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Article 14

Third Party Consent to Warrantless Police Search of Jointly Occupied Premises Valid Notwithstanding Contemporaneous Objection of Co-Occupant

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by making the appellate divisions their courts of last resort.

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Third party consent to warrantless police search of jointly occupied premises valid notwithstanding contemporaneous objection of co-occupant.

The fourth amendment[247] prohibition against unreasonable searches and seizures generally requires that government officials obtain a valid warrant prior to conducting a search.[248] The need for a warrant is obviated, however, if valid consent[249] to the search is

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[247] The fourth amendment provides:

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

U.S. CONST. amend. IV; *see* N.Y. CONST. art. 1, § 12.

[248] *See* Warden v. Hayden, 387 U.S. 294, 301-02 (1967); Mapp v. Ohio, 367 U.S. 643, 643-60 (1961); Weeks v. United States, 232 U.S. 383, 393-94 (1914); 1 W. LAFAVE, SEARCH AND SEIZURE § 3.1, at 438-39 (1978); Comment, 30 RUTGERS L. REV. 1056, 1057 (1977).

Warrantless searches are deemed unreasonable per se, Schneckloth v. Bustamonte, 412 U.S. 218, 219 (1973); Coolidge v. New Hampshire, 403 U.S. 443, 454-55 (1971) (citing Katz v. United States, 389 U.S. 347, 357 (1967)), unless they are predicated on one of the established exceptions to the warrant requirement. *See, e.g.*, Michigan v. Tyler, 436 U.S. 499, 509-10 (1978) (exigency); United States v. Ramsey, 431 U.S. 606, 619 (1977) (border searches); South Dakota v. Opperman, 428 U.S. 364, 372-76 (1976) (inventory search of automobile); United States v. Matlock, 415 U.S. 164, 165-66 (1974) (consent); United States v. Robinson, 414 U.S. 218, 234-35 (1973) (search incident to traffic arrest); Cady v. Dombrowski, 413 U.S. 433, 447-48 (1973) (dangerous weapon); Coolidge v. New Hampshire, 403 U.S. 443, 465-71 (1971) (open view); Chambers v. Maroney, 399 U.S. 42, 48-52 (1970) (automobile); Chimel v. California, 395 U.S. 752, 762-63 (1969) (search incident to lawful arrest); People v. Howard, 50 N.Y.2d 583, 592-93, 408 N.E.2d 908, 914, 430 N.Y.S.2d 578, 585 (1980) (abandonment); People v. Kuhn, 33 N.Y.2d 203, 209-10, 306 N.E.2d 777, 780, 351 N.Y.S.2d 649, 653-54 (1973) (airport searches); *cf.* Mincey v. Arizona, 437 U.S. 385, 395 (1978) (no scene-of-crime exception). Evidence seized as a result of an illegal search will be suppressed pursuant to the exclusionary rule. Mapp v. Ohio, 367 U.S. 643, 655 (1961).

[249] In order to be valid, consent to a warrantless search must be made voluntarily. *See, e.g.*, Schneckloth v. Bustamonte, 412 U.S. 218, 222 (1973). Whether consent is voluntary "is a question of fact to be determined from the totality of all the circumstances." *Id.* at 227. Some of the factors to be considered in determining the voluntary nature of a defendant's consent include:

> the youth of the accused, his lack of education, or his low intelligence, the lack of any advice to the accused of his constitutional rights, the length of detention, the repeated and prolonged nature of the questioning, and the use of physical punishment such as the deprivation of food or sleep.

Id. at 226 (citations omitted).

Consent has been rendered involuntary by the presence of a disproportionate number of police in relation to the number of defendants, People v. Gonzalez, 39 N.Y.2d 122, 124,

obtained.[250] Consent sufficient to legitimize a warrantless search need not be obtained from the person against whom the search is directed.[251] Rather, it has been held that in the absence of the subject of the search a third party with joint control over the premises

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347 N.E.2d 575, 577, 383 N.Y.S.2d 215, 217 (1976), and by the use of mental coercion by the police, People v. Litt, 71 App. Div. 2d 926, 926, 419 N.Y.S.2d 726, 727 (2d Dep't 1979). Although the failure to advise the defendant of his right to withhold consent is not dispositive of the question of voluntariness, it is one factor to be taken into account. Schneckloth v. Bustamonte, 412 U.S. at 227; People v. Gonzalez, 39 N.Y.2d 122, 130, 347 N.E.2d 575, 581, 383 N.Y.S.2d 215, 221 (1976); People v. Kuhn, 33 N.Y.2d 203, 209, 306 N.E.2d 777, 780, 351 N.Y.S.2d 649, 653 (1973).

