
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

BRIEF FOR PETITIONER

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September 16, 2005

QUESTION PRESENTED

Whether one occupant of a shared residence may give law enforcement officers valid consent to search the premises when another occupant is present on the premises and objects to the search.

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STATEMENT OF THE CASE

On the morning of July 6, 2001, Jessica Applewood, respondent Edmond Fitzgerald's girlfriend, called the Mifflinville, Pennsylvania police to report her suspicion that respondent was keeping drugs at his apartment, located at 230 Market Street in Mifflinville. *Commonwealth v. Fitzgerald*, 875 A.2d 1058 (Pa. 2005). Applewood explained to Officers Patton and Hutchinson that she had not actually seen the drugs, but had overheard respondent telling people over the phone that he had "some of the stuff" at the apartment. *Id.* at 1058-1059. The officers later testified that Applewood sounded upset during the call. *Id.* at 1059. Applewood's testimony at respondent's suppression hearing on October 3, 2002, disclosed that she sporadically dated respondent for the previous four years, and that on the morning of her phone call to the police, respondent and Applewood had an altercation over financial issues. *Id.* Respondent told Applewood to leave his apartment; she then went to her own residence, where she called police. *Id.*

Officers Patton and Hutchinson immediately went to respondent's apartment, hoping to get consent to conduct a search. *Id.* When respondent answered the door, they told him that they had no warrant, but that they had received a report that he was keeping illegal drugs at the residence. *Id.* The officers asked him for consent to search, and he refused. *Id.*

Respondent's roommate, Paul Jaworski, then came to the door, where he told the officers that he lived in the apartment with respondent. *Id.* He then consented to a search, and respondent again objected to the officers' entry. *Id.* The officers entered the apartment and began to search the common room and the kitchen. *Id.* The evidence at the suppression hearing showed that both respondent and Jaworski had signed the lease for the Market Street apartment, where they had both lived for two years. *Id.* The two shared the common room and the kitchen, but had separate

bedrooms and bathrooms: respondent lived in the east bedroom and used the attached bathroom, while Jaworski lived in the west bedroom and used the attached bathroom. *Id.*

In the kitchen, the officers found five packages of white power that appeared to be cocaine in a cabinet under the sink. *Id.* When Officer Hutchinson left the premises to get the evidence bag, Officer Patton noticed that the door to the east bedroom was open. *Id.* at 1060. He asked Jaworski if the door was often open, and Jaworski said, “usually.” *Id.* Officer Patton then entered the room over respondent’s objection, where he found a marijuana pipe. *Id.* At the suppression hearing, Jaworski testified that while respondent frequently left his bedroom door open or ajar, Jaworski never went into respondent’s bedroom absent respondent’s invitation or permission. *Id.* Jaworski also testified that he and respondent had an “understanding” that their bedrooms and bathrooms were private areas that were not to be entered without invitation. *Id.*

Officer Patton took the pipe into the common room and asked respondent whether he had used it to smoke marijuana; respondent said he had not. *Id.* The white power from the kitchen then field tested positive for cocaine. *Id.* Officer Patton reentered respondent’s bedroom, where he found several packages of what looked like marijuana in the closet. *Id.* The officers seized the marijuana, then arrested respondent. *Id.* Respondent was charged with possession of cocaine, possession of marijuana, possession with intent to deliver both cocaine and marijuana, and possession of drug related paraphernalia. *Id.*

Respondent made a pre-trial motion to suppress the drugs and paraphernalia seized from his apartment, claiming that the search violated the Fourth Amendment of the United States Constitution and Art. 1 § 8 of the Pennsylvania Constitution. *Id.* The Court of Common Pleas agreed with respondent on the basis that a third party cannot give valid consent when another party is present and objects to the search. *Id.*

The Commonwealth appealed the suppression to the Superior Court of Pennsylvania, Eastern Division. *Id.* The Superior Court found that under *United States v. Matlock*, 415 U.S. 164 (1974), Jaworski, as a co-occupant with common authority over the apartment, could give valid consent, and therefore the Fourth Amendment did not require suppression. *Commonwealth v. Fitzgerald*, 875 A.2d 1049, 1056 (Pa. Super. 2004).

