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IN THE SUPREME COURT OF THE UNITED STATES

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GEORGIA, :
Petitioner, :
v. : No. 04-1067
SCOTT FITZ RANDOLPH. :
- - - - - x

Washington, D.C.
Tuesday, November 8, 2005

The above-entitled matter came on for oral
argument before the Supreme Court of the United States
at 11:07 a.m.

APPEARANCES:

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General, Atlanta, Georgia; on behalf of the
Petitioner.

MICHAEL R. DREEBEN, ESQ., Deputy Solicitor General,
Department of Justice, Washington, D.C.; for the
United States, as amicus curiae, supporting the
Petitioner.

THOMAS C. GOLDSTEIN, ESQ., Washington D.C.; on behalf
of the Respondent.

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2 [11:07 a.m.]

3 CHIEF JUSTICE ROBERTS: We'll hear argument
4 next in Georgia versus Randolph.

5 MS. SMITH: Mr. --

6 CHIEF JUSTICE ROBERTS: Ms. Smith.

7 ORAL ARGUMENT OF PAULA K. SMITH

8 ON BEHALF OF PETITIONER

9 MS. SMITH: Mr. Chief Justice, and may it
10 please the Court:

11 The question presented in this case is
12 whether one occupant can give law enforcement valid
13 consent to search the common areas of a premises
14 shared with another, even though another occupant is
15 present and objects to the search. The State of
16 Georgia submits that the answer to this case is a
17 resounding yes. It is reasonable to recognize that a
18 person who satisfies Matlock's definition of common
19 authority -- that is, a definition that is not based
20 upon property-law concepts, but one who has mutual use
21 of property by virtue of having joint access or
22 control for most purposes -- can give consent for a
23 search of that premises, in his or her own right.

24 JUSTICE O'CONNOR: Do we look to what is
25 socially acceptable? Is there some language to that

1 effect in some of our cases?

2 MS. SMITH: There has been some of that in
3 some of the prior cases, Your Honor, that you do look
4 to social norms. You've also said --

5 JUSTICE O'CONNOR: Do you think it is the
6 norm that, if there are co-inhabitants of a house or
7 apartment, that it's okay to let a stranger in,
8 against the express wishes of your spouse or co-
9 inhabitant?

10 MS. SMITH: I think that is --

11 JUSTICE O'CONNOR: You think that's socially
12 acceptable?

13 MS. SMITH: I think it is -- I think it is
14 common, Your Honor. As much as one would like to
15 think --

16 JUSTICE O'CONNOR: Well, it might be common,
17 but I'm not sure that's an acceptable kind of
18 performance.

19 MS. SMITH: Well, I think, Your Honor, we
20 have what we have called either adduced expectation of
21 privacy or a limited expectation of privacy or what we
22 called a shared expectation of privacy, by making the
23 decision, long before police appear at the door, to
24 share this premises with someone. And by --

25 JUSTICE O'CONNOR: What --

1 MS. SMITH: -- that decision --

2 JUSTICE O'CONNOR: -- what if the spouse had
3 put a sign up, "No police allowed here"?

4 MS. SMITH: I don't think that, even as --
5 in -- one could ensure that the spouse would honor the
6 other person's wishes. I think this case is here to
7 give some substance to the recognition in Matlock of
8 the ability of the cotenant to consent, in his or her
9 own right.

10 JUSTICE KENNEDY: What --

11 JUSTICE SOUTER: Is --

12 JUSTICE KENNEDY: What about the extent of
13 the search? Can the wife say, "It's okay for you to
14 come in, and you can look in my husband's top drawer"?

15 MS. SMITH: I think, Your Honor, that would
16 be a question of fact, under the circumstances, to see
17 whether the husband has exhibited some exclusive use
18 of that drawer or whether the facts would demonstrate
19 that she puts socks in there for him, she puts --

20 JUSTICE KENNEDY: I mean, how does the --

21 MS. SMITH: -- notes in there --

22 JUSTICE KENNEDY: -- how does the policeman

23 --

24 MS. SMITH: -- for him --

25 JUSTICE KENNEDY: -- so, how is the

1 policeman supposed to know that?

2 MS. SMITH: Well, I think -- looking -- we
3 measure what is reasonable on the part of the police
4 by looking to what they know. And Rodriguez made very
5 clear, one does -- a policeman doesn't simply accept
6 every invitation to enter. If there's some ambiguity
7 or some uncertainty, the policeman has a duty to
8 inquire. And, I think, looking into the facts of this
9 particular case is a good example. You have police
10 who were called to the marital home of Mr. and Mrs.
11 Randolph. It arose out of a domestic dispute, because
12 Mr. Randolph had absconded with the couple's child.
13 The officer -- this was a small town -- the officer
14 knew Mr. Randolph, because Mr. Randolph was a local
15 attorney. The officer knew that Ms. -- who the wife
16 was. And he knew this was the couple's home. When he
17 got there, in talking with the wife -- Mr. Randolph
18 was off with the child, hasn't returned to the
19 residence -- he learned that they had been having some
20 problems, but, in looking at the two conversations
21 that ensued, the policeman learned that, despite the
22 problems, she was back, she was living there. There
23 was no separation.

24 JUSTICE GINSBURG: I thought she said she
25 came to collect her belongings. That didn't sound

1 like she's intending to stay very long.

2 MS. SMITH: She did not -- she did not relay
3 that to the officer. That came from Mr. Randolph, in
4 his testimony at the suppression hearing. All --

5 JUSTICE GINSBURG: But isn't it relevant
6 what the status of the person is? Someone might not
7 know -- the police might not know that someone on the
8 premises is a temporary visitor.

9 MS. SMITH: Well, Your Honor -- and I think
10 that, looking at the tenor of the conversations, that
11 is exactly what this officer ascertained. He knew
12 that she was there, they had been living there, she
13 was back, she had been on a visit. She did not tell
14 him they were separated. She did not tell him she was
15 --

16 JUSTICE GINSBURG: She called --

17 MS. SMITH: -- only there --

18 JUSTICE GINSBURG: -- the police, didn't
19 she? She called the police to come.

20 MS. SMITH: She called the police. And what
21 we have, more importantly, is a factfinding by the
22 trial court that she, in fact, had common authority to
23 give consent to search.

24 JUSTICE SOUTER: And is that a -- is there
25 any issue about that here?

1 MS. SMITH: No, Your Honor.

2 JUSTICE SOUTER: In other words, I thought
3 the issue was whether his statement, in effect, vetoed
4 whatever -- for Fourth Amendment purposes, whatever
5 permission might have been given. But, as I -- I
6 understood that there was no question -- what is it? -
7 - under Rodriguez, at least -- of her authority,
8 facially to admit the police to the places that they
9 went.

10 MS. SMITH: That is our position, Your
11 Honor. I think there has been some question raised by
12 the Respondent, in his brief, trying to challenge both
13 her authority over the actual bedroom, itself, which
14 is an issue that wasn't raised below.

15 JUSTICE SOUTER: That's what I thought.

16 MS. SMITH: And there had been an argument
17 raised in the appellate court --

18 JUSTICE GINSBURG: But we --

19 MS. SMITH: -- about whether she had
20 abandoned the property. But the trial --

21 JUSTICE GINSBURG: But all of this is really
22 getting pretty far from what I think is really the key
23 question in the case. Matlock is decided. And
24 Matlock said -- it referred to the risk that a joint
25 occupant undertakes, the risk of inability to control

1 access during one's absence. So, the scene in Matlock
2 is: one occupant is there, the other is absent; and
3 the one who was absent assumes the risk that the one
4 who was there will exercise control. Matlock doesn't
5 speak to the two people who are in disagreement
6 situation.

7 MS. SMITH: That is correct, Your Honor, as
8 to not addressing the spectral situation. But I would
9 disagree that Matlock simply only spoke to an absent
10 nonconsenting defendant.

11 JUSTICE O'CONNOR: Well, what if we think it
12 does? Because that's how I read it, too, that Matlock
13 governs where one of the people is absent. And we
14 have a situation that's different here. Now what rule
15 do we look to?

