RESOLVING THE CIRCUIT SPLIT OVER CONSENT BASED SEARCHES IN SHARED LIVING SPACES

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ABSTRACT

The court should find that when there is ambiguity as to whether a person has the authority to authorize the search of property under common authority, or property subjected to mutual use (property used by two people), that it is the duty of the police to inquire further and dispel any such ambiguity. If they fail to, and the property being searched does not belong to the person who consented, then the search should be found unconstitutional and any evidence collected from the search should be suppressed.[1] *Furthermore, the courts should adopt the test laid out in United States v. Salinas-Cano*[2] *to determine whether there exists ambiguity as to whether the property was subject to mutual use. Additionally, they should take into consideration the totality of the circumstances, which has been a commonly used tool throughout Fourth Amendment jurisprudence.*[3] *These standards would allow for efficient law enforcement while protecting the rights of the people to be insulated from unreasonable search and seizures.*

1 *See* Wong Sun v. United States, 371 U.S. 471, 488 (1963) (purporting that evidence collected as the result of unconstitutional activity should be excluded from trial).

2 United States v. Salinas-Cano, 959 F.2d 861, 863 (10th Cir. 1992).

3 *See, e.g.*, United States v. Cortez, 449 U.S. 411, 411 (1981).

I. INTRODUCTION

Currently, we are facing a constitutional crisis where the government is able to exploit a sort of legal loophole to warrantlessly search a citizen's home without a warrant or their consent. The circuit courts are divided over whether they should allow police to exploit this loophole. To conduct a search the government generally requires a warrant or the consent of the properties owner.[4] Although this rule appears simple, problems arise when people choose to live in a shared space with roommates. When one roommate authorizes a search of property that is used by two or more people, the non-consenting party's Fourth Amendment protections are forfeited unless that party is physically present and objecting.[5] Through this mechanism, the principles which justify allowing a person to forfeit their own rights through consent have been extended to also allow them to surrender a third party's Fourth Amendment protections.[6] This issue will become increasingly more important due to the increasing rates in which people choose to move to urban areas and live with other non-familial roommates.

Of course, it is not always possible for the government to determine who the actual property owner is, and thus, not always possible to determine who has the authority to consent to a search.[7] The Fourth Amendment does not require that the government be correct in all its assessments, only that the government acts reasonably in making them.[8] Government officers must only make a reasonable determination of whether the person granting consent has actual authority.[9]

An ambiguity in the law arises when it is unclear whether a roommate consenting to a search actually has authority over the absent roommate's space or property. The courts cannot agree whether the government or the property owner bears the burden of resolving the ambiguity. Put differently, the question is: when the government obtains consent to conduct a warrantless search, and within the area to be searched there is property in a common space or property mutually used by two or more residents, who bears the burden of ensuring the person who gave consent had the actual authority to consent? Is the burden on the police, or is the burden on the owner of the property being searched? The 4th, 6th, D.C., and 10th Circuit Courts, relying on Rodriguez,[10]

4 *See* Schneckloth v. Bustamonte, 412 U.S. 218 (1973).
5 U.S. v. Matlock, 415 U.S. 170, 171 (1974).
6 Coolidge v. New Hampshire, 403 U.S. 4333, 487-490 (1971).
7 *See generally* Illinois v. Rodriguez, 497 U.S. 177, 189 (1990).
8 Terry v. Ohio, 392 U.S. 1, 21-22 (1968).
9 Illinois v. Rodriguez, 497 U.S. 177, 184 (1990).
10 *Id*.

have determined that the police bear the burden of resolving the ambiguity before searching the property.[11] Conversely, the 2nd and 7th Circuits have determined that is the duty of the citizen to affirmatively notify the government that they lack the ability to consent to the search of the ambiguous property.[12]

From the onset of our republic, the founders believed general warrants to be abhorrent.[13] The *Virginia Declaration of Rights*, passed on June 12, 1776, provided the first constitutional protection for individual rights and was a blueprint for our Bill of Rights.[14] It was highly influential on James Madison, who is largely credited with drafting the Fourth Amendment.[15] The Fourth Amendment is the people's main protection against government intrusion into their homes and property.[16] The *Virginia Declaration* focused on prohibiting 'general warrants', which during colonial times had authorized British agents to baselessly rummage through the colonist's homes and belongings. [17] The general warrant included a license to search for everything in a named place and to search any property within that place at the agent's discretion.[18] In specific response to these warrants, the Fourth Amendment was codified into the Bill of Rights.[19]

The Court has repeatedly defended the importance of the Fourth Amendment.[20] They proclaimed "the right to be secure against rude invasions of privacy by state officers is . . . constitutional in origin, [and] we [cannot] permit that right . . . [to be an] empty promise."[21] Given how much the founders abhorred the idea of general warrants, the slight inconvenience faced by a police officer in having to secure a warrant is insignificant compared to the potential for Fourth Amendment abuse which is faced by the people.[22] By allowing police to

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11 U.S. v. Whitfield, 939 F.2d 1075 (4th Cir. 1991); U.S. v. Peyton, 745 F.3d 554 (D.C. Cir. 2014); United States v. Taylor, 600 F.3d 678, 680–85 (6th Cir. 2010); United States v. Salinas-Cano, 959 F.2d 861, 864 (10th Cir. 1992).

12 U.S. v. Melgar, 227 F.3d 1038 (7th Cir. 2000); United States v. Snype, 441 F.3d 119, 136 (2d Cir. 2006).

13 Boyd v. United States, 116 U.S. 616, 626-27 (1886) (maintaining that it can be "confidently asserted" that the English cases involving general warrants and their results "were in the minds of those who framed the Fourth Amendment.").

14 Winona Morrissette-Johnson, *"The Virginia Declaration of Rights: A Blueprint for Liberty" Civics Lesson Plan*, CURRIKICDN (Oct 31, 2016), https://currikicdn.s3-us-west-2.amazonaws.com/resourcefiles/54d2be80d1301.pdf.

15 Morrissette-Johnson, *supra* note 15; Robert Allen Rutland, *The Birth Of The Bill Of Rights*, MICH. L. REV. 554, 1776-1791 (2011).

16 Morrissette-Johnson, *supra* note 15.

17 Rutland, *supra* note 15.

18 Warden Md. Penitentiary v. Hayden, 387 U.S. 294, 315 (1967) (Justice Douglas dissenting) (citing Frisbie v. Butler, 1 Kirby 213 (Conn. 1787)).

19 Coolidge v. New Hampshire, 403 U.S. 443, 467 (1971).

20 *E.g.*, Arizona v. Gant, 556 U.S. 332, 338 (2009); Kyllo v. U.S., 533 U.S. 27, 34 (2001).

21 Mapp v. Ohio, 367 U.S. 643, 660 (1961).

22 United States v. Matlock, 415 U.S. 164, 180 (1974) (Justice Douglas dissenting).

conduct searches based upon the consent of a third party, the police have effectively been given a general warrant[23] since they can then rummage through a third party's home without any sort of restraint, exactly as the founders had feared.[24] The people deserve a system where overzealous police officers are prevented from subverting the Fourth Amendment merely because it would be inconvenient for them to inquire about who actually owns the property they want to search. The Fourth Amendment fails to protect people if it allows for the government to conduct a search in spite of clear ambiguity as to whether a person consenting to a search actually had the authority to allow it. Police should be required to either obtain a warrant or conduct further inquiry and resolve the ambiguity before continuing their search.

The purpose of this paper is to highlight this issue and propose a standard that the courts should follow that adheres to Supreme Court Jurisprudence, and the intentions of the Founding Fathers. I will explore the different rationales for the circuit courts decisions and examine how my proposed standard contorts or conforms to their reasoning. I contend the court should find that when there is ambiguity as to whether a person has authority to authorize the search of spaces held under common authority it is the duty of the police to inquire further and dispel any such ambiguity. If they fail to do so, and the property that is searched does not belong to the person who consented, then the search should be found unconstitutional and any evidence collected from the search should be suppressed.[25] Furthermore, the courts should adopt the test laid out in *United States v. Salinas-Cano*[26] to determine whether there was such an ambiguity. They should also take into consideration the totality of the circumstances, which has been a commonly used tool throughout Fourth Amendment jurisprudence.[27] These standards would allow for efficient law enforcement while protecting the rights of the people to be insulated from unreasonable search and seizures.

II. A REVIEW OF THE JURISPRUDENCE BEHIND CONSENT BASED SEARCHES IN SHARED LIVIGN SPACES.

This section of the note is dedicated to reviewing the current state of consent based searches in shared living spaces. It seeks to provide a framework for understanding my proposed standard and to generally

23 *Id*. at 187-188 (Justice Douglas dissenting).

