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THIRD-PARTY CONSENT SEARCHES: SOME NECESSARY SAFEGUARDS

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INTRODUCTION

> Police arrest Jones and place him in a police car in front of the house where he resides. The police then ask Smith, who shares the residence with Jones, if they may search the premises. Smith consents to the warrantless search and evidence is found that incriminates Jones. Although he was available at the time of the search, Jones' consent was never sought.

A certain amount of confusion has always surrounded the fourth amendment prohibitions against unreasonable searches and seizures.[1] While the language of that amendment is far from clear, a number of general statements defining what the fourth amendment does and does not say may be made. It does say that all people shall be secure in their persons, houses, papers, and effects against unreasonable searches and seizures;[2] that all warrants, to be valid, must be based upon probable cause;[3] and that certain requirements must be met before a search warrant may be issued, *i.e.*, facts establishing probable cause must be supported by oath or affirmation and describe with particularity[4] the place to be searched and the person or things[5] to be seized.

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1. Camara v. Municipal Court, 387 U.S. 523, 528 (1966). *See, e.g.*, Christopher, *A New Rule in Searches and Seizures*, 1 ALA. L. REV. 49 (1948); Franklin, *Full Search Incident to a Lawful Custodial Arrest for a Traffic Violation — The Deterioration of Fourth Amendment Guarantees Against Unreasonable Searches and Seizures*, 18 How. L.J. 446 (1974).

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> 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.

U.S. CONST. amend. IV.

3. Aguilar v. Texas, 378 U.S. 108 (1964); Wong Sun v. United States, 371 U.S. 471 (1963).

4. United States v. Ventresca, 380 U.S. 102 (1965) (Fortas, J., dissenting).

5. Warden v. Hayden, 387 U.S. 294 (1967).

The fourth amendment does not, however, require a warrant for all searches.[6] A warrantless search is permissible as long as it is reasonable under the circumstances.[7] Nor does the fourth amendment say that for a search to be reasonable it must be based upon probable cause.[8] While the general rule is that a search warrant is necessary for a valid search and subsequent seizure of items as evidence, it is also clear, based on the wording and judicial interpretation of this amendment, that there may be constitutional searches which are warrantless, or done without probable cause, or both.[9] These latter searches are exceptions to the general rule. Circumstances under which they can arise include searches of a vehicle upon probable cause, for the fruits or instrumentalities of a crime;[10] searches incident to a valid arrest and limited in scope to the area within the immediate control of the arrested party;[11] and searches conducted pursuant to the consent of the party searched.[12]

The general focus of this article centers on the last of the above exceptions, the consent search. Specifically, the search made pursuant to consent given by a third party, one not the ultimate defendant, will be given particular attention. The third-party relationship involved in such searches arises from a husband-wife or intrafamilial relationship, a joint-tenancy situation, or various other settings involving co-occupancy of premises or effects. The purpose of this article is twofold. First, it is to demonstrate how the access and control test presently used by the Court to validate third-party consent searches inadequately protects fourth amendment rights to privacy. Secondly, and more importantly, the purpose of this article is to suggest a workable means to safeguard fourth amendment rights without significantly handicapping effective law enforcement techniques. To facilitate this end, it is

6. Katz v. United States, 389 U.S. 347, 357 (1967).

7. *See* Camara v. Municipal Court, 387 U.S. 523, 539 (1966), where the Court describes warrantless searches that have been validated because they were reasonable.

8. The wording of the fourth amendment says only that the standard for *issuing* warrants is probable cause. Where no warrant is issued, and the search is reasonable, it may still be valid though done without a probable cause. *See* note 9 *infra.*

9. Schneckloth v. Bustamonte, 412 U.S. 218, 219 (1974) (consent searches require neither probable cause nor search warrant).

10. Chambers v. Maroney, 399 U.S. 42 (1970); Brinegar v. United States, 338 U.S. 160 (1949); Carroll v. United States, 267 U.S. 132 (1925).