The Supreme Court of Pennsylvania reversed the Superior Court. *Fitzgerald*, 875 A.2d at 1058. The Supreme Court found that an occupant only assumes a risk that his co-occupant will permit a search while he is absent from the premises. *Id.* at 1067. The Court distinguished *Matlock* from this case, explaining that here, respondent was both present and clearly objected to the search. *Id.* at 1066-1067. The Court then determined that respondent's presence rendered Jaworski's consent invalid; the search, therefore, was illegal, requiring suppression of the evidence. *Id.* at 1067.

Writing in dissent, Judge Baer concluded that *Matlock* applied to this case despite respondent's presence. *Id.* at 1072 (Baer, J., dissenting). The dissent stated that the focus should not be on whether an occupant is present, but on whether an occupant has assumed a risk that another occupant with common authority will permit a search of the premises. *Id.* In this case, respondent did assume the risk that Jaworski, as a co-lessee with common authority over the apartment, would consent to a search. *Id.* The dissent found that Jaworski's consent was valid, and the search was therefore permissible under the Fourth Amendment. *Id.*

This Court granted the Commonwealth's petition for a writ of certiorari.

SUMMARY OF ARGUMENT

When one person who has common authority over a shared residence gives law enforcement officers consent to search that residence, his consent alone is sufficient to justify the search under the Fourth Amendment. *United States v. Matlock*, 415 U.S. 164, 171 (1974). This Court's third party consent cases do not provide a foundation for invalidating one occupant's consent simply because another occupant is present and objects to the search. In a joint occupancy arrangement, the occupants all have reduced expectations of privacy: the nature of the arrangement is such that one cannot expect total privacy because another may always allow an outsider access to the premises. Therefore, the joint occupant assumes a risk that the other occupant will consent to a search at any time because each occupant has the right to let anyone on the premises, including law enforcement. Important community interests, including the effectiveness and efficiency of law enforcement, call for the existence of that right whether other occupants are on or off the premises at the time of consent. Since respondent and Jaworski lived as joint occupants with joint access to and control over the premises, Jaworski's consent was valid, and the search was reasonable under the Fourth Amendment.

Jaworski's consent was valid not only for the common areas of the apartment, but also for respondent's bedroom. *Illinois v. Rodriguez*, 497 U.S. 177 (1990), requires that police officers make an inquiry if a reasonable person would doubt the consenting party's authority over the premises. *Id.* at 188-189. But in this case, the police did not need to ask extensively about Jaworski's access to respondent's room. Knowing that respondent did not seal off his room by keeping his door shut was enough under *Matlock* to show that Jaworski had regular opportunities to access the room even if he chose not to do so. The police officers had ample grounds to believe that Jaworski could consent to a search of the whole apartment.

ARGUMENT

I. Law Enforcement May Search a Residence if One Occupant Gives Consent, Even Though Another Occupant is Present and Refuses to Consent

While the Fourth Amendment generally prohibits warrantless searches and seizures, there is an exception when a person with the proper authority gives voluntary consent to a search or seizure. *Rodriguez*, 497 U.S. at 181. This Court has held steadfastly to the validity of consent searches, stating that they are “a constitutionally and wholly legitimate aspect of effective police activity,” and warning that placing “artificial restrictions upon such searches would jeopardize their basic validity.” *Schneckloth v. Bustamonte*, 412 U.S. 218, 228-229 (1973). In *United States v. Matlock*, this Court approved third party consent searches of jointly occupied residences when the consenting party has “common authority or other sufficient relationship to the premises.” *Id.* at 171. In its decision below, the Pennsylvania Supreme Court flouted the warning in *Schneckloth* and the rule of *Matlock*: it created a rule that strips the consent search of its basic validity by preventing a co-occupant of a residence from giving law enforcement officers legitimate consent to search the residence when another occupant is on the premises and able to object to the search. *Fitzgerald*, 875 A.2d at 1067. In practice, this rule would require law enforcement officers to obtain consent from every occupant present at the residence before conducting a search. But the rule lacks support from the decisions of this Court and other courts, and it threatens the effectiveness of law enforcement operations.