16 MS. SMITH: I think you look to whether she
17 has common authority over the premises in his -- in
18 her own right.

19 JUSTICE SCALIA: Why?

20 JUSTICE O'CONNOR: Even when --

21 JUSTICE SCALIA: Why?

22 JUSTICE O'CONNOR: -- even when the husband
23 is physically present and says no?

24 MS. SMITH: Yes, Your Honor, because, first
25 of all, you said, in Rodriguez, the Constitution does

1 not guarantee that a search, only with the defendant's
2 consent, will occur. Your Honors said that --

3 JUSTICE O'CONNOR: But, do you --

4 MS. SMITH: -- only a search that --

5 JUSTICE O'CONNOR: -- do you --

6 MS. SMITH: -- is unreasonable --

7 JUSTICE O'CONNOR: -- think the officers had
8 sufficient grounds to get a warrant here for a search?

9 MS. SMITH: They ultimately did, Your Honor,
10 but that consideration of getting a warrant was also
11 at play in Matlock and, I think, in Rodriguez. And
12 the point is, if one has valid consent, you don't have
13 to get a warrant. They --

14 JUSTICE O'CONNOR: But that's --

15 JUSTICE KENNEDY: Well, but that's the --

16 JUSTICE O'CONNOR: -- the issue. Is it
17 valid consent when the co-owner, the husband, is there
18 and says, "No, you don't"?

19 MS. SMITH: Well, Your Honor, I think you --
20 we come back to the fact that he does not have a
21 reasonable expectation of absolute or unequivocal
22 control --

23 JUSTICE SCALIA: Why --

24 JUSTICE KENNEDY: Well, I guess that --

25 JUSTICE SCALIA: Why not? I --

1 JUSTICE KENNEDY: -- that depends on what we
2 say. I'm, frankly, still somewhat surprised at your
3 answer to Justice O'Connor, indicating that it happens
4 all the time where there are two occupants, and one
5 expressly says, "You can't come in," and they do
6 anyway. But leaving that aside, it seems to me that
7 most of the considerations that would impel a decision
8 in your favor can be answered under other doctrines.
9 If there's cocaine that's being used and may be
10 destroyed, there's exigent circumstances. I don't see
11 the necessity for the rule that you propose.

12 MS. SMITH: Well, I think, Your Honor, its
13 ability -- if we're going to have consent, and if
14 we're going to have a third-party-consent rule, then
15 this is an issue that is going to have to be resolved.

16 JUSTICE SCALIA: You're talking about --

17 MS. SMITH: I'm --

18 JUSTICE SCALIA: -- reasonable expectations,
19 I suppose, here.

20 MS. SMITH: Yes, Your Honor.

21 JUSTICE SCALIA: Why do you assume that it -
22 - that it is the reasonable expectation of two people
23 who have -- who are living together in -- on -- in
24 common premises, that, where one of them wants
25 somebody to come in, and the other one does not want

1 somebody to come in, the person may come in? I would
2 think that the normal assumption is just the opposite,
3 that, where one wants somebody excluded, that person
4 will be excluded.

5 MS. SMITH: Well, I think, in the Morning
6 case that was cited in the brief, they realized one
7 can always hope that the other will accede to one's
8 wishes. But, this is the dynamics of personal
9 behavior, and I think it comes from an almost
10 subliminal assertion that the person who was saying no
11 does, in fact, have absolute authority over --

12 JUSTICE SCALIA: In --

13 MS. SMITH: -- that shared --

14 JUSTICE SCALIA: In Matlock --

15 MS. SMITH: -- premises. And that's --

16 JUSTICE SCALIA: In Matlock --

17 MS. SMITH: -- that's out of sync --

18 JUSTICE SCALIA: In Matlock, did the -- did
19 the absent person say no?

20 MS. SMITH: He was -- it -- he was silent.
21 He had been arrested --

22 JUSTICE SCALIA: So, you --

23 MS. SMITH: -- on the scene --

24 JUSTICE SCALIA: -- you don't even have, in
25 Matlock, a situation where you know that one of the

1 parties didn't want entry. You don't know that. You
2 -- there was one party there, and that party said,
3 "Okay, come in." And the other party said, "Well, if
4 I had been consulted, I would have said no," or
5 whatever. But --

6 MS. SMITH: Well, in -- and even in that
7 situation, Matlock, the reference to the absent
8 nonconsenting defendant was in a paragraph where the
9 court had talked about how it had reserved, in Amos --
10 the Amos case -- the question of whether a wife could
11 waive her husband's rights. And then you had decided
12 the Frazier case, and that was what was described as
13 the nonconsenting absent codefendant in which two
14 cousins had shared the use of a duffle bag, and the
15 defendant had left the duffle bag with the cousin. The
16 cousin and his mother gave consent for the search.
17 And it simply was not that the defendant was not
18 present, but this Court found there was mutual use of
19 that bag that gave the cousin the authority to
20 consent. And then, the Court readily rejected
21 Frazier's arguments that, "Well, the cousin could only
22 use one compartment of the duffle bag." And you said
23 you wouldn't get into such metaphysical distinctions.

24 JUSTICE SOUTER: Ms. --

25 MS. SMITH: But --

1 JUSTICE SOUTER: -- Ms. Smith, may I -- your
2 time is getting short, and I want to get clear on one
3 thing. As I understand it, your argument is not an
4 argument that the husband, in this case, lost an
5 expectation of privacy. You are not arguing that he
6 has no right to object. Am I correct on that?

7 MS. SMITH: I think, Your Honor, we had
8 called it a --

9 JUSTICE SOUTER: Okay, and let me --

10 MS. SMITH: -- a reduced --

11 JUSTICE SOUTER: If that is correct, then
12 your whole argument rests on the fact that, although
13 he has, and may assert, an expectation of privacy,
14 that is irrelevant to the right of his wife to let
15 people, including the police, come into an area which
16 is under her control, as well as his. Is that it?

17 MS. SMITH: Yes, Your Honor --

18 JUSTICE SOUTER: Okay.

19 MS. SMITH: -- that is. And I think,
20 looking at Justice Stevens' dissent in Rodriguez,
21 there is that recognition of: When you make the
22 decision to share premises with another, you have lost
23 the expectation of exclusive or absolute control --

24 JUSTICE SOUTER: But your expectation --
25 this is what I'm trying to get at -- your expectation

1 is not what governs. You concede, as I understand it,
2 that he still had an expectation, in the sense that he
3 could assert a right of privacy, he can litigate this
4 case, he has standing --

5 MS. SMITH: Yes, Your Honor.

6 JUSTICE SOUTER: -- but that his expectation
7 is irrelevant to the fact that the wife, in this case,
8 we assume, had the right to admit them to an area
9 which was under her control, as well as his. Is --
10 have I got it correct?

11 MS. SMITH: Yes, Your Honor, I think so.

12 JUSTICE SOUTER: Okay.

13 MS. SMITH: I think that his -- his
14 expectation is unreasonable. And we would urge the
15 Court not to adopt that and enshrine that as the rule
16 for fourth amendment, third-party searches.

17 If there are no further questions, I'll save
18 the remainder --

19 JUSTICE GINSBURG: So, you would distinguish
20 -- in your answer to Justice Souter -- this is -- this
21 is a lawyer. One room in the house is devoted -- is
22 his office.

23 MS. SMITH: Yes, Your Honor.

24 JUSTICE GINSBURG: Her permission wouldn't
25 extend to that room, would it?

1 MS. SMITH: I think it would -- it would
2 have presented a much closer question of -- and
3 particularly given the protection of papers and the
4 fact that you may have business papers in there with
5 attorney-client privilege -- I think her authority to
6 consent it would have presented a closer question,
7 although it would still be something to look at under
8 totality of circumstances. She might have operated as
9 a paralegal. She might have been his secretary. She
10 might have known where he stashed his cocaine under a
11 particular file.

12 But that's not the question we have in this
13 case. We're talking about common areas of a marital
14 home over which both have equal access and control.
15 And we would urge this Court to recognize that she,
16 with common authority over those premises, has the
17 ability to admit police and give consent to a search,
18 in her own right.

19 CHIEF JUSTICE ROBERTS: Thank you, Counsel.

20 Mr. Dreeben.

21 ORAL ARGUMENT OF MICHAEL R. DREEBEN,

22 FOR THE UNITED STATES, AS AMICUS CURIAE,

23 ON BEHALF OF THE PETITIONER

24 MR. DREEBEN: Thank you, Mr. Chief Justice,

25 and may it please the Court:

1 The law of consent searches is governed by a
2 determination of what is reasonable for the police to
3 do in a particular circumstance, and it starts from
4 the premise that consent is not a disfavored species
5 in the law, that cooperation with law enforcement is a
6 good thing and should be encouraged.