11. Chimel v. California, 395 U.S. 752 (1969).

12. Vale v. Louisiana, 399 U.S. 30 (1970); Davis v. United States, 328 U.S. 582 (1946); Zap v. United States, 328 U.S. 642 (1946).

helpful to begin with a brief examination of past methods used by courts to validate consent searches, and to show how these methods have proved unsatisfactory.

DEVELOPMENT OF THIRD-PARTY CONSENT TESTS

Until 1974, the Supreme Court had never directly dealt with the question of searches made pursuant to consent given by one other than the person suspected of the crime.[13] As a result, lower courts struggled with this problem[14] and posed a number of solutions to it. Among the first of these solutions to develop was the agency, or apparent authority test.[15] Under the rationale of this test, the ultimate defendant had acted either directly or indirectly to appoint a third party as his agent. As a result, the ultimate defendant was held to have authorized the waiver of his fourth amendment right to privacy by the creation of the agency relationship and the subsequent consent to the search by the agent. Under the agency or apparent authority test, the third party (agent) could consent to a search on behalf of the ultimate defendant (principal). For example, if Jones agreed to let Smith have the use of his house, the law would imply that Smith was acting as Jones' agent with respect to matters concerning the house. As such, Smith could act on behalf of his principal and could consent to a search of the premises that was aimed at Jones.

The agency theory may be an adequate means to validate third-party consent searches in situations where goods have been bailed, or where an express agency relationship can otherwise be shown;[16] but generally, it is unsatisfactory for two important reasons. First, the agency relationship in the majority of cases

13. In Amos v. United States, 255 U.S. 313 (1921), the question was raised as to whether a wife could waive her husband's fourth amendment rights and consent to a search on the basis of the husband-wife relationship alone. Deciding the case on other grounds, the Court did not reach that issue.

14. *See* Bender, *Third Party Consent to Search and Seizure: A Request for Reevaluation*, 4 CRIM. L. BULL. 343, 344-46 (1968).

15. Berner, *Search and Seizure: Status and Methodology*, 8 VAL. U.L. REV. 471, 548 (1974) [hereinafter cited as Berner].

16. In United States v. Eldridge, 302 F.2d 463 (4th Cir. 1962), the defendant gratuitously bailed his automobile to a friend who subsequently consented to a search of its trunk. The search was held valid because the bailment relationship implied that the person in possession of the vehicle could do "whatever was reasonable and not inconsistent with its entrustment to him," *id.* at 446, and also because the search was aimed at the consenting party and not the ultimate defendant.

is obviously based on a fiction.[17] Second, the test is difficult to apply because it suggests no natural guidelines for its application.[18]

A second solution to the problem of third-party consent searches involves the more recent "assumption of risk" test.[19] Whether the suspect has an actual and reasonable expectation of privacy is the basic question under this test. If such an expectation does not exist the third-party consent search is valid. If, on the other hand, the expectation of privacy can be shown by all the circumstances, either a warrant or the property owner's personal consent to have his property searched must be obtained. For example, Jones gives the use of his house to Smith on the condition that Smith not use the basement, which is locked and for which only Jones has the key. Applying the assumption of risk test, Smith could not consent to a search of the basement because Jones had specifically restricted the use of it from Smith, thus demonstrating his expectation of privacy concerning that area of the house. However, Smith could consent to a search of the rest of the house since Jones demonstrated no expectation of privacy for any area other than the basement.

Whether the agency test, the assumption of risk test, or other tests[20] are still valid legal theories is now uncertain. The Supreme Court, in the recent case of *United States v. Matlock*,[21] supports a test which considers only the co-occupants' access and control over the premises and effects sought to be searched. Since the Court in *Matlock* neither overruled nor mentioned any of the other tests relative to third-party searches fashioned by the lower courts, the futures of those tests may now be questionable.