24 *See* Kremen v. United States, 353 U.S. 346 (1957) (police rummage through a house after receiving consent).

25 *See* Wong Sun v. United States, 371 U.S. 471, 488 (1963) (purporting that evidence collected as the result of unconstitutional activity should be excluded from trial).

26 United States v. Salinas-Cano, 959 F.2d 861, 863 (10th Cir. 1992).

27 *E.g*., United States v. Cortez, 449 U.S. 411, 411 (1981).

outline how the Fourth Amendment has been viewed in our releveant context.

In *Davis v. U.S*,[28] the Court opined that when property is searched without a warrant and without a probable cause, the search is Constitutional so long as consent has been voluntarily given. They found that allowing an individual to waive their rights was in line with both the principles of the Fourth and Fifth amendments.[29] The Fourth Amendment provides:

> 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.[30]

And the Fifth Amendment guarantees, in part, that "no person. . . shall be compelled in any Criminal Case to be a witness against himself . . . . "[31] The law of searches and seizures, as shown through the holdings of the Supreme Court, is "the product of the interplay of these two constitutional provisions."[32] It reveals the dual purpose of these amendments: 1) protection of the privacy of the individual, his right to be left alone and 2) the protection of an individual against being compelled to aid in having evidence collected which will be used against him.[33] When a party consents to a search and the individual has voluntarily allowed officers to examine his property, neither of these principles are offended.[34]

The Supreme Court ruled on the ability of a cohabitant to consent to a search of their jointly occupied residence in *United States v. Matlock*.[35] Respondent Matlock was arrested for bank robbery[36] while in the front yard of a home which he shared with Mrs. Graff and several

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28 *E.g*., Davis v. United States, 328 U.S. 582, 587 (1946); Schneckloth v. Bustamonte, 412 U.S. 218 (1973).

29 *Davis*, 328 U.S. 582, 587 (1946).

30 U.S. Const. amend. IV.

31 U.S. Const. amend. V.

32 *Davis*, 328 U.S. 582, 587 (1946); *Matthew J. Dougherty*, Constitutional Law – Implied Consent Laws: Fourth Amendment Plus Protection for the Drunk Driver Hays v. City of Jacksonville, 518 SO. 2d 892 (Ala.Crim.App. 1987) 19 Cumb. L. Rev. 180 (1988/1989).

33 *See* Dougherty, *supra* note 33; *Davis v. United States*, 328 U.S. 582, 587 (1946);

34 *See, e.g*., Katz v. United States, 389 U.S. at 358 (1967), Vale v. Louisiana, 339 U.S. 30, 35, 90 (1970).

35 415 U.S. 164, 166 (1974); *Cydney L. Reynolds*, Criminal Procedure-Third Party Consent-Upholding Consent to Search by Cotenant over Objection of Tenant Removed from Premises Fernandez v. California, 134 S. Ct. 1126 (2014), 45 Cumb. L. Rev. 202 (2015).

36 *Id*. (Matlock was indicted for robbing a federally insured bank, in violation of 18 U.S.C. §2113 (2012)).

members of her family.[37] Mrs. Graff informed officers that she slept in the same room as Matlock and shared a dresser with him.[38] Matlock was not asked for consent to search his property – instead, the officers requested Mrs. Graff give consent for the police to search a bedroom which she shared with Matlock.[39] Subsequently, officers discovered incriminating evidence within the closet in the room shared by Matlock and Mrs. Graff.[40]

The Supreme Court reviewed the lower court's decisions pertaining to whether the consent of a person possessing "common authority" or having "mutual use"[41] of property[42] was binding against a party who was absent and did not consent.[43] The Court held that a third party (Ms. Gaff in our case) could consent to the search of property located in an area that the cohabitatants had common authority over or property that was subject to their mutual use.[44] They opined that common authority is not implied from the mere property interest a third party has in property but instead common authority rests upon the mutual use of the property by persons that *generally have joint control or access for most purposes*.[45] By allowing another to have access to your property and by leaving it in mutual space, you are assuming the risk that another person residing in the space will allow a third party to access your property.[46] Thus, it is also reasonable to recognize that any co-inhabitants have the right to permit the inspection of their own residence, and any person who chooses to cohabitate with somebody has assumed the risk their roommate may permit a common area, or their mutually used property to be searched.[47] For example, when one person stores a bag in mutual space, they are assuming the risk that a co-inhabitant will allow a third party access to look into the bag.[48] The Court in *Matlock* made it clear that a third party can voluntarily consent to the search of an area they hold common authority over.[49]

This subsequently led to the question of whether police could conduct a warrantless search when, despite being mistaken, they reasonably believed the person who consented to their search possessed

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37 *Id*. (Matlock lived with Mrs. Graff, Graff's siblings, Graff's children, and Graff's mother.).

38 *Id*. at 168.

39 *Id*. at 166.

40 *Id*. at 166-67.

41 *Id*. at 170.

42 *See* Frazier v. Cupp, 394 U.S. 731, 740 (1969) (holding joint users of a duffel bag both possessed the authority to consent to its search.).

43 *Matlock II,* 415 U.S. at 170-172.

44 *See id*. at 164.

45 *Id*. at 170 (emphasis added).

46 *Id*. at 171; Coolidge v. New Hampshire, 403 U.S. 433, 487-490 (1971).

47 *Id*. at, 171; Frazier v. Cupp, 394 U.S. 731, 740 (1969).

48 *Id*. at 171; Coolidge v. New Hampshire, 403 U.S. 433, 487-490 (1971).

49 *Id*. at 170.

common authority over property.[50] The Supreme Court addressed this issue in *Illinois v. Rodriguez.*[51] The Court held that a search is constitutionally valid so long as the government *reasonably believed* a tenant possessed authority over the premises or property to be searched.[52]

In *Rodriguez*, Ms. Fischer, Rodriguez's girlfriend, allowed police officers to enter his private apartment.[53] Fischer described the apartment to police as "our apartment", opened the door with a key she carried on her person, and stated she owned several items inside the apartment.[54] Unbeknownst to the officers, Fischer did not live with Rodriguez, and had not lived with him for several weeks[55] and her key to the apartment had been obtained without Rodriguez's knowledge.[56] During the subsequent search the police discovered cocaine paraphernalia which the state would attempt to introduce into evidence during Rodriguez's trial.[57] Rodriguez contended the search was unconstitutional since consent was not given by somebody with actual authority over the space being searched.[58] Rodriguez argued that allowing Fischer to grant consent to a search of his apartment based upon only the reasonable belief that she possessed common authority allowed her to vicariously waive his Fourth Amendment rights.[59]

The Supreme Court found the state had not met their burden of proving that Fischer actually possessed common authority over the apartment based on several factors such as Fischer lacking the authority to bring guests over, not paying rent, not living in the apartment, and not possessing any actual basis to assert authority to permit a search.[60] However, the Court stressed that the issue in *Rodriguez* was whether the search was reasonable.[61] The Fourth Amendment does not require an officer acting on probable cause to be correct, it only requires that they act reasonably in determining such cause.[62] The court found no reason to depart from the prevailing rule that the Fourth Amendment only

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50 Reynolds, *supra* note 36, at 204.

51 497 U.S. 177, 179 (1990).

52 *Id*. at 188-89.

53 *Id*. at 179 (Fischer had informed that police that she had been assaulted by Rodriguez).

54 *Id*.; Reynolds, *supra* note 36, at 204.

55 *Rodriguez*, 497 U.S. 177, 181 (1990).

56 *Id*.

57 *See id*. at 180. ("Rodriguez was charged with possession of a controlled substances with intent to deliver.").

58 *Id*. at 180.

59 *Id*. at 183.

60 *Id*. at 181-82.

61 *Id*. at 187.