7 The right of the cotenant, in this case, to
8 consent stems from her common authority, which is
9 independent of his and allows her to serve valuable
10 social interests, as well as interests that represent
11 her own personal interest. Many of these cases arise
12 not among couples who are harmonious, but among
13 couples in which there is some degree of tension, and
14 the spouse who consents in these situations has an
15 independent interest in ensuring that she can call
16 upon the protection of the law.

17 JUSTICE O'CONNOR: But we --

18 CHIEF JUSTICE ROBERTS: Was --

19 JUSTICE O'CONNOR: Go ahead.

20 CHIEF JUSTICE ROBERTS: I was curious,
21 though, which way that fact cut. I can see the
22 argument that the closer the relationship, the more
23 reasonable it is to say that the one party more or
24 less recognizes that their privacy interests are held
25 hostage to the views of the other. It's when you get

1 the disrupted relationship, or their adverse
2 interests, that maybe the expectations of privacy, or
3 the reasonableness of one acting as an agent of the
4 other, becomes a little more strained.

5 MR. DREEBEN: Well, Mr. Chief Justice, I
6 don't think that the law in this area is founded on a
7 notion of agency. It's founded on a notion of
8 independent authority of each to grant access to the
9 police, to cooperate with law enforcement with respect
10 to premises over which authority is shared. And in a
11 case like this, the wife has an independent interest
12 in disassociating herself from criminal activity that
13 is going on, on the premises.

14 JUSTICE KENNEDY: But she can do that by
15 advising the police, and then there's probable cause.
16 Or, if the husband's there, there are probably
17 exigent circumstances.

18 MR. DREEBEN: Justice Kennedy, there may
19 well be other bases to allow law enforcement activity
20 to go on, but that presupposes that her authority to
21 consent is somehow qualified: If the police could
22 obtain a warrant or some other doctrine, would it
23 support the search? And this Court has twice rejected
24 exactly that approach to the analysis of consent
25 searches.

1 JUSTICE SCALIA: Mr. Dreeben, does this
2 authority to let someone in, over the objection of the
3 cohabitant, apply only to policemen, or is it -- is it
4 also the case that -- I don't know, as a matter of,
5 what, property law, or whatever? -- that when two
6 people have common ownership of a piece of land or a
7 house or whatever, and one of them says, "I don't want
8 a certain party to come on," the tie always goes to
9 the other party, who says, "I do want somebody to come
10 on," is that -- is there any cases that establish that
11 proposition? It seems to me an odd proposition. I
12 would have thought the opposite.

13 MR. DREEBEN: Well, the law of property,
14 Justice Scalia, to the extent that it's relevant here,
15 would allow any cotenant to license his or her
16 interest --

17 JUSTICE O'CONNOR: But we have not decided
18 Fourth Amendment issues on the basis of the law of
19 property, have we?

20 MR. DREEBEN: I quite agree, Justice --

21 JUSTICE O'CONNOR: Don't we --

22 MR. DREEBEN: -- O'Connor.

23 JUSTICE O'CONNOR: -- have to look at social
24 understanding on right to privacy? And how is it that
25 you can construe, in every instance, a right of a

1 cotenant to override the express objections of the
2 other cotenant, who's there, and says no? How can you
3 say that's acceptable?

4 MR. DREEBEN: Well, Justice O'Connor, I
5 certainly do not think that there is any uniform
6 social understanding that should drive the decision in
7 this case, for two different reasons. First of all, I
8 think, in many circumstances, two people who share
9 property, and who disagree about whether a guest
10 should be invited, will resolve it in a variety of
11 different ways. Somebody might let in a commercial
12 visitor, over the objection of a cotenant, or someone
13 --

14 JUSTICE O'CONNOR: Well, that's possible,
15 but you have a case here where the wife says, "Come
16 in," and the husband is right there and says, "No, you
17 can't."

18 MR. DREEBEN: And I think that the other
19 factor that the Court needs to consider in evaluating
20 this is not just social expectations with respect to
21 non-law-enforcement events and visitors, but this
22 positive, affirmative social interest in encouraging
23 cooperation with the law, which is something that she
24 has the ability to do with respect to property over
25 which she has common authority.

1 JUSTICE KENNEDY: But -- well, you keep
2 saying that, but that policy is -- can be vindicated
3 by using doctrines other than consent. And you want
4 us to -- I think you want us to say, I think we have
5 to say, that there's a general social expectation that
6 the person who wants entry overrides the person who
7 doesn't.

8 MR. DREEBEN: I --

9 JUSTICE KENNEDY: And I also agree with
10 Justice Scalia, that social expectation may be, in
11 part, measured by our cases on this subject. And I
12 just don't see how, if it's against the interest of an
13 occupant to allow entry, that that -- that that
14 interest must, necessarily, be overridden.

15 MR. DREEBEN: I think that what the Court
16 needs to do is look at the consent-search doctrine in
17 relation to third-party consents, generally. Matlock
18 makes quite clear that if the objecting -- potentially
19 objecting party, the target of the search, does not
20 voice an objection, then the third party has full
21 authority to allow the search, even if they're --

22 JUSTICE O'CONNOR: Well, yes, but there's
23 kind of an assumption there that if the cotenant is
24 not there, sure, you'll let the tenant who is there
25 call the shots.

1 MR. DREEBEN: I don't think that, on the
2 facts of either Matlock or Rodriguez, that would be a
3 particularly logical or reasonable assumption. In
4 Matlock, you're dealing with a man who was arrested
5 for bank robbery in the front lawn of his house, the
6 police take him to a police car, put him in a police
7 car, do not ask him for consent; instead, they go back
8 and they ask the woman, with whom he is living at the
9 house, for consent to search.

10 JUSTICE STEVENS: May I ask --

11 MR. DREEBEN: Rodriguez is even more
12 dramatic, because, in Rodriguez, the victim of a
13 battery, Gail Fischer, seeks out the police and says,
14 "I want you to arrest Rodriguez," and brings him to
15 the -- to -- the police to the apartment, where they
16 enter and arrest Rodriguez. Surely, if Rodriguez had
17 been asked, or if Matlock had been asked, the
18 presumption is, they would have objected.

19 JUSTICE STEVENS: May I ask two questions?
20 Seems to me you're -- if we're using social analogies
21 in what happens, I imagine that it would make a
22 difference if the person who wants to -- who was
23 invited in by the wife, is larger or smaller than the
24 husband.

25 [Laughter.]

1 JUSTICE STEVENS: And I think he probably
2 would not go in if he thought he was a -- could not do
3 so --

4 [Laughter.]

5 JUSTICE STEVENS: -- in his physical
6 encounter. And the problem with your case here is,
7 the police officer is always larger than the
8 homeowner, and he always has the power to override any
9 physical objection. So, I think that the -- the
10 actual social situation will vary tremendously from
11 different facts as to the fair -- and yet, we're
12 looking for a rule that applies equally across the
13 board --

14 MR. DREEBEN: Well --

15 JUSTICE STEVENS: -- in this case.

16 MR. DREEBEN: At --

17 JUSTICE STEVENS: And the second question I
18 want you to address at the same time is, What if this
19 was a suitcase that they both owned? They stopped in
20 the airport. The wife says, "I don't want you to open
21 it," and her husband says, "Go ahead and open it," or
22 vice versa.

23 MR. DREEBEN: Well, Justice Stevens, the
24 second one is the easier one. The same rule applies.
25 Anyone who has common authority over the suitcase

1 should be able to cooperate with law enforcement to
2 vindicate both the social interest in cooperating with
3 a law enforcement request and the interests of the
4 person's who's making it. And I think that that's
5 what Matlock is all about.

6 Now, as for the attempt to mirror --

7 JUSTICE STEVENS: Matlock is the reasonable
8 police -- well, go ahead. I shouldn't interrupt.

9 MR. DREEBEN: The attempt to transpose
10 ordinary social understandings from a myriad of
11 infinitely varied settings that do not involve law
12 enforcement, I submit, will not correctly allow this
13 Court to calibrate what it should be doing, which is
14 balancing the individual interests in privacy against
15 the social interests that affirmatively encourage and
16 validate the use of consent. And I think what Matlock
17 does, to put this case in context, is to illustrate
18 that if the police had waited until Respondent had
19 left his house to go to work, or to go to court, or to
20 do anything else, or if he had stayed there and gone
21 to sleep at night, then Matlock tells us that she
22 would have full authority to allow the police into the
23 house to conduct a search of common areas. And, for
24 this Court to announce a rule that says, no, when the
25 person is there on the scene and vocalizes an

1 objection, which we can reasonably presume that he
2 would have if he was given the opportunity to voice
3 it, would mean that police simply have an incentive to
4 find a different way to accomplish the same end. And
5 I would submit that that does not give adequate --

6 JUSTICE STEVENS: The "different way," of
7 course, would be to get a warrant.

8 MR. DREEBEN: An option would be to get a
9 warrant in cases where the police do have probable
10 cause, but, as this Court recognized in *Schneckloth*
11 versus *Bustamonte*, the courts -- the officers will not
12 always have probable cause.