[250] United States v. Matlock, 415 U.S. 164, 169-72 (1974); Schneckloth v. Bustamonte, 412 U.S. 218, 219 (1973); Katz v. United States, 389 U.S. 347, 358 & n.22 (1967); People v. Kuhn, 33 N.Y.2d 203, 208, 306 N.E.2d 777, 779, 351 N.Y.S.2d 649, 652 (1973). When it is claimed that valid consent obviated the need for a search warrant, the prosecution bears the burden of proving that the consent was voluntary. Bumper v. North Carolina, 391 U.S. 543, 548 (1968). *See generally* note 249 *supra.*

[251] *See* United States v. Matlock, 415 U.S. 164, 171 (1974) (paramour consented to search of bedroom which she shared with defendant); Frazier v. Cupp, 394 U.S. 731, 740 (1969) (consent obtained from one who shared the searched property with the defendant); United States v. Wixom, 441 F.2d 623, 625 (7th Cir. 1971) (owner of premises shared with defendant validly consented to its search); People v. Carter, 30 N.Y.2d 279, 282, 283 N.E.2d 746, 746-47, 332 N.Y.S.2d 865, 866 (1972) (wife consented to search of the marital home). *See generally* W. RINGEL, SEARCHES & SEIZURES, ARRESTS AND CONFESSIONS § 9.5(c), (f) (2d ed. 1980).

In upholding the validity of third-party consents, many early cases employed either an "agency" or "relationship" approach. *See, e.g.,* Lucero v. Donovan, 354 F.2d 16, 21 (9th Cir. 1965); Roberts v. United States, 332 F.2d 892, 895-96 (8th Cir. 1964), *cert. denied,* 380 U.S. 980 (1965); United States v. Eldridge, 302 F.2d 463, 465 (4th Cir. 1962). Under the agency approach, if the defendant had expressly or impliedly authorized the third party to consent to a police search, the search was held to be valid. *See, e.g.,* Lucero v. Donovan, 354 F.2d 16 (9th Cir. 1965). Similarly, under the relationship approach, if the implicated party had some strong relationship to the third party, the consent was deemed valid. *See, e.g.,* Stein v. United States, 166 F.2d 851, 853 (9th Cir.), *cert. denied,* 334 U.S. 844 (1948). Subsequently, the validity of third party consent was predicated upon the consenting party's possession and control of the searched premises. *See, e.g.,* United States v. Kellerman, 431 F.2d 319, 324 (2d Cir.), *cert. denied,* 400 U.S. 957 (1970); Galbraith v. United States, 387 F.2d 617, 618 (10th Cir. 1968). In applying the "possession and control" test, many courts focused on the third party's relationship to the premises being searched, rather than to the owner of the premises, *see, e.g.,* Carlton v. United States, 391 F.2d 684, 686 (8th Cir. 1968), *cert. denied,* 394 U.S. 1014 (1969); Burge v. United States, 342 F.2d 408, 413 (9th Cir.), *cert. denied,* 382 U.S. 829 (1965). The Supreme Court, however, has rejected the contention that a third party's right to consent to a search of jointly used premises is predicated on his property interest in the premises. United States v. Matlock, 415 U.S. 164, 171 n.7 (1974). The *Matlock* Court stated:

> [The third-party consent rule] rests rather on mutual use of the property by persons generally having joint access or control for most purposes, so that it is reasonable to recognize that any of the co-inhabitants has the right to permit the inspection in his own right and that the others have assumed the risk that one of their number might permit the common area to be searched.

