NEW MEXICO LAW REVIEW

Volume 26
Issue 3 *Summer 1996*

Summer 1996

State Constitutional Law - New Mexico Rejects Apparent Authority to Consent as a Valid Basis for Warrantless Searches: State v. Wright

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STATE CONSTITUTIONAL LAW—New Mexico Rejects Apparent Authority to Consent as a Valid Basis for Warrantless Searches: *State v. Wright*

I. INTRODUCTION

In *State v. Wright*,[1] the New Mexico Court of Appeals addressed whether a warrantless search is valid when based on the consent of a third party whom the police reasonably believed to possess common authority over the premises. The court held that such consent was invalid in New Mexico because the federal "apparent authority"[2] exception violated Article II, Section 10 of the New Mexico Constitution.[3] Therefore, in *Wright*, the evidence discovered by officers who relied on the "apparent authority" of a third party's consent to search a residence was suppressed.

Based on the *Wright* decision, if law enforcement officials do not have sufficient basis to conclude that a third party has actual authority to consent, they must obtain a warrant to search the premises or risk having the seized evidence suppressed at trial.[4] This Note will provide an overview of the evolution of the apparent authority to consent exception in both federal and state law, examine the rationale of the *Wright* court, and explore some of the implications of the court's decision.

II. STATEMENT OF THE CASE

On May 8th, 1992, two police officers arrived at Mark Allen's trailer home "in response to a Crime Stoppers' tip . . . that cocaine and marijuana had been delivered to the trailer . . . and were being divided up for sale."[5] Shortly before this, the defendant, Derilee Wright, her boyfriend, John A. Corman III, and Deidre Wertz, had arrived at the trailer home. Wertz introduced Corman and the defendant to Allen who gave them permission to use his back bedroom.

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1. 119 N.M. 559, 893 P.2d 455 (Ct. App.), *cert. denied*, 119 N.M. 389, 890 P.2d 1321 (1995).

2. The United States Supreme Court articulated the "apparent authority" exception in Illinois v. Rodriguez. 497 U.S. 177 (1990). The United States Supreme Court held that a consent to search given by a third party was valid for purposes of the Fourth Amendment, if the police reasonably believed at the time of the search that the third party possessed the authority to consent. This holding allows a third party to consent to a search even though they do not have authority to do so. *Id.* at 188.

3. This section provides:

> The people shall be secure in their persons, papers, homes, and effects, from unreasonable searches and seizures, and no warrant to search any place, or seize any person or thing, shall issue without describing the place to be searched, or the persons or things to be seized, nor without a written showing of probable cause, supported by oath or affirmation.

N.M. CONST. art. II, § 10.

4. *See Wright*, 119 N.M. at 564-65, 893 P.2d at 460-61.

5. *Id.* at 561-62, 893 P.2d at 457-58. Unless otherwise cited, all subsequent references to the facts of this case refer to *Wright*, 119 N.M. at 561-62, 893 P.2d at 457-58.

Before the officers could knock on the door of the trailer, Wertz opened it and said "Hi." After identifying themselves as police officers, Officer Al Marchand asked Wertz if they could come inside. Wertz responded by opening the door wider and stepping back. At this time the officers did not know who owned the trailer or the vehicles parked in front of it.

Officer Marchand asked Wertz if anyone else was in the trailer. She replied that only she and her two children were there. She showed Marchand that her children were sleeping in a bedroom. Marchand noticed a light coming from under the door of another bedroom. He became concerned for his and Officer Ted Eldridge's safety and asked Wertz if anyone else was present. She replied that she did not think so. Marchand asked if he could look, and she replied, "Oh, it's not my place but go ahead." Marchand and Eldridge looked into the bedroom and saw drug paraphernalia near Corman and the defendant. They placed both of them under arrest. Eldridge then found cocaine on the defendant.

