patton noticed nothing remarkable. Officer Patton then entered the room, over Appellee’s objection to, “stay the hell out of my bedroom,” and began a search for drugs.

The evidence presented at the suppression hearing indicated the door to Appellee’s bedroom had no lock. Additionally, Jaworski testified that Appellee often left the door to his bedroom open or ajar. However, Jaworski also testified he never entered Appellee’s room without invitation or permission and Appellee and he shared an understanding that their bedrooms and adjoining baths were, “private areas that we don’t go into unless asked to come in.”

While searching a large box next to Appellee’s bed, Officer Patton discovered a small pipe, which he believed, from its smell, had been used to smoke marijuana. Patton removed the pipe, and brought it into the common room to question Appellee about it. When asked if he had used the pipe to smoke marijuana, Appellee denied that he had.

In the meantime, Officer Hutchinson had returned with the evidence bag and had seized the packages of white powder from the kitchen, which field tested positive for cocaine.

Officer Patton then returned to searching Appellee’s bedroom. While searching Appellee’s closet, Patton discovered several packages of what he believed, based on his experience, to be marijuana.

After seizing the marijuana, the officers placed Appellee under arrest, read him his *Miranda* rights and took him to the police station for booking. Appellee was charged with possession of cocaine; possession of

marijuana; possession with intent to deliver both cocaine and marijuana; and possession of drug related paraphernalia.

Subsequent lab tests revealed that the white substance found under Appellee’s kitchen sink weighed five kilograms and was cocaine. Additionally, the lab tests confirmed that the substance seized from Appellee’s closet was ten kilograms of marijuana and that the pipe seized from Appellee’s bedroom had been used to smoke marijuana.

Prior to trial, Appellee brought a motion to suppress all the drugs and drug related paraphernalia. Appellee alleged that the drugs and paraphernalia had been seized during an illegal search of his house, which violated the Fourth Amendment of the United States Constitution and Art. 1 § 8 of the Pennsylvania Constitution.

Finding that a third party could not give valid consent over the objection of a present party, the Court of Common Pleas agreed with Appellee and suppressed the drugs and paraphernalia. This appeal followed.

Standard of Review

The court’s review of suppression rulings is circumscribed. *Commonwealth v. Cleckley*, 738 A.2d 427, 429 (Pa. 1999). Where the record supports the factual findings of the court below, the reviewing court may reverse the suppression ruling only if the legal conclusions drawn from those facts are in error. *Cleckley*, 738 A.2d at 429.

In reviewing a decision granting a motion to suppress or where the Commonwealth is appealing the adverse decision of suppression court, the reviewing court must consider only the evidence of the defendant’s witnesses and so much of the evidence of the prosecution as, read in the context of the record as a whole, remains uncontradicted. *See Commonwealth v. Francis*, 700 A.2d 1326, 1328 (Pa. Super. Ct

1997; *Commonwealth v. Robinson*, 651 A.2d 1121, 1123 (Pa. Super. Ct 1994). If the evidence supports the trial court's factual finding, the reviewing court is bound by such findings and may only reverse if the legal conclusions drawn therefrom are in error. *Francis*, 700 A.2d at 1328; *Robinson*, 651 A.2d at 1123.

II. Discussion

Standing

The concept of standing in a criminal search and seizure context empowers the defendant to assert a constitutional violation and thus, seek to exclude or suppress the government's evidence pursuant to the exclusionary rules under the U.S. Const. Amend. IV; Pa. Const. Art. 1 § 8. See *Commonwealth of Pennsylvania v. Hawkins*, 718 A.2d 265, 266 (Pa. 1998). An individual's personal rights must be at stake in order to qualify as a person aggrieved by an unlawful search and seizure. See *Commonwealth of Pennsylvania v. White*, 459 Pa. 84, 89 (1974). Appellee meets this requirement as the 230 Market Street residence was his legal residence and the evidence gathered was sought to be used against him in court.

Warrantless Searches

U.S. Const. Amend IV guarantees that the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated. See *Commonwealth v. White*, 327 A.2d 40, 42 (1974). To the same effect is Pa. Const. art 1, § 8. *White*, 327 A.2d at 42. U.S. Const. Amend. IV forbids the federal government to convict a man of a crime by using testimony or papers obtained from him by unreasonable searches and seizures. See U.S. Const. Amend IV; *Ker et Ux. v. California*, 374 U.S. 23, 30 (1963);

Warden v. Haydon, 387 US 294, 301-302 (1967); *Commonwealth of Pennsylvania v. Hawkins*, 718 A.2d 265, 269 (Pa. 1998). The security of one's privacy against arbitrary intrusion by police, which is at the core of U.S. Const. amend IV, is implicit in the concept of ordered liberty and enforceable against the states through the Due Process Clause of U.S. Const. Amend XIV. See *Ker*, 374 U.S. at 31.