Id.

may consent.[252] It was unsettled, however, whether the third party's consent would validate a warrantless search if the co-inhabitant is present and objects to the search of the jointly controlled premises.[253] Recently, in *People v. Cosme*,[254] the New York Court of Appeals resolved this uncertainty, holding that a third party with the right of equal access to or control over premises could consent to a warrantless police search notwithstanding the objections of a co-occupant.[255]

In *Cosme*, an argument between the defendant and his fiancee, Hennessey, prompted Hennessey to report to the police that Cosme kept a gun and a quantity of cocaine in the apartment they

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[252] *See* People v. Carter, 30 N.Y.2d 279, 283 N.E.2d 746, 332 N.Y.S.2d 865 (1972). In *Carter*, the Court of Appeals adopted the view that a third party's ability to consent is based upon an independent right "to authorize entry into the premises where she lives and of which she [has] control." *Id.* at 282, 283 N.E.2d at 747, 332 N.Y.S.2d at 866 (quoting Roberts v. United States, 332 F.2d 892, 897 (8th Cir. 1964)). The *Carter* Court thereby rejected the "agency" or "relationship" approach utilized by some courts to uphold the validity of third party consents. 30 N.Y.2d at 282, 283 N.E.2d at 746-47, 332 N.Y.S.2d at 866. Having decided that the authority to permit police entry is a personal right stemming from the individual's right of access to the premises, the Court subsequently had no difficulty upholding the validity of a landlord's consent to a search of her tenant's bedroom where the room was shared with the landlord's young son. *See* People v. Wood, 31 N.Y.2d 975, 293 N.E.2d 559, 341 N.Y.S.2d 310 (1973) (per curiam). The *Wood* Court reasoned that because the room was not used exclusively by the defendant, he had no reasonable expectation of privacy. Therefore, the landlord's right to enter her son's bedroom validated her consent to a search of the room. *Id.* at 976, 293 N.E.2d at 560, 341 N.Y.S.2d at 311.

The validity of a third party's consent to a search of effects, as opposed to premises, has also been recognized. In Frazier v. Cupp, 394 U.S. 731 (1969), incriminating evidence was seized from a duffel bag which was shared by the defendant and his cousin. The search had been consented to by the cousin in the defendant's absence. In holding the consent valid, the Court reasoned that by allowing another party to keep and use his property, the defendant assumed the risk that such party would allow the police to inspect it. *Id.* at 740.

[253] *Compare* United States v. Robinson, 479 F.2d 300, 303 (7th Cir. 1973) *and* Lucero v. Donovan, 354 F.2d 16, 21 (9th Cir. 1965) *and* People v. Mortimer, 46 App. Div. 2d 275, 277, 361 N.Y.S.2d 955, 958 (4th Dep't 1974) *with* United States v. Sumlin, 567 F.2d 684, 687-88 (6th Cir. 1977), *cert. denied*, 435 U.S. 932 (1978) *and* People v. Dolan, 95 Misc. 2d 470, 475, 408 N.Y.S.2d 249, 252 (Sup. Ct. Bronx County 1978). *See also* United States v. Matlock, 415 U.S. 164 (1974). In *Matlock* the Supreme Court stated 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." *Id.* at 170 (emphasis added); *accord*, People v. Howland, 62 App. Div. 2d 1094, 1096, 405 N.Y.S.2d 131, 134 (3d Dep't 1978); People v. Mortimer, 46 App. Div. 2d 275, 276, 361 N.Y.S.2d 955, 956 (4th Dep't 1974). The Sixth Circuit, however, has recently stated that the *Matlock* decision imposed no limitation on a third party's right to consent in the presence of his co-occupant. *See* United States v. Sumlin, 567 F.2d 684 (6th Cir. 1977), *cert. denied*, 435 U.S. 932 (1978); note 274 *infra*.

[254] 48 N.Y.2d 286, 397 N.E.2d 1319, 422 N.Y.S.2d 652 (1979), *aff'g*, 63 App. Div. 2d 1123, 405 N.Y.S.2d 1012 (1st Dep't 1978) (mem.).