62 *See* Illinois v. Rodriguez, 497 U.S. 179, 184 (1990) (reasonableness has been defined by the objective standard: "would the facts available to the officer at the moment . . . warrant a man of reasonable caution to the belief that the consenting party had authority over the premise?").

requires reasonableness, and that reasonableness is determined objectively.[63] Thus, so long as a police officer has a reasonable belief that a consenting third party has common authority over premises or property, the officer has a sufficient basis to conduct a search.[64] More importantly for our discussion, the Court specified that if officers *could not reasonably determine* whether a third party had authority, the officers must conduct "additionally inquiry", and if they fail to do so, then a search will be unconstitutional unless actual authority exists.[65]

Subsequently, in *Georgia v. Randolph* the Court ruled that "a physically present inhabitant's express refusal of consent to a police search was dispositive in determining whether the police could conduct a warrantless search, regardless of the consent of a fellow occupant."[66]

The Court began by affirming and clarifying their decisions in *Matlock* and *Rodriguez*.[67] Common authority is not described as a property right, but instead draws from widely shared social expectations which, though naturally influenced by property laws, are not governed by them.[68] Shared tenancy by its nature includes an "assumption of risk" that another tenant may invade your privacy, which the government is entitled to rely upon.[69] The Court analyzed the societal relationship of cotenants and their treatment under the law.[70] They found that in both legal and social context, one tenant's authority over shared property cannot supersede their cotenants.[71] Each tenant is entitled to the property equally, and likewise, each tenant, for practical purposes, is able to restrict the entry of unwanted guests.[72] Resolution to disagreement between tenants must come through mutual accommodation of each other's needs, not through appeals to authority.[73] Thus a co-tenant wishing to grant entry to a third party has no legal or social authority to prevail over a present and objecting cotenant.[74] Accordingly, a police officer at the door has no reasonable belief that they can enter and search a premise in absence of consent of all present tenants.[75]

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63 *Id*. at 186-88.
64 *Id*. at 188-89.
65 *Id*. at 188.
66 *Id*. at 122-23.
67 *Id*. at 109-10.
68 Georgia v. Randolph, 547 U.S. 103, 110 (2006); Reynolds, *supra* note 36, at 207.
69 *Id*. at 111 (the court listed many more examples, drawing heavily upon *Matlock*.).
70 *Id*. at 113; Reynolds, *supra* note 36, at 207.
71 *Id*. at 114.
72 *Id*. at 113.
73 *Randolph*, 547 U.S. 103, 114 (2006).
74 *Id*. at 114.
75 *Id*. at 114.

III. The Resulting Circuit Split: Who has the Duty to Resolve Ambiguity?

The 2nd and 7th Circuit Courts have ruled that, when there is ambiguity as to who possesses authority over an item stored in a mutual space, it is a citizen's duty to affirmatively inform the police if they lack authority to consent to the search of that item.[76]

Along with other circuits, the 10th, D.C., and 6th circuit's believe that Rodriguez places the burden upon government to make further inquiry when this situation occurs.[77] They believe that if the search continues without further inquiry or a warrant then the government has breached the Fourth Amendment and evidence resulting from the search must be suppressed.[78] The circuits have created tests for these situations, and expressed various rationales in support of their holdings which we will explore in this section.

A. Majority Circuits: The Burden is on the Police to Conduct Further Inquiry.

1. The D.C. Circuit: Concerns About the Safety of Third Parties are "Red Herrings" and the Duty to Resolve Ambiguity Must be On the Police to Preserve the Fourth Amendment.

The D.C. circuit court addressed the issue in *U.S. v. Peyton*[79] and found that the government had to conduct further inquiry before searching ambiguous property or the evidence discovered would be suppressed. The police were investigating Peyton (appellant) for dealing narcotics after they received a tip he was using selling drugs out of his apartment.[80] Police were aware that appellant shared his small one-bedroom apartment with his great-great-grandmother Martha Hicks, and that the appellant would not be home since he was currently under arrest.[81] They arrived at the apartment without a warrant and requested consent to conduct a search from Ms. Hicks.[82] Hicks gave consent and

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76 U.S. v. Saddeh, 61 F.3d 510 (7th Cir. 1995); U.S. v. Melgar, 227 F.3d 1038 (7th Cir. 2000); United States v. Snype, 441 F.3d 119, 136 (2d Cir. 2006);

77 U.S. v. Taylor, 600 F.3d 678, 678 (6th Cir. 2010); U.S. v. Peyton, 546, 554 (D.C. Cir. 2014); U.S. v. Whitfield, 939 F.2d 1071, 1074 (4th Cir. 1991).

78 *See*, *e.g*., *Taylor*, 600 F.3d 678, 685 (6th Cir. 2010).

79 745 F.3d 546 (D.C. Cir. 2014).

80 *Id*. at 449; The Court also concluded the burden was on the police in several other similar cases (*see, e.g*., U.S. v. Whitfield, 939 F.2d 1071, 1072 (D.C. Cir. 1991)).

81 *Id*. at 550.

82 *Id*.

informed the police that the appellant resided in the living room and kept his belongings in a corner near his bed.[83]

Police opened a closed shoebox near Peyton's bed and discovered it contained marijuana, cocaine, and approximately $4,000.00 in cash.[84] Appellant moved to have the evidence suppressed on the grounds that a reasonable person would not have thought Hicks had authority to consent to a search of his personal property and that the area in which the property was discovered was not a shared space.[85] The appellate court held that all evidence collected from the shoebox should be suppressed.[86] Although they agreed the living room constituted a shared space, it was unreasonable for the police to believe Hicks authority to consent to a search extended to personal property clearly belonging the appellant.[87] They opined that although the police may search property being mutually used,[88] a person's Fourth Amendment rights are not waived simply because they agree to live with another person.[89] This principle flows logically from the way people live in a shared space; two people often agree to share a room however they often retain private interior spaces such as closets, footlockers, dresser drawers, which they do not allow co-inhabitants to inspect.[90] It was ambiguous in this case whether the appellant's shoebox was an item shared by the roommates, and thus the police searching without further inquiry was not reasonable.[91]

The court opined that *Rodriguez* requires the police to conduct further inquiry when faced with an ambiguous situation and that any other ruling would greatly diminish the Fourth Amendment.[92] The court stated police could determine whether property is shared based upon several factors such as: whether the item is secured, whether the container is one commonly used to preserve privacy, and the totality of the circumstances.[93]

The dissent argued that the majority's position on the issue was "untenable" because it would prevent contenants from being able to

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83 *Id*. at 549.

84 *Peyton*, 745 F.3d 546, 550 (D.C. Cir. 2014).

85 *Id*. at 549 (a shared space would be subject to mutual use and thus Hicks could consent to such an area being searched).

86 *Id*. at 550.

87 *Peyton*, 745 F.3d 546, 550 (D.C. Cir. 2014).

88 *Id*. at 550 (mutual use of property refers to property which persons generally have joint access or control over for most purposes to the extent that it is reasonable to assume the risk a co-habitant may consent to the search of such property).

89 *Id*. at 554.

90 *Id*. at 553 (citing Silverman v. United States, 365 U.S. 505, 511 (1961)).

91 *Peyton*, 745 F.3d 546, 554 (D.C. Cir. 2014).

92 *Id*. at 554.

93 *Id*. at 554.

have contraband removed from a shared dwelling[94] and that the majorities holding was directly opposed to the jurisprudence put forth in *Fernandez v. California*.[95] The majority disagreed and opined that their holding protected the Fourth Amendment and did not foreclose a cotenants ability to remove contraband from their residence.[96]

The Court in *Georgia v. Randolph*[97] addressed public policy concerns voiced by the dissent in *Peyton*. The dissent expressed concerns about tenants who would be barred from receiving help from the police in the presence of an objecting cotenenant.[98] The majority's concerns in Georgia about an inability for a law-abiding citizen to utilize the police against an unlawful cotenant, specifically in regards to domestic violence, were dismissed as "red herrings."[99] The majority purports that there are several other avenues that can be taken to resolve such a conflict.[100] An individual can deliver evidence of their cotenants' illegal activity to the police or can provide the police with enough information that the police can gain a warrant to conduct a lawful search.[101] Further, they opined that in some situations there exists a basis for giving deferential treatment to the interests of one cotenant over another, such as where a suspect has victimized a cotenant.[102] In these and similar situations the police have authority to enter the premises regardless of the cotenant's consent.[103]

2. *U.S. v. Waller*: Allowing Police to Conduct Searches Under the Guise of Ignorance Would Render the Fourth Amendment

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94 *Peyton*, 745 F.3d 546, 556 (D.C. Cir. 2014).

95 *Id*. at 562 (Circuit Judge Karen Henderson dissenting).

96 *Id*. at 556 ("The co-tenant acting on his own initiative may be able to deliver evidence to the police, Coolidge v. New Hampshire, 403 U.S. 443, 487–489 (1971) (suspect's wife retrieved his guns from the couple's house and turned them over to the police), and can tell the police what he knows, for use before a magistrate in getting a warrant." Georgia v. Randolph, 547 U.S. 103, 116 (2006)").

97 547 U.S. 103, 116 (2006).

98 *Id*.

99 *Id*. at 120.

100 *Id*. at 116, 117.