13 JUSTICE GINSBURG: Would they, on -- in --
14 on these facts -- I thought not, but perhaps I was
15 wrong -- the -- when the police come to the house,
16 they don't suspect anything about cocaine. Wife then
17 accuses husband of being a cocaine user. So, that's
18 the first information the police have. Could they get
19 a warrant, just on her say-so? In fact, they got the
20 straw that had the cocaine residue on it. They went
21 to the magistrate with that straw, and he gave them a
22 warrant. But if they had nothing but the wife's
23 accusation, "He -- he's a cocaine user," would that
24 amount to probable cause?

25 MR. DREEBEN: I think it clearly would,

1 Justice Ginsburg. And the facts in this --

2 JUSTICE O'CONNOR: It would, or would not?

3 JUSTICE STEVENS: It would?

4 MR. DREEBEN: It would amount to probable
5 cause if the wife, who has -- she's in a position
6 where she would know what's going on in the house,
7 what kind of activity is going on in the house, she is
8 a presumptively reliable citizen providing information
9 to the police, and the fact --

10 JUSTICE SCALIA: All she said is, "He's a
11 cocaine user." Does that -- does that -- does that
12 give probable cause to believe that there are -- you
13 know, that there's contraband on the premises or --

14 MR. DREEBEN: Well, that's not all she said,
15 Justice Scalia.

16 JUSTICE SCALIA: Oh.

17 MR. DREEBEN: What she said was that there
18 were items of drug evidence --

19 JUSTICE SCALIA: Yes.

20 MR. DREEBEN: -- in the house. And if you
21 look at the warrant that the officers obtained, it
22 more clearly elaborates that she said there were drugs
23 and paraphernalia. But, for the Court's purposes,
24 this case is virtually identical to Illinois versus
25 McArthur with respect to the probable cause. You have

1 a wife and a husband who are in a domestic dispute,
2 and the wife comes out, in Illinois versus McArthur,
3 and tells the officers, you know, "He's got drugs
4 inside there." And the Court was unanimous, I
5 believe, on the point that that furnished probable
6 cause. But what is different from Illinois versus
7 McArthur, and this case, is that the police officers
8 have the consent of someone who reasonably appears to
9 them to have common authority, someone who's living in
10 the marital home, someone who is in a position to know
11 what's going on and exercise her own independent
12 authority. And for this Court to say, "Well, there
13 are alternatives" -- you know, the police could pull
14 Respondent out of the house and quarantine it while
15 they go get a warrant, or the police could do other
16 investigation, or they could rely on exigent
17 circumstances -- what that does is treats her consent
18 as worth nothing. It reduces her --

19 JUSTICE O'CONNOR: Well, not nothing,
20 because we have cases that have said: If the co-
21 inhabitant is not there, he relinquishes whatever
22 right he had to object. But if the co-inhabitant is
23 there, and says no, what's the matter with giving
24 effect to that?

25 MR. DREEBEN: I think it's very odd to say

1 that, in Matlock, the right was relinquished, when
2 Matlock was arrested and taken to a police car and was
3 never asked for consent, or that Rodriguez
4 relinquished his right by falling asleep in his own
5 apartment. What really -- I would qualify my
6 statement, though, in response to your comment,
7 Justice O'Connor. It's not that it treats it as
8 nothing. It would treat her consent as 100 percent
9 valid when he's asleep or absent, no matter how much
10 we know he would object, and it would treat it as zero
11 when he's on the scene and vocalizes an objection.
12 And I think that that would protect Fourth Amendment
13 rights only by happenstance, or, worse, it would
14 simply be an invitation to the --

15 JUSTICE O'CONNOR: Well, but it's by
16 happenstance that the police find the wife in the
17 house. I mean, it's six of one, half a dozen of the
18 other. It's a happenstance.

19 MR. DREEBEN: Well, in this case, as in many
20 other cases involving this kind of potential incident,
21 the wife called the police to the scene. So, there
22 was a reason for them to be on the scene. It was a
23 perfectly valid investigatory step. And once they
24 acquired the information relating to drugs on the
25 premises, and had the authority of someone who's in

1 charge of the premises, I submit that the police
2 should be able to conduct the search as a reasonable
3 matter under the Fourth Amendment, just as they would
4 if Respondent had been asleep or if Respondent had
5 said, "Well, I have to go now. Am I free to go?" and
6 the police said that, "You are."

7 And I don't think that it always would be an
8 advantage for the nonconsenting tenant, somebody like
9 Mr. Randolph, to insist on the police getting a
10 warrant or conducting a probable-cause arrest. If
11 he's arrested, he's taken down to the station, he has
12 a search incident to arrest, he may not get a hearing
13 for 48 hours. If the police do have to get a warrant,
14 they are entitled to search anywhere and everywhere in
15 the premises; whereas, in this case, one of
16 Respondent's main claims is that she wasn't credible.

17 Well, if she wasn't credible, and she had led the
18 police upstairs, and the police had found nothing,
19 that might have been the end of the whole incident.
20 And I think that it's because of the socially valuable
21 function of efficiently resolving accusations,
22 potentially dueling accusations of criminal conduct
23 that consent searches can facilitate, that this Court
24 has said that consent searches are a positive social
25 good and should be encouraged, rather than

1 discouraged.

2 JUSTICE THOMAS: Mr. Dreeben, is it -- is
3 this case materially different if she simply ran
4 upstairs, grabbed the straw, brought it down, and
5 handed it to the police officer? It's, in effect, the
6 same thing, isn't it?

7 MR. DREEBEN: It is, in effect, the same
8 thing. And I think that, had that happened, there
9 would have been no question that, assuming that the
10 police reasonably believed that she had authority to
11 do it, and possibly even if they didn't, the
12 contraband would have come into the hands of law
13 enforcement, and there is really no reason, or
14 doctrine under the Fourth Amendment, to deny it.

15 JUSTICE KENNEDY: You want us to take the
16 position that there's no legal difference between, (a)
17 entering a home and taking something, and, (b)
18 receiving it on the outside?

19 MR. DREEBEN: I think that the difference,
20 when you receive something with the consent of someone
21 who has the authority to exercise control over it, is
22 a question of whether she leads the police upstairs,
23 or whether she brings the item downstairs. And, for
24 Fourth Amendment purposes, I don't see a difference.

25 Thank you.

1 CHIEF JUSTICE ROBERTS: Thank you, Mr.
2 Dreeben.

3 Mr. Goldstein.

4 ORAL ARGUMENT OF THOMAS C. GOLDSTEIN

5 ON BEHALF OF RESPONDENT

6 MR. GOLDSTEIN: Thank you, Mr. Chief
7 Justice, and may it please the Court:

8 The Court should hold that it is not
9 reasonable for officers to conduct a consent search
10 when a person with an equivalent interest in the
11 premises expressly objects.

12 CHIEF JUSTICE ROBERTS: What about the
13 telephone call between a husband and wife, and the
14 wife tells the police, "Listen in on this call"?
15 She's consented to the monitoring of the conversation,
16 the husband has not. Maybe he even begins the call by
17 saying, "I -- don't let anybody else listen to this."
18 It's clear that that is admissible, isn't it?

19 MR. GOLDSTEIN: It is, Mr. Chief Justice,
20 although not on the theory of third-party consent.
21 The analog to your hypothetical, which is this Court's
22 decision in Lopez, is Justice Thomas' reference to
23 Coolidge versus New Hampshire -- to the New Hampshire
24 case. And what happens there is, this -- Mrs.
25 Randolph could take the cocaine and give it to the

1 officer. She was participating in giving an item to
2 them. It is not the same, I think, when she
3 authorizes the police to conduct a generalized search
4 of the premises. It would be as if --

5 CHIEF JUSTICE ROBERTS: She's consenting.
6 It's an intrusion, in the one case, on the
7 conversation; in the other case, on the home. In the
8 telephone case, it's recognized, in the law, the
9 consent of one party subjects the other to having the
10 conversation monitored. In this case, the consent of
11 one party subjects the other party to the search.