Under both the U.S. Const., Amend. I.V. and Penn. Const. Art. 1 § 8, a search which is conducted without a warrant is deemed to be per se unreasonable. See *Katz v. United States*, 389 U.S. 347, 357 (1967); *Coolidge v. New Hampshire*, 403 U.S. 443, 454-455 (1971); *Commonwealth of Pennsylvania v. Cleckley*, 738 A.2d 427, 428 (Pa. 1999). The Fourth Amendment prohibition against unreasonable searches and seizures generally requires that any search be based upon a warrant issued pursuant to probable cause. See Sharon E. Abrams, Third Party Consent Searches, the Supreme Court, and the Fourth Amendment, 75 J. Crim. L. & Criminology 963 (1984). The Supreme Court of the United States and the Pennsylvania Supreme Court affirm the principle that the search of property, without warrant and without probable cause, but with proper consent voluntarily given is valid under the Fourth Amendment. See *United States v. Matlock*, 415 U.S. 164, 165 (1974); *Schneckloth v. Bustamonte*, 412 U.S. 218, 219 (1973); *Cleckley*, 738 A.2d at 429. In the instant matter, we find that Officers Patton and Hutchinson were proceeding under the full cloak of state and federal law when they approached the co-tenants of 230 Market Street with the intention to request a search of the residence despite the absence of a search warrant.

Validity of the Consent to Search the home shared by Edmond Fitzgerald and Paul Jaworski at 230 Market Street.

We next examine whether Jaworski gave valid consent to the search of the premises at 230 Market Street. The Pennsylvania Superior Court has previously considered the validity of warrantless searches conducted in the absence of the person claiming to be aggrieved. *See Commonwealth v. Van Jordan*, 456 A.2d 1055 (Pa. Super. Ct. 1983) (finding that defendant's hotel guest used the premises to bathe and change his clothes, which gave him common authority for the purposes of giving valid consent to law enforcement officials); *Commonwealth v. Latshaw*, 363 A.2d 1246 (Pa. Super. Ct. 1976; *aff'd* *Commonwealth v. Latshaw*, 392 A.2d 1301 (Pa. 1978) (finding where there was a legitimate owner of the barn, a second party whose interest was that of a gratuitous licensee shared with the owner of barn, and a third party who was paying the licensee to use the barn to store drugs, the legitimate owner was a joint user of the shared premises and could make a valid consent to a warrantless search).

In *United States v. Matlock*, the Supreme Court of the United States considered the question whether the State had provided sufficient evidence that it had obtained third party consent to search the defendant's premises and that the items seized pursuant to that search were admissible evidence at the defendant's trial for bank robbery. *Matlock*, 415 U.S. at 164. The defendant in *Matlock* was arrested in his front yard. *See Id.* at 165. The defendant was present but did not object when the officers asked Mrs. Graff (who lived with the defendant) for consent to search their shared premises. *See Id.* at 165. The *Matlock* court did not indicate that the objection of a present co-habitant could invalidate the consent obtained from other residents who share common authority over the premises. *See generally United States v. Matlock*, 415 U.S.

164 (1974). The *Matlock* court instead affirmed the principle espoused in *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973), 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. *See Id.* at 169. The Court, in its endorsement of third party consent searches stated the following:

When the prosecution seeks to justify a warrantless search by proof of voluntary consent, it is not limited to proof that consent was given by the defendant, but may show that permission to search was obtained from a third party who possessed common authority over or other sufficient relationship to the premises or effects sought to be inspected.

See Matlock, 415 U.S. at 171.

Today, state and federal courts remain largely divided on whether *Matlock* affirms the legality of a third party consent search when the other co-tenant is present at the time of the search and objects to the search. *See United States v. Donlin*, 982 F.2d 31 (1st Cir. 1992); *State v. Randolph*, 604 S.E. 2d 835 (Ga. 2004). In the instant matter, the trial judge's memorandum and order stated the following:

United States v. Matlock requires us to find that one co-tenant cannot give valid consent to a search shared premises when another co-inhabitant is present and makes a stark objection. Hence, the actions of officers on July 6, 2001 in conducting a search of the premises over

the sustained objection of the defendant did not amount to a valid consent search. The evidence gathered from the July 6 search of 230 Market Street is to be suppressed. It is hereby ordered.