101 *Id*. at 116, 117 (citing Coolidge v. New Hampshire, 403 U.S. 488 (1971) (where a suspect's wife delivered his guns from their shared residence and turned them over the police)); (U.S. v. Lefkowtize, 285 U.S. 452, 464 (1932) ("the informed and deliberate determinations of magistrates empowered to issue warrants as to what searches and seizures are permissible under the Constitution are to be preferred over the hurried actions of officers.")).

102 *Id*. at 118 (citing 4 LaFave et al., §8.3(d) at 161 ('[E]ven when two . . . two persons quite clearly have equal rights in the place, as where two individuals are sharing an apartment on an equal basis, there may nonetheless sometimes exist a basis for giving greater recognition to the interests of one over the other . . . .[W]here the defendant has victimized the third-party . . . the emergency nature of the salutation is such that the third-party consent should validate a warrantless search despite defendant's objections (internal quotation marks omitted; third party omission in original)); Reynolds, *supra* note 36, at 207.

103 Georgia v. Randolph, 547 U.S. 103, 118 (2006).

Insignificant.

The 6th Circuit would address this issue in *U.S. v. Waller*[104] and would reason their holding similarly to the D.C. Circuits. Like the D.C. Circuit, they would rule that further inquiry is necessary when ambiguity exists and would adopt a test to guide their determination of whether an object was subject to common use.[105]

Appellant Waller had been storing his suitcase in his friend Howard's bedroom closet since the appellant was temporarily homeless.[106] Police arrested the appellant outside of Howard's apartment and then proceeded into the apartment whereupon they were authorized to search the apartment by Howard.[107] Howard currently had two guests in his apartment, and he informed the police that appellant had been storing his property within his apartment.[108] Police discovered the suitcase, opened it, and found an illegal firearm within which was determined to belong to appellant.[109] The Court of Appeals ruled the evidence must be suppressed. Since Howard lacked common authority over the suitcase he could not consent to the search; the police should not have proceeded under the assumption Howard had authority to consent without further inquiry since it was ambiguous whether Howard had the apparent authority as described in *Rodriguez*.[110]

Howard's authority to consent to the search did not extend to the suitcase because he had no access to it.[111] The court opined it was certainly ambiguous whether Howard had apparent authority to consent to the search and, like the D.C. Circuit, they found *Rodriguez* requires further inquiry when ambiguity exists.[112] The court relied on the test laid out in *United States v. Salinas-Cano*[113] in determining whether a search was ambiguous. Several factors are noted such as:

> (1) the type of container, because certain container types "historically command a high degree of privacy"; (2) whether the owner took any precautions to manifest his subjective expectation of privacy; (3) whether the host of the premises initiated police involvement; and (4) whether the consenting party displayed a lack of interest in the item

104 U.S. v. Waller, 426 F.3d 838 (6th Cir. 2005).
105 *Id*. at 845.
106 *Id*. at 841, 842.
107 *Id*. at 842.
108 *Waller*, 426 F.3d 842 (6th Cir. 2005).
109 *Id*. at 843.
110 *Id*. at 844 – 847 (the court also found that the appellant did have a reasonable expectation of privacy and thus had standing to challenge the search).
111 *Id*. at 845.
112 *Id*. at 846.
113 959 F.2d 861 (10th Cir. 1992).

(e.g., disclaiming ownership).[114]

Given these factors, it was clear to the court that there was ambiguity since the suitcase commanded a high level of privacy, was sealed and hidden in a closet and Howard had not initiated the police involvement.[115]

The court opined that to find the search Constitutional would "render meaningless the Fourth Amendment's protection."[116] It would allow for police officers to utilize "deliberate ignorance" when conducting a warrantless search, as they did in this case.[117] The true owner of the suitcase could easily have been discovered by the police, and to allow the evidence to enter court would be an affront to the Fourth Amendment that would run counter to jurisprudence.[118]

B. The Minority Circuits: The Burden is on the Citizen to Affirmatively Inform the Police Who the True Owner is and Resolve Ambiguity.

1. The 7th Circuit: To Achieve Justice it is Appropriate to Limit the Restraints on Police So Long as the Limits are Reasonable.

The Seventh Circuit held that the burden of resolving ambiguity should not be placed upon the person giving consent.[119] In *U.S. v. Melgar*, the Seventh Circuit held that the search of a purse was valid when it was "discovered by the police during a search to which the renter of the hotel room had validly consented and under the circumstances, the police were permitted to investigate the contents of the purse as well."[120]

The police in *Melgar* were investigating the use of fraudulent checks. Their investigation turned up Rita Velasquez as a suspect and further investigation revealed that she was currently renting a room at a local Holiday Inn.[121] Two officers visited the hotel room whereupon they discovered three individuals within the room, none of whom were

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114 *Waller*, 426 F.3d 848 (6th Cir. 2005) (citing U.S. v. Salinas-Cano, 959 F.2d 861 (10th Cir. 1992)); When faced with a similar case, U.S. v. Taylor, 600 F.3d 878 (2010), the court would again rely on these factors in order to determine whether it was ambiguous police could reasonably believe that a third party had common authority to consent to a search.

115 *Id*. at 848.

116 *Id*. at 849 (quoting U.S. v. Salinas-Cano, 959 F.2d 866 (10th Cir. 1992)).

117 *Id*.

118 *See id*. at 848 – 849.

119 United States v. Melgar, 227 F.3d 1038 (7th Cir. 2000).

120 *Id*.

121 *Id*. at 1039.

Ms. Velasquez.[122] The officers gained consent to enter the room and search the wallets or purses of all the rooms' current occupants.[123] The officers observed several pieces of luggage and other containers lying scattered throughout the room.[124] During this searchn Ms. Melgar, Velasquez, and a third woman entered the room.[125] The police obtained consent from Ms. Velasquez to search the entire hotel room and upon the discovery of fraudulent checks placed all the rooms' occupants under arrest.[126] The police then continued their search and discovered a purse with no personalized markings lodged between the mattress and box spring of the bed.[127] Within the purse, the police discovered fraudulent checks which were determined to belong to Ms. Melgar.[128]

Ms. Melgar moved for the evidence to be suppressed.[129] Although she conceded that the police had obtained apparent authority to conduct a search of the room from Ms. Velasquez, the police should not have reasonably believed that authority extended to her purse.[130] She argued that it was ambiguous whether Ms. Velasquez had authority over the purse because all other purses in the room had been claimed by other occupants, the several suitcases in the room indicated Ms. Velasquez was not the sole occupant, and that the presence of several women in the room indicated that the purse was not necessarily Ms. Velasquez's.[131] Although the lower court found merit in this argument, choosing not to rely on consent for their ruling on the motion, the upper court found the police did have consent based authority to conduct their search. [132]

The court determined the burden should be on the consenter to provide police with information that another person lacks consent to search their property.[133] The court combined the philosophy from two of their previous rulings[134] to guide their decision in this case. The court wanted to limit the restraint put on police when conducting warrantless

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122 *Id*.
123 *Id*.
124 *Melgar*, 227 F.3d 1040 (7th Cir. 2000).
125 *Id*.
126 *Id*.
127 *Id*.
128 *Melgar*, 227 F.3d 1040 (7th Cir. 2000).
129 *Id*.
130 *Id*.
131 *Id*.
132 *Id*.
133 *Id*. at 1041.
134 United States v. Saddeh, 61 F.3d 510 (7th Cir. 1995) (the owner of a facility consented to the police conducting a search of their workplace in pursuit of illegal drugs, the court upheld the search of a closed toolbox and desk); United States v. Rodriguez, 888 F.2d 519 (7th Cir. 1989) (a spouses consent to search a union hall did not extend to a bag which was clearly labeled with the named "Mike" because such a precedent would mean police would have authority to conduct a search on all luggage in a major airlines baggage facility).

searches based on consent, however they did not want to give them limitless power. The court determined that unless the police receive reliable affirmative information that a container is not under the consenters' control the search will be deemed Constitutional if the police acted in a reasonable manner.[135] The court worried that a contrary rule would require police to receive *ex-ante* information about every item in a room before they could conduct a search and that such a rule would place an "impossible" burden upon the police.[136]

2. The Second Circuit: The Defendant Must Show it is Nearly Certainty He Possesses Exclusive Control of the Property.

The 2nd Circuit, in concurrence with the seventh, found in *United States v. Snype*[137] that the defendant had the burden to adduce credible evidence that demonstrates a property is obviously and exclusively under his control.[138] This burden is extremely difficult to satisfy and heavily favors the police.[139]