12 MR. GOLDSTEIN: But -- yes, Mr. Chief
13 Justice. I do think that Lopez and White, in that
14 line of cases, established that other things that
15 people do consent to can expose us to intrusions on
16 our property. What I think, however, is, it doesn't
17 follow that she can authorize the -- them to conduct a
18 generalized search of the premises. It's as if she
19 were saying, "You can listen in on" --

20 JUSTICE SOUTER: Well --

21 MR. GOLDSTEIN: -- "all the phone calls" --

22 JUSTICE SOUTER: Excuse me.

23 MR. GOLDSTEIN: -- "in the house."

24 JUSTICE SOUTER: It was -- it was the -- it
25 was a search only of premises with respect to which

1 she had, supposedly, common rights. I mean, we take
2 the case on that assumption.

3 MR. GOLDSTEIN: You do --

4 JUSTICE SOUTER: If --

5 MR. GOLDSTEIN: -- Justice Souter.

6 JUSTICE SOUTER: If she and her husband, you
7 know -- if she had a right to be in only two rooms,
8 she couldn't authorize the search of the whole house,
9 right?

10 MR. GOLDSTEIN: That is --

11 JUSTICE SOUTER: Okay.

12 MR. GOLDSTEIN: -- correct. But, Justice
13 Souter, I think the thing that is important -- and I
14 want to get to your line of questioning about exactly
15 what the nature of the State's argument is -- is that
16 he had a distinct individual right to privacy at the
17 core of the home, as opposed to, for example,
18 information privacy.

19 JUSTICE SOUTER: All right, then he --

20 CHIEF JUSTICE ROBERTS: Well, that --

21 JUSTICE SOUTER: -- if he --

22 CHIEF JUSTICE ROBERTS: -- begs the question
23 -- it begs the question to say "it's a distinct
24 individual right to privacy." It's a little academic
25 to talk about his individual right to privacy when

1 he's sharing the home with someone else.

2 MR. GOLDSTEIN: Mr. Chief Justice, that's
3 why I finished off on that. Let me just focus on the
4 important part of my statement. And that is, we are
5 talking about a search of the home, at the core of the
6 Fourth Amendment. This Court's doctrines are quite
7 different about situations in which you share
8 information with third parties.

9 Let me step back and do the case before
10 Lopez, and then explain how it was extended to Lopez.

11 Cases like White say, "If you give information to
12 someone else, you -- they can give it to the police
13 without conducting a search of you." This is a very
14 different situation. The police are clearly
15 conducting a search of a premises that I think,
16 Justice Souter, it has to be agreed, he has a
17 reasonable expectation of privacy with respect to.

18 Now, Justice Souter, it is absolutely right
19 that there are instances in which people have
20 expectations of privacy, and yet searches occur,
21 notwithstanding those. And there is an argument to be
22 made here that says, "Look, he has a reasonable
23 expectation of privacy, but the police came in for a
24 different reason." That would be true, for example,
25 if there was a warrant; they would come in,

1 notwithstanding his reasonable expectation. That
2 would be true if there were exigent circumstances.
3 But the theory of consent is very different.

4 Schneckloth, Zap, all of the Court's precedents --

5 JUSTICE SOUTER: Well, it -- let me make
6 sure I understand where you're going. We agree that
7 he had a reason -- everybody agrees, I guess, that he
8 has a reasonable expectation. He can -- he can raise
9 his Fourth Amendment claim. Your argument is that,
10 even though we get past the reasonable expectation,
11 there's a second reasonableness question, and that is,
12 Is the search, itself, reasonable?

13 MR. GOLDSTEIN: Good guess.

14 JUSTICE SOUTER: And that's the focus of
15 your argument --

16 MR. GOLDSTEIN: Exactly --

17 JUSTICE SOUTER: -- correct?

18 MR. GOLDSTEIN: -- right.

19 JUSTICE SOUTER: Okay.

20 MR. GOLDSTEIN: But I do think it's
21 important, of course, this Court's precedents have
22 often said that the degree of the expectation informs
23 the reasonableness of the search. A consent --

24 JUSTICE SOUTER: Okay.

25 MR. GOLDSTEIN: -- search is reasonable.

1 Reasonableness, or course, is a balance --

2 JUSTICE BREYER: All right. Well, I -- the
3 words that keep going around in my mind -- it's her
4 house, too, isn't it?

5 MR. GOLDSTEIN: Yes.

6 JUSTICE BREYER: Well, she wants the
7 policeman in. So, why does he have more of a right to
8 keep the policeman out than she has to have the
9 policeman in?

10 MR. GOLDSTEIN: I think everybody makes
11 their --

12 JUSTICE SCALIA: And vice versa.

13 MR. GOLDSTEIN: Yes. I think that --

14 JUSTICE BREYER: Right.

15 MR. GOLDSTEIN: -- that's the point --

16 [Laughter.]

17 MR. GOLDSTEIN: -- is that -- that everybody
18 makes some -- there are two things.

19 JUSTICE BREYER: Everybody makes some
20 sacrifices.

21 MR. GOLDSTEIN: That's --

22 JUSTICE BREYER: All right --

23 MR. GOLDSTEIN: -- right.

24 JUSTICE BREYER: -- let's think --

25 MR. GOLDSTEIN: And so, he --

1 JUSTICE BREYER: -- of the need for this,
2 because it's the other thing that's on my mind. The
3 two words that came into my mind are "spousal abuse."
4 All right? I would say maybe there's a pretty good
5 need for this. The husband's beating her up. And
6 there isn't evidence of that, but she's sitting in the
7 kitchen table, and the neighbors hear something odd,
8 and they call the police. "We'd better look into it."
9 They come to the door. She says, "Um, hmmm, oh, I'd
10 like, Officer, for you to just come upstairs to my
11 bedroom for a minute." Is there any neighbor, friend,
12 or policeman, in those circumstances, who wouldn't go?

13 MR. GOLDSTEIN: Justice Breyer, because
14 she's not authorizing a search -- she wants them to
15 come in and talk to her, wherever, in the house --
16 that might be a different case. The two words --

17 JUSTICE BREYER: Oh, no. It's the question
18 of the rule. I haven't seen anything on your side
19 that would advocate a rule that would not prevent the
20 many, many, many, I believe -- I am not an expert --
21 ambiguous cases of domestic spousal abuse from being
22 investigated by the policeman. And maybe you can tell
23 me you've looked into it empirically and I'm wrong,
24 and that's why I'm bringing it up.

25 MR. GOLDSTEIN: Yes. Okay. I have, and I

1 can. Since 1974, when this Court decided Matlock, the
2 Federal and State courts, combined, have considered
3 this question. And so, there was a finding of
4 evidence, and it led to a suppression hearing. That's
5 the best that I can do. Fifteen times, all the
6 Federal and State courts, once every two years. It is
7 the case that in that -- in -- last year alone, there
8 were 200,000 domestic disputes that were reported.
9 But that's just the city of Chicago.

10 What we're considering here is the situation
11 in which there is no real need for the police to --

12 JUSTICE BREYER: No, no, but -- no, I'm not
13 getting your answer. Are you telling me that it is
14 the law in Chicago, for example, that if a policeman
15 responds to a call, a call of -- it's ambiguous --
16 what it says is, "An anonymous caller said there's an
17 odd situation next door. Will you check out 2355
18 Maple Street?" He goes there. The wife looks a
19 little oddly at him, but they're sitting at the table,
20 and she says, "Officer, I'd like you to come upstairs
21 with me." The husband says no. Are you saying that
22 the law is clear in Chicago that the policeman can't
23 do it?

24 MR. GOLDSTEIN: No. What I'm --

25 JUSTICE BREYER: All right. Where --

1 MR. GOLDSTEIN: -- saying is --

2 JUSTICE BREYER: -- is it clear that the

3 policeman cannot do it?

4 MR. GOLDSTEIN: Well, Your Honor, the -- it

5 is an unresolved question of --

6 JUSTICE BREYER: Fine.

7 MR. GOLDSTEIN: -- this Court. It's --

8 JUSTICE BREYER: That's what --

9 MR. GOLDSTEIN: -- equally divided --

10 JUSTICE BREYER: -- I thought it was not

11 clear. And, therefore, what I'm asking you for is --

12 if your rule --

13 MR. GOLDSTEIN: Yes.

14 JUSTICE BREYER: -- is the law --

15 MR. GOLDSTEIN: Yes.

16 JUSTICE BREYER: -- there are 200,000 cases

17 a year in Chicago, alone. I think that there might be

18 many ambiguous cases. So, you relieve me of my

19 concern that if you win this case, in those ambiguous

20 situations, where the wife wants the policeman in, and

21 she's afraid to tell him why, until she gets him up to

22 the room -- she wants him in -- and he, now under your

23 rule, as far as I can see, could not go in. And I'm

24 telling you, quite frankly, that's what bothers me a

25 lot.