At trial, the defendant "moved to suppress the evidence seized by the officers. The trial court ruled that Defendant lacked standing to object to the search of the bedroom . . . ."[6] Additionally, it found that before beginning a search of the other rooms of the trailer, the officers "had sufficient basis to conclude that Wertz had actual or apparent authority to give her consent to a search of the residence."[7]

The defendant appealed her convictions for conspiracy to traffic cocaine and possession of drug paraphernalia.[8] She invoked the protection of both the Fourth Amendment of the United States Constitution and Article II, Section 10 of the New Mexico Constitution.[9] In determining whether the trial court properly denied the defendant's motion to suppress the evidence, the New Mexico Court of Appeals considered two relevant issues:[10] 1) whether the third-party consent authorizing the search was valid;[11] and 2) whether the defendant had standing to challenge the search.[12] The court of appeals reversed the trial court's denial of the defendant's motion to suppress the evidence seized at the trailer.[13] The court concluded that an individual clothed with apparent authority to consent to a search could not give lawful consent to law enforcement officers to enter and search the premises of another.[14] Moreover, the court held that the defendant had a legitimate expectation of privacy in the bedroom which could only be surrendered in the case of a co-occupant of the bedroom.[15]

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6. *Id.* at 562, 893 P.2d at 458.
7. *Id.*
8. *Id.* at 561, 893 P.2d at 457.
9. *Id.* at 563, 893 P.2d at 459.
10. The court also rejects the state's alternative argument that the search was reasonable as a search incident to a protective sweep. This issue, however, is beyond the scope of this note.
11. *Wright*, 119 N.M. at 564, 893 P.2d at 460.
12. *Id.* at 562, 893 P.2d at 458.
13. *Id.* at 565, 893 P.2d at 461.
14. *Id.*
15. *Id.* at 563, 893 P.2d at 459.

III. HISTORICAL AND CONTEXTUAL BACKGROUND

A. *Federal Law—The Evolution of the Consent Exception*

An individual's right to freedom from unreasonable searches and seizures is set out in the Fourth Amendment to the United States Constitution.[16] In *Weeks v. United States*,[17] the United States Supreme Court held that evidence seized in violation of the Fourth Amendment was inadmissible in federal criminal prosecutions.[18] The *Weeks* Court held that the use of illegally seized evidence in a criminal prosecution was a violation of the defendant's constitutional rights.[19] In *Mapp v. Ohio*,[20] the Supreme Court extended the exclusionary rule to the states through the Due Process Clause of the Fourteenth Amendment.[21]

In *Schneckloth v. Bustamonte*,[22] the United States Supreme Court affirmed the proposition that voluntarily given consent is a valid exception to the general presumption against warrantless searches.[23] The Supreme Court stated that a search conducted pursuant to valid consent is an established exception to the requirements of both a warrant and probable cause, under the Federal Constitution's Fourth Amendment.[24] The issue before the *Schneckloth* Court was: "what must the prosecution prove to demonstrate that a consent was 'voluntarily' given?"[25] The Court noted that a search pursuant to consent may result in considerably less incon-

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16. U.S. CONST. amend. IV ("The right of the people to be secure in their persons, houses, 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.").

17. 232 U.S. 383 (1914).

18. *Id.* at 398.

19. *Id.*

20. 367 U.S. 643 (1961).

21. *See id.* at 660. In *Mapp*, the United States Supreme Court held that all evidence obtained by searches and seizures in violation of the Fourth Amendment of the United States Constitution was now inadmissible in state criminal trials as well as in federal criminal trials. The Court noted that the Due Process Clause of the Fourteenth Amendment protected against state action not only freedom from unreasonable searches and seizures but also the right to have excluded from state and federal criminal trials any evidence illegally seized. *Id.* There is some disagreement about whether the exclusionary rule is constitutionally mandated. *See* United States v. Leon, 468 U.S. 897 (1984).

22. 412 U.S. 218 (1973). In *Schneckloth*, a police officer had stopped a car for safety reasons. The officer asked if he could search the car to which one passenger replied, "[s]ure, go ahead." The officer found three stolen checks under the left rear seat. At trial, the defendant, Bustamonte, moved to suppress the evidence found in the car and was denied. *Id.* at 219.

23. *Id.*

24. *Id.* The Supreme Court stated that:

> It is well settled under the Fourth and Fourteenth Amendments that a search conducted without a warrant issued upon probable cause is "per se unreasonable subject only to a few specifically established and well-delineated exceptions."

Id.