The police in *Snype* were investigating Mr. Snype for his involvement in an armed robbery and shootout with police in Yonkers, NY.[140] The investigation led them to the home of Jennifer Bean where the police correctly believed Snype to be staying.[141] The police forcibly entered the premises and placed Mr. Snype under arrest.[142] On the floor of the bedroom where Snype was found arresting officers saw a knapsack, red plastic bag, and a box taken from one of the tellers during the robbery.[143] The officers then received Ms. Bean's voluntary consent to conduct a search of the rest of the apartment.[144] Acting on the consent, they conducted a search of the apartment and found evidence within Mr. Snype's aforementioned belongings which implicated him in the robbery.[145]

The 2nd Circuit held that Ms. Bean's open-ended consent was enough to permit the search and seizure of the entire apartment with the exception only to items "obviously" belonging to another party; as such it was Mr. Snype's obligation to adduce credible evidence

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135 *Melgar*, 227 F.3d 1041 (7th Cir. 2000).
136 *Id*. at 1042.
137 441 F.3d 119, 136 (2d Cir. 2006).
138 *Id*. at 136.
139 *See id*.
140 U.S. v. Snype, 441 F.3d 125 (2d Cir. 2006).
141 *Id*. at 126.
142 *Id*.
143 *Id*. at 126-127.
144 *Id*. at 127.
145 *Id*.

demonstrating the items were obviously and exclusively his.[146]

This burden is extremely difficult to satisfy. The 2nd Circuit seemingly acknowledged that it was unclear whether Ms. Bean truly had access to the bag but instead focused its holding on whether the opposite was obviously true.[147] This principle can be illustrated by its application in *United States v. Zapata-Tamallo*.[148] In that case, an officer watching Mr. Zapata-Tamallo enter a home carrying a duffle bag mere minutes before gaining consent from a third party to search the home.[149] Despite this, the court still held that Mr. Zapata-Tamallo had not shown he possessed obvious and exclusive control of the bag.[150] In essence, the court held that simply by bringing a bag into another person's home, the social implications of that action give the other person the right to access the bag. Since they have that right, they are able to give the police authority to search it. This ruling allows for far-reaching implications concerning the degradation of the Fourth Amendment. The 2nd Circuit had created one of the hardest standards for a defendant to overcome and fully removes the burden from the police to resolve ambiguity for consent based searches.

IV. RESOLUTION: MANDATING THE POLICE CONDUCT FURTHER INQUIRY BEFORE SEARCHING PROPERTY WOULD PROTECT THE FOURTH AMENDMENT AND ALLOW FOR EFFICIENT POLICING.

The majority's opinion should prevail. The court should find that when there is ambiguity as to whether a person has authority to authorize a search of spaces under common authority or property subjected to mutual use, that it is the duty of the police to inquire further and dispel any ambiguity. If they fail to do so and the property that is searched does not belong to the person who consented, the search should be found unconstitutional and any evidence collected from the search should be suppressed. Furthermore, the courts should adopt the test laid out in *United States v. Salinas-Cano*[151] to determine whether there exists ambiguity as to whether the property was likely held in

146 *Snype*, 441 F.3d 127, 136 (2d Cir. 2006).

147 *Id*. at 136 (the Second District focused on whether Mr. Snype could prove he had exclusive control, rather than focusing on whether it was unclear if Ms. Bean had any access to the property).

148 833 FF.2d at 27.

149 *Id*.

150 *Id*.

151 U.S. v. Waller, 426 F.3d 848 (6th Cir. 2005) (citing U.S. v. Salinas-Cano, 959 F.2d 861 (10th Cir. 1992); When faced with a similar case, U.S. v. Taylor, 600 F.3d 878 (2010), the court would again rely on these factors in order to determine whether it was ambiguous police could reasonably believe that a third party had common authority to consent to a search.

common authority. Additionally, they should take into consideration the totality of the circumstances, which has been a commonly used tool throughout Fourth Amendment jurisprudence. These standards would allow for efficient law enforcement while protecting the rights of the people to be insulated from unreasonable search and seizures.

A. The Majority Circuit's Ruling Adheres to Supreme Court Precedent and The Fourth Amendments Original Intent, Thus It Should be Followed.

The view taken by the majority of district courts (4th, 6th, D.C.) is superior since it is more consistent with the Constitution and third-party consent jurisprudence.[152] The minority courts argue that when a residence is jointly occupied, the court is faced with the impossible challenge of severing those joint rights to determine who has actual authority[153] and that requiring such itemized consent can present the police with an impossible obligation "to ascertain the ownership or possession or custody of every article or space on the premises searched."[154] However, the police do not have such an obligation because when a person enters a joint living arrangement it is understood that there is a surrender of privacy in regards to individually-owned objects which are kept in areas that are regularly used by other occupants (i.e. subjected to mutual use).[155] This surrender of privacy is not total and absolute for that would obviously run contrary to the common understanding between joint occupants in most societal contexts.[156] Recognizing this, the majority have reasoned that it does not follow that joint occupants should lose their protection from warrantless searches just because they have chosen to live with another person. The protections the Fourth Amendment provides are too important to be so callously discarded. Furthermore, the majority's holdings, unlike the minorities, adhere to the Courts statement in *Rodriguez* that when ambiguous situations arise the police must conduct further inquiry.[157]

The minority have followed a trend which has been persisting for the last forty years: diminishing the necessity of warrants in criminal cases.[158] The Supreme Court first began chipping away at the

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152 Wayne R. LaFave et al., *Search And Seizure: A Treatise On The Fourth Amendment,* §8.5(c) (5th ed., 2016).

153 Villine v. United States, 297 A.2d 785 (D.C. App. 1972).

154 United States v. Robinson, 479 F.2d 300 (7th Cir. 1973); LaFave et al., *supra* note 152.

155 LaFave et al., *supra* note 152.

156 *Id*.

157 Illinois v. Rodriguez, 497 U.S. 177, 188 (1990).

158 *See* Joshua Dressler & George C. Thomas, Criminal Procedure: Investigating Crime 333-433 (3d ed. 2006).

requirement for warrants in *Terry v. Ohio,*[159] where it found that the brief intrusion of a warrantless stop and search was justified when it was in pursuit of protecting safety.[160] The Court continued this trend of stripping Fourth Amendment warrant requirements over the next forty years, usually with the justification that if the police had to spend time obtaining a warrant there would be an increase in the probability that an officer would be injured or that evidence would be destroyed.[161] The Supreme Court often balances the degree of invasion into a person's privacy against the benefits of not requiring a warrant.[162] Those benefits most often focus on public safety and the prevention of the destruction of evidence.[163]

The Court has found a decreased level of expectation of privacy when an individual is in a vehicle or in public but when an individual is within their home they generally have the highest expectation of privacy and are thus afforded the highest level of protection.[164] The ancient adage that "a man's house is his castle"[165] is one of the most commonly used phrases by the Supreme Court in Fourth Amendment home search cases.[166] In recognition of this, the Court in *Rodriguez*[167] held that if officers could not reasonably determine whether a third party had authority to consent to the search of a home, the officers must conduct "additionally inquiry", and if they fail to do so then a search will be unconstitutional unless actual authority exists.[168]

Despite this, in the cases discussing third-party consent, the minority courts do not justify their holdings on the basis of preventing the destruction of evidence or on promoting safety. The courts instead rely on the idea that it would be either inconvenient for the police to obtain a warrant or that ascertaining who has actual authority over items would be too difficult.[169] The only safeguard placed by the minority is that when an item is "obviously" or "affirmatively" not under the authority of a consenter, the police may not continue the search. This is a very hard standard to fulfill and places little real restriction on the

159 *See* Terry v. Ohio, 392 U.S. 1, 19 (1968).

160 *Id*. at 20, 88.

161 *See* Dressler & Thomas, *supra* note 158.

162 *See* Sameer Bajaj*, Policing the Fourth Amendment: The Constitutionality of Warrantless Investigatory Stops for Past Misdemeanors,* 109 COLUM L. REV. 309 (2009).

163 *See* Dressler & Thomas, *supra* note 158.

164 California v. Ciraolo, 476 US 207, 213 (1986); *See* Carey v. Brown, 447 US 455, 456 (1980).

165 Georgia v. Randolph, 547 US 103, 115 (2006).

166 *See William J. Cuddihy*, The Fourth Amendment: Origins and Original Meaning, 1545-1547(1990) (unpublished manuscript, on file with the Columbia Law Review).

167 Illinois v. Rodriguez, 497 U.S. 177 (1999).

168 *Id*. at 188.