A. One Occupant of a Shared Residence May Give Valid Consent for Law Enforcement to Search the Premises

Prior to *Matlock*, this Court articulated the principle that a person who jointly uses property may give valid consent for a search of that property. *Frazier v. Cupp*, 394 U.S. 731, 740 (1969). In *Frazier*, the Court held that a search of the defendant’s duffel bag was reasonable because his

cousin, who gave consent to search, was a “joint user of the bag,” and therefore “clearly had authority to consent to its search.” *Id.* The defendant, moreover, had not only allowed his cousin to use the bag, but had left it in the cousin’s house. *Id.* This led the Court to conclude that the defendant had “assumed the risk” that his cousin “would allow someone else to look inside.” *Id.*

In *United States v. Matlock*, the Court again considered the validity of a third party’s consent, but in this case, the subject of the search was a jointly occupied home. Police officers arrested the defendant in the front yard of the home, where he lived with several other people, including a woman named Mrs. Graff. 415 U.S. at 166. The officers then went to the door of the house, asked Mrs. Graff if they could search the house, and she gave consent. *Id.* The defendant later challenged her authority to consent to a search of an upstairs bedroom that they occupied together. *Id.* at 167. The Court stated that the prosecution is not required to show that the defendant gave voluntary consent, but may instead “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.” *Id.* at 171. In clarifying the “common authority” concept, the Court explained that the authority derives from “mutual use of the property by persons generally having joint access or control for most purposes.” *Id.* at 171, n.7. When people share property in this manner, “it is reasonable to recognize that any of the co-inhabitants has the right to permit the inspection in his own right and that the others have assumed the risk that one of their number might permit the common areas to be searched.” *Id.*

A third watershed case on third party consent is *Illinois v. Rodriguez*. Here, the Court decided that even when a third party lacks authority to consent to a search, her consent is valid if law enforcement officers reasonably believe she has authority. 497 U.S. at 188-189. The consenting party in *Rodriguez* was the defendant’s former cotenant; she had a key to the

defendant's apartment, and traveled with the police to the apartment so she could unlock the door for them. *Id.* at 179. She also referred to the apartment as “our” apartment, and told the police that she had some possessions there. *Id.* When the officers entered the apartment, they knew that the defendant was on the premises, but was asleep. *Id.* Upon their discovery of cocaine in two rooms, the officers arrested the defendant. *Id.* at 180. While the former cotenant did not have actual authority to consent to the search under the “common authority” rule of *Matlock*, the Court noted that the Fourth Amendment only requires that law enforcement officials act reasonably in carrying out a search. *Id.* at 181-182, 186. Therefore, when the police have a reasonable, though erroneous, belief that a party has authority to consent, the consent may still be valid and the search may be reasonable. *Id.* at 186.

These cases illustrate the wide array of situations concerning jointly held property in which this Court has validated third party consent. This case compels a result no different from those of *Matlock* and *Rodriguez*. The presence test that the Pennsylvania Supreme Court contrived does not logically follow from a careful application of the *Matlock* and *Rodriguez* rules. Instead, conscientious readings of those cases warrant a finding that Jaworski's consent was valid.