25. *Id.* at 223. In *Schneckloth*, the Court held that when the subject of a search is not in custody, the State must prove that the consent was voluntarily given and not the result of duress or coercion, express or implied. The Court went on to state that voluntariness is to be determined from all the circumstances and while the subject's knowledge of her right to refuse consent is a fact to be taken into account, the prosecution is not required to show such knowledge as a prerequisite to establishing voluntary consent. *Id.* at 227.

venience to the subject of the search and, if properly conducted, is a legitimate aspect of police activity. Additionally, where the police have evidence about some illegal activity, but lack probable cause, a search authorized by consent may be the only means of obtaining reliable evidence.[26]

1. The Emergence of "Common Authority": *United States v. Matlock*[27]

In *United States v. Matlock*, the United States Supreme Court set forth the principle that a person who possesses common authority over a premises may validly consent to a search.[28] The authority which justifies third-party consent rests on the mutual use of property by persons having joint access or mutual control for most purposes.[29] Common authority is not implied from the mere property interest a third party has in the property to be searched.[30]

The defendant in *Matlock* challenged a warrantless search executed by officers who had secured the consent of a woman who said the premises were jointly occupied by the defendant and herself.[31] The issue was whether the evidence presented by the United States with respect to the voluntary consent of a third party to search the living quarters of the defendant was legally sufficient to render the seized materials admissible in evidence at the defendant's criminal trial.[32] The Court held that the voluntary consent of a joint occupant of a residence to search the premises jointly occupied is valid against the co-occupant.[33] This holding allowed evidence found in the State's search to be used against the defendant in his criminal trial.[34]

The Supreme Court acknowledged that the consent of an individual who possesses common authority over the premises is valid against the absent, non-consenting individual with whom that authority is shared.[35] The absent defendant assumes this risk when he allows another to have joint control of his premises or effects.[36] The United States Supreme Court ruled that when the State seeks to justify a warrantless search by proof of voluntary consent it need not rely on proof of the defendant's consent. The State may, instead, show that it obtained consent from a

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26. *Id.* The Court noted in *Schneckloth* that the police lacked probable cause to search the car and yet the search pursuant to consent yielded tangible evidence which served as a basis for prosecution and assured that innocent parties were not brought to trial. *Id.*

27. 415 U.S. 164 (1974).

28. *Id.* at 171.

29. *See id.*

30. *See id.* at 172 n.7.

31. *Id.* at 166.

32. *Id.* at 171-72.

33. *Matlock*, 415 U.S. at 169-70.

34. *Id.* The Court noted that the lower courts in *Matlock*, specifically the Seventh Circuit, which had affirmed the district court's motion to suppress the evidence, had accepted this proposition. *Id.* at 169.

35. *Id.* at 170.

36. *Id.* (citing Frazier v. Cupp, 394 U.S. 731, 740 (1969)).

third party who possessed common authority or other sufficient relationship to the premises or effects sought to be searched.[37] The Court reversed the district court and the court of appeals and thus declined to reach the "apparent authority" contention argued by the Government.[38]

2. "Apparent Authority" to Consent: *Illinois v. Rodriguez*[39]

Sixteen years after *Matlock*, the United States Supreme Court addressed the issue of whether a warrantless search is valid when based upon the consent of a third party whom police reasonably believed to possess common authority over the premises.[40] In *Rodriguez*, the defendant was arrested in his apartment and charged with possession of illegal drugs.[41] The officers had gained entry with the consent and assistance of a third party who represented the defendant's apartment as "ours" said that she had clothing and furniture there and unlocked the door with her key.[42] At trial, the defendant moved to suppress all evidence seized at the time of his arrest, claiming that the third party's consent was invalid because she did not possess common authority over the premises.[43]

The Court found that the prosecution did not sustain its burden of proving that the third party who consented had common authority over the premises.[44] Nevertheless, the Court rejected the defendant's assertion that permitting a reasonable belief of common authority to be a valid consent would vicariously waive his Fourth Amendment rights.[45] In *Rodriguez*, the Court acknowledged that the defendant is guaranteed, by the

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37. The Supreme Court defined common authority as:

> Common authority is, of course, not to be implied from the mere property interest a third party has in the property. The authority which justifies third-party consent, does not rest upon the law of property, with its attendant historical and legal refinements . . . but 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.

Matlock, 415 U.S. at 172 n.7 (citing Chapman v. U.S., 365 U.S. 610 (1961); Stone v. California, 376 U.S. 483 (1964)).

38. *Id.* at 178. The Court stated that it was not necessary to reach the issue of whether the government had only to prove that the searching officers reasonably believed that the third party had sufficient authority over the premises to consent to the search. *Id.* at 178 n.14.