Under the access and control test, primary emphasis is placed on the consenting party's relationship to the place searched rather

17. See Henry v. Commonwealth, 211 Va. 48, 175 S.E.2d 416 (1970), where a gratuitous bailee could validly consent to a search of a motor vehicle even though the search was directed at a passenger in the car who was present at the time.

18. *See* Berner *supra* note 15, at 548.

19. People v. Nunn, 55 Ill. 2d 344, 304 N.E.2d 81 (1973), *cert. denied*, 416 U.S. 904 (1973).

20. State v. Kinderman, 271 Minn. 405, 136 N.W.2d 577 (1965) (the superior property interest test); Waters v. United States, 311 A.2d 835 (D.D.C. 1973) (discussing the *in loco parentis* test).

21. 94 S. Ct. 988 (1974). In *Matlock*, the defendant was arrested and placed in a police car in front of the house where he was residing. The police then asked the women with whom he was living if she would consent to a search of Matlock's room. The ensuing search uncovered evidence used to convict the defendant.

than on the actual consent of the ultimate defendant or even the relationship between the two.[22] If the consenting person actually has common authority[23] over, or control of, the premises searched, the search is valid. Any items seized may then be used as evidence against any co-occupant in a subsequent criminal action.[24] For example, Jones and Smith are co-tenants of a one-bedroom apartment. Both freely use every room in the apartment, including all closets and storage areas. If the police sought to make a consent search of the apartment, either Jones' or Smith's consent would be sufficient to validate the search. Using the access and control test, each tenant's complete and unrestricted authority over the premises enables him to consent to a search of the entire area, the results of which will be binding on the non-consenting co-tenant.

THE AFTERMATH OF MATLOCK—PROBLEMS LEFT UNSOLVED

To the extent the Supreme Court has adopted one test over all others, the *Matlock* decision provides some clarity in an otherwise confusing area of constitutional law. However, the case leaves several major problems unsolved.

The first problem is whether the consenting party, absent any express authority given him by the ultimate defendant, may waive that defendant's fourth amendment rights. Prior to *Matlock,* Supreme Court decisions had suggested that absent an express agreement between the consenting party and the ultimate defendant, no such waiver would be permissible.[25] This position was the Court's response to lower courts' attempts to validate warrantless searches of hotel and boarding house rooms by rationalizing that the proprietor of the premises could consent to the search by virtue of his relationship to the tenant, *i.e.,* the proprietor was held to be acting as an agent for the tenant.[26] Calling the lower court's rationale "strained applications of the

22. *See* Berner *supra* note 15, at 548-49.

23. "Common authority" is not derived from mere property interests but from "mutual use of the property by persons generally having joint access or control for most purposes, so that any of the co-inhabitants has the right to permit the inspection in his own right. . . ." United States v. Matlock, 94 S. Ct. 988, 993 n.7 (1974).

24. *Id.* at 993.

25. Stoner v. California, 376 U.S. 483, 488 (1964); Jones v. United States, 362 U.S. 257, 266-67 (1960); United States v. Jeffers, 342 U.S. 48 (1951); Lustig v. United States, 338 U.S. 74 (1949).

26. *See* Stoner v. California, 376 U.S. 483 (1964).

law of agency"[27] and "unrealistic doctrines of apparent authority,"[28] the Court in *Stoner* rejected such a means for validating consent searches. Holdings such as *Stoner* seemed to indicate that third-party consent was, in fact, a waiver of another's constitutional rights. In *Stoner*, the Supreme Court demonstrated that it would not permit fourth amendment rights to be circumvented under the guise of the legal fictions of the agency test.[29]

> *Matlock* has apparently renewed the question of waiver:
>
> This Court left open . . . the question whether [a] wife's permission to search the residence in which she lived with her husband could "waive his constitutional rights," but more recent authority here clearly indicates that the consent of one who possesses common authority over premises or effects is valid as against the absent, nonconsenting person with whom that authority is shared.[30]

By simply adopting the access and control test for validating third-party consent searches without providing any attendant safeguards, the Court may well have created, through the use of

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27. *Id.* at 488.