169 United States v. Melgar, 227 F.3d 1042 (7th Cir. 2000); See U.S. v. Snype, 441 F.3d 119, 136 (2d Cir. 2006).

police and government.[170] Police can easily avoid the latter safeguard by simply waiting for the person they are investigating to leave their home and then gaining consent from a third party, effectively circumventing any Fourth Amendment protections that person is endowed with.[171] The minority circuits fail to conform to the common rationale used by the Supreme Court for excluding the warrant requirement and even go so far as to offend very the very purpose that the Fourth Amendment was ratified.

The Fourth Amendment was ratified to prevent the "general warrants" which were used by the British to rummage through the homes of the colonists.[172] We are not merely dealing with formalities; the presence of a search warrant serves an important and highly valued function.[173]

> [T]he Fourth Amendment has interposed a magistrate between the citizen and the police. This was done not to shield criminals nor to make the home a safe haven for illegal activities. It was done so that an objective mind might weigh the need to invade that privacy in order to enforce the law. The right of privacy was deemed too precious to entrust to the discretion of those whose job is the detection of crime and the arrest of criminals. Power is a heady thing; and history shows that the police acting on their own cannot be trusted. And so the Constitution requires a magistrate to pass on the desires of the police before they violate the privacy of the home.[174]

General warrants were the chief evil which the Fourth Amendment was enacted to protect against. By granting police the power to gain authority over a third party through consent, the police have effectively been given a general warrant which allows them to rummage through the homes of absent third parties with few real restraints, which is exactly what the founders had feared.[175] If the third party is not present during the search they will have no way use their Constitutional protections and unless it is exceedingly obvious that property is solely theirs, they will have no recourse against the warrantless search of their property. The slight inconvenience faced by a police officer in having to secure a warrant is insignificant compared to the potential for Fourth Amendment abuse which is faced by the people.[176] The rationale allowing the search runs counter to the very purpose the Fourth

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170 United States v. Snype 441 F.3d 119, 136 (2d Cir. 2006); United States v. Melgar, 227 F.3d 1041 (7th Cir. 2000).

171 *See* U.S. v. Peyton, 745 F.3d 561 (D.C. Cir. 2014).

172 United States v Matlock, 415 US 164, 166 (1974) (Douglas dissenting).

173 *Id*. at 186 (Douglas dissenting).

174 *Id*. at 186 (Douglas dissenting (citing McDonald v. U.S., 335 U.S. 454 (1948)).

175 *Id*. at 187-188; *See* Kremen v. United States, 353 U.S. 346 (1957) (police rummage through a house after receiving consent).

176 *Id*. at 180.

Amendment was created by allowing police to fully circumvent the need for a warrant and conduct invasive searches of a person's most private domain.

The system created by the minority courts creates an environment where police officers are encouraged to act unethically. The police can easily remove a suspect from a home or wait for the suspect to leave the home before gaining consent form a third-party to conduct a search (like they did in *Hicks*). Thereafter, it will be easier for police to conduct warrantless searches if they feign ignorance regarding who actually has authority over an item. Our society should not want our police officers encouraged to behave in this manner.

B. It is Not Inconvenient for Police To Conduct Further Inquiry

Once an officer realizes a situation is ambiguous, she should make general inquiries about the nature of living arrangements before continuing to conduct her search of a jointly occupied space.[177] There is such a large variety of joint tenancy arrangements that in the majority of circumstances before the police can have a reasonable belief that the tenant granting consent possess actual authority to permit a search it is already ordinarily necessary for the police to make inquiry into the particularity of the tenants arrangements; a burden which cannot be discharged simply concluding that the consenting tenant actually has authority.[178] Such an inquiry can be very useful in resolving ambiguity and making it standard police procedure to ask these basic questions when ambiguity exists will protect a citizen's important Fourth Amendment rights while placing only a minor burden upon the police. The police are already required to request consent before conducting the search,[179] requiring them to conduct one more dialogue of questioning is consistent with the requirement in *Rodriguez*,[180] is not a stringent requirement, and it is not novel for the Court to require the police to give statements to suspects.[181]

177 LaFave et al., *supra* note 152 (citing Moffett v. Wainwright, 512 F.2d 496 (5th Cir. 1975) ("After defendant had been jailed as a robbery suspect, police went to his apartment and, with the consent of two young girls found there who said that they were occupants, conducted a full search of the apartment. The court, emphasizing that the officers had no knowledge of the girls' authority over or rights to the premises except for that brief statement, concluded there had not been a sufficient showing that the girls had "equal rights" to the apartment. As for the fact that the officers observed some women's clothing in the apartment, the court responded that this could not fill the gap in the absence of more detailed information as to what clothing was observed, where it was observed, and who it belonged to")).

178 *Id*.

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

180 Illinois v. Rodriguez, 497 U.S. 188 (1999).

181 *See* Miranda v. Arizona, 384 U.S. 436 (1966) (establishing the famous "Miranda rights").

Inquiry into the character of the living arrangement could remove ambiguity very quickly for most areas of a jointly occupied residence.[182] For example, when married individuals are living together there would appear to exist a degree of intimacy that would support the finding of a broad authority to consent for each of them.[183] The same would not be true when two acquaintances decide, for purposes of economy, to rent an apartment together, however an inquiry could quickly shed light upon the established living patterns of the roommates whereby certain rooms (e.g., living room, bathroom) are used in common while other rooms (e.g., bedrooms) are not.[184] The questioning would also easily reveal the extent to which the common areas of the premises are jointly used (e.g., hallways, kitchens, bathrooms, and yards).[185] The questioning would quickly and efficiently clear most ambiguity and alleviate much of the risk that an unconstitutional search will occur, thus expediting or even preventing future litigation.

C. The Questioning Presented By the Court in United States v. Salinas-Cano Should Serve As Guidelines to Effectively Implement These Requirements.

The Court should also apply the totality of the circumstances test to guide them when determining whether ambiguity exists, however, it is important that the court possesses additional factors for applying their test or else the different circuits' results may vary widely.[186] Without guidelines or parameters situations will arise where these searches result in uncertain and lengthy litigation. Such a system would unduly bog down the already over-encumbered criminal justice system. Having simple guidelines can assist the police with knowing when to inquire further, when to proceed without additional inquiry, and can streamline the court's decisions regarding the searches.

The Court in *United States v. Salinas-Cano* laid out a test which is helpful for determining whether a person's consent will extend to a third

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182 LaFave et al., *supra* note 152.

183 *Id*.

184 *Id*. (citing "United States v. Jimenez, 419 F.3d 34 (1st Cir. 2005) (where woman was lessee of premises but bedroom was set aside for defendant's use and "she was not supposed to enter the room" and "did not even have a key to go into the room" her consent valid as to common areas and her own bedroom but not as to defendant's bedroom); United States v. Brock, 417 F.3d 692 (7th Cir. 2005) (dog sniff of defendant's bedroom no Fourth Amendment search, as "police were lawfully present inside the common areas of the residence with the consent of Brock's roommate").

185 LaFave et al., *supra* note 152.

186 Similar to the *Spinelli/Agulair* test by the Supreme Court where they combine a two prong factored test with a totality of the circumstances test.

party's belonging.[187]

> (1) the type of container, because certain container types "historically command a high degree of privacy"; (2) whether the owner took any precautions to manifest his subjective expectation of privacy; and (3) whether the consenting party displayed a lack of interest in the item (e.g., disclaiming ownership).[188]

This test and tests like this have already been adopted by other circuits and offer helpful guidelines.[189] These factors are effective because they draw largely on common experience rather than on a technical legal standard.

The first factor given to us by *Salinas-Cano* can quickly resolve many questions to whether an officer acted reasonably. Certain types of containers possess a higher degree of privacy than others because of the subjective expectation of privacy commonly associated with it.[190]

> Common experience of life, clearly a factor in assessing the existence and the reasonableness of privacy expectations, surely teaches all of us that the law's 'enclosed spaces'-mankind's valises, suitcases, footlockers, strong boxes, etc.-are frequently the objects of his highest privacy expectations, and that the expectations may well be at their most intense when such effects are deposited temporarily . . . in places under the general control of another.[191]

For example, a kitchen drawer generally is considered less private than a closed lockbox. Often the type of container an object is stored in will be a very useful indicator of whether a third party expected the contents to remain private.

The second factor, "whether the owner took any precautions to manifest his subjective expectation of privacy", should take a person's manifested subjective expectation of privacy into account. This factor counter-balances the first factor since it considers a person's subjective expectation, while the first factor takes into account society's objective expectation of a container's privacy. An example of this when this factor would be triggered is when a container has a lock on it or a third

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187 U.S. v. Waller*,* 426 F.3d 848 (6th Cir. 2005) (citing U.S. v. Salinas-Cano, 959 F.2d 864 (10th Cir. 1992); When faced with a similar case, U.S. v. Taylor, 600 F.3d 878 (2010), the court would again rely on these factors in order to determine whether it was ambiguous police could reasonably believe that a third party had common authority to consent to a search.

