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IT'S IN THE BAG: VOLUNTARINESS, SCOPE, AND THE AUTHORITY TO GRANT CONSENT

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK

United States v. Harris[1]
(decided July 27, 2011)

I. THE MATTER OF UNITED STATES v. HARRIS

The defendant in this matter made a motion to suppress evidence that was seized during a search conducted by the Agency of Tobacco, Firearms and Explosives (the "ATF") on December 22, 2010.[2] Defendant's motion to suppress was based upon the contention that the search violated his Fourth Amendment protection against illegal search and seizure.[3] The hearing for defendant's motion was scheduled and heard by the U.S. District Court, Southern District of New York on May 17, 2011.[4] The court, upon its review of relevant case law and statutory interpretations, ruled that the defendant was not subjected to an illegal search and subsequent seizure, and, therefore, defendant's motion to suppress was denied.[5]

[1] No. 11 Cr. 92(RPP), 2011 WL 3273241 (S.D.N.Y. July 27, 2011).

[2] *Id.* at *1.

[3] *Id.*; *see also* U.S. CONST. amend. IV:

> 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.

[4] *Harris*, 2011 WL 3273241, at *1 (stating that the "hearing was commenced on May 17, 2011 . . . continued on June 3, 2011," and was decided on July 27, 2011).

[5] *Id.* at *15.

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The defendant, Kyle Harris, was the subject of an investigation being conducted by the ATF in connection with possession of drugs and firearms.[6] On December 22, 2010, Agent McCormick and the ATF conducted "[an] arrest of the [d]efendant [at premises located] at 16 Holly Street in New Bedford, Massachusetts."[7] During a sweep of the apartment, the officers located three to four persons in the apartment, including the defendant and one Tarean Joseph, who would later be used as a witness in the suppression hearing.[8] Agent McCormick questioned the defendant in the apartment and informed him that he was being arrested by federal agents pursuant to his involvement in a "Hobbs Act" robbery.[9] During the questioning of the defendant, Agent McCormick asked "which room is yours," at which point the defendant "motioned with his head over his shoulder [to] the room behind him."[10] The defendant was then asked whether there were guns or drugs present in the room, to which he said no.[11] The agent asked if he could enter the room, to which the defendant responded with something to the effect of "[s]ure."[12]

While the exact response given by the defendant is questionable, Agent McCormick noted at the suppression hearing that the defendant's answer was "definitely affirmative that [the agent] could search his room."[13] Agent McCormick did not remove defendant's

[6] *Id.* at *1.

[7] *Id.*

[8] *Id.* Agent McCormick noted that the defendant was sitting on "a couch in the middle of the living room," Mr. Joseph was "in a chair on the right of the room," and a third person was "sitting in the back of the room on another chair. *Harris*, 2011 WL 3273241, at *2.

[9] *Id.* at *2-3; 18 U.S.C. § 1951(a) (2006). The Hobbs Act states, in pertinent part:

> Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined under this title or imprisoned not more than twenty years, or both.

Id.

[10] *Harris*, 2011 WL 3273241, at *2.

[11] *Id.*

[12] *Id.*; *see also* Schneckloth v. Bustamonte, 412 U.S. 218, 219 (1973) (citing Davis v. United States, 328 U.S. 582, 593-94 (1946) (stating that one exception to the necessity for a search warrant is the voluntary consent of the accused to the search)).

[13] *Harris*, 2011 WL 3273241, at *2 (stating that the defendant's response was "clear[ ]," made in the presence of other officers, and was not made while any of the agents' guns were drawn).

handcuffs to have him sign a written consent to the search, due to the nature of crime he was accused of committing.[14] Agent Michael Zeppieri, the supervising agent of the task force assigned to the investigation, affirmed that the defendant gave his verbal consent to have the room searched shortly after being read his *Miranda* rights.[15] At the suppression hearing, Mr. Joseph, the individual who answered the door when the police arrived, stated that the officers "never showed [the warrant] to them," and that he "never heard any officer ask [the defendant] for consent to search his room."[16] Agent McCormick refuted this, contending that Mr. Joseph was being questioned by a police detective, and would not have heard such a brief exchange between the defendant and the questioning agents.[17]

In the search of the defendant's bedroom that followed, a sealed backpack was uncovered by ATF agents, which was subsequently opened.[18] The search of the backpack and room yielded "a digital scale, several cell phones, and a Police Athletic League Identification from the Bronx for [the defendant]."[19] According to the agents, at no time did the defendant or Mr. Joseph object to the search of the room.[20]

The defendant filed a motion to suppress the evidence found during the search of his bedroom.[21] Defense counsel argued that no constitutionally valid consent was given to the officers to search.[22] In the event that consent could have been determined by the court to be given to the agents, the defendant contended that the consent was not voluntary, and, furthermore, that the search of the closed backpack was not within the general scope of consent to search a room.[23]

The court acknowledged that "[w]arrantless searches 'are *per se* unreasonable under the Fourth Amendment−subject to only a few

[14] *Id.* at *3 (stating that the arrest warrant for the defendant was issued in connection with a "robbery [in which] the victim was very brutally stabbed").

[15] *Id.* at *8.

[16] *Id.* at *7.

[17] *Id.* at *12.

[18] *Harris*, 2011 WL 3273241, at *13.

[19] *Id.* at *3.

[20] *Id.* at *3-4.

[21] *Id* at *1.

[22] *Id.* at *10.

[23] *Harris*, 2011 WL 3273241, at *10.

specifically established and well-delineated exceptions.' "[24] Among these limited exceptions is consent given by the individual being searched or someone with the authority over the area being searched.[25] In order for such consent to be constitutionally valid, the court looked to well-established federal case law on consent, which point to the necessity of the consent to be "freely and voluntarily given."[26] Further, the prosecution bears "the burden of proving that the consent was, in fact, freely and *voluntarily given* by a preponderance of the evidence."[27]

The court in *Harris* agreed with the prosecution that the defendant consented to the search of his bedroom by the arresting officers.[28] While the testimony of the two officers differed slightly, the "pivotal fact [that the defendant] . . . consented to the search" of his room remained consistent between the two.[29] The defendant's acknowledgment of his room, the subsequent nod towards the room, and the affirmative response given to the agent's request to enter and search all comprised consent.

The existence of consent did not completely defeat the defendant's motion to suppress. The prosecution still bore the burden to show that the consent was "voluntarily given," otherwise it would be invalid under the Fourth Amendment.[30] At the time the defendant gave his consent to the search, he remained handcuffed on the sofa and did not exhibit any aggressive or fearful behaviors.[31] The court

[24] *Id.* (quoting Katz v. United States, 389 U.S. 347, 357 (1967) (internal citations omitted)).