In arriving at our decision to reverse the trial judge, we rely on the wisdom of fellow state and federal courts who have previously contemplated the legal and practical implications of sharing one's premises with other individuals. In particular, we are grateful for their insight on what amounts to a reasonable expectation of privacy in a shared dwelling and the assumption of risk involved on legal issues such as consent to third parties to enter the premises.

We find that both Jaworski and Fitzgerald satisfy the requirements of having common authority over the premises at 230 Market Street. The authority which justifies third party consent does not rest upon the law of property, with its attendant historical and legal refinements, but rests rather on (1) mutual use of the property by (2) persons generally having joint access or control for most purposes, so that it is reasonable to recognize that any of the co-inhabitants has the right to permit the inspection in his own right and that the others have assumed the risk that one of their number might consent to the search. *United States v. Morning*, 64 F.3d 531, 534 (9th Cir. 1995).

If common authority is established, the person whose property is searched is unjustified in claiming an expectation of privacy in the property because that person cannot reasonably believe that the joint user will not, under certain circumstances, allow a search in her own right. *United States v. McAlpine*, 919 F.2d 1461, 1463 (10th Cir. 1990). A person has voluntarily relinquished his expectation of privacy by sharing access or control over her or his

property with another person. *McAlpine*, 919 F.2d at 1463. The relevant analysis in third-party consent cases focuses on the relationship between the consenter and the property searched, not the relationship between the consenter and the defendant. *Id.* at 1463. While the character of the relationship between the consenter and the defendant may bear on the nexus between the consenter and the property, it is not dispositive of the issue of effective consent. *Id.* at 1464.

Fitzgerald and Jaworski do not dispute that they were roommates at the time. The evidence presented to the suppression judge indicated that Appellee and Jaworski had been sharing the apartment at 230 Market Street for two years and were both signatories to the lease. They each had separate bedrooms and bathrooms but shared a common room and a kitchen. Appellee did not put a lock on his door and kept his bedroom door open most of the time. As such, their roommate relationship satisfies the mutual use, joint access and control requirements used in the majority of federal courts. *See United States v. Morning*, 64 F.3d 531 (9th Cir. 1995) (finding that a boyfriend and girlfriend living in a shared premises meant that the boyfriend had common authority over the premises); *United States v. Childs*, 944 F.2d 491 (9th Cir. 1991) (finding that the co-occupants of a houseboat shared as a residence meant that one co-occupant had common authority to consent to a search of the premises).

Having established that Jaworski had common authority over the 230 Market Street, we find that his consent entitled the officers to conduct a search of Appellee's open and unlocked bedroom and seize the contraband items they discovered. It is generally understood that if an individual consents to a search, the government may undertake a search without a warrant or probable cause, and any evidence discovered

during such a search may be seized and admitted at trial. *United States v. Amadioha*, 37 Fed. Appx. 594, 595 (3d Cir. 2002).

We find that Fitzgerald's objections did not invalidate Jaworski's consent for the officers to search the premises. A co-tenant's consent to the search of their shared residence is effective even if the other co-tenant protests. *See United States v. Flores*, 172 F.3d 695, 698 (9th Cir. 1999); *Lenz v. Winburn*, 51 F.3d 1540, 1548 (11th Cir. 1995). In *United States v. Flores*, the Ninth Circuit Court of Appeals found that a defendant cannot expect sole, exclusionary authority unless he lives alone, or at least has a special and private place within the joint residence. *See Flores*, 172 F.3d at 698. We join in Judge Thompson's opinion that where people have joint access and control over property, it is reasonable to recognize that any of the co-inhabitants has the right to permit the inspection in his own right and that others have assumed the risk that one of the members might permit the common area to be searched. *Id.* at 698. We too find that by sharing a common area a defendant assumes the risk that a third party might consent to a search of the area at any time, even when he, himself, was present. *See United States v. Bethea*, 598 F.2d 331 (4th Cir. 1979). Likewise we agree with Circuit Judge Fernandez in *United States v. Morning*, 64 F.3d 531, 536 (9th Cir. 1995), who held that where a boyfriend had common authority over the premises, he had the right to consent to the search that led to the discovery of the marijuana, even though his girlfriend objected. We conclude that valid consent may be given by a third party with common authority over the premises. Third party consent remains valid even when the defendant specifically objects to it. *See United States v. Donlin*, 982 F.2d 31, 33 (1st Cir. 1992).