39. 497 U.S. 177 (1990).

40. *Id.* at 183-97.

41. *Id.* at 177.

42. *Id.*

43. *Id.*

44. *Id.* at 181 (citing United States v. Matlock, 415 U.S. 164, 171 n.7 (1974)). The Supreme Court noted that the third party, Gail Fischer, had moved out of the apartment almost a month before the search in question. *Id.* She removed her clothing, though she left behind some furniture and household effects. *Id.* She sometimes returned to spend the night, but never went to the apartment by herself when the defendant was not home. *Id.* "Her name was not on the lease not did she contribute to the rent." *Id.* She did have a key to the apartment, which she stated at trial that she had taken without the defendant's knowledge. *Id.* Based on these facts, the Court determined that the State had not established that Fischer had "joint access or control for most purposes" of the defendant's apartment. *Id.* at 181-82.

45. *Rodriguez*, 497 U.S. at 183.

exclusionary rule, "that no evidence seized in violation of the Fourth Amendment will be introduced at his trial."[46] His protection under the Fourth Amendment itself is that an unreasonable government search of his house will not occur.[47]

"There are various elements . . . that can make a search of a person's house 'reasonable,' one of which is the consent of the person or his co-tenant."[48] Therefore, the Court held that when a government officer exercises his judgment regarding the facts, there is no Fourth Amendment violation unless the officer's judgment is unreasonable.[49] The Court determined that when a claim of apparent consent is raised, the issue is whether one's right to be free from unreasonable searches has been violated.[50]

The *Rodriguez* Court held that police officers may not always accept an invitation to enter the premises.[51] The determination of consent must be judged against an objective standard.[52] The Court cautioned: "Even when the invitation is accompanied by an explicit assertion that the person lives there, the surrounding circumstances could conceivably be such that a reasonable person would doubt its truth and not act upon it without further inquiry."[53]

B. Other Jurisdictions

Following the ruling in *Rodriguez*, other jurisdictions have required only that police officers reasonably believed that a third party's authority to consent was valid.[54] The doctrine becomes problematic when courts try to determine what constitutes an officer's reasonable belief in a third party's apparent authority.[55] In *Delaware v. Brooks*,[56] the Superior Court

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46. *Id.*

47. *Id.*

48. *Id.* at 183-84.

49. *Id.* at 184-85. The Court stated that the defendant was urging a requirement on the consent exception that had not been imposed upon other elements that compel government officers to exercise their judgment concerning the facts: "namely, the requirement that their judgment be not only responsible but correct." *Id.* at 184.

50. *Id.* at 187.

51. *Id.* at 188.

52. *Rodriguez*, 497 U.S. at 188. The Court stated: "As with other factual determinations bearing upon search and seizure, determination of consent to enter must 'be judged against an objective standard: would the facts available to the officer at the moment . . . . Warrant a man of reasonable caution in the belief' that the consenting party had authority over the premises?" *Id.* (quoting Terry v. Ohio, 392 U.S. 1, 21-22 (1968)). "If not, then warrantless entry without further inquiry is unlawful unless authority actually exists. But if so, the search is valid." *Id.* at 188-89.

53. *Id.* at 188.

54. *See, e.g.*, People v. Richards, 578 N.Y.S.2d 380, 383 (N.Y. 1991) (holding that tenant's failure to regain possession of apartment constituted reasonable basis in landlord's apparent authority to consent to search); United States v. Brown, 961 F.2d 1039, 1041 (2d Cir. 1992) (holding that officer's belief that homeowner's limited authority to enter for particular purposes gave rise to authority to consent was a mistake of law, thereby invalidating officer's search); State v. Whitrock, 468 N.W.2d 696, 707 (Wis. 1991) (holding that officer's reliance on landlord's consent to search tenant's apartment was reasonable because landlord represented to officers that tenant was a holdover tenant and therefore, not in lawful possession of apartment).

55. *See generally* Delaware v. Brooks, Nos. IK94-04-0509 to -0512, 1994 WL 466032 (Del. Super. Ct. 1994).