B. In a Joint Occupancy Arrangement, All Occupants Assume an Unchanging Risk That One Occupant Will Consent to a Search Even When All Occupants Are Present on the Premises

The Pennsylvania Supreme Court attempted to justify its rule through distinguishing a co-occupant's expectation of privacy when he is on the premises from his expectation of privacy when he is absent. In essence, the Court concluded that he assumes a risk that another occupant will allow a search only when he is absent from the premises. 875 A.2d at 1067. This is incompatible with the assumption of risk analysis in *Matlock*: a joint occupant may consent to a search without input from the other occupants, for the others “have assumed the risk that one of their number

might permit the common area to be searched.” 415 U.S. at 171, n.7. *Matlock* does not qualify this risk for situations where multiple occupants are present. The co-occupant’s risk remains the same whether he is on or off the premises at the time of consent. The Pennsylvania Supreme Court, however, took a fundamentally different view from *Matlock* on the nature of the risk. According to the decision below, the risk is “‘merely an inability to control access to the premises during one’s absence.’” 875 A.2d at 1067 (quoting 3 Wayne R. LaFare, *Search and Seizure* § 8.3(d) at 252 (2d ed. 1987)). But *Matlock* recognized that the risk is unceasing for the joint occupant, for any other occupant with common authority may permit a search at any time. 415 U.S. at 171, n.7. A joint occupant may share the property, but his right to consent to a search stands uncompromised: the joint occupant may consent “in his own right,” without regard to the presence or absence of other occupants. *Id.* As a joint occupant, then, Jaworski’s consent was perfectly valid, and the police did not need to obtain consent from respondent to make their search reasonable. Respondent, in agreeing to lease the apartment with Jaworski, assumed the risk that Jaworski would allow the police access to the apartment even when both were present on the premises.

The Pennsylvania Supreme Court tried to differentiate *Matlock* from this case, seizing upon Matlock’s detention in a police car at the time his co-occupant granted consent and the fact that he voiced no objection to the search. 875 A.2d at 1066-1067. *Matlock*, the Court suggested, should not control this case because of those factual differences. *Id.* at 1066. It is true that the facts of *Matlock* are not exactly like the facts in this case. Unlike Matlock, respondent remained free while the search went on and he expressed his objection to the search. But this did not reduce the risk he assumed in sharing the apartment; again, *Matlock* does not circumscribe the risk according to an occupant’s presence or objection. Because the risk does not vary, *Matlock* still applies to this case.

The Ninth Circuit has provided an example of how *Matlock* works in a situation very similar to this case, and has thoughtfully applied the *Matlock* rule to find that an occupant's presence and objection to a search does not override a co-occupant's consent. *United States v. Morning*, 64 F.3d 531, 536 (9th Cir. 1995).

In *Morning*, Drug Enforcement Administration agents went to a jointly occupied residence, where they asked Morning, the occupant who answered the door, for permission to search the premises. *Id.* at 532. She stated that she would prefer that the agents get a warrant. *Id.* The agents then asked if anyone else lived there, and she sent her co-occupant to the door. *Id.* The co-occupant told the agents that there were drugs on the premises, and then gave oral and written consent for the agents to search. *Id.* Morning moved to suppress evidence gathered during the search, claiming that she "expressly" gave no consent. *Id.* The Court, invoking the *Matlock* risk principle, said that the "risks to property or privacy interests are not substantially lessened because of the defendant's own lack of consent," and that a person "cannot expect sole exclusionary authority unless he lives alone." *Id.* at 536. A co-occupant, therefore, always bears the risk that another occupant may allow a search, even when the former is on the premises and does not consent to the search.