28. *Id.*

29. To validate the consent search, the Court in *Stoner* used the fictions of agency and apparent authority to make it appear as though the defendant himself had actually consented to the search. Some writers believe that the use of fictions in the law is necessary because it brings about a desired result without making the law appear to be constantly changing. Thus, fictions add the appearance of stability to the law while at the same time achieving equitable results. H. MAINE, ANCIENT LAW 23-27 (3d Amer. ed. 1888); 3 BLACKSTONE'S COMMENTARIES 1553 (W. Jones ed. 1916) (fictions of law are always founded in equity). But in the area of search and seizure, the past fifty years demonstrates that there is no appearance of stability to maintain. The Court has continually recognized individual rights and has consistently created safeguards to preserve those rights. *See* notes 3-5 *supra*. In addition, equitable results are not achieved in the search and seizure context when fictions of law are used to circumvent the ultimate defendant's fourth amendment right to privacy. Accordingly, when fictions are used to deprive an individual of guaranteed rights, as in *Stoner*, these fictions of law must be viewed with the contempt shown for them by Jeremy Bentham when he wrote:

> What you have been doing by the fiction — could you, or could you not, have done it without the fiction? If not, your fiction is a wicked lie. If yes, a foolish one. Such is the dilemma. Lawyer! escape from it if you can.

7 J. BENTHAM WORKS 283 (1843).

30. United States v. Matlock, 94 S. Ct. 988, 993 (1974).

this test, a new fiction that will offset the good which resulted from the rejection of the fictions in *Stoner*.

The new fiction stems from the underpinnings of the access and control test and can best be illustrated through the use of a simple hypothetical situation: Assume police officers suspect Jones of possessing contraband in his home. They know their suspicions do not rise to the level needed to establish probable cause, and therefore, they know they cannot obtain a search warrant. However, they also believe that Jones' roommate, Smith, knows nothing about Jones' suspected illegal activity. In Jones' absence the police ask Smith if he would consent to a search of the house. He gives his consent and the police enter and search the premises. In this hypothetical example, clearly Jones is the suspect at whom the search is directed. Assuming Smith has common authority over the premises, his consent creates a valid search; and any articles seized may be used as evidence against Jones.[31] The access and control test holds that such a search is valid because Smith could waive his own right to fourth amendment protections.[32] It is therefore only coincidental that his roommate, who was the suspect against whom the search was directed, was also affected by Smith's waiver of his own rights. The third-party consent search is held valid because the search was of the consenting person's premises, and not the nonconsenting suspect's premises. Obviously, when the search is said to be directed at one other than the suspect but is nevertheless made for the purpose of obtaining evidence to be used against him, a fiction has been employed. In reality, what has taken place is that one party has been permitted to waive the fourth amendment right to privacy of *both* co-occupants, the very result which the Court tried to avoid by rejecting the fictions employed by the lower courts in *Stoner*.

The second problem is whether a third-party consent search is *place* or *person*-oriented. This problem arises when the suspect is in police custody or is otherwise available to the police for questioning. The access and control test is founded upon the consenting party's relationship to the place searched,[33] and therefore

31. This assumes no violation of other search and seizure safeguards, *i.e.*, consent being involuntary. Schneckloth v. Bustamonte, 412 U.S. 904 (1973).

32. People v. Nunn, 55 Ill. 2d 344, 304 N.E.2d 81 (1973), *cert. denied*, 416 U.S. 904 (1973).

33. *See* United States v. Sferas, 210 F.2d 69, 74 (7th Cir. 1954), *cert. denied*, 347 U.S. 935 (1954) (validity of consent turns on consenting person's right to use or occupancy of *premises*) (emphasis added). *See also* United

seems to be *place*-oriented.[34] The problem that arises when one emphasizes *place* under the access and control test is that the fourth amendment speaks of a personal right protecting people, not places.[35]