[25] *See Schneckloth*, 412 U.S. at 219 (stating that consent to a search is a "specifically established exception" to the necessity of a search warrant); United States v. Buettner-Janusch, 646 F.2d 759, 766 (2d Cir. 1981) ("[T]he Government may scrutinize even the most private enclosure if the third party has the authority to permit the intrusion.").

[26] *See* United States v. Arango-Correa, 851 F.2d 54, 57 (2d Cir. 1988) (stating that voluntary consent is "essentially free and unconstrained [by] . . . all of the surrounding circumstances").

[27] *Harris*, 2011 WL 3273241, at *10 (emphasis added) (quoting United States v. Porras-Quintero, No. 07 CR 228(RPP), 2007 WL 4531552, at *7 (S.D.N.Y. Dec. 21, 2007)).

[28] *Id.* at *11.

[29] *Id.*

[30] *Id.* (quoting *Arango-Correa*, 851 F.2d at 57 ("The test of voluntariness is whether the consent was the product of an essentially free and unconstrained choice by its maker, and is a question of fact to be determined from all of the surrounding circumstances.")); *see also* United States v. Kon Yu-Leung, 910 F.2d 33, 41 (2d Cir. 1990) (stating that consent may be invalidated if it was given under "duress or coercion").

[31] *Harris*, 2011 WL 3273241, at *13 ("Mr. Harris was calm during the encounter, and the

found that at no point during the time where consent was requested did the officers draw their weapons or make any actions to intimidate or force the defendant to agree to a search.[32] In an examination of the "totality of the surrounding circumstances," the court held that the defendant was not coerced or intimidated into granting consent, but rather that it was given freely and volitionally.[33] Because the consent was voluntary, it was constitutionally valid under the Fourth Amendment.[34]

The last argument that the court considered in the defendant's motion to suppress was the defendant's contention that the search of the backpack in the bedroom was outside the scope of the consent given.[35] The Supreme Court established the standard of " 'objective' reasonableness" in order to determine whether the search conducted was within the scope of consent given.[36] The scope of consent is ascertainable by determining what would be "objectively reasonable for the officer to believe that the scope of the suspect's consent permitted him to [search]."[37] Consent to a search can either be given to police officers open-endedly, or limited to a specified area.[38]

In answering the agent's request to "take a look around," the defendant simply responded with a "yes," "sure," or some other short affirmative.[39] This request, as asked by the officers after the defendant indicated his room, provided notice to the defendant that they intended to search the area to which the defendant signaled.[40] Given his short affirmative response, an objectively reasonable individual would have believed that the entire room and its contents were within the scope of the consent granted by the defendant.[41] By giving a ge-

defense witness Mr. Joseph testified that [the defendant] joked with the officers.").

[32] *Id.*

[33] *Id.*

[34] *See Kon Yu-Leung*, 910 F.2d at 41 ("Consent to search should be deemed valid if . . . [it] was voluntarily given . . . .").

[35] *Harris*, 2011 WL 3273241, at *13.

[36] *Id.* at *14 (quoting Florida v. Jimeno, 500 U.S. 248, 251 (1991) (stating that an "objective reasonableness" standard should be applied in determining the scope of consent given)).

[37] *Id.* (quoting United States v. Garcia, 56 F.3d 418, 423-24 (2d Cir. 1995)).

[38] *See* United States v. Snow, 44 F.3d 133, 135 (2d Cir. 1995) (stating that open ended consent could be reasonably construed to lack any form of limitation).

[39] *Harris*, 2011 WL 3273241, at *14.

[40] *Id.*

[41] *Id.*

neralized or open-ended consent, the agents were entitled to look anywhere within the room for evidence of illegal activities, even inside of sealed containers.[42] In the event the defendant wished to limit the search to specific areas within his room, he needed only to voice his objection and limitation.[43] Therefore, the search of the closed backpack located within the defendant's bedroom was within the scope of consent given to the agents.[44]

Because the defendant was found to have voluntarily granted consent to a search of his bedroom by the arresting ATF agents, and the objects searched and subsequently seized from the room were within the scope of consent given, the evidence at issue was deemed admissible.[45] The defendant did not indicate that he wished to limit the scope of the consent he granted, nor was he coerced or strong-armed into granting said consent.[46] The court determined that the defendant's Fourth Amendment protection against unreasonable searches and seizures was not violated and, therefore, denied the defendant's motion to suppress the aforementioned evidence.[47]

II. FEDERAL INTERPRETATION OF CONSENT TO A WARRANTLESS SEARCH

The Fourth Amendment of the U.S. Constitution protects people from unreasonable searches and seizures by law enforcement and government agencies.[48] The Constitution has only one exception directly built into the verbiage of the construction of the Amendment, that such a search may be conducted with probable cause.

In the seminal case, *Mapp v. Ohio*,[49] lewd and lascivious con-

[42] *Id.* (quoting *Snow*, 44 F.3d at 135 ("[I]t is self-evident that a police officer seeking general permission to search a [room] is looking for evidence of illegal activity. It is just as obvious that such evidence might be hidden in closed containers.")).

[43] *Id.* (stating that "[t]he agents' interpretation of his consent as including the right to search containers, such as backpacks, found in the bedroom was objectively reasonable," and valid within the confines of the Fourth Amendment).

[44] *Harris*, 2011 WL 3273241, at *14.

[45] *Id.* at *15.

[46] *Id.*; *cf. Garcia*, 56 F.3d at 422 ("So long as police do not coerce consent, a search conducted on the basis of consent is not an unreasonable search.").

[47] *Harris*, 2011 WL 3273241, at *15.

[48] U.S. CONST. amend. IV.

[49] 367 U.S. 643 (1961).

traband was seized from the defendant's home during a warrantless search that was used to arrest her for a crime separate and apart from the purpose of the search.[50] While following up on information the police had received that the defendant was hiding the perpetrator of a bombing, officers arrived at the house, demanded entrance, and subsequently forced their way into the property.[51] The officers did not discover the individual they were searching for, but rather, found sexual and pornographic materials that were illegal under state law.[52] At trial, the court found that the police officers acted legally within the confines of probable cause in their search and seizure of the materials at issue.[53]

The Supreme Court reversed and remanded the case as a result of its determination that such a search violates the Fourth Amendment.[54] In reaffirming its holding in *Weeks v. United States*,[55] the Court reiterated its interpretation of the effect of the language of the Fourth Amendment:

> [T]he 4th Amendment put the courts of the United States and Federal officials, in the exercise of their power and authority, under limitations and restraints (and) forever secure(d) the people, their persons, houses, papers, and effects, against all unreasonable searches and seizures under the guise of law and the duty of giving to it force and effect is obligatory upon all entrusted under our Federal system with the enforcement of the laws.[56]

In *Mapp*, the Supreme Court showed its proclivity towards a strict interpretation of the language of the Constitution in regards to

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[50] *Id.* at 643 ("[T]he Supreme Court of Ohio found that her conviction was valid though 'based primarily upon the introduction in evidence of lewd and lascivious books and pictures unlawfully seized during an unlawful search of defendant's home.' ").