[255] 48 N.Y.2d at 292, 397 N.E.2d at 1322, 422 N.Y.S.2d at 655.

shared.[256] Hennessey provided the responding officers with a key to the apartment and a diagram indicating the location of the contraband.[257] Upon entering the apartment, the police seized the protesting defendant and a companion,[258] and searched the closet which Hennessey had indicated was the repository of the contraband.[259]

Based upon the evidence seized, Cosme was indicted for criminal possession of a gun and narcotics. The defendant moved to suppress the evidence on the grounds, *inter alia,* that the police had not obtained valid consent for the search.[260] Denying the motion, the trial court concluded that Hennessey's "unfettered access to and joint occupancy of" Cosme's apartment gave her the authority to consent to a search despite the defendant's objection.[261] The Appellate Division, First Department, affirmed the defendant's subsequent conviction without opinion, and the defendant appealed.[262]

In an opinion authored by Judge Gabrielli,[263] a unanimous Court of Appeals affirmed, holding that the seized evidence had been properly admitted.[264] Initially, the Court noted that the theoretical basis for the third party consent rule is that when premises are jointly controlled each inhabitant has a right to consent which is independent from that of other occupants.[265] Proceeding from this premise, the Court held that an objection by an individual does not vitiate the consent of a co-occupant,[266] since by granting another control over the premises, an individual has either as-

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[256] *Id.* at 288-89, 397 N.E.2d at 1320, 422 N.Y.S.2d at 653. The Court, though stating that the apartment was shared on a "part-time" basis, did not elaborate on the amount of time spent there by Hennessey. *See* note 269 *infra.*

[257] 48 N.Y.2d at 289, 397 N.E.2d at 1320, 422 N.Y.S.2d at 653.

[258] *Id.* at 289, 397 N.E.2d at 1321, 422 N.Y.S.2d at 653.

[259] *Id.*

[260] *Id.* at 289, 397 N.E.2d at 1321, 422 N.Y.S.2d at 653.

[261] *Id.* at 289-90, 397 N.E.2d at 1321, 422 N.Y.S.2d at 653.

[262] 63 App. Div. 2d 1123, 405 N.Y.S.2d 1012 (1st Dep't 1978) (mem.).

[263] Chief Judge Cooke and Judges Jasen, Jones, Wachtler, Fuchsberg and Meyer joined with Judge Gabrielli.

[264] 48 N.Y.2d at 292-93, 397 N.E.2d at 1323, 422 N.Y.S.2d at 655-56.

[265] *Id.* at 291-92, 397 N.E.2d at 1321-22, 422 N.Y.S.2d at 654-55.

[266] *Id.* at 292-93, 397 N.E.2d at 1322-23, 422 N.Y.S.2d at 655-56. The Court indicated that the defendant's protests upon being handcuffed prior to the search did not necessarily constitute a refusal to consent thereto. *Id.* at 290, 397 N.E.2d at 1321, 422 N.Y.S.2d at 654. It was concluded, however, that even an explicit refusal by the defendant to consent to the search would have been ineffective to invalidate Hennessey's consent. *Id.*

sumed the risk of consent or reduced his expectation of privacy.[267] In either case, the Court concluded, the individual cannot prevent a search when the valid consent of a co-occupant has been obtained.[268] Applying this reasoning to the case at bar, the Court ruled that Hennessey possessed "the requisite degree of control" to give rise to an independent right to consent to the search,[269] and consequently, any objection by Cosme was ineffective to prevent the search or render the seized evidence inadmissible.[270]

It is suggested that the *Cosme* Court's decision that one occupant's consent to a warrantless search is valid despite the protests of his co-occupant is a logical extension of prior cases upholding the validity of a third party's consent.[271] It is well established that a party who possesses control of premises has a vested, independent right to consent to a search of those premises.[272] Since this right is personal to each party and independent of that possessed by others with like authority, a subsequent objection by one co-occupant to a warrantless search conducted pursuant to consent from another co-occupant has been held to be ineffective to invalidate the search.[273] By logical extension, therefore, a contemporaneous objection also should be ineffective.[274]

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[267] *Id.* at 292, 397 N.E.2d at 1322, 422 N.Y.S.2d at 655.

[268] *Id.*

[269] *Id.* at 292, 397 N.E.2d at 1323, 422 N.Y.S.2d at 655. In holding that Hennessey possessed the "requisite degree of control" over the premises, the Court relied on the finding below that she had equal access to and use of both the apartment and the bedroom closet. *Id.*

[270] *Id.* at 292-93, 397 N.E.2d at 1323, 422 N.Y.S.2d at 655-56. Having concluded that Hennessey's consent was sufficient to legitimize the search, it was unnecessary for the Court to examine whether another recognized exception to the rule barring warrantless searches was applicable. *Id.* at 293, 397 N.E.2d at 1323, 422 N.Y.S.2d at 656.