1 MR. GOLDSTEIN: All right. Let me answer
2 this on several different levels. First, there is no
3 serious argument that we interfere with investigating
4 abuse claims. The conversation can happen. It may
5 not happen, arguably, in a place that he has a right
6 to privacy, but it can happen outside. It happens
7 outside all the time. If there is any suggestion that
8 a reasonable officer would believe that there was an
9 ongoing crime, there was abuse going on right then,
10 then it's clear that exigent circumstances would
11 authorize the --

12 JUSTICE BREYER: There aren't exigent
13 circumstances. In the case I'm thinking of, I'm
14 thinking of what I call "ambiguity," and there are
15 many such cases, I believe, of spousal abuse, where
16 the wife is intimidated. Now, maybe I'm wrong on my
17 facts, but those are the cases I'm worried about.

18 MR. GOLDSTEIN: Justice Breyer, I am not an
19 expert in spousal abuse; and so, I'm not -- which I
20 think is a very serious issue. I do know one thing
21 about my rule, and that is that, under our rule, and
22 under the rule that the Georgia Supreme Court
23 articulated, they are allowed to speak with her,
24 including speaking to her outside. It's true, there
25 may be some sacrifice. And you have identified a

1 sacrifice. And that is, she can't take them into a
2 room in which he has a constitutional expectation of
3 privacy. I will concede that if he says, "I don't
4 want you in the bedroom," that will be a sacrifice.
5 But what I am saying is that there is no serious
6 argument that they can't have the conversation in a
7 place where she feels secure. That's on the porch,
8 that's in a police car.

9 If she says, "I need you to come up," and
10 there's been abuse, then what would have happened in
11 this case -- let me explain what happened in this
12 case. The officers asked Mr. Randolph first. He said
13 no. They found out -- had found out from her that
14 there was drug paraphernalia on the premises. What
15 they had to do in order to conduct this search -- if
16 they wanted to search, rather than having her bring
17 the materials out -- is to pick up the phone and get a
18 telephonic warrant, which would have taken less than 5
19 minutes.

20 The real reason I bring to your attention
21 the 200,000 domestic disturbances is that what you
22 should be concerned about, I think, is not the 15
23 cases, which is not a serious intrusion on law
24 enforcement interests over 30 years, but it's the many
25 times in which our family relationships ebb and flow.

1 We are concerned here with the person -- the Fourth
2 Amendment is -- it's not the person who has the drugs
3 or the abuser. Consent searches involve a situation
4 in which the police come to the door, and they say,
5 "Can we search?" Because they do as much as they are
6 permitted to do. And the person just says, "Sure,"
7 perhaps completely ignorant of her rights. There's no
8 reason to believe anything is going on. And what the
9 State's position is, is that, despite the fact that
10 this is the home, and that the core of the
11 constitutional right to privacy in the text of the
12 Fourth Amendment is that the only thing he can do to
13 be secure in the language of the Constitution is not
14 live with someone else. Remember, the theory --

15 CHIEF JUSTICE ROBERTS: Well, all --

16 JUSTICE SCALIA: Well, you're --

17 CHIEF JUSTICE ROBERTS: -- reflects is the -

18 -

19 JUSTICE SCALIA: Go on.

20 CHIEF JUSTICE ROBERTS: I was just going to
21 say, it just reflects the expectation of privacy. And
22 when you do live with someone else, you compromise
23 your individual privacy interest to that extent. We
24 know that you compromise it to the extent that if you
25 happen not to be there, and that person says, "Sure,

1 come on in and search," that's going to bind you, as
2 well. Why is it -- why do you not compromise the
3 expectation to the extent of giving the other person
4 the right to consent?

5 MR. GOLDSTEIN: Mr. Chief Justice, I do
6 think you've put your finger on it.

7 And I just want to say, Justice Souter, that
8 I do think that the other side's argument inevitably
9 does revolve around this notion of an expectation of
10 privacy.

11 And, Mr. Chief Justice, I think the
12 expectation is -- and this is what the Court said in
13 Minnesota versus Carter -- that, while it's
14 technically possible that the people -- Minnesota
15 versus Olson, I'm sorry -- the people that we live
16 with will admit others over our objection, our
17 expectation about what -- about what will happen, our
18 reasonable expectation, is different. And I also want
19 to take --

20 JUSTICE SOUTER: Yes, but Olson was a
21 standing case. Olson was not confronting this
22 situation. In Olson, the police simply went in
23 without a warrant. And the argument was made that
24 this person was not the normal inhabitant of the --
25 what was he? A houseguest or something of the sort.

1 And the only issue that Olson addressed was his right
2 to raise a Fourth Amendment claim. It did not respond
3 to the issue that you are raising, which is the
4 reasonable extent of search.

5 MR. GOLDSTEIN: Justice Souter, that's why
6 I, sort of, paused and came to you. And that is, I do
7 think that the other side's argument -- I want to say
8 two things. One is that it inevitably reduces to the
9 idea that we have a lessened expectation of --

10 JUSTICE SOUTER: I don't --

11 MR. GOLDSTEIN: -- privacy --

12 JUSTICE SOUTER: I don't see that --

13 MR. GOLDSTEIN: Okay.

14 JUSTICE SOUTER: -- at all.

15 MR. GOLDSTEIN: Well --

16 JUSTICE SOUTER: They concede -- the only
17 expectation of privacy you've got to have for Fourth
18 Amendment purposes in order to raise a claim is a
19 minimal one -- they concede that the -- that this
20 individual has an expectation of privacy sufficient to
21 raise a Fourth Amendment claim.

22 MR. GOLDSTEIN: But --

23 JUSTICE SOUTER: Their argument is that,
24 although he can raise it, the rights, however they may
25 be derived on the part of his wife, allowed her to

1 admit the police -- in effect, thwarting his
2 expectations. Your argument, as I understand it, is
3 that when the police search with that kind of
4 permission, over his objection, it's not a reasonable
5 search. Isn't that the way to structure the issue?

6 MR. GOLDSTEIN: Justice Souter, I think it
7 is. I will only say, in my defense, that their brief
8 articulates it in the manner that I was describing it,
9 I think, with the Chief Justice. But let me --

10 JUSTICE SOUTER: That --

11 MR. GOLDSTEIN: -- let me --

12 JUSTICE SOUTER: -- I -- I agree with you.

13 MR. GOLDSTEIN: Okay. All right.

14 JUSTICE SOUTER: There is this talk about
15 lessened --

16 MR. GOLDSTEIN: Yes.

17 JUSTICE SOUTER: -- expectation, and I -- I
18 think, ultimately, that's irrelevant.

19 MR. GOLDSTEIN: All right. Let me look at
20 it through the other lens. And that is from the
21 perspective of a reasonable police officer. I think
22 there are two points to make. The first is, I -- the
23 common ground between the sides in the case is, you
24 look at it from the perspective of the person who
25 arrives at the house, and you ask what is reasonable.

1 And if someone arrives at the house, it is a
2 different matter entirely if, as in Matlock or in
3 Rodriguez, someone says, "Come on in," and they -- you
4 believe they have authority over the premises, versus
5 you come to the house and someone with authority over
6 the premises says, "Come on in," and the other person
7 says, "No, stay out."

8 JUSTICE SOUTER: Okay. Now what's your --

9 CHIEF JUSTICE ROBERTS: Well, that's not a
10 fair reading of Rodriguez. There, it was, "Come on
11 in, he's asleep." It was quite clear that if he were
12 awake, he was going to say, "Don't come in."

13 MR. GOLDSTEIN: Mr. Chief Justice, the
14 Government has argued successfully in this Court that
15 we don't make any assumptions about whether people
16 will consent or not. There are innumerable cases in
17 the lower courts --

18 JUSTICE SOUTER: Well, maybe we don't, but
19 isn't there -- isn't the -- isn't Mr. Dreeben's
20 argument fair that no one in his right mind would have
21 expected Matlock to agree to this? It is clear that
22 Matlock, had he known what was going on -- and he may
23 have; I don't know -- would have objected? So that if
24 we accept your argument that the presence of the
25 person there expressing an objection is what makes the

1 difference, then Matlock and Rodriguez become almost
2 silly cases. They are -- they are -- they're cases
3 that rest upon an assumption that is clearly contrary
4 to fact.