The Pennsylvania Supreme Court rejected the holdings of *Morning* and similar cases from the United States Courts of Appeals ostensibly because these cases all incorrectly determined that the defendant in *Matlock* was present when his co-occupant consented to the search.¹ 875 A.2d at 1065. The Court went on to make its own pronouncement that the defendant in *Matlock* was absent when the co-occupant gave consent, and therefore could not object to the search: "[A] defendant who has been legitimately arrested and placed in a squad car is no longer 'present' for

¹ The other cases include *United States v. Shelton*, 337 F.3d 529 (5th Cir. 2003), and *United States v. Donlin*, 982 F.2d 31 (1st Cir. 1992).

the purposes of obtaining consent” *Id.* at 1066. The Court raised the issue of the defendant’s presence in *Matlock* to lend support to its position that the *Matlock* rule only applies where a co-occupant is absent. But *Matlock* made no explicit finding as to whether the defendant was present or absent; indeed, it appears to have found the distinction unimportant, since no part of the majority’s opinion speaks to the defendant’s presence or absence. His location had no bearing upon the validity of his co-occupant’s consent.

The Pennsylvania Supreme Court further sought to bolster its limited view of *Matlock* by pointing to “very plain language” in that case. 875 A.2d at 1066. The language that the Court deemed so crucial is this: “[T]he 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.” *Matlock*, 415 U.S. at 170. The Court faltered, however, in plucking this sentence from its context. A careful reading of *Matlock* reveals that this sentence is only a small part of a recitation of various cases dealing with third party consent, and is really an introductory description of *Frazier v. Cupp*, a case where the nonconsenting party happened to be absent at the time of consent. *Id.* The sentence is not, as the Pennsylvania court supposed, part of the ultimate holding in *Matlock*. To treat it as the ultimate holding is to engage in a rather specious analysis.

A more circumspect reading would have looked to the conclusion that *Matlock* drew from its examination of precedent: the prosecution “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.” *Id.* at 171. Several cases have accepted this as the guiding principle to be gleaned from *Matlock*. See, e.g., *United States v. Hendrix*, 595 F.2d 883, 885 (D.C. Cir 1979) and *United States v. Sumlin*, 567 F.2d 684, 687-688 (6th Cir. 1977).

Finally, even if the defendant was absent in *Matlock*, making third party consent valid only against an absent, nonconsenting co-occupant, the Pennsylvania Supreme Court's rule is still inconsistent with *Illinois v. Rodriguez*. In *Rodriguez*, the police knew the defendant was on the premises when they obtained consent to search from his former co-occupant. 497 U.S. at 179. The officers did not attempt to ask for the defendant's consent; instead, they proceeded with their search while he remained asleep. *Id.* at 180. The Court never indicated that the defendant's presence had any relevance to the validity of the former co-occupant's consent or the reasonableness of the search. The search is reasonable if law enforcement officers act upon consent from a party whom they reasonably believe has common authority over the premises, even though they may later learn that the consenting party lacked that authority. *Id.* at 186. The presence of any co-occupant is simply not an issue upon which the validity of consent turns. It is not a factor that may render the search unreasonable under the Fourth Amendment.

To reinforce its contention that a person only assumes a risk when he is absent, the Pennsylvania Supreme Court looked to commentary by LaFave on Fourth Amendment law that highlights disagreements about *Matlock*. LaFave points out that while some promote the view that the right to consent is not curbed even when a co-occupant is present and objects, others say that unanimous consent is necessary when all occupants are present because in joint occupancy arrangements, people would “accommodate each other by not admitting persons over another's objection while he was present.” 4 Wayne R. LaFave, *Search and Seizure* § 8.3(d) at 159 (4th ed. 2004) (quoting Weinreb, Generalities of the Fourth Amendment, 42 U. Chi. L. Rev. 47, 58-64 (1974)). LaFave finds “merit to both positions,” but concedes that “the latter has somewhat greater appeal.” *Id.* The Pennsylvania Supreme Court sided with LaFave, but ignored subsequent commentary indicating that there may be situations in which a third party may give consent that is

effective against his present co-occupant. *Id.* at 161-162. Those situations arise when, as in this case, a “consenting occupant acts to allow police seizure of items of contraband or stolen property, which are present on those premises and which the consenting occupant thus might otherwise have later been charged with possessing.” *Id.* Because this case is so similar to that which LaFave describes, the Pennsylvania Supreme Court’s reliance solely on LaFave’s earlier statements is ill-considered.