While the voluntariness of Jaworski's consent is not disputed, we discuss

voluntariness here as it is pivotal to the validity of any consent search. The validity of such a search rests with whether it was in fact voluntary or the product of duress or coercion, whether express or implied. *See Schneckloth v. Bustamonte*, 412 U.S. 218, 227 (1973). This is a question of fact to be determined from the totality of all the circumstances. *See Schneckloth*, 412 U.S. at 226; *Cleckley*, 738 A.2d at 432. In the instant matter, the record does not support a finding of duress or coercion. Jaworski was not privy to the officer's earlier conversation with Mrs. Applewood but was aware that he was giving law enforcement officials consent to search the premises.

For the record, the opposing arguments to our expansive view of third party consent is articulated in *State v. Randolph*, 604 S.E.2d 835 (Ga. 2004):

Where the police have obtained consent to search from an individual possessing at best, equal control over the premises, that consent remains valid against a cohabitant, who also possesses equal control, only while the cohabitant is absent. However, should the cohabitant be present and able to object, the police must also obtain the cohabitant's consent. Any other rule exalts expediency over an individual's Fourth Amendment guarantees.

State v. Randolph, 604 S.E. 2d 835, 837 (Ga. 2004). We find these arguments unpersuasive.

In *Randolph v. State*, 590 S.E. 2d 834 (Ga. Ct. App. 2003), the court opined that it is reasonable for an occupant of premises to believe that his wishes that the premises not be searched will be honored, as ordinarily

persons with equal rights in a place would accommodate each other by not admitting persons over another's objection while he was present. *Randolph*, 590 S.E. 2d at 836. According to the *Randolph* court, in the absence of evidence to the contrary, in Georgia there is a presumption that a co-occupant has waived his right of privacy as to other co-occupants when consenting to the search of a premises. *Id.* at 838. But when police are confronted with an unequivocal assertion of that co-occupant's Fourth Amendment rights, such a presumption cannot stand. *Id.* at 838. Likewise, we find these arguments unpersuasive. The *Randolph* court posited that if one person with equal rights refuses to honor a co-occupant's objection, such refusal hints of underlying trouble in the relationship and should raise a question as to why consent was given. *Id.* at 837. We believe this question is already addressed in the officer's routine assessment of witness credibility whenever a complaint is filed by a member of the public. We do not propose to add new rules to stifle the ability of members of the public to communicate with law enforcement about possible criminal activity propagated by persons with whom they are in acquaintance. In addition, well-settled legal thought on privacy does not support the opinions of the Georgia courts. A person must maintain the privacy of his possessions in such a fashion that his expectations of freedom from intrusion are recognized as reasonable. See *Commonwealth v. White*, 327 A.2d 40, 42-43 (Pa. 1974) (citing *Commonwealth v. Platou*, 312 A.2d 29, 34 (Pa. 1973), cert. denied, 417 U.S. 976 (1974)). This supports the idea that the only way to ensure absolute privacy is to be the sole proprietor of your residence and not grant any decision-making privileges to a third party.

The *Randolph* court stated that it is inherently reasonable that police honor a

present occupant's express objection to a search of his dwelling, shared or otherwise. *Id.* at 837. However, it gives no suitable explanation of why an objection should weigh in more heavily than consent. The *Randolph* court opines that if common authority is the basis for allowing one co-occupant to consent to a search on behalf of all the occupants, it seems reasonable that common authority should permit a co-occupant to exercise privacy rights on behalf of all occupants. *Id.* The *Randolph* court argues that constitutional rights may not be defeated by the expedient of soliciting several persons successively until the sought after consent is obtained. *Id.* at 838. We do not equate asking permission from several co-owners of a residence with "soliciting several persons successively" but rather requesting permission from persons with equal ownership rights. We conclude that Jaworski's consent was valid despite Fitzgerald's objections. Therefore, the law enforcement officers were justified in confiscating the items as evidence.

We reverberate the words of the learned Justice Stewart:

It is no part of the policy underlying the Fourth and Fourteenth Amendment to discourage citizens from aiding to the utmost of their ability in the apprehension of criminals. Rather, a community has a real interest in encouraging consent, for the resulting search may yield necessary evidence for the solution and prosecution of crime, evidence that may insure that that a wholly innocent person is not wrongly charged with a criminal offense.

Coolidge v. New Hampshire, 403 U.S. 443, 488 (1971).

III. Conclusion

In conclusion, we find the following:

1. Appellee's roommate, Paul Jaworski, gave valid consent to the search of the 230 Market Street residence.
2. Having discovered the marijuana, cocaine

and drug paraphernalia before Jaworski's withdrawal of consent, the officers were permitted seize the items.

The judgment of the trial court is reversed.

It is hereby ordered.