[51] *Id.* at 644 ("Upon their arrival at that house, the officers knocked on the door and demanded entrance but appellant . . . refused to admit them without a search warrant . . . [which led to] at least one of the several doors to the house [being] forcibly opened . . . [through which] the policemen gained admittance.").

[52] *Id.* at 645.

[53] *Id.*

[54] *Mapp*, 367 U.S. at 660.

[55] 232 U.S. 383 (1914).

[56] *Mapp*, 367 U.S. at 647 (quoting *Weeks*, 232 U.S. at 391-92).

the ability of law enforcement and the courts to search a person or property without a warrant.[57] Absent a substantial reason justifying probable cause, the Court here established its view on cases involving otherwise unreasonable search and seizure.[58]

a. Federal Interpretation of Voluntariness of Consent

In certain situations, the United States Supreme Court has acknowledged the existence of exceptions to the necessity of a search warrant in the pursuit of justice.[59] One of these exceptions is the voluntary consent to a warrantless search by the individual being searched, or by a person with the authority to consent to a search over a certain area.[60] So long as the consent given to a search is voluntary, the subsequent search does not violate the Fourth Amendment.[61]

The Court in *Schneckloth v. Bustamonte*[62] sought to provide guidance as to what constitutes "voluntariness" for the purposes of valid consent.[63] The defendant in this matter was subjected to a search of his vehicle by a police officer following a routine traffic stop, which led to his arrest for possession of a check with the intent to defraud.[64] The Court granted certiorari for the purposes of determining whether the Fourth and Fourteenth Amendments require that consent must be uncoerced and made with the knowledge that such consent "could be freely and effectively withh[e]ld."[65]

In referring to earlier case law on the issue, the Court noted that no previous cases involving unreasonable search and seizure provided a clear and "talismanic definition of 'voluntariness' mechanically applicable to the host of situations where the question has

[57] *Id.* at 659 ("If the government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy.").

[58] *Id.* at 660.

[59] *Schneckloth*, 412 U.S. at 222 (citing Vale v. Louisiana, 399 U.S. 30, 35 (1970)).

[60] *Katz*, 389 U.S. at 358 (citing Zap v. United States, 328 U.S. 624, 630 (1946)).

[61] *See id.*

[62] 412 U.S. 218 (1973).

[63] *Id.* at 223-24.

[64] *Id.* at 219-20.

[65] *Id.* at 221-22 (stating that the district court denied the defendant's writ of habeas corpus and defendant appealed to the Ninth Circuit Court of Appeals, which subsequently "vacated the order denying the writ and remanded the case").

arisen."[66] Given the broad scope of scenarios where voluntariness is at issue, the Supreme Court reflected upon the "test of voluntariness" as established by English and American courts over the prior two hundred years, which was to be applied in the questioning of suspects.[67] As the Court explained, this test consists of the following question:

> Is the confession the product of an essentially free and unconstrained choice by its maker? If it is, if he has willed to confess, it may be used against him. If it is not, if his will has been overborne and his capacity for self-determination critically impaired, the use of his confession offends due process.[68]

The Court in *Schneckloth* qualified this test by including a requirement for the assessment of "the totality of all the surrounding circumstances" in order to determine the will of the defendant.[69] This standard, as the Court stated, is to be utilized to determine the voluntariness of consent to a search.[70] The Court, in applying its test, held that the state bears only the burden of showing that the search was made with consent, and that the consent was not the product of "duress or coercion, express or implied."[71] The determination of voluntariness is fact-specific and is "to be determined from all the circumstances . . . of which the [defendant's] knowledge of a right to refuse is a factor."[72]

In a pair of cases occurring approximately a decade apart, the Court examined whether the boarding of buses by police officers and their subsequent request to search passengers and luggage coerced passengers to consent.[73] In both of these cases, the Court focused on the circumstances surrounding the searches, and whether a reasonable person in the place of the defendants would have understood that they

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[66] *Id.* at 224.
[67] *Schneckloth*, 412 U.S. at 225.
[68] *Id.* at 225-26 (citing Culombe v. Connecticut, 367 U.S. 568, 602 (1961)).
[69] *Id.* at 226.
[70] *Id.* at 227.
[71] *Id.* at 248-49. The case was reversed on the basis that the Ninth Circuit applied an inappropriate standard in determining the voluntariness of consent.
[72] *Schneckloth*, 412 U.S. at 248-49.
[73] United States v. Drayton, 536 U.S. 194 (2002); Florida v. Bostick, 501 U.S. 429 (1991).

could refuse to consent to a search.[74] In *Florida v. Bostick*,[75] police officers boarded a bus and requested to see passengers' identification, tickets and inspect their luggage for narcotics.[76] By positioning themselves in the aisle, the officers essentially blocked off the passengers means of egress from the bus.[77] The defendant, a passenger on the bus, was subsequently questioned by officers and informed of his right to refuse, but he granted consent to the officers, who subsequently found cocaine in his luggage and arrested him.[78] The Court granted certiorari in order to determine whether the officers' boarding of the bus "constitute[d] a 'seizure,' " and whether an individual on the bus would have been coerced into granting consent to a search thereafter.[79]

The scenario in *United States v. Drayton*[80] was very similar to the facts of *Bostick*. In *Drayton*, officers boarded a stopped bus at a rest stop and asked passengers for permission to search for illegal drugs or firearms.[81] In a situation similar to that of *Bostick*, the officers positioned themselves at the front and rear of the bus, trapping the passengers between them.[82] A search of the defendants uncovered two bundles containing over half a kilogram of cocaine in total.[83] Here, the Supreme Court granted certiorari to determine if the defendants were "seized" by not being informed of their right to refuse a search, and whether their ensuing consent to the search was voluntary.[84]

In both cases, the Supreme Court held in favor of the state.[85]

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[74] *See Drayton*, 536 U.S. at 207-08; *Bostick*, 501 U.S. at 439-40.

[75] 501 U.S. 429 (1991).

[76] *Id.* at 431-32.

[77] *Id.* at 435.

[78] *Id.* at 432 ("[P]olice specifically advised [defendant] that he had a right to refuse consent . . . [and] at no time did the officers threaten [the defendant] . . . .").

[79] *Id.* at 433-34.

[80] 536 U.S. 194 (2002).

[81] *Id.* at 197-99.

[82] *Id.* at 197-98.

[83] *Id.* at 199.

[84] *Id.* at 197 (stating that the Court was required to consider whether passengers must be advised by officers of "their right not to cooperate" or consent to a search).