Finally, in *United States v. Karo*, 468 U.S. 705 (1984) (O’Connor, J., concurring in part and concurring in the judgment), Justice O’Connor raised the very problem now before this Court in a concurring opinion. It is a “relatively easy case,” O’Connor explained, if “two persons share identical, overlapping privacy interests in a particular place, container, or conversation.” *Id.* at 726. Both parties “share the power to surrender each other’s privacy to a third party.” *Id.* Both “share the power to consent to a search,” but “only if neither consents do both retain the right to object to the fruits of an unlawful search.” *Id.* O’Connor likened the two parties with the shared privacy interest in a place to two people in conversation who may share an expectation that their conversation will be kept private: here, “either may give effective consent to a wiretap or other electronic surveillance.” *Id.* (citing *United States v. White*, 401 U.S. 745 (1971)). Thus, in a jointly occupied residence, although all occupants may share an equal expectation of privacy, each shares the ability to circumscribe the others’ privacy by cooperating with the police. All share a constant risk that one may permit a search.

C. An Occupant’s Objection Does Not Affect the Validity of Another Occupant’s Consent

The Pennsylvania Supreme Court cautioned that “the defendant’s mere presence without more is not enough to invalidate a third party consent search.” 875 A.2d at 1066. Rather, a third

party's consent becomes invalid when a present co-occupant refuses to consent, as Fitzgerald did. *Id.* But no decisions from this Court lend support to that proposition. *Matlock* does not condition its rule upon objection or lack of objection, for the consenting occupant may allow a search "in his own right," and the other occupants have no recourse because sharing a residence means assuming a risk that a co-occupant may consent to a search. 415 U.S. at 171, n.7.

The decision below declares that even if *Matlock* was present, he never objected to a search, so his co-occupant's consent was valid. 875 A.2d at 1066-1067. That statement ignores a key fact: the police did not ask *Matlock* for consent. Given the evidence gathered during the search of *Matlock*'s home, it is likely that if the police had asked him for consent, he would have objected. This Court said nothing to that effect in *Matlock*, for a co-occupant's objection would have no consequence when all occupants bear the risk that one will consent to a search. Under *Matlock*, the risk outweighs all other considerations. Objection is simply not a factor in assessing the validity of consent.

Moreover, in *Illinois v. Rodriguez*, the defendant was present, and the police knew of his presence, but did not ask him for consent. 497 U.S. at 179-180. Here, too, it is reasonable to conjecture that the defendant would have objected if he had been asked for consent. Yet this Court measured the reasonableness of the search by the officers' perception of the third party's authority, not by the defendant's opportunity to object. *Id.* at 188-189.

Turning again to *United States v. Morning*, the Ninth Circuit did not find that a co-occupant's objection invalidates another occupant's consent. 64 F.3d at 536. Instead, the "primary factor" is the risk that an occupant will permit entry, "even if the defendant does not approve of the entry." *Id.* It is important to recall that *Morning* presented facts very much like those now before this Court: like respondent and Jaworski, the two co-occupants had common authority over the

residence, and like respondent, defendant Morning refused consent. *Id.* at 532-534. Moments later, her co-occupant allowed the officers to enter the residence, as Jaworski did shortly after respondent denied entry. *Id.* at 532. Confronted with these similarities and the facts of *Matlock* and *Rodriguez*, the conclusion in *Morning* should control here: objection to a search has no effect on the validity of the co-occupant's consent.