5 MR. GOLDSTEIN: No, Justice Souter. And
6 that is, the Government has argued, and this Court has
7 accepted, again -- and this is a different point; and
8 that is, you have to have a clear line for police
9 officers that is administrable. And the line that is
10 reflected in Matlock and Rodriguez is: If you get
11 consent to come into the house from someone who has
12 the common authority to do so, that will be
13 sufficient, but that doesn't mean that if some -- and
14 so, you don't have to go around and -- finding other
15 people and asking other people. It's just as if you
16 showed up at a house, and you were invited in. You
17 wouldn't say, "Well, let me check with everybody else"
18 --

19 JUSTICE SOUTER: Sure, but --

20 MR. GOLDSTEIN: -- "who lives here."

21 JUSTICE SOUTER: -- an equally clear line
22 would simply be that, if the area to be searched is
23 one of common tenancy or occupation or whatnot, the
24 only consent that will suffice will be the consent of
25 the person against whom you expect to use any evidence

1 found. Easy clear line.

2 MR. GOLDSTEIN: It's true, Justice Souter,
3 there are a lot of possible clear lines. What I'm
4 describing to you is why the difference between
5 Matlock and this case is one in kind, and that is that
6 Matlock, I think, reflects an administrable rule, and
7 that is, if you do have permission from someone who
8 has the authority to admit you, you don't have to go
9 ask anybody else.

10 JUSTICE SOUTER: Okay.

11 MR. GOLDSTEIN: But that --

12 JUSTICE SOUTER: But an equally
13 administrable rule here is that, even though the
14 person you suspect objects, you can still go in, if a
15 person with authority otherwise says you can. Equally
16 clear rule, and it has one advantage: It does not
17 turn Matlock and Rodriguez into silly cases.

18 MR. GOLDSTEIN: Justice Souter, I don't
19 think they're silly cases. I think that it is an
20 important rule that the police show up and they are
21 able to rely -- if they only hear from one person,
22 they're able to rely on that person. I don't -- the --
23 -- I'm not claiming that our rule has great
24 administrative advantages over the other side's. What
25 I'm saying is that it is not necessary to sacrifice

1 the individual's privacy who lives in the house -- as
2 you say, has an expectation of privacy. And so, let
3 me return --

4 JUSTICE BREYER: An expectation of privacy.

5 I have a lingering question here I'd like to get your
6 view on. I don't know what the expectation is, is my
7 problem. If I think of social -- I've never been in a
8 situation, frankly, where one person said, "Stay out,"
9 and the other said, "Come in." So, I don't know what
10 I'd do. If I imagine myself in a normal social
11 situation, I think probably, if I am the typical
12 person, which may or may not be, I --

13 [Laughter.]

14 JUSTICE BREYER: -- I think I'd say, "Well,
15 you know, I don't want to have anything to do with
16 this." If it's a dinner party, forget it. But if I'm
17 in a situation such as the police might be involved
18 in, where I think there is some danger, there is
19 something wrong in the house, there's something odd
20 about it, I don't think the average person would just
21 say, "I'm going away." I think the average person
22 either would come in, or he'd say, "I'll come in for a
23 while. I'm going to call the police," or they're --
24 you just wouldn't have that reaction, "I want nothing
25 to do with it." That's the reaction, you know --

1 that's a bad reaction, when you want nothing to do
2 with a dangerous situation. So, I think, in that
3 situation, the normal reaction would be, "I'm going
4 in," or, "I'm going to get some help," or, "I'm going
5 to get a friend," or, "I'm going to call the police."

6 So, I don't know you do have expectations of
7 that kind, in those situations, though you might with
8 a dinner party.

9 MR. GOLDSTEIN: Justice Breyer, I think
10 that's why it's important that our rule is not that
11 the police should go away. We call for a balance
12 here, and --

13 JUSTICE BREYER: But I want you to address
14 the question of how the legal category of "reasonable
15 expectation of privacy" fits in with what I just said,
16 where I'm assuming, in some social situations, you do
17 think you'd be left alone; but, in the typical
18 situation, stretching well beyond, but certainly
19 including, situations of danger where the police might
20 be involved, you wouldn't have an expectation that you
21 will be left alone. I want to know how those facts,
22 if they are facts -- and you can say they were not --
23 fit within the category called "reasonable expectation
24 of privacy."

25 MR. GOLDSTEIN: Justice Breyer, the Court

1 has precedent on this very point, and that is -- and,
2 Justice Souter, he is asking about reasonable
3 expectations of privacy -- Minnesota versus Olson.
4 The Court considered this and said the very reason
5 that person had standing and could -- had a Fourth
6 Amendment right is because they did have a reasonable
7 expectation of privacy in the premises, that, even
8 though they had no property rights to keep any -- this
9 is the overnight guest -- had no property rights to
10 keep anybody out at all, their expectation -- their
11 reasonable expectation of privacy for Fourth Amendment
12 purposes -- is that if somebody wanted to come in, to
13 which they objected, that objection would be honored.

14 Now, I don't want to lose sight of the fact
15 that our position is the balance; and that is, we
16 don't tell the police to go away. We say, "Look, if
17 she tells you that there's contraband in the house,
18 she can bring it out." That's the Coolidge case.

19 And I do think, Justice Thomas, that there
20 is a difference in kind, not degree, in giving
21 something to someone and then having -- versus having
22 a uncabined search of a house. The complaint --

23 JUSTICE THOMAS: The -- but this was not an
24 uncabined search. That's my problem. What you're --
25 what you're -- the bottom, you're saying to us, is

1 that it's not unreasonable -- an unreasonable search
2 if she went upstairs and brought the straw down,
3 right?

4 MR. GOLDSTEIN: Yes, because that's not a
5 search.

6 JUSTICE THOMAS: Okay. But you're saying it
7 is an unreasonable search for her to lead the police
8 officer to the straw.

9 MR. GOLDSTEIN: Justice --

10 JUSTICE THOMAS: Which is what she did.

11 MR. GOLDSTEIN: Justice Thomas, it's how it
12 played out, because they stopped the search then,
13 because she withdrew her consent. But what she
14 authorized was something very different. She --

15 JUSTICE THOMAS: But she withdrew it after
16 he observed the straw.

17 MR. GOLDSTEIN: Yes, Justice Thomas, that's
18 absolutely correct. My point, instead, is that what
19 happened here, in terms of the consent, and what the
20 State's rule of law would authorize, and what Matlock
21 and Rodriguez authorize if they're extended to this
22 point, is not, "Take me to the drugs," which is an
23 interesting proposition, but, instead, "Go ahead and
24 search the whole house." So, our point, Justice
25 Breyer is, "Look, don't leave. Get a telephonic

1 warrant. It takes 5 minutes. If you know there's
2 something in the house, bring it out. If you have
3 anything to -- any reason to believe there's ongoing
4 criminality, seal the house."

5 JUSTICE KENNEDY: Now, any reason to believe
6 --

7 MR. GOLDSTEIN: Of --

8 JUSTICE KENNEDY: -- but --

9 MR. GOLDSTEIN: Sorry.

10 JUSTICE KENNEDY: -- you can't enter without
11 probable cause.

12 MR. GOLDSTEIN: Right.

13 JUSTICE KENNEDY: And that's a -- with
14 exigent circumstances.

15 MR. GOLDSTEIN: Yes.

16 JUSTICE KENNEDY: Suppose you have
17 suspicions of a domestic problem that's ongoing. It's
18 short of probable cause, but you have reasonable
19 suspicion. Does that alter the nonconsenting party's
20 interest and elevate the consenting party's interest?

21 MR. GOLDSTEIN: Justice Kennedy, I don't
22 think that it does. Our view of the law is that the
23 question is, When the property rights are -- and their
24 -- their control over the property, I should say; I
25 don't mean to invoke the common law -- when the

1 control over the property is equivalent, then, in that
2 tie, if you will, the Fourth Amendment controls. If -
3 - there are doctrines designed to protect against
4 situations in which you have concerns about ongoing
5 criminality and protecting people. But that's --

6 CHIEF JUSTICE ROBERTS: When you talk about
7 that tie, your approach applies in the case -- a
8 dormitory, you have a common room, there are ten rooms
9 off of it, nine people say, "Sure, come on in and
10 search," and the one person says, "No." That one
11 person exercises a veto over a search of the common
12 area?