[85] *Drayton*, 536 U.S. at 207-08 (holding that officers do not need to inform persons of their right to refuse a search, so long as a reasonable individual would have construed that they have such a right); *Bostick*, 501 U.S. at 439-40 (holding that consent to a search is voluntary if a reasonable person would understand that consent to said search may be lawfully

The Court in *Bostick* applied the similar voluntariness standard as applied in *Schneckloth*, and held that, upon a review of the totality of the "circumstances surrounding the encounter," consent to a search is voluntary when a reasonable person would understand that he or she has the right to refuse to give such consent.[86] The Court in *Drayton* came to a similar conclusion. Because the defendants were not confronted or threatened in any manner and "a reasonable person [would have known] that he or she was free to refuse [giving consent]," the consent given was voluntary and valid.[87]

The Second Circuit has also qualified what it considers valid voluntary consent. In *United States v. Garcia*,[88] the court considered whether consent to a search, apart from being voluntary, needs also to be "knowing" consent.[89] The defendant in this case was subjected to a search by police officers who suspected him of having purchased a firearm.[90] The defendant's wife granted the police access to the home, and, after a discussion with the officers, the defendant retrieved and presented the firearm in question to the officers.[91] The defendant, although not arrested at the time, was later arrested and indicted following an act of vandalism on the car of the person who informed the officers about the firearm.[92]

Following a suppression hearing in which evidence was suppressed pursuant to the district court's finding that "consent was [not] given knowingly and voluntarily," the Court of Appeals heard the state's appeal.[93] While the court acknowledged that a waiver of one's rights is inherent in the process of a fair criminal trial, it explained that Fourth Amendment cases are held to different standards, as set forth in *Schneckloth* and its progeny.[94] Since knowledge is only a

refused).

[86] *Bostick*, 501 U.S. at 439.

[87] *Drayton*, 536 U.S. at 206-07.

[88] 56 F.3d 418 (2d Cir. 1995).

[89] *Id.* at 422, 424.

[90] *Id.* at 420 (stating that the defendant "had been [previously] convicted of a felony," more specifically, assault, and was "in violation of 18 U.S.C. §§ 922(g)(1) and 924(a)(2)").

[91] *Id.* at 420-21.

[92] *Id.* at 421.

[93] *Garcia*, 56 F.3d at 421-22.

[94] *Id.* at 422 (citing *Schneckloth*, 412 U.S. at 241 (explaining the "vast difference between" rights protected in a criminal trial versus those protected by the Fourth Amendment)).

factor to be considered by a court analyzing the "totality of all the circumstances" involved in consent given to a search, there is no sufficient legal basis for the trial court's requiring that the defendant's consent was "knowing," in addition to being voluntary.[95]

b. Federal Interpretation of the Scope of Consent

The federal judiciary has also addressed the limitation upon what is included within the scope of consent given by an individual to law enforcement. In its general analyses of consent, the Supreme Court has always defaulted to the reasonableness of a search under the Fourth Amendment.[96] The same concept of "reasonableness" has been recognized as the limiting factor in the scope of consent given, as outlined in *Florida v. Jimeno*.[97]

In *Jimeno*, the defendant was pulled over by an officer in a routine traffic stop.[98] Believing the defendant to be in the possession of narcotics, the officer "asked permission to search the car," informed the defendant of his right to refuse, and was subsequently granted consent by the defendant.[99] The search uncovered a "brown paper bag, [which was located] on the floorboard," and was found to contain a "kilogram of cocaine."[100] The defendant was arrested and, prior to trial, "moved to suppress the cocaine" because he did not believe that the search he allegedly consented to included the opening of bags and containers in his car, namely the one containing the cocaine.[101]

The Supreme Court granted certiorari to determine whether closed containers, which "might reasonably hold the object of the search," are excluded from general consent to a search.[102] In its ex-

[95] *Id.* at 424 (stating that a defendant's "lack of awareness" only matters if consent was given under duress or was coerced).

[96] *Katz*, 389 U.S. at 359.

[97] *Jimeno*, 500 U.S. at 251 (1991) (citing Illinois v. Rodriguez, 497 U.S. 177 (1990)).

[98] *Id.* at 249 (stating that the officer that was pursuing the defendant had overheard a phone conversation between someone and the defendant allegedly arranging a drug transaction, which gave way to the pursuit).

[99] *Id.* at 249-50.

[100] *Id.* at 250.

[101] *Id.* (emphasis added) ("[Defendant's] mere consent to search the car did not carry with it *specific consent* to open the bag and examine its contents.").

[102] *Jimeno*, 500 U.S. at 249.

amination of the case, the Court applied an " 'objective' reasonableness" standard: "[w]hat would the typical reasonable person have understood by the exchange between the officer and the suspect" to have been included within the scope of the search.[103] The Court concluded that an objective individual in the place of the defendant would have reasonably foreseen that consent to a search for drugs within an area—in this case, a car—would include containers that might contain drugs.[104]

The Second Circuit maintained the same view as the Supreme Court's holding in *Jimeno*. In *United States v. Snow*,[105] the defendant was stopped for a traffic violation when a police officer noticed a shotgun in the back seat of his vehicle.[106] The defendant gave the officer consent to a search of the vehicle, which resulted in the discovery of a duffel bag containing pistol parts and a small bag containing marijuana.[107] Mirroring the situation in *Jimeno*, a suppression hearing was held to determine whether evidence found in closed containers should be considered inadmissible as outside the scope of the search's consent.[108]

In its application of the Supreme Court's holding in *Jimeno*, the court expounded upon what the officer intended by the word "search."[109] The court held that, by any definition of the word "search," a reasonable individual would imply that a consented-to search would include any "readily-opened, closed containers discovered inside the car."[110] In its explanation, the court recognized that an individual has the "right to limit the scope of his consent."[111]

A more recent case in the Sixth Circuit, *United States v. Lucas*,[112] addressed the scope of a search within a private residence.[113]

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[103] *Id.* at 251.

[104] *Id.* at 251-52 (delineating between a reasonable search within an unlocked container versus an unreasonable search of a locked container).

[105] 44 F.3d 133 (2d Cir. 1995).

[106] *Id.* at 134.

[107] *Id.*

[108] *Id.* (stating that the district court suppressed the items that were found in the closed containers, but not the shotgun, which was considered as "in plain view" of the arresting officer).

[109] *Id.* at 135.

[110] *Snow*, 44 F.3d at 135.

[111] *Id.* (citing *Jimeno*, 500 U.S. at 252).

[112] 640 F.3d 168 (6th Cir. 2011).