D. Requiring Consent From All Present Occupants Hampers the Public Interest in Effective Law Enforcement and Neglects the Interests of Occupants in Special Situations

As Justice Stewart wrote in *Coolidge v. New Hampshire*, 403 U.S. 443 (1971), “it is no party of the policy underlying the Fourth and Fourteenth Amendments to discourage citizens from aiding to the utmost of their ability in the apprehension of criminals.” *Id.* at 488. Assisting the police through consent searches can be quite critical, for “where the police have some evidence of illicit activity, but lack probable cause to arrest or search, a search authorized by a valid consent may be the only means of obtaining important and reliable evidence.” *Schneckloth*, 412 U.S. at 228. The community, therefore, “has a real interest in encouraging consent, for the resulting search may yield necessary evidence for the solution and prosecution of crime.” *Id.* at 243.

This case certainly qualifies as the type of situation in which the police had limited opportunities to gather evidence: they wanted to act as quickly as possible upon the tip from Applewood, so they avoided the warrant procedure in the hope of obtaining consent to search. Applewood's vague knowledge of respondent's activities may not have constituted probable cause for warrant purposes, creating an impediment to the officers' investigation. Narcotics are easy to move between locations, making it imperative for the officers to get to the search site without delay. Under the Pennsylvania Supreme Court's approach, once an occupant denies entry, the only way for the officers to carry out a reasonable search would be to get a warrant. This would give a

defendant ample time to move or destroy the evidence of criminal activity, thus thwarting the police and obstructing the administration of justice.

Additionally, the Pennsylvania Supreme Court's rule would force police officers to wait until a potentially hostile occupant left the premises before they could attempt to request consent. If police lacked probable cause or were investigating at a time of day when magistrates were unavailable to issue warrants, the rule could seriously retard law enforcement operations. The police may resort to obtaining a warrant to arrest a suspect, then taking the suspect off the premises and asking his co-occupant for consent to search. The Pennsylvania Supreme Court assumed that the police may not engage in that practice, but the scenario so closely resembles the facts of *Matlock* that courts may very well allow it. *Fitzgerald*, 875 A.2d at 1066, n.4.

Still, the practice may be legal, but it is not necessarily wise. Again, it would hamper police efficiency by forcing officers to get an arrest warrant; the officers would then need to wait until all occupants are on the premises to ensure the presence of a third party who may consent. These examples, moreover, show that the Pennsylvania rule imposes the kind of restrictions that *Schneckloth* decried: the consent search no longer has "basic validity," but is valid only when police officers manipulate their investigations enough to guarantee the absence of a potential objector. 412 U.S. at 229.

As noted above in the discussion of *LaFave*, the rule also creates a problem for an innocent co-occupant who has a significant stake in being able to give valid consent: his cooperation with the police may allow him to avoid a charge. *Schneckloth* explained that consent searches can produce evidence that "may insure that a wholly innocent person is not wrongly charged with a criminal offense." 412 U.S. at 243. Protecting the innocent should be a priority in a case like this

one, where both occupants may be charged with possession because drugs are discovered in common areas, but only one occupant is responsible for the drugs.

Finally, the interest of the consenting third party may be greater than that of the objecting co-occupant when the objector has “victimized” the third party. 4 Wayne R. LaFave, *Search and Seizure* § 8.3(d) at 161 (quoting Comment, U. Chi. L. Rev. 121, 136 n.88 (1973)). Two cases from the Courts of Appeals have allowed the third party’s consent to outweigh the defendant’s objection in domestic abuse situations. In both cases, the consenting parties were wives who had suffered violence inflicted by their husbands, while the husbands were the present, objecting parties. *Donlin*, 982 F.2d at 32; *Hendrix*, 595 F.2d at 884-885. If the Pennsylvania Supreme Court’s rule stands, it may exacerbate circumstances for victims of domestic violence. Their consent alone will be insufficient to allow a search, letting the perpetrator escape investigation and possibly continue his course of violent conduct.

Forcing consent to turn on the presence of all occupants, then, produces operational obstacles for law enforcement officials, and exposes innocent and victimized co-occupants to injustice.