56. *Id.* at *1.

of Delaware found that if there is no objective indicia of common control, the police must make further factual inquiries.[57]

In *United States v. Whitfield*,[58] two FBI agents obtained verbal consent from a mother to search her twenty-nine-year-old son's bedroom.[59] The court held that the search violated the Fourth Amendment.[60] It determined that, as a factual matter, the agents could not have reasonably inferred that the defendant's mother had common authority to permit the search.[61] The court noted that *Rodriguez* held that "the Fourth Amendment does not validate warrantless searches based on a reasonable mistake of fact, as distinguished from a mistake of law."[62] The circumstances in *Whitfield* were ambiguous regarding the third party's common authority.[63] Therefore, the agents were required to make further factual inquiries in order to establish apparent authority or to procure a warrant as mandated by the Fourth Amendment.[64]

North Dakota, in contrast, has suggested that because game wardens knew certain facts about a farmstead, they could reasonably conclude that a third party had common authority over the premises.[65] The North Dakota Supreme Court ruled that a third party had apparent authority to consent under the facts as they appeared to law enforcement officials.[66] Similarly, in *United States v. Rosario*,[67] the Seventh Circuit adopted a more lenient test for apparent authority.[68] In this case, police officers went to investigate reports of suspicious activity at a motel room.[69] One officer knocked on the door and a man opened it and gestured for the officers to enter.[70] Before they entered, the officers did not determine the man's name, identity, or relationship to the room.[71] The court ruled that this was not dispositive on the issue of apparent authority. Rather, the issue was whether the individual projected an aura of authority upon

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57. *Id.* at *4. The Delaware Superior Court noted that case law since *Rodriguez* has been ambiguous regarding "what constitutes a reasonable belief in a third-party's apparent authority because reasonableness under the circumstances facing an officer in a given situation is highly fact-dependent." *Id.* at *3.

58. 939 F.2d 1071 (D.C. Cir. 1991).

59. *Id.* at 1073.

60. *Id.* at 1075.

61. *Id.* (citing United States v. Matlock, 415 U.S. 164, 171 (1974)).

62. *Whitfield*, 939 F.2d at 1073. The court emphasized that "*Rodriguez* thus applies to situations in which an officer would have had valid consent to search if the facts were as he reasonably believed them to be." *Id.* at 1074

63. *Id.* at 1075.

64. *Id.*

65. *See* North Dakota v. Zimmerman, 529 N.W.2d 171, 175-76 (N.D. 1995).

66. *Id.* North Dakota has apparently adopted a "good-reason-to-believe" standard. The North Dakota Supreme Court did not require officers to make further factual inquiries under seemingly ambiguous facts. Because the game wardens were not told of the third party's lack of authority and because "[i]t is reasonable for officials to conclude the patriarch of the family farm would have authority over the farmstead." *Id.* The North Dakota Supreme Court reversed the trial court, thus allowing the seized evidence to be used against the defendant. *Id.*

67. 962 F.2d 733 (7th Cir. 1992).

68. *Id.* at 737.

69. *Id.* at 734-35.

70. *Id.* at 735.

71. *Id.*

which one could reasonably rely.[72] The Seventh Circuit affirmed the trial court's denial of the defendant's motion to suppress the evidence seized from the motel room.[73]

C. *New Mexico Law*

1. The Consent Exception in New Mexico

The New Mexico Court of Appeals has held that in the absence of a warrant, but when the defendant has consented to a search, the burden is on the prosecution to show by clear and positive evidence that the consent was voluntarily given.[74] In *State v. Valencia-Olaya*,[75] a police officer had asked twice if he could look inside the defendant's car and the defendant had given him permission. The officer became suspicious and removed a door panel to discover cocaine. The court of appeals ruled that the prosecution had carried its burden of proving that the defendant had voluntarily given the officer his unlimited consent to search the car.[76]

2. Common Authority

In *State v. Madrid*,[77] the New Mexico Court of Appeals addressed the issue of whether a third party's consent to a search was valid, during which evidence was seized to be used against the defendant in a criminal trial. *Madrid* involved the validity of a wife's consent to search her husband's residence because she was not living there at the time. The court of appeals concluded that because furniture and personal items belonging to the wife were there and because both she and the defendant had keys to the residence, the wife could validly consent to a search of the residence.[78] The New Mexico Court of Appeals based its decision on the fact that the wife had a sufficient relationship to the premises.[79] Therefore, the court held that the defendant had no reasonable expectation

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72. *Rosario*, 962 F.2d at 738. The court added that the Fourth Amendment does not require that an officer's belief be correct, only reasonable. *Id.* (citing Illinois v. Rodriguez, 497 U.S. 177, 186 (1990)). The court noted that to hold differently would be to expect law enforcement officials to perform their duties infallibly. *Id.*

73. *Id.* at 739.