In *Lucas*, police responded to an informant's tip about the defendant's purported marijuana-growing operation in his home.[114] After speaking with the defendant, one of the detectives noticed marijuana paraphernalia and requested to search the house.[115] The defendant granted consent to a limited search of his residence which was to include a search for "illegal controlled substances, drug paraphernalia, and 'other material or records pertaining to narcotics.' "[116] During an inspection of a laptop that police expected to contain records related to the defendant's marijuana production, officers uncovered images of child pornography in an attached flash drive.[117]

In its review of defendant's appeal from a suppression hearing, the court considered whether a personal computer is within the scope of a search of a private residence.[118] Because the defendant maintained written records of his marijuana-growing operations, the court recognized that the officer's expectation that more records were on the laptop was reasonable.[119] Furthermore, the laptop was not secured by a password, which the court maintained was the equivalent of an unlocked container in a vehicle.[120] Lastly, the court held that the search of the attached flash drive was not unconstitutional, as upon his recognition of pornographic images of children, the detective ceased his search and awaited the issuance of a search warrant.[121]

c. Federal Interpretation of Who May Grant Consent

Apart from the issues of the voluntariness and scope of con-

[113] *Id.* at 175, 177.

[114] *Id.* at 170.

[115] *Id.*

[116] *Id.* at 170-71 (stating that the defendant signed a form consenting to the search after being told that a search warrant would most likely be issued on the basis of "probable cause" should he not sign.).

[117] *Lucas*, 640 F.3d at 172, 179 (explaining that prior to continuing his search of the flash drive, the detective stopped "in anticipation of obtaining a search warrant," and defendant was later indicted on charges for possession of both the marijuana as well as the child pornography).

[118] *Id.* at 177 (stating that the Sixth Circuit had "not previously issued a published opinion applying the analysis of . . . automobile search cases . . . [to] a consent search of a personal computer located inside a private residence").

[119] *Id.* at 177-78.

[120] *Id.* at 178.

[121] *Id.* at 179-80.

sent granted by a person subject to a search, the federal courts have also explored the issue of who may grant valid consent to a search aside from the party in question. In *United States v. Matlock*,[122] the United States Supreme Court was faced with this very question.[123] At issue in this case was whether the voluntary consent of one Ms. Graff, who granted police consent to search a bedroom she shared with the defendant, was valid under the Fourth Amendment.[124]

Police arrested the defendant in *Matlock* outside of his home for the "robbery of a federally insured bank . . . [under] 18 U.S.C. [§] 2113."[125] Subsequent to the arrest, the officers were admitted to the home by Ms. Graff and given access to search the bedroom she shared with the defendant for a weapon and stolen money, the latter of which was found inside a bag in the bedroom closet.[126] Following the arrest, the defendant filed a motion to suppress the evidence found in the bedroom, arguing that he did not consent to the search.[127] The district court, and, subsequently, the Court of Appeals for the Seventh Circuit, both held in favor of the defendant, citing that Ms. Graff did not have the "actual authority to consent to the search" on behalf of the defendant.[128]

In hearing the appeal, the Supreme Court reversed the Seventh Circuit's decision.[129] The Supreme Court held that for third party consent to a warrantless search to be valid, the grantor of the consent must "possess[ ] common authority over [the area to be searched] or other sufficient relationship to the premises or effects sought to be inspected."[130] In this case, the prosecution showed that Ms. Graff had sufficient control and authority over the bedroom, and, in the absence of the defendant, could grant consent to a warrantless search of the room.[131]

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[122] 415 U.S. 164 (1974).

[123] *Id.* at 166 (determining whether consent by a third party to search another's living quarters is valid to render evidence seized as admissible).

[124] *Id.* at 166-67.

[125] *Id.* at 166.

[126] *Id.* at 166-67.

[127] *Matlock*, 415 U.S. at 166.

[128] *Id.* at 167-69.

[129] *Id.* at 169.

[130] *Id.* at 171 (stating that the prosecution must show that a sufficient relationship existed between the third party and the area of which the search is being consented to).

[131] *Id.* at 176-77.

The Supreme Court considered yet another issue in regards to third party consent in *Illinois v. Rodriguez*.[132] In *Rodriguez*, police responded to a call made by a woman, Ms. Fischer, who claimed she was assaulted by the defendant.[133] Ms. Fischer went with the police to the apartment where the defendant resided, which she referred to as "our" apartment, and granted the officers access to the apartment.[134] After seeing drugs and drug paraphernalia in plain view, the officers proceeded to the bedroom where they discovered more drugs and the defendant, who was placed under arrest.[135]

The defendant moved to suppress the evidence, claiming that Ms. Fischer had previously "vacated the apartment" and therefore had no authority to give consent to a search.[136] The Supreme Court granted certiorari to determine whether the officers reasonably believed Ms. Fischer had the authority to give consent to a search and conducted said search in reliance on that belief.[137] The Court likened this situation to that of police officers entering premises without a warrant because they reasonably, yet incorrectly, "believe they are in pursuit of a violent felon who is about to escape."[138] In such cases, there is no violation of the defendant's Fourth Amendment rights.[139] The Court reiterated, as established previously in *Brinegar v. United States*,[140] that "[b]ecause many situations which confront officers in the course of executing their duties are more or less ambiguous, room must be allowed for some mistakes on their part. But the mistakes must be those of reasonable men, acting on facts leading sensibly to their conclusions of probability."[141] The Supreme Court ultimately

[132] 497 U.S. 177 (1990).

[133] *Id.* at 179.

[134] *Id.* at 179-80.

[135] *Id.* at 180 (stating that the defendant was arrested for possession of a controlled substance with intent to deliver).

[136] *Id.* (stating that the defendant's motion was granted by the county court and later affirmed by the appellate court).

[137] *Rodriguez*, 497 U.S. at 179, 181 (stating that the Supreme Court is faced with an issue it "expressly reserved in *Matlock*," whether third party consent to a warrantless search is valid if the police *reasonably believe* the third party has the common authority to grant such consent, but, in fact, does not) (emphasis added).

[138] *Id.* at 186.

[139] *Id.* at 189.

[140] 338 U.S. 160 (1949).

[141] *Rodriguez*, 497 U.S. at 186 (quoting *Brinegar*, 338 U.S. at 176).

held that third party consent is valid, even if based upon erroneous authority, so long as the officers reasonably believed the party to have the actual authority to consent to such a search.[142]

The Second Circuit has further explored the issue of who may grant valid consent under the Fourth Amendment. In *United States v. Buettner-Janusch*,[143] the court examined the question of whether another exception exists that gives a third party the right to consent to a search over an area of "common authority."[144] In this case, a search was conducted in the defendant's laboratory after defendant's colleagues contacted the authorities believing that the defendant was manufacturing illegal narcotics at his place of employment.[145] The defendant's research assistant and a fellow professor gave consent to the officers to search the laboratory where they worked, and the search yielded evidence of precursor materials used for the manufacture of LSD and other illegal drugs.[146] The defendant was arrested and found guilty on a number of counts involving the manufacture, possession, and intent to sell illegal drugs.[147]

The consent to the search at issue was given by the defendant's colleagues and employer, and not by the defendant himself.[148] The Second Circuit acknowledged the existence of third-party consent as an exception to the Fourth Amendment's limitation of searches.[149] The Second Circuit had previously established a rule that: "[c]onsent to a search by one with access to the area searched, and either common authority over it, a substantial interest in it or permission to exercise that access, express or implied, alone validates

[142] *Id.* at 188-89.