II. Law Enforcement May Search Private Areas of Shared Residences if the Party Giving Consent Shows That He Has Access to or Control Over the Area

The Pennsylvania Supreme Court argued that even if Jaworski’s consent to search the apartment was valid as to the common areas, he did not have control over respondent’s bedroom, and therefore had no authority to consent to a search of the bedroom. 875 A.2d at 1068. Yet this Court has resisted “extreme or strained applications of the exclusive control concept.” 4 Wayne R. LaFave, *Search and Seizure* § 8.3(f) at 168. In *Frazier v. Cupp*, for instance, the defendant argued that his cousin, who consented to a search of defendant’s duffel bag, only had permission to use

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one compartment of the bag, and therefore had no authority to consent to a search of the other compartments. 394 U.S. at 740. The Court did not accept this argument, preferring not to take up “metaphysical subtleties in judging the efficacy of [the cousin’s] consent.” *Id.* As in *Frazier*, there is no need to decide the scope of Jaworski’s consent based upon the details of his living arrangement with respondent. The police had no duty to make a full inquiry about Jaworski’s access to respondent’s bedroom while they were in the midst of a search for which they had valid consent.

The decision below cited the *Rodriguez* rule that when officers should reasonably doubt the third party’s authority to consent, they must make an inquiry about the extent of that authority. *Id.* at 1070. *Rodriguez* advises that “[e]ven when the invitation [to search] is accompanied by an explicit assertion that the person lives there, the surrounding circumstances could conceivably be such that a reasonable person would doubt its truth and not act upon it without further inquiry.” 497 U.S. at 188. In this case, the Court asserted, the officers should have had doubts about Jaworski’s authority to consent to a search of respondent’s room because they understood that the two roommates were unrelated and they knew that respondent had a privacy interest in the room from his admonition to stay out of it. *Id.*

Applying *Rodriguez* to this case, the police made the appropriate inquiry when they asked whether the bedroom door was normally open. They did not enter respondent’s room without concern for possible restrictions. Jaworski’s reply that respondent’s door was usually open indicated to the police that respondent did not consistently exclude others from the room. While Jaworski did not sleep in the room or keep personal possessions there, as did the consenting occupant in *Matlock*, he still had access to the room. *Matlock* requires a third party to have joint access to *or* control over the premises, not both. 415 U.S. at 171, n.7 (emphasis added). The open

door was an objective showing that Jaworski had such access. The police did not need to acquire information about the subjective intentions of the roommates with respect to their bedroom arrangements. The actual arrangements, which were revealed at the suppression hearing, are the kind of “metaphysical subtleties” that this Court wished to avoid in *Frazier*.

The protocol established between respondent and Jaworski, while delineated enough to suggest Jaworski’s lack of authority over respondent’s bedroom, was merely a voluntary agreement. That Jaworski never entered respondent’s bedroom without permission only illustrates that he chose to honor respondent’s desire for privacy. Respondent did not actively try to prevent Jaworski from entering; after all, there was no lock on the door. 875 A.2d at 1060. The existence of an “understanding” as to the roommates’ private areas does not show that Jaworski lacked access to the room. Subscribing to the agreement simply meant that Jaworski did not exercise control over the room, as the dissenting opinion below observed. 875 A.2d at 1072 (Baer, J., dissenting).

The scope of consent, furthermore, is “generally determined by the investigators’ express object of the search, applying a standard of reasonableness to the parties’ understanding of that object.” *United States v. Aghedo*, 159 F.3d 308, 311 (7th Cir. 1998). Here, Jaworski gave general consent to search the apartment, placing no limits upon what rooms the police could enter. The police officers had no indication from Jaworski that they should limit their search to the common areas of the apartment. It was therefore reasonable for them to believe that they could search the whole apartment.

CONCLUSION

For the foregoing reasons, the Petitioner respectfully requests that this Honorable Court reverse the decision of the Pennsylvania Supreme Court.

Respectfully submitted,

Joanna Dubus