[271] *See, e.g.*, People v. Wood, 31 N.Y.2d 975, 293 N.E.2d 559, 341 N.Y.S.2d 310 (1973); People v. Carter, 30 N.Y.2d 281, 283 N.E.2d 746, 332 N.Y.S.2d 865 (1972).

[272] United States v. Matlock, 415 U.S. 164 (1974); United States v. Stone, 471 F.2d 170, 173 (7th Cir. 1972), *cert. denied*, 411 U.S. 931 (1973); People v. Carter, 30 N.Y.2d 281, 283 N.E.2d 746, 332 N.Y.S.2d 865 (1972); *see* W. RINGEL, *supra* note 251, § 9.5(c), at 9-25.

[273] *See, e.g.*, People v. Wood, 31 N.Y.2d 975, 293 N.E.2d 559, 341 N.Y.S.2d 310 (1973) (per curiam); People v. Carter, 30 N.Y.2d 281, 283 N.E.2d 746, 332 N.Y.S.2d 865 (1972).

[274] *See* Weinreb, *Generalities of the Fourth Amendment*, 42 U. CHI. L. REV. 47, 61-62 (1974); White, *The Fourth Amendment As A Way of Talking About People: A Study of* Robinson *and* Matlock, 1974 SUP. CT. REV. 165, 222; *cf.* United States v. Sumlin, 567 F.2d 684 (6th Cir. 1977), *cert. denied*, 435 U.S. 932 (1978) (third party consent valid although obtained subsequent to defendant's refusal to consent); People v. Dolan, 95 Misc. 2d 470, 408 N.Y.S.2d 249 (Sup. Ct. Bronx County 1978) (seizure of blood samples valid when consent given by hospital personnel even though defendant had refused to submit to separate blood test). It has been observed that since a co-occupant has a personal, individual right to consent to a warrantless search, the defendant's protests cannot serve to invalidate consent

The *Cosme* Court expressly left open the efficacy of third party consent in cases where either the consenting individual "enjoys less than unrestricted access to and control over the premises to be searched" or a co-occupant consents to a search of a specific area of the jointly-controlled premises which another co-occupant has reserved for his exclusive use.[275] It is submitted, however, that validating a consensual search in either circumstance would be inconsistent with the underlying premises of the third party consent rule. Where the consenting party's access to or use of part or all of the premises is restricted in some manner, the authority which gives rise to the right to consent is absent.[276] Extending the appli-

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that was independent of his authority. *See* Weinreb, *supra*, at 62. *See also* W. RINGEL, *supra* note 251, § 9.5(c), at 9-25; Wefing & Miles, *Consent Searches and the Fourth Amendment: Voluntariness and Third Party Problems*, 5 SETON HALL L. REV. 211, 269 (1974).

In United States v. Sumlin, the defendant contended that his co-occupant's consent to the warrantless search of a jointly-used apartment was invalid because it was obtained after the defendant had refused to consent to the search. 567 F.2d at 686-87. In upholding the validity of the third party's consent, the *Sumlin* court minimized the significance of the Supreme Court's reference in *Matlock* to the absence of the nonconsenting party. *Id.* at 688; *see* United States v. Matlock, 415 U.S. 164, 171 (1973); note 253 *supra*. Noting that the *Matlock* defendant had just been arrested in the front yard of the house when the third party's consent was procured, the *Sumlin* court interpreted *Matlock* as focusing on whether consent was obtained from a third party possessing common control over the premises to the search. 567 F.2d at 687-88. Where such consent has been obtained, the court concluded, the defendant possessed no reasonable expectation of privacy and hence his objection to the search was irrelevant. *Id.* at 688.

[275] 48 N.Y.2d at 293 n.2, 397 N.E.2d at 1328 n.2, 422 N.Y.S.2d at 655 n.2. The *Cosme* Court apparently recognized that a person may give others a right of access to his property but limit the exercise of that right. *See id.* For example, maintenance personnel may be provided with a key to the premises but with the expectation that it will be used only at a particular time or for a particular purpose. Similarly, property as a whole may be shared but with a specific area set aside for the exclusive use of one occupant.

[276] *See* United States v. Mojica, 442 F.2d 920 (2d Cir. 1971) (per curiam); United States v. Kellerman, 431 F.2d 319 (2d Cir.), *cert. denied*, 400 U.S. 957 (1970); People v. Wood, 31 N.Y.2d 975, 293 N.E.2d 559, 341 N.Y.S.2d 310 (1973) (per curiam).