The access and control test's emphasis on *place* subjects that test to abuse by officials who intentionally seek a third party's consent at a certain time *because* of the absence of the suspect. The test, as it presently exists, permits such tactics even though they clearly run counter to the spirit of consent searches.[36] Additionally, the test also allows police to circumvent the policy against allowing a search without a warrant where one co-occupant consents to a search and the other co-occupant refuses.[37]

The seriousness of this second problem is compounded where suspicion has focused on a person who is available to the police. Since the access and control test only inquires into the relationship of the consenting person to the place searched, permission to search may be granted in cases where it otherwise would have been denied had the suspect himself been asked to consent to the search. Permission or refusal to search may turn on the fortuitous presence or absence of the ultimate defendant, a result the Supreme Court has tried to avoid whenever constitutional rights are at stake.[38] These types of situations demonstrate the need for safeguards in the application of the access and control test.

States v. Stone, 471 F.2d 170 (7th Cir. 1972), *cert. denied*, 411 U.S. 931 (1973); United States v. Wixom, 441 F.2d 623 (7th Cir. 1971).

34. *See* Berner *supra* note 15, at 548-49.

35. Katz v. United States, 389 U.S. 347, 351 (1967). But note Mr. Justice Harlan's analysis of the issue:

> [T]he question, however, is what protection it [the fourth amendment] affords to those people. Generally, as here, the answer to that question requires reference to a "place."

Id. at 361 (concurring opinion).

36. *See* Schneckloth v. Bustamonte, 412 U.S. 218 (1973), wherein the Court stated:

> Consent searches are part of the standard investigating technique of law enforcement agencies. They normally occur on the highway, or in a person's home or office, and under informal and unstructured conditions. The circumstances that prompt the initial request to search may develop quickly or be a logical extension of investigative police questioning.

Id. at 231-32.

37. *See* Carlton v. United States, 391 F.2d 684, 686 n.4 (8th Cir. 1968); Lucero v. Donovan, 354 F.2d 16 (9th Cir. 1966); Tompkins v. Superior Court, 59 Cal. 2d 65, 378 P.2d 113, 27 Cal. Rptr. 889 (1963).

38. The Supreme Court has consistently placed the need for constitutional protections above subtleties and distinctions that would deprive persons

A PROPOSED SOLUTION TO THE MATLOCK PROBLEMS

When suspicion focuses upon a particular person, and that person is in police custody or is otherwise available to the police for questioning, a warrantless search is valid only if it is the suspect who provides the consent for that search.

As originally stated, the purpose of this paper is to demonstrate measures aimed at providing adequate safeguards to fourth amendment rights in the situation where a suspect is available for questioning. Since the Supreme Court has expressly rejected the necessity for a specific disclosure of one's fourth amendment rights prior to a consent search,[39] the proposed test represents a workable compromise to the hard and fast rule of specific disclosure. The triggering device of this proposal is that suspicion has focused on a particular person. It is the same type of standard used in police interrogation and grand jury investigation situations to determine at what point the *Miranda*[40] warning must be given. The focus of suspicion test arises, according to the Supreme Court, when "the investigation is no longer a general inquiry into an unsolved crime but has begun to focus on a particular suspect,"[41] and "when the process shifts from investigatory to accusatory. . . ."[42] Exactly when the focus of suspicion is reached is a question few courts have endeavored to answer. Generally, that focus point is determined on a case by case basis through inquiry into the conduct of the investigating officers. For example, one court determined when suspicion had

of those rights. For example, where the standing necessary to challenge the admissibility of evidence seized in a warrantless search turned on whether the defendant was a lessee, licensee, invitee, or guest, the Court rejected such fortuitous distinctions and said that such distinctions "ought not to be determinative in fashioning procedures ultimately referable to constitutional safeguards." Jones v. United States, 362 U.S. 257, 266 (1959). *A fortiori*, the fortuitous presence or absence of the ultimate defendant should not determine his right to constitutional protections.