188 U.S. v. Salinas-Cano, 959 F.2d 864 (10th Cir. 1992).

189 Waller, 426 F.3d 848 (6th Cir. 2005) (citing U.S. v. Salinas-Cano, 959 F.2d 864 (10th Cir. 1992).

190 *See Salinas-Cano*, 959 F.2d 864 (10th Cir. 1992).

191 *Id*. (citing United States v. Block, 590 F.2d 535, 541 (4th Cir. 1978)); *See also* 3 W. LaFave, Search and Seizure, §8.5(d), at 307 (2d ed. 1987) ("Among the articles which it would seem would most commonly be deserving of the 'high expectation of privacy' label in the host-guest context would be the overnight bag or suitcase").

party has been explicitly forbidden from opening it.[192] The third factor will be triggered when the opposite is true. When somebody disclaims ownership of an item, they will no longer be able to claim their rights were violated when that item is searched.[193]

These factors will be useful for courts when determining whether a search was conducting despite ambiguity. They will furthermore create a barrier to police acting in deliberate ignorance to ambiguity in order to conduct a search.[194] Finally, the totality of the circumstances will serve an effective 'catch-all' function for determining when ambiguity exists. It is already a tool commonly used in a vast variety of Fourth Amendent search cases and would work suitably in these situations.[195]

D. Requiring the Police to Conduct an Inquiry Before a Consent Based Search Will Increase Public Confidence in Police Which Will Enhance their Ability to Police Effectively in the Aggregate.

The police in the United States are currently experiencing a nearly unprecedented level of negative public perception. Having the police operate in a more fair and balanced way will serve to help bolster public perception of their organization. A recent gallop poll has shown public confidence in the police is at a twenty-year low.[196] When looking at manner which the Supreme Court has stripped Fourth Amendment restrictions, it comes as no surprise that many people have begun to feel that the police are too powerful and cannot be trusted.[197]

Taking measures to improve public perception of police will enhance their ability to combat crime and make the community safer. When the public does not trust the police, it makes it harder for the police to do their job since people are more hesitant to report crimes and cooperate with investigations.[198] When people feel that they are being victimized by the police it "generally leads citizens to feel frustrat[ion] and resentment as a result of losing private interests or rights." [199] On the contrary, studies have found that when public confidence in the

192 *Salinas-Cano*, 959 F.2d 864 (10th Cir. 1992).

193 *Id*.

194 *See Waller*, 426 F.3d 849 (6th Cir. 2005).

195 *See, e.g*., United States v. Cortez, 449 U.S. 411, 411 (1981).

196 http://news.gallup.com/poll/183704/confidence-police-lowest-years.aspx, by Jeffrey M. Jones (6/09/2015), last visited 9/23/2017.

197 http://www.nydailynews.com/news/crime/stop-and-frisk-leads-mistrust-cops-study-article-1.1460528, by Erin Durkin (9/19/2013), last visited 9/23/2017.

198 *Id*.

199 Ren, Ling & Cao, Liqun & Lovrich, Nicholas & Gaffney, Michael (2005). Linking confidence in the police with the performance of the police: Community policing can make a difference. Journal of Criminal Justice. 33. 55-66. 10.1016/j.jcrimjus.2004.10.003.

police is higher, "[i]t also strengthens the moral connection between people and their police, thus encouraging greater civic participation and more active public engagement in domains of security, policing and the regulation of social and community life."[200] There is a need to balance the need for effective law enforcement with our cherished constitutional rights.[201] Achieving such a balance increases public confidence in policing and "[u]ltimately . . . [the] integrity of judicial proceedings will be enhanced by [achieving that balance]."[202] Having the police take such a simple step as asking who owns certain property in an apartment can help build faith that the police are doing their job ethically and will build trust with the public.

While on the surface, my proposed rule appears to make an officers job more difficult, in the aggregate having the police conduct a simply inquiry before they proceed on a consent based search will help make people feel less victimized by the police which will improve public confidence in the police and enhance an officers' ability to police their community. The use of deceptive tactics, like in *Hicks* where the police purposefully waited for the defendant to leave before obtaining consent from his great-great-grandmother to search the home show an avenue the police can take to subvert the Fourth Amendment which will certainly cause people to feel victimized. Historically, the implementation of Miranda Rights and other requirements similar to my proposed rule has helped to build that confidence. By fostering a positive relationship with the community, you can expect that people will be more willing to work with the police in solving crimes.

E. Though Concerns About Placing the Burden on The Police Are Valid, They are Often Over-Exaggerated and Do Not Out Outweigh The Benefits of the Fourth Amendment.

Of course, not everybody will agree that placing the burden upon the police is the correct decision. The same arguments that arise whenever the court places additional burdens upon the police will be made against my proposed standards.[203] The new standard would, of course, make a police officers ability to conduct a search more difficult, and the fact based standard of review could potentially lead to an

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200 Jackson, Jonathan and Bradford, Ben, *What is trust and confidence in the police?* POLICING: A JOURNAL OF POLICY AND practice, 4 (3). pp. 241-248 (2010).

201 Edward Gregory Mascolo, *Miranda v. Arizona Revisited Are Expanded: No Custodial Interrogation Without the Presence of Counsel*, 68 CONN BJ 305, 328 (1994).

202 *Id*.

203 *See* Dressler & Thomas, *supra* note 158 (detailing the relaxation of warrant requirements through US Supreme Court jurisprudence and the rationale behind the decisions).

increase in cases being litigated.[204] This, in turn, could cause more causes to be dismissed due to the exclusionary rule which would allow criminals to go free.[205] There will also be arguments that there will be an increased probability that evidence will be destroyed while the police obtain a warrant.[206] A concern that is more specific to this issue is the concern that it will be more difficult for a person to involve the police when they suspect their roommate is engaging in illegal activity.[207] Although all these concerns may be valid, as noted in *Georgia v. Randolph*[208] they are often over-exaggerated and the benefits of requiring a warrant outweigh the negatives.

Requiring the police to conduct further inquiry will require the police to do more work. However, as was I discussed previously, a simple question inquiring about a persons' living arrangements will generally clear any ambiguity and will not require much additional effort on the officer's part.[209] If it is discovered a consenter lacks authority or a situation is still ambiguous, then an officer will have to obtain a warrant. While this is certainly an inconvenience for her, that inconvenience is far outweighed by a citizen's right to privacy and Fourth Amendment protection in their own home.[210] It is for this reason that the Supreme Court has expressed a preference for the warrant process:[211]

> The warrant process 'interposes an orderly procedure' involving 'judicial impartiality' whereby a "neutral and detached magistrate" can make 'informed and deliberate determinations' on the issue of probable cause. To leave such decisions to the police is to allow 'hurried actions' by those 'engaged in the often competitive enterprise of ferreting out crime.' [212]

The Supreme Court has taken this preference because they believe it is better to have a neutral decision maker involved who can make

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204 Stuntz, *Warrants and Fourth Amendment Remedies,* 77 VA. L. REV. 881, 887–88 (1991).

205 Davies, *A Hard Look at What We Know (and Still Need to Learn) About the "Costs" of the Exclusionary Rule: The NIJ Study and Other Studies of "Lost" Arrests*, 1983 A.B.F. RES. J. 611, 621–22, 679–80.; *See* Illinois v. Gates, 462 U.S. 213, 223 (1983).

206 *See* Coolidge v. New Hampshire, 403 U.S. 443, 518 (1971).

207 *U.S. v. Peyton*, 745 F.3d 546 (D.C. Cir. 2014) (Circuit Judge Henderson dissenting); Georgia v. Randolph, 547 U.S. 103, 120 (2006).

208 547 U.S. 103, 110 (2006).

209 *See* LaFave et al., *supra* note 152.

210 *See* Bajaj, *supra* note 162.

211 *E.g.*, Bookspan, *Reworking the Warrant Requirement: Resuscitating the Fourth Amendment*, 44 VAND. L. REV. 473 (1991).

212 §4.1(a) The benefits of the warrant process, 2 Search & Seizure §4.1(a) (5th ed.) (citing United States v. Mendez-Jimenez, 709 F.2d 1300 (9th Cir. 1983), United States v. Jeffers, 342 U.S. 48, 72 (1951), Johnson v. United States, 333 U.S. 10, 68 (1948), Aguilar v. Texas, 378 U.S. 108 (1964), Johnson v. United States, 333 U.S. 10, 68 (1948)).

decisions in a non-bias and calmer manner.[213] Thus, despite my proposed standard making an officer job marginally more difficult, it greatly serves to protect the rights of citizens and is consistent with the Supreme Court's preference for warrants in home searches.