13 MR. GOLDSTEIN: Mr. Chief Justice, the
14 straightforward rule that I have argued for today is
15 that if you have an equivalent interest in the
16 premises -- it is, of course, the State's rule that,
17 if nine people object, Matlock says that any one of
18 them can let them in, and an individual can override
19 the objections of everybody else in the house. What
20 I'm saying, I think, just to return to the basics, is,
21 I do think --

22 CHIEF JUSTICE ROBERTS: What -- well, what
23 is your answer --

24 MR. GOLDSTEIN: I'm sorry.

25 CHIEF JUSTICE ROBERTS: -- to that case?

1 Your case is that, if one out of ten who share the
2 common room says to the police, "You may not come in,"
3 that controls?

4 MR. GOLDSTEIN: I don't think that has to
5 follow from our rule. It's true, we have articulated
6 one broad rule that would allow the Fourth Amendment
7 to control, but I think if we analogize to the social
8 situation -- if you said to yourself, "What do you
9 expect will happen if nine people that you live with
10 want to let in someone and you're the only one who's
11 going to object?" -- I think it would be perfectly
12 reasonable to say to -- that individual expects the --
13 them to come in.

14 Justice Souter, let me return -- I want to
15 make sure I --

16 JUSTICE SOUTER: But the -- I -- you assume
17 we got -- there goes the -- that -- there goes any
18 bright line administrable rule, I guess.

19 [Laughter.]

20 MR. GOLDSTEIN: Justice Souter, I honestly
21 don't think that's true. I think that Illinois versus
22 Rodriguez, on this question, which is assessing the
23 degree of the authority over the premises, does call
24 for a "totality of the circumstances" inquiry.

25 I also don't know that I fully answered your

1 point, that we look at this question from the
2 perspective of the officer and the reasonableness of
3 the search. And let me just say that, in Matlock and
4 in Rodriguez, the Court's analysis was that it's
5 reasonable, because the person whose privacy is
6 intruded on has assumed some risk. The Court does
7 look to the privacy interests of the person who is
8 ultimately the defendant. That's a -- an element of
9 the reasonableness inquiry. And our point,
10 fundamentally, is that it cannot be the case that when
11 the framers enacted the Fourth Amendment so that you
12 could live with other people and have a private space
13 away from the Government, that you, merely by living
14 with your family, assume the risk that your privacy
15 will be lost. That assumption of the risk --

16 CHIEF JUSTICE ROBERTS: So, can I just take
17 the next step in my hypothetical? The wife and the
18 two adult children who live in the home say, "Come on
19 in," and the husband says, "No." What happens then?

20 MR. GOLDSTEIN: On our broadest rule, the
21 husband would control, although it doesn't follow,
22 from our -- that, to affirm the judgment, you have to
23 say that, because I think you could say that,
24 reasonably, the person realizes they would be
25 outvoted. But I do think the children is an important

1 point.

2 CHIEF JUSTICE ROBERTS: Reasonably, the
3 person realizes he would be outvoted?

4 MR. GOLDSTEIN: Yes.

5 CHIEF JUSTICE ROBERTS: So, it does go to
6 his presumably objectively reasonable views of what
7 nature of privacy he has.

8 MR. GOLDSTEIN: Yes. And what --

9 CHIEF JUSTICE ROBERTS: So, if he thinks,
10 "Look, I've been having a bad time with my wife. I
11 think she's going to consent and let the police in if
12 I'm not" -- then his objection shouldn't control?

13 MR. GOLDSTEIN: Mr. Chief Justice, when -- I
14 agree with you objectively. This Court didn't, for
15 example, in Matlock and Rodriguez, look at the
16 particular family dynamics at that time. It looks to
17 broader social understandings.

18 I did want to return to your "children"
19 point. Remember -- and I think this is a vital point
20 -- and that is, the Courts of Appeals uniformly
21 conclude, after Matlock and Rodriguez, that children
22 are residents, which is the inquiry in Illinois versus
23 Rodriguez, and they can give consent to search a home.
24 It necessarily follows that if you extend that rule,
25 Matlock and Rodriguez, to this case, that children,

1 because they have the authority to admit the police --
2 minor children, 12, 14, 15 -- can then authorize the
3 search, notwithstanding the objection of the parents.

4 Now, if everyone agrees, "That can't be right, it's
5 the parents' home," that's because we are assessing --

6 JUSTICE GINSBURG: What is the case that
7 says that, that the child's invitation overrides the
8 parents' objection?

9 MR. GOLDSTEIN: Justice Ginsburg, that
10 question hasn't been confronted by any court we've
11 checked. But what I -- what the Courts of Appeals
12 have confronted repeatedly, and uniformly agree -- and
13 it's in our brief -- is that children satisfy the
14 Matlock and Rodriguez --

15 JUSTICE GINSBURG: So --

16 MR. GOLDSTEIN: -- standard.

17 JUSTICE GINSBURG: -- would a mother-in-law.

18 [Laughter.]

19 MR. GOLDSTEIN: Yes.

20 CHIEF JUSTICE ROBERTS: But they don't have
21 the same -- they don't have the same property interest
22 as a spouse does, as a tenant in common or whatever.
23 The child doesn't have that interest in the home.

24 MR. GOLDSTEIN: Mr. Chief Justice, that's
25 right, but, of course, that's not the inquiry under

1 Matlock and Rodriguez. If we take your point, then we
2 are definitely moving beyond Matlock and Rodriguez.
3 We're going to have to look to more. And my point is
4 that, if we do look to more than simply the fact that
5 the officers have found someone, however ignorant, has
6 the ability to consent in their own right, if we're
7 going to assess the other factors, the rule should
8 look -- the Court should look to what the ordinary
9 social understandings and --

10 JUSTICE GINSBURG: Mr. Goldstein, your time
11 is almost up, but I want to know if you place any
12 weight at all on the fact that the husband was the
13 target in this case. The target said, "No," and the
14 one who wasn't under suspicion said, "Yes." Does that
15 make any difference?

16 MR. GOLDSTEIN: The -- I do not believe, as
17 a matter of doctrine, that it does. I do think,
18 however, that it informs this Court's analysis of
19 reasonableness, in the sense that the Court, in
20 *Schneckloth*, said, "We are not going to allow consent
21 to circumvent the requirements of getting a warrant."
22 And it is the case -- we have to inescapably agree, I
23 think, that this is simply a way of getting around the
24 warrant requirement. They wanted to find out
25 something about him. He had a privacy interest in the

1 premises. He said, "No." The Constitution says, "You
2 have somebody who's cooperating with you. Let them
3 tell you what's going on in the house." And Illinois
4 versus McArthur says, "Seal off the premises." In
5 fact, Illinois versus McArthur is -- the very point of
6 the Court in that case was that it's much better to
7 seal the premises and get a warrant, which will define
8 --

9 JUSTICE BREYER: Was there anybody in that
10 case who -- since I wrote it, I guess I'm supposed to
11 know it in detail, but I don't --

12 [Laughter.]

13 JUSTICE BREYER: -- and I thought, was --
14 there was no one -- no consent there. There was
15 nobody giving consent, was there?

16 MR. GOLDSTEIN: Oh, Justice --

17 JUSTICE BREYER: Was there?

18 MR. GOLDSTEIN: Justice Breyer --

19 JUSTICE BREYER: I'll go back and read it.

20 MR. GOLDSTEIN: -- she said, "I think you
21 should" -- she said --

22 JUSTICE BREYER: I'll reread it.

23 [Laughter.]

24 MR. GOLDSTEIN: Okay. She said, "I think
25 you should go in there and get it."

1 JUSTICE BREYER: Uh-huh.

2 MR. GOLDSTEIN: But, inescapably, what's
3 going on, there are -- I think that this is not a case
4 that follows, necessarily, from Matlock and Rodriguez.
5 And there is a bright line to be drawn, and that is,
6 you are going to have to not live with your family,
7 which is precisely what the Fourth Amendment is about,
8 in order not to assume the risk of the police coming
9 in. The reasonableness determination is a balancing
10 of law enforcement and privacy interests. The privacy
11 interests are very high. The police can easily get a
12 telephonic warrant or have the materials brought out
13 to them. It is not necessary to take this case, when
14 so rarely has it been that the police have needed to
15 use this authority.

16 If there are no further questions.

17 CHIEF JUSTICE ROBERTS: Thank you, Mr.
18 Goldstein.

19 Ms. Smith, you have a minute and a half
20 remaining.

21 MS. SMITH: No rebuttal, Your Honor.

22 CHIEF JUSTICE ROBERTS: The case is
23 submitted.

24 [Whereupon, at 12:04 p.m., the case in the
25 above-entitled matter was submitted.]