[143] 646 F.2d 759 (2d Cir. 1981), *cert. denied*, 454 U.S. 830 (U.S. Oct. 5, 1981) (No. 80-2054).

[144] *Id.* at 761, 764.

[145] *Id.* at 761.

[146] *Id.* at 763.

[147] *Id.* at 763-64.

[148] *Buettner-Janusch*, 646 F.2d at 764 ("Throughout this litigation, the prosecution has maintained that the May 17 search was validated by the consent of Jolly and Richard Macris, [the defendant's colleagues, and such] . . . consent to search was freely and voluntarily given.").

[149] *Id.* (citing *Matlock*, 415 U.S. at 171 n.7 (explicating that third party consent to a search is valid "when a defendant can be said to have assumed the risk that someone having authority over the area" may grant such consent to officers)).

the search."[150] In applying the aforementioned rule, the court here determined that both the research assistant and professor had access to and common authority over the laboratory in which they all worked, but by granting access to his colleagues, the defendant gave up any reasonable expectation of privacy that would have invalidated the search.[151] Ultimately, the court held that a third party, such as a coworker, may grant consent to a search over an area of shared common authority, and affirmed the conviction of the defendant.[152]

III. NEW YORK STATE'S INTERPRETATION OF CONSENT TO A WARRANTLESS SEARCH

Article I, Section 12 of the New York State Constitution provides for the right of individuals to "be secure in their persons, houses, papers and effects, against unreasonable searches and seizures . . . and [that] 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."[153] This part of Section 12 mirrors verbatim the Fourth Amendment of the U.S. Constitution. This is evidence of the desire of the framers of the state constitution to maintain the same level of security of the fundamental protection against unreasonable search and seizure as those who drafted the federal Constitution. For this reason, cases in the state courts involving searches are particularly scrutinized in order to determine whether there truly was consent. The decisions of the New York state courts have traditionally afforded greater protections to defendants in these seizure cases, making it more difficult for the prosecution to meet the standard to prove that consent was voluntarily given and that the search conducted fell within the scope of consent given.[154]

[150] *Id.* at 765 (quoting United States v. Gradowski, 502 F.2d 563, 564 (2d Cir. 1974)).
[151] *Id.* at 765-66.
[152] *Id.* at 765, 767.
[153] N.Y. CONST. art. I, § 12.
[154] *See, e.g.*, People v. Gonzalez, 347 N.E.2d 575 (N.Y. 1976).

a. New York State's Interpretation of Voluntariness of Consent

The New York Court of Appeals has traditionally maintained a similar standpoint on voluntariness of consent as the federal judiciary, that consent to search, so long as it is voluntarily given, is a waiver of Fourth Amendment protections.[155] In *People v. Kuhn*,[156] the court reviewed a pair of cases in which the defendants alleged a violation of their constitutional protection against unreasonable search and seizure.[157] In these cases, the defendants were both subjected to searches in an airport to after giving verbal consent to officers.[158] Both defendants were subsequently arrested for possession of illicit materials.[159]

The court examined whether or not the defendants gave valid voluntary consent.[160] In both cases, the court held that the state "sustained its burden of establishing a voluntary consent," as set forth by the standards in *Schneckloth*.[161] The defendants both gave verbal affirmative consent, and the officers conducting the searches did not act in a manner that was coercive or intimidating to the defendants.[162]

The Court of Appeals in *People v. Gonzalez*[163] drastically modified the way New York courts approach the issue of voluntariness of consent.[164] In *Gonzalez*, the defendants were a husband and wife arrested for the possession of drugs after the husband was set-up in a drug transaction with federal agents of the Drug Enforcement Administration.[165] After an initial altercation between the agents and the defendant-husband, the defendants were handcuffed and sepa-

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[155] *See* People v. Kuhn, 306 N.E.2d 777, 779 (N.Y. 1973) (referencing *Davis*, 328 U.S. 582).

[156] 306 N.E.2d 777 (N.Y. 1973).

[157] *Id.* at 778.

[158] *Id.* at 778-79.

[159] *Id.* (stating that defendant Boungermino was arrested for possession of marijuana, and defendant Kuhn was arrested for possession of a hypodermic needle and heroin).

[160] *Id.* at 779.

[161] *Kuhn*, 306 N.E.2d at 779 (citing *Schneckloth*, 412 U.S. at 221).

[162] *Id.*

[163] 347 N.E.2d 575 (N.Y. 1976).

[164] *Id.* at 580-81.

[165] *Id.* at 577-78.

rated.[166] The agents informed the defendants of their desire to search the home, and had both of them sign a written statement consenting to the search.[167]

On the state's appeal from a suppression hearing, the court applied a four-prong analysis to determine whether a defendant has given valid voluntary consent under the state and federal constitutions.[168] The four factors the court took into consideration were:

> [W]hether the consenter is in custody or under arrest, and the circumstances surrounding the custody or arrest[,] . . . the background of the consenter [or experience dealing with police officers,] . . . whether the consenter has been, previously to the giving of consent, or for that matter even later, evasive or uncooperative with the law enforcement authorities[,] . . . [and] whether the defendant was advised of his right to refuse to consent.[169]

In its analysis of the situation experienced by the defendants, the court determined that the defendants: were detained and intimidated by the presence of a large number of federal agents; had little experience in dealing with the police; responded to the agents in a defiant and resistive manner, and; while presented with a form advising them of their right to refuse consent, were in a coercive atmosphere that negated any exercise of their right to refuse.[170] While the court noted that the last factor regarding knowledge of the right to refuse is not requisite, the sum of the circumstances surrounding the arrest resulted in a violation of the defendants' rights under both the federal and state constitutions.[171]

The Appellate Division, Fourth Department, has applied a slightly more stringent interpretation as to what qualifies as voluntary

[166] *Id.* at 578.

[167] *Id.* at 579 (explaining that the defendant-husband stated, at the time of his signing the consent form, that he did not know whether or not "his wife had disposed of the drugs" prior to letting the agents into the apartment).

[168] *Gonzalez*, 347 N.E.2d at 580-81.

[169] *Id.*

[170] *Id*. at 581-82.