39. It has been suggested that a type of *Miranda* warning be given prior to consent searches of any kind, third-party or otherwise. United States v. Nikrasch, 367 F.2d 74 (7th Cir. 1966) (dictum). The warning would consist of a statement to the effect that consent to search the premises may be withheld and that the party has the right to deny police access to the premises unless they have a search warrant. The Supreme Court has recently rejected this suggestion in Schneckloth v. Bustamonte, 412 U.S. 218, 231-34 (1972), on the grounds that such a warning would be too impractical in the normal consent search setting.

40. Miranda v. Arizona, 384 U.S. 436 (1966).

41. Escobedo v. Illinois, 378 U.S. 478, 490 (1964).

42. *Id.* at 492

focused on a particular suspect in a murder case by the following reasoning:

> [It] is apparent that while hospitalized D'Nicuola had become the focus of an investigation. . . . Although at the time of the hospital interview the police were unaware of Thomas Effting's death, they definitely knew that Effting was missing and that he and D'Nicuola had not kept a previously scheduled appointment. Being aware of these circumstances and having found a recently fired revolver in D'Nicuola's automobile, it is naive to assume that when the police came to the hospital to question the appellant they were merely following up on an attempted suicide. This point is further substantiated by the fact that the first specific questions asked by the police concerned the ownership of the weapon.[43]

In grand jury investigations, the point at which the person testifying is entitled to the constitutional safeguards of the *Miranda* warning is described by a number of names: when the witness becomes the "target of the investigation,"[44] when he becomes the "putative defendant,"[45] or the person upon whom "the investigation has begun to focus,"[46] or the "prospective" or "de facto" defendant.[47] Whether the witness has acquired such a status is again a question of fact to be determined from the conduct of the investigating authorities.[48] When suspicion has focused on an individual as the possible perpetrator of a crime, and a consent search is sought, the safeguard proposed would require the police to seek the consent of the party they suspect of the crime.[49]

The proposed safeguard to fourth amendment rights will only come into play when the police know, or have reason to know

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43. Commonwealth v. D'Nicuola, 448 Pa. 54, 202 A.2d 333, 335 (1972).

44. People v. Ianniello, 21 N.Y.2d 418, 420, 235 N.E.2d 439, 441, 288 N.Y.S.2d 462, 465 (1968).

45. United States v. Matlock, 94 S. Ct. 988, 991 (1974).

46. Escobedo v. Illinois, 378 U.S. 478, 490 (1964).

47. Y. KAMISAR, W. LAFAVE, AND J. ISRAEL, MODERN CRIMINAL PROCEDURE 946 (4th ed. 1974).

48. *See* United States v. Frucktman, 282 F. Supp. 534 (N.D. Ohio 1968); State v. Sibilia, 88 N.J.Super. 546, 212 A.2d 869 (1965).

49. It is important to note that exigent circumstances may still be the controlling factors in certain cases. For example, where the suspect is arrested in or near the premises, and the police believe that evidence may be destroyed within the house by a confederate, a search may be made without the consent of the arrestee. Vale v. Louisiana, 39 U.S. 30 (1970).

through reasonable efforts, the whereabouts of the suspect, or have the suspect in custody, or under arrest. In these situations, absent exigent circumstances,[50] there is no valid reason for allowing the police to direct to a third person their request to search for evidence which will be used against the suspect. The following situations are examples demonstrating the use and results of using the proposed constitutional safeguard. Each of the following three examples assumes that Jones and Smith are co-occupants, and that each has access and control over the entire premises.