Both the *Cosme* and *Matlock* decisions relied upon the theory that the person who permitted the search did so in his own right, and that this right derived from his access to and control of the property to a degree at least equal to that of the nonconsenting party. *See* United States v. Matlock, 415 U.S. 164, 171 & n.7 (1974); People v. Cosme, 48 N.Y.2d 286, 291-92, 397 N.E.2d 1319, 1322, 422 N.Y.S.2d 652, 654-55 (1979). Where the consenting party has less authority over the area in question than the nonconsenting occupant, however, it appears that the basis for allowing the former to consent would be absent. Thus, an area or portion of the property over which the defendant has retained exclusive control should be immune from a search authorized by a third party. *See* W. RINGEL, *supra* note 251, § 9.5(d), at 9-27. The *Cosme* Court's reliance on the fact that Hennessey had access to both the apartment and the closet where the contraband was found, *see* 48 N.Y.2d at 292, 397 N.E.2d at 1323, 422 N.Y.S.2d at 655, appears to support this conclusion. Moreover, in People v. Wood the Court stated that one who has exclusive possession and control over a

cability of the third party consent rule to such situations, moreover, would jeopardize a co-occupant's reasonable expectation of privacy. It is unrealistic to presume that a defendant assumed the risk that a person whose use of the premises was circumscribed could consent to a warrantless search.[277] Indeed, it appears that the application of the third party consent rule beyond the limits set forth in *Cosme* would undercut a defendant's fourth amendment rights based on his granting even a modicum of access or control of his premises to another and would subvert the judicial policy favoring use of search warrants.[278] It is suggested, therefore, that use of the third party consent rule be limited to situations where the consenting party enjoys "unfettered access to and control over" the premises searched.

Peter McNamara

Use of defendant's silence at time of arrest for impeachment violates due process, despite absence of Miranda *warnings*

It is well established in New York that a defendant's silence upon arrest may not be used by the prosecution in a criminal trial

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premises cannot be subjected to a warrantless search of those premises based on the consent of a third party. 31 N.Y.2d at 976, 293 N.E.2d at 559-60, 341 N.Y.S.2d at 311. Thus, it can be concluded that a third party's consent would not validate a warrantless search of an area used exclusively by a co-occupant.

It also appears that the consent of a third party would be invalid where the third party has less access and control than the nonconsenting individual. *See* Stoner v. California, 376 U.S. 483 (1964). In *Stoner*, a warrantless search of a hotel room was performed with the consent of the management in the absence of the occupant. *Id.* at 484-85. While acknowledging that the defendant impliedly shared control of the room with the hotel management, the Court held that the degree of control possessed by the hotel management was not sufficient to authorize consent to a police search. *Id.* at 488-90. It is logical to assume, therefore, that if a third party with less control cannot validly consent to a search in the absence of the occupant, he cannot do so in the presence of the occupant.

[277] The doctrine of assumption of risk is based on the theory that the defendant voluntarily has chosen to encounter a risk that is both recognized and appreciated. *See* Bacigal, *Some Observations and Proposals on the Nature of the Fourth Amendment*, 46 GEO. WASH. L. REV. 529, 541 (1978). As applied to third party consent situations, it has been reasoned that a willingness to share one's possession, use or control of property implies an assumption of the risk that the joint user might allow a police search of the property. *Id.* at 548. *See also* United States v. Matlock, 415 U.S. 164, 171 (1974); Frazier v. Cupp, 394 U.S. 731, 740 (1969).

[278] *See generally* Coolidge v. New Hampshire, 403 U.S. 443, 454-55 (1971); Katz v. United States, 389 U.S. 347, 357 (1967); Trupiano v. United States, 334 U.S. 699, 705 (1948); United States v. Houle, 603 F.2d 1297, 1299 (8th Cir. 1979); United States v. Prescott, 599 F.2d 103, 105 (5th Cir. 1979); People v. Kreichman, 37 N.Y.2d 693, 697, 339 N.E.2d 182, 186, 376 N.Y.S.2d 497, 502 (1975); 2 W. LAFAVE, SEARCH AND SEIZURE § 4.1, at 3 (1978).