[171] *Id.* at 582 ("The instant seizure would have hardly survived scrutiny if the matter had been prosecuted in the Federal courts as the agents at some point had intimated they would do. It may not survive scrutiny in the State courts.").

consent to a search. In *People v. Schwab*,[172] the court was faced with the issue of whether a search conducted by police officers of an apartment was a violation of the defendant's Fourth Amendment rights.[173] The officers entered the building under what was claimed to be valid consent from the defendants, and "seized contraband items," namely controlled substances.[174]

On appeal from a hearing denying suppression of the evidence seized, the Fourth Department sought to expand upon the definition of what constitutes voluntary consent to a search.[175] In applying a statement made in *United States v. Smith*,[176] the court held that, in order for consent to be voluntary, it must be "unequivocal, specific and intelligently given."[177] This standard enlarges the burden placed upon the state in showing that the consent given was, in fact, voluntary.[178]

b. New York State's Interpretation of the Scope of Consent

The Court of Appeals has also expanded upon the federal judiciary's interpretation regarding the scope of a search conducted by officers subsequent to valid voluntary consent. In *People v. Adams*,[179] police officers were in pursuit of the defendant who threatened to shoot his girlfriend by pointing a gun at her and subsequently opened fire on an officer.[180] The defendant fled, and the officers were led by his girlfriend to the apartment where he was hiding.[181]

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[172] 382 N.Y.S.2d 158 (App. Div. 4th Dep't 1976).

[173] *Id.* at 158.

[174] *Id.* at 159 (stating that the officers' entry onto the premises was not conducted due to "exigent circumstances" and must thereby rely on valid voluntary consent).

[175] *Id.* (recognizing that consent to a search must be "freely and voluntarily given," and that it is not voluntary "if it is the product of duress or coercion").

[176] 308 F.2d 657 (2d Cir. 1962).

[177] *Schwab*, 382 N.Y.S.2d at 159 (stating that the search of defendant's home failed to meet this requirement (quoting *Smith*, 308 F.2d at 663)).

[178] *See* Bumper v. North Carolina, 391 U.S. 543, 548 (1968) ("When a prosecutor seeks to rely upon consent to justify the lawfulness of a search, he has the burden of proving that the consent was, in fact, freely and voluntarily given.").

[179] 422 N.E.2d 537 (N.Y. 1981).

[180] *Id.* at 538.

[181] *Id.* (stating that the defendant's girlfriend had a key to the apartment and was able to give the police access to the apartment).

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The girlfriend also told officers where the defendant stored weapons and ammo.[182] The defendant was arrested five days later.[183]

Prior to trial, the defendant filed a motion to suppress the weapons, arguing that the scope of the consent given to the officers to conduct a warrantless search did not include the search of a closet.[184] On appeal from the denial of the defendant's motion, the Court of Appeals determined that the officers relied on the apparent authority of the girlfriend to consent to entry into the apartment and that any subsequent search would need to be objectively reasonable.[185] The court held that "it was clearly reasonable [under the circumstances] for the officers . . . to rely on [the girlfriend's] apparent capability to consent to a search of the closet . . . ."[186] While acting under the exigent circumstances of the situation, the officers were still bound to the "objective reasonableness" standard outlined by the Supreme Court in *Jimeno*.[187]

The Court of Appeals has also determined that the scope of consent in a search is limited to the general consent given, and that such consent does not include the material alteration of an area to find the suspected evidence.[188] In *People v. Gomez*,[189] a police officer pulled a car over for a routine traffic stop and noticed, upon inspection, that the car possessed characteristics of vehicles that are often used in narcotics trafficking and transport.[190] The officer requested consent to search, which was granted by the defendant.[191]

[182] *Id.* at 538-39 ("[Defendant's girlfriend] pointed out the closet in which she claimed defendant stored his weapons [and, inside,] the police found a .308 calibre rifle . . . [and] ammunition.").

[183] *Id.* at 539.

[184] *Adams*, 422 N.E.2d at 539.

[185] *Id.* at 540-41 ("We emphasize that the police belief must be reasonable, based upon an objective view of the circumstances present and not upon the subjective good faith of the searching officers.").

[186] *Id.* at 541.

[187] *See Jimeno*, 500 U.S. at 249 (holding that the scope of a search pursuant to valid consent must be that which an objectively reasonable individual would believe to be included).

[188] *See* People v. Gomez, 838 N.E.2d 1271, 1273 (N.Y. 2005) (stating that an officer may not jeopardize the "structural integrity" on the basis of general consent).

[189] 838 N.E.2d 1271 (N.Y. 2005).

[190] *Id.* at 1272 ("[U]pon [the officer's] inspection [of the car, he] not[ed] a fresh undercoating around the gas tank . . . a tampered registration card . . . [and] darkly tinted windows . . . .").

[191] *Id.*

Using a pocket knife and a crowbar, the officer pried up the floorboard of the vehicle and opened part of the gas tank, revealing approximately one and a half pounds of cocaine.[192]

In its review of the case, the Court of Appeals relied upon precedent set forth in *Jimeno* and the litany of cases that followed.[193] While the defendant was found to have granted general consent to the search by the arresting officer, that search was bound by the "objective reasonableness" standard.[194] In an effort to establish a clearer standard for the scope of a search conducted with consent, the court established that "once a search exceeds the objectively reasonable scope of a voluntary consent, a more specific request or grant of permission is needed, in the absence of probable cause, in order to justify damage to the searched area or item sufficient to require its repair."[195] Because such a "damag[ing]" search was conducted of the defendant's vehicle and exceeded the scope of consent, the case was reversed and remanded by the Court of Appeals.[196]

c. New York State's Interpretation of Who May Grant Consent

The New York state judiciary has adopted and modified the approach taken by the federal courts in regards to who may grant valid consent to a search. The Court of Appeals has acknowledged that, in any area in which "two or more individuals share a common right of access to or control," either one of the parties may grant consent to a warrantless search in the absence of the other.[197] In addition to this well-settled issue, the New York courts have further encountered some unique situations in regards to third party consent to warrantless searches and when such consent is valid under the state and federal

[192] *Id.* at 1272-73 (stating that after his arrest and indictment, defendant filed a motion to suppress claiming that no voluntary consent was given and that if consent could be found, "the search exceeded the scope" of consent).

[193] *Id.* at 1273.

[194] *Gomez*, 838 N.E.2d at 1273 (quoting *Jimeno*, 500 U.S. at 251).

[195] *Id.* at 1274; *id.* (Read, J., dissenting) (stating that the majority seeks to establish a "bright-line rule[]" for determining the scope of consent, which is "eschewed" by the Supreme Court in regards to Fourth Amendment cases).

[196] *Id.*

[197] People v. Cosme, 397 N.E.2d 1319, 1321 (N.Y. 1979) (citing *Matlock*, 415 U.S. at 171; People v. Wood, 293 N.E.2d 559, 560 (N.Y. 1973)).

constitutions.