(1) The police suspect Jones of committing a criminal offense, but get Smith's consent to search the premises, when Jones was, in fact, available to them. Any items seized during such a search would be inadmissible as evidence against either Jones or Smith. This result rests on the police's failure to meet the threshold requirement necessary to validate a consent search. That requirement, of course, is the consent of the person upon whom suspicion had focused. Any items seized from such a search would therefore be subject to the exclusionary rule.[51]

(2) The police suspect Jones, when Smith has actually committed the crime. Jones is available to the police, but the police use Smith's consent to conduct a search. Evidence is found incriminating Smith. In this example, the evidence may be used against Smith. This result harmonizes with the rationale underlying consent searches, because Smith waived his own personal right to fourth amendment protections. The police do not have to meet the threshold requirement of obtaining the consent of the person upon whom suspicion had focused unless they seek to use that evidence against the absent, nonconsenting suspect. Evidence gathered against Smith is admissible because he gave his consent to the search that produced the evidence, and is precluded from later withdrawing that consent. And since the evidence is not being used against Jones, he has no standing[52] to suppress the evidence by arguing that the threshold requirement was not met.

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50. Circumstances such as actual fear that the evidence will be destroyed, or fear for one's own safety or the safety of another would justify a warrantless search without first obtaining consent.

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

52. The issue of standing to contest searches is discussed in Brown v. United States, 411 U.S. 223 (1973); Alderman v. United States, 394 U.S. 165 (1969); Jones v. United States, 362 U.S. 257 (1960).

(3) The police suspect Jones of committing a crime and obtain his consent to search the area. They find evidence incriminating both Jones and Smith. Here, the evidence is admissible against both Jones and Smith. By seeking the consent of the person upon whom suspicion had focused, the police met the threshold requirement proposed by this safeguard. The items seized are admissible against Smith under the general theory that if evidence is constitutionally seized, it may be used against any person.[53] Since Smith never gave his consent to the request for a search, an argument might be made that the items seized should be excluded as evidence against him. However, this argument must be rejected. The purpose of the proposed safeguard is not to emasculate consent searches, or erode the access and control test, but to prevent possible abuse of consent searches by law enforcement officials. Where such abuse is clearly absent, as where the threshold requirement is met, the evidence held to be constitutionally seized is admissible against any defendant.[54]

As the previous examples demonstrate, the proposed safeguard does away with the need for the fictions thought necessary to validate consent searches. The proposed safeguard also does away with the problem of fortuity. Whether the suspect is present or absent when the police would initially like to make a consent search is not important, since they must seek the consent of the suspect.[55]

Expediency suggests that the police need not turn every stone to find the suspect in complying with the proposed test when there is no focus of suspicion on any one person, or when the suspect purposefully makes himself unavailable for police

53. In Skally v. United States, 347 U.S. 935 (1954), the Court expressed the rule that where two persons have equal rights to the use or occupation of premises, either may give consent to a search, and the evidence seized may be used against either occupant. This rule was reaffirmed in United States v. Matlock, 94 S. Ct. 988, 992 n.4 (1974).

54. This would also be the result where police suspect both Jones and Smith of having committed a crime, but only obtain Jones' consent to search, even though Smith was also available to the police. Any items subsequently found and seized which incriminate Jones, Smith or both are admissible into evidence.

55. Naturally, if the suspect is in police custody, the consent must be voluntarily, knowingly, and intelligently given for there to be a valid waiver of his fourth amendment rights. Schneckloth v. Bustamonte, 412 U.S. 218 (1973). While at least one court, Judd v. United States, 190 F.2d 649 (D.C. Cir. 1951), held that a suspect in police custody could *never* give such a voluntary consent due to the inherently coercive nature of custody, the Supreme Court's decision in *Schneckloth* is *contra.*

questioning.[56] The "focus of suspicion" test is not an inflexible test that must be met in every situation. To make such a demand on law enforcement officers would be both unrealistic and unreasonable. Whether there was compliance with the proposed safeguard would be a matter for the trial judge to decide at the suppression of evidence hearing. The officers who conducted the search in question would be required at the hearing to explain to an impartial judicial officer exactly what procedures were followed. The judge would consider the efforts made by the police to locate the suspect, along with any special circumstances that may have necessitated an immediate search. Perhaps in its simplest form, the test could be administered by asking two questions: (1) "Did the defendant give his consent?" and (2) "if the defendant did not give his consent, *why* didn't he?" A finding that the officers did not comply with the proposed safeguard measures would subject the evidence gathered to the exclusionary rule. In cases where some doubt exists as to the truth of the facts as reported by the police, a determination as to whether the proposed safeguard was observed could be made by applying the same tests used to determine "timed arrests"[57] and "pretext arrests."[58]