A second argument against my standard is that it will increase costs by increasing litigation.[214] Similarly, there are concerns that this will result in more criminals 'getting away' with their crime as a result of the exclusionary rule.[215] However, these concerns can be refuted by examining the effects of *Schneckloth v. Bustamonte*[216] and related laws passed by states which implemented a similar yet much more strenuous requirement.[217] *Schneckloth* held that the police were not required to informed motorists of their right to decline to give consent before being asked if they would allow the police to search their vehicles.[218] In response, both Ohio and New Jersey passed laws that required police to inform motorists anyway.[219] A study of Ohio's law found that the number of people giving consent decreased "from 94.9% [giving consent] before the warning to 92.2% after the warning" and concluded the impact was "negligible."[220] A review of the New Jersey law yielded similar results with nearly 90% of people still consenting to be searched. [221] Assuming my less strenuous proposed requirement, which does not inform an owner of their right to refuse a search, would have a similar effect as the laws passed in Ohio and New Jersey, the difference made by requiring officers to take addition steps before conducting searches was negligible. Therefore, the benefits gained by increasing ones Fourth Amendment protections would warrant complying with the proposal.

The idea that costs will increase due to increased litigation rates is false since my proposal would likely reduce the number of litigated cases.[222] By having a clear standard and procedures which police must follow, it would avoid confusion over whether the police acted Constitutionally or not. Most increased costs would come from officers acquiring warrants, however, the simple questioning I proposed would most likely not result in officers needing to obtain warrants in most

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213 *E.g.*, Bookspan, *supra* note 209.

214 *See* Stuntz, *supra* note 203.

215 Davies, *supra* note 204; *See* Illinois v. Gates, 462 U.S. 213, 223 (1983).

216 412 U.S. 218 (1973).

217 *See* Miranda v. Arizona, 384 U.S. 436 (1966).

218 *Schneckloth,* 412 U.S. 218 (1973).

219 Matthew Phillips, *Effective Warnings Before Consent Searches: Practical, Necessary, and Desirable,* AMERICAN CRIMINAL L. REV. 1193 – 1195 (2008).

220 *Id*. at 1195.

221 *Id*. at 1193 – 1195 (no baseline was available to compare pre-warning requirement rates with post-warning requirement rates).

222 *E.g.*, Bookspan, *supra* note 209.

cases (nearly 90% if the rates are similar to automobile consent based searchesin NJ and Ohio).[223] The cases which remain to be litigated would be cases where an officer went forward based on consent and a third party felt his rights were violated which are exactly the types of cases already being litigated.[224] Due to my clear requirement, a judge would be able to quickly and efficiently rule on these cases without the need for a lengthy hearing. Thus increased costs would be minimal, and flood-gate arguments and concerns about increased cost are mostly unfounded.

Concerns regarding the exclusion of evidence and dismissal of criminal cases are credible, however, the actual amount of criminals who would likely benefit from my proposed standard are minimal. The cumulative amount of felony cases lost because of Fourth Amendment violations is between 0.6% and 2.35% (and only from 0.3% to 0.7% excluding drug and weapon cases).[225] The benefits to individual privacy and protection outweigh the risk of allowing a marginal amount of people to benefit from the exclusionary rule.[226]

Another risk is that when officers cannot gain consent from a roommate to search a third party's property, that roommate may tip off the third party that they are under investigation and that would allow the third party to dispose of evidence of his illegality before a warrant could be obtained. This is a valid concern, but once again the rights of a person to privacy outweigh the risk that this situation might occur. Furthermore, there are steps officers could take to prevent this situation from occurring.[227] If an officer feels he has probable cause (which he would need to obtain a warrant) he is able to detain the resident of the home outside until the warrant can be obtained.[228] This technique would drastically undermine the risk that evidence could be destroyed, though the risk would still exist if probable cause could not be found by an officer.[229]

A final concern, which was voiced by the minority courts, is that roommates would be unable to turn each other in for criminal activity originating within the shared residency. [230] This concern is exaggerated. A co-tenant may still deliver evidence to the police if they want a

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223 *See* LaFave et al., *supra* note 152.

224 U.S. v. Whitfield, 939 F.2d 1075 (4th Cir. 1991); U.S. v. Peyton, 745 F.3d 554 (D.C. Cir. 2014); United States v. Taylor, 600 F.3d 678, 680–85 (6th Cir. 2010); United States v. Salinas-Cano, 959 F.2d 861, 864 (10th Cir. 1992); U.S. v. Melgar, 227 F.3d 1038 (7th Cir. 2000); United States v. Snype, 441 F.3d 119, 136 (2d Cir. 2006).

225 Davies, *supra* note 204.

226 *Id*.

227 Illinois v. McArthur, 531 U.S. 326, 337 (2001).

228 *Id*.

229 *Id*. at 333.

230 U.S. v. Peyton, 745 F.3d 546, 556 (D.C. Cir. 2014) (Circuit Judge Henderson dissenting).

roommate caught.[231] They may also provide the police with the information that will allow the police to obtain a warrant and legally conduct a search.[232] These two simple methods can effectively keep roommates from becoming helpless to act against a criminal co-tenant.[233]

Although there are concerns which can be voiced regarding the proposed standard, most of them in practice will result in a relatively minor effect. Given how minor the practical negative effects will be compared to how important the right to privacy in a person's own domicile is, there should little question that the burden should be placed on the police to conduct further inquiry when faced with an ambiguous situation.

V. CONCLUSION: THE PROPOSED RESOLUTION CONFORMS TO JURISPRUDENCE, FOURTH AMENDMENT HISTORY, AND IS JUSTIFIED GIVEN THE IMPORTANT VALUES IT PROTECTS.

The solution which I have proposed would settle the circuit split in a manner that conforms to joint tenancy search & seizure jurisprudence in a manner that preserves our founding fathers intentions for the Fourth Amendment. The Fourth Amendment was codified to place a magistrate between the police and their suspect so that an officer could not rummage through all of a person's belongings merely hoping to discover incriminating evidence.[234] Placing the burden upon a citizen, who is often absent during the consent search, to object to having their property rummaged through would offend the very principles the Fourth Amendment was founded upon.[235] The Supreme Court recognized this in *Rodriguez* when stated police would have to conduct further inquiry if they were not reasonably sure that a person consenting to a search had actual authority to do so.[236] The simple inquiry that I advocate for will often times negate the minority's main concern that it would be impossible to fully clear ambiguity in most cases.[237] Furthermore, the

231 Coolidge v. New Hampshire, 403 U.S. 443, 487-489 (1971) (a suspect's wife retrieved his guns from their house and handed them over to the police.).

232 Georgia v. Randolph, 547 U.S. 103, 116, 126 (2006).

233 *Id*. at 117.

234 §4.1(a) The benefits of the warrant process, 2 Search & Seizure §4.1(a) (5th ed.) (citing United States v. Mendez-Jimenez, 709 F.2d 1300 (9th Cir. 1983), United States v. Jeffers, 342 U.S. 48, 72 (1951), Johnson v. United States, 333 U.S. 10, 68 (1948), Aguilar v. Texas, 378 U.S. 108 (1964), Johnson v. United States, 333 U.S. 10, 68 (1948)); Winona Morrissette-Johnson, *supra* note 15; Rutland, *supra* note 15.

235 *See* U.S. v. Peyton, 745 F.3d 546, 550 (D.C. Cir. 2014).

236 Illinois v. Rodriguez, 497 U.S. 179, 188 (1990).

237 LaFave et al., *supra* note 152; United States v. Melgar, 227 F.3d 1042 (7th Cir. 2000).

factors which I have laid out will be a useful tool for the courts and police to determine when an unconstitutional search has occurred.[238] Of course, placing the burden on the police does make their duty marginally more difficult, however in most situations, these burdens are very minor, and in the long-term, increased public confidence in policing will help to make their job easier. Thus, given the extremely high level of protections the Supreme Court has placed upon the right to privacy in one's home, the minor burden on policing imposed by my proposal, and similar rules already enforced by several circuits, are certainly justified.[239] Overall my proposed solution offers a template for the successful unification of the circuit courts regarding this issue, and it is a solution which will preserve the rights of the people whilst having a negligible effect upon law enforcement.[240]

238 *See* U.S. v. Salinas-Cano, 959 F.2d 864 (10th Cir. 1992).
239 *See* Bajaj, *supra* note 162.
240 Davies, *supra* note 204.