74. In State v. Valencia-Olaya, 105 N.M. 690, 736 P.2d 495 (Ct. App.), *cert. denied*, 105 N.M. 689, 736 P.2d 494 (1987), the court noted that the New Mexico Supreme Court had adopted a three-tiered analysis for determining whether a consent was voluntary:

> First, there must be clear and positive testimony that the consent was unequivocal and specific. Second, the government must establish that the consent was given without duress or coercion. Finally, we view the first two elements with a presumption against waiver of constitutional rights.

Id. at 694, 736 P.2d at 499 (citing United States v. Recalde, 761 F.2d 1448 (10th Cir. 1985)).

75. 105 N.M. 690, 736 P.2d 495 (Ct. App.), *cert. denied*, 105 N.M. 689, 736 P.2d 494 (1987).

76. *See id.* at 694-95, 736 P.2d at 499-500.

77. 91 N.M. 375, 574 P.2d 594 (Ct. App.), *cert. denied*, 91 N.M. 491, 576 P.2d 297 (1978).

78. *See id.* at 378, 574 P.2d at 597.

79. *Id.* at 378, 574 P.2d at 587. The court noted that the wife had a right to occupy the premises, had a key, used the premises to an extent, and left some of her things there. *Id.*

of exclusive use of the premise.[80] Likewise, in *State v. Hensel*,[81] the New Mexico Court of Appeals affirmed that the authority which validates third-party consent does not rest on the property interest that the third party has in the premises to be searched.[82] Rather, the Court determined that the third party's authority to consent rests "on the mutual use of the property by individuals having joint access or control" for most purposes.[83]

3. New Mexico Constitution—Article II, Section 10 Jurisprudence

In a line of cases, beginning in 1989, the New Mexico Supreme Court has afforded defendants more protection under Article II, Section 10 of the New Mexico Constitution than is afforded by its federal counterpart, the Fourth Amendment of the United States Constitution.[84] In *State v. Gutierrez*,[85] the New Mexico Supreme Court held that it is the court's duty to enforce the constitutional guarantee of freedom from unreasonable search and seizure:

> Denying the government the fruits of unconstitutional conduct at trial best effectuates the constitutional proscription of unreasonable searches and seizures by preserving the rights of the accused to the same extent as if the government's officers had stayed within the law.[86]

It is in this context that the New Mexico Court of Appeals decided *Wright*.

IV. RATIONALE OF THE *WRIGHT* COURT

In *State v. Wright*,[87] the New Mexico Court of Appeals considered whether the trial court properly denied the defendant's motion to suppress

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80. *Id.*

81. 106 N.M. 8, 738 P.2d 126 (Ct. App.), *cert. denied*, 105 N.M. 720, 737 P.2d 79, *cert. denied*, 484 U.S. 958 (1987).

82. *Id.* at 10, 738 P.2d at 128.

83. *Id.* (citing United States v. Matlock, 415 U.S. 164, 171 n.7)

84. *See, e.g.*, State v. Cordova 109 N.M. 211, 214, 784 P.2d 30, 33 (1989) (holding that New Mexico requires a valid warrant affidavit to meet a two-prong test: 1) a substantial basis for believing the informant; and 2) a substantial basis for concluding that the informant gathered the information of illegal activity in a reliable fashion). New Mexico rejected the more lenient test set forth by the U.S. Supreme Court in Illinois v. Gates, 462 U.S. 213 (1983). *Cordova* 109 N.M. at 216-17, 784 P.2d at 35-36. *See also* State v. Gutierrez, 116 N.M. 431, 863 P.2d 1052 (1993) (holding that the "good-faith" exception to the federal exclusionary rule was incompatible with state constitutional protections); Campos v. State, 117 N.M. 155, 870 P.2d 117 (1994) (holding that a warrantless public arrest must be based upon both probable cause and sufficient exigent circumstances, rejecting the more lenient federal rule set forth in U.S. v. Watson, 423 U.S. 411 (1976)).

85. 116 N.M. 431, 863 P.2d 1052 (1993).