In *People v. Cosme*,[198] the Court of Appeals was faced with the question of whether a third party may grant consent to officers in the presence of the suspect party and contrary to the suspect's denial of such consent.[199] In *Cosme*, the police were informed by the defendant's fiancée that the defendant was "storing a gun and a large quantity of cocaine in the apartment" shared by the two.[200] When the officers arrived, the defendant's fiancée granted them access to search, which was refused shortly thereafter by the defendant, who was present in the home.[201] Defendant was subsequently indicted for possession of narcotics and a firearm.[202]

Following a denial of his motion to suppress the evidence on the basis of a lack of his consent to the search, the defendant appealed to the Appellate Division, and ultimately the Court of Appeals.[203] The Court of Appeals held that because the defendant's fiancée had "an unrestricted right to share in the use" of and common authority over the bedroom, she was allowed to grant consent to the search, contrary to the later refusal by the defendant.[204] Because his fiancée gave valid consent prior to his refusal, the court determined that the defendant's objection to the consent was "ineffective," as it was untimely.[205]

The Appellate Division, First Department, much like the Second Circuit in *Buettner-Janusch*, further qualified who may grant voluntary consent to a search in *People v. Nalbandian*.[206] In *Nalbandian*, officers received a call to "interview a robbery complainant" at

[198] 397 N.E.2d 1319 (N.Y. 1979).

[199] *Id.* at 1320.

[200] *Id.*

[201] *Id.* at 1320-21 (stating that defendant and a friend were handcuffed by the police "under protest").

[202] *Id.* at 1321.

[203] *Cosme*, 397 N.E.2d at 1321 (explaining that the defendant pleaded guilty to a lesser charge following the denial of his motion, then appealed to the Appellate Division, which affirmed the conviction).

[204] *Id.* at 1323.

[205] *Id.* (stating that since the defendant gave his fiancée "an unrestricted right to share in the use and control of the bedroom closet," voluntary consent given by his fiancée renders any latter opposition on his part as "ineffective").

[206] 590 N.Y.S.2d 885, 886-87 (App. Div. 1st Dep't 1992).

a shelter for men being run out of the Palace Hotel.[207] The night clerk "buzzed" the officers in and the officers proceeded to a dormitory, where they found the defendant with drugs and drug paraphernalia.[208]

While the hearing court suppressed this evidence as being the product of an unreasonable and unconsented to search, the First Department reversed.[209] Because the night clerk controlled access to and from the sleeping quarters, he "was authorized by the residents . . . to consent to entry into the room by guests, visitors, and any others who had legitimate business there."[210] Furthermore, the court noted that the defendant could not even sustain an argument under the Fourth Amendment, as a reasonable expectation of privacy in an area is requisite for such an argument.[211] As the defendant shared an open "communal" room with other persons, anything done in the open is considered "forfeit [of] any reasonable expectation of privacy."[212]

In *People v. Fayton*,[213] the Appellate Division, First Department, surveyed the scope of consent that can be given by a third party.[214] The third party in this case was the complainant who had informed the police that she had been "menaced [by the defendant] with a gun."[215] The complainant shared an apartment with the defendant and knew where the defendant kept his weapon.[216] The officers received express consent from the complainant to search the apart-

[207] *Id.* at 886.

[208] *Id.*

> [The officer] noticed defendant sitting on one of the beds . . . folding a small piece of aluminum foil. Between [the defendant's] legs was a plastic bag containing white powder. The officer also noticed [on] . . . the bed . . . a glassine envelope which the officer believed to contain heroin.

[209] *Id.* at 887.

[210] *Id.*

[211] *Nalbandian*, 590 N.Y.S.2d at 887 (citing *Katz*, 389 U.S. at 361 (Harlan, J., concurring)).

[212] *Id.*

[213] 715 N.Y.S.2d 2 (App. Div. 1st Dep't 2000).

[214] *Id.* at 3.

[215] *Id.*

[216] *Id.* ("The complainant . . . informed the police that there was a gun in the apartment [and] gave the gun's precise location . . . .").

ment and subsequently arrested the defendant.[217]

The suppression hearing resulted in a denial of defendant's motion to suppress the gun.[218] On appeal, the First Department held that an individual with apparent authority over a shared area may both grant access to and determine the scope of the search conducted by officers subsequent to his or her consent.[219] Because there was "no indication that the room was exclusively [the] defendant's," the scope of roommate's consent to search the entire apartment included each and every room located within.[220]

IV. THE VALUE OF UNITED STATES V. HARRIS

The court in *Harris* maintained the well-established federal court view that the consent exception to unreasonable searches under the Fourth Amendment is only valid when it is voluntarily given. Both the state and federal judiciaries support the view maintained in *Harris*, that consent to a search must be "the product of an essentially free and unconstrained choice."[221] The court in *Harris* adhered to the time-honored approach to the federal interpretation of voluntariness, in lieu of incorporating some of the ostensibly forward-thinking approaches of the state courts, such as the four-prong analysis established by the New York Court of Appeals in *Gonzalez*.[222]

The court in *Harris* also illustrates the breadth that the federal courts are willing to give to the scope of searches conducted by officers who receive a general consent to search. The court here emphasized that a verbal consent as simple as a " 'yes' or 'sure' " provides the groundwork for a search that an objectively reasonable individual could understand as virtually all-inclusive, barring the few occasions where searches may include locked areas.[223] By not limiting such a search, the court noted that general consent allows an officer to look anywhere within a room that evidence of illegal activity could be

[217] *Id.*
[218] *Fayton*, 715 N.Y.S.2d at 2.
[219] *Id.* at 3.
[220] *Id.*
[221] *Harris*, 2011 WL 3273241, at *13 (quoting *Schneckloth*, 412 U.S. at 225).
[222] *See Gonzalez*, 347 N.E.2d at 580-81 (explaining the four factors to be considered to determine whether consent is truly voluntary).
[223] *Harris*, 2011 WL 3273241, at *14.

found.[224]

So long as consent to a search is made voluntarily, by a person with the authority to do so, and the scope of the conducted search falls within what an objectively reasonable individual might ascertain as being included in such a search, the court in *Harris* held that it would be constitutional under the Fourth Amendment.[225] This creates a very minute obstacle that prosecutors in a federal court would need to surmount to establish a valid search. *Harris* furthers the federal judiciary's apparent position in affording officers a large berth of discretion in warrantless searches following consent.

Daniel Fier[*]

[224] *Id.* (quoting *Snow*, 44 F.3d at 135 ("It is self-evident that a police officer seeking general permission to search a [room] is looking for evidence of illegal activity. It is just as obvious that such evidence might be hidden in closed containers.")).

[225] *Id.* at *14-15.

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