One criticism of any type of requirement designed to protect constitutional rights is that it simultaneously hinders law enforcement techniques.[59] In the present case that criticism is valid. Consent searches would require more police effort than has been necessary in the past. Third-party consent searches would be more difficult to validate using the proposed safeguard than

56. Wade v. Warden, Maryland Penitentiary, 278 F. Supp. 904 (D. Md. 1968), involved a suspect who fled from police pursuit, leaving behind a wife and child. Under the proposed "focus of suspicion" test, the wife's subsequent consent to search the automobile and apartment would be sufficient to validate the search even though suspicion had clearly focused on a suspect. This result is justified because it was the suspect himself who made it impracticable for his consent to be obtained.

57. For there to be a "timed arrest," two things must coalesce. First, the police must have clearly disregarded the opportunity for an earlier arrest; and second, it must be clear that the sole purpose of the police in not making an earlier arrest was to make a more fruitful search later. Chimel v. California, 395 U.S. 752 (1969).

58. If a court believes that the arrest which produced the ability for the police to search incident to the arrest (a search either of the immediate area in control of the arrestee, or a plain-view search) was a pretext, *i.e.*, one that police would not have made absent their suspicions of a crime other than the one on which the arrest was based, then the search incident to that arrest will be held invalid. Green v. United States, 355 U.S. 184 (1957).

59. *See* Watts v. Indiana, 338 U.S. 49, 59 (1963) (Jackson, J., concurring in part and dissenting in part).

by using the access and control test alone. Use of the proposed safeguard, however, is not unreasonable. The fourth amendment itself was designed to hinder unfettered invasions of privacy by the state.[60] The consent search conducted without a warrant and without a showing of probable cause before a neutral magistrate provides that kind of invasion most intrusive and most subject to abuse. When the result of permitting such an invasion is to forfeit effectively one's constitutional rights, a hindrance to police investigations such as the "focus of suspicion" safeguard proposed here is not only justified, but mandated.

CONCLUSION

Former Chief Judge Swygert, dissenting in a case in which the seventh circuit upheld the validity of a third-party consent search, stated that the issue in such searches was:

> Are the police to be deprived of the benefits of a consent search of a shared premises when the only party who could effectively waive his fourth amendment rights to privacy, and who might do so if asked, is absent from those premises?[61]

So framed, the question points out the fortuity of the present access and control test, and the seriousness of its application without safeguards. The grant or denial of consent may well turn on the absence or presence of the ultimate defendant, and its application may well result in the forfeiture of the ultimate defendant's fourth amendment right to privacy. The Supreme Court has consistently rejected fictitious and fortuitous methods of by passing constitutional rights,[62] and should do so with the

60. United States v. Matlock, 94 S. Ct. 988, 998 n.1 (1974) (Douglas, J., dissenting opinion).

61. United States v. Stone, 471 F.2d 170, 177 (7th Cir. 1972) (dissenting opinion). Chief Judge Swygert went on to say:

> I suggest that the answer lies in the reasonableness of this kind of search, considering all the attendant circumstances. The exigencies of the situation, the relationship of the parties, the whereabouts of the absent party, and the reasons for his absence are all relevant factors.

Id. at 177.

62. *See* Warden v. Hayden, 387 U.S. 294 (1967), where the Court stated:

> We have recognized that the principal object of the Fourth Amendment is the protection of privacy rather than property, and have increasingly discarded fictional and procedural barriers rested on property concepts.

Id. at 304.

access and control test. The proposal introduced here guards against abuses of this property-based test by preventing a forfeiture of one's rights by a person other than the party whose rights are at stake. To prevent such abuses has been the goal of the Court in the past. Requiring the consent of the suspect under the proposed safeguard would achieve that goal in the future.