86. *Id.* at 446, 863 P.2d at 1067. *See also* YALE KAMISAR, WAYNE R. LAFAVE, & JEROLD H. ISRAEL, MODERN CRIMINAL PROCEDURE § 5, at 58-59 (8th ed. 1994) (discussing the reaction of state courts determined to provide the accused with greater protections under state law than is said to be provided under the Federal Constitution by construing "a state constitutional provision more expansively than the United States Supreme Court has interpreted a *textually identical* or *parallel* provision of the Federal Bill of Rights.").

87. State v. Wright, 119 N.M. 559, 893 P.2d 455 (Ct. App.), *cert. denied*, 119 N.M. 389, 890 P.2d 1321 (1995).

evidence following a warrantless search of a bedroom occupied by the defendant and her boyfriend in the home of a third person. The court of appeals addressed a question of first impression in New Mexico: whether "an individual clothed with apparent authority to consent to a search may give lawful consent to law enforcement officers to enter and search the premises owned by another . . . ."[88] The State conceded that Wertz did not have actual authority to consent to the officers' entry into the trailer and the bedroom.[89] Nevertheless, the State argued that Wertz possessed apparent authority to consent to the entry and subsequent search.[90]

The State asserted that the United States Supreme Court's decision in *Illinois v. Rodriguez* supported this claim.[91] The court of appeals acknowledged that in determining apparent authority the United States Supreme Court applied an objective standard; nevertheless, it rejected this argument.[92] The *Wright* court stated, "the State's reliance on the officers' subjective belief that Wertz had 'apparent authority' to give consent to search the residence and the bedroom occupied by defendant and Corman runs counter to the provisions of Article II, Section 10 of the New Mexico Constitution."[93]

The *Wright* court relied on the New Mexico Supreme Court's rationale in *State v. Gutierrez*.[94] "An individual's right to be free from unreasonable searches and seizures under Article II, Section 10 of the New Mexico Constitution precludes the erosion of such right by a 'good faith' exception as articulated by the United States Supreme Court in *United States v. Leon* . . . ."[95] The *Wright* court concluded "that where the State relies upon consent to justify a warrantless search of a residence, there is no 'apparent authority' exception under Article II, Section 10 of the New Mexico Constitution."[96]

Additionally, the State argued that the defendant lacked a legitimate expectation of privacy in both the trailer and the bedroom; thus she did not have standing to challenge the officers' search.[97] The court of appeals

88. *Id.* at 564, 893 P.2d at 460. *See also* State v. Munoz, 111 N.M. 118, 119, 802 P.2d 23, 24 (Ct. App.), *cert. denied*, 111 N.M. 136, 802 P.2d 645 (1990) (declining to reach the question of whether a warrantless entry is valid when based on the consent of a party whom the police at the time of the entry reasonably believed to possess common authority over the premises).

89. *See Wright*, 119 N.M. at 564, 893 P.2d at 460.

90. *Id. See also supra* note 52 and accompanying text.

91. *Wright*, 119 N.M. at 564, 893 P.2d at 460.

92. *Id.*

93. *Id.*

94. *See id.* In *Gutierrez*, the court held that evidence obtained by virtue of an invalid search warrant may not be admitted under the exclusionary rule's "good faith" exception. State v. Gutierrez, 116 N.M. 431, 446-47, 863 P.2d 1052, 1067-68 (1993). The "good faith" exception provides that whenever an officer executes a search pursuant to a warrant that is later proved invalid, the officer's "good faith" belief in the warrant would preserve otherwise excludable evidence. *Id.* at 437, 863 P.2d at 1058. *See also* United States v. Leon, 468 U.S. 897 (1984) (acknowledging a "good faith" exception to the exclusionary rule).

95. *Wright*, 119 N.M. at 564, 893 P.2d at 461.

96. *Id.* at 565, 893 P.2d at 461.

97. *See id.* at 562, 893 P.2d at 458.

set forth a two-pronged test to determine whether an individual has a reasonable expectation of privacy: 1) by his or her conduct, has the individual demonstrated an actual expectation of privacy; and 2) "is the person's subjective expectation one that society recognizes as reasonable."[98] The court rejected the State's argument that the defendant lacked standing because the prosecution failed to prove that she was an overnight guest.[99]

The *Wright* court determined that the State's reliance on a United States Supreme Court case, *Minnesota v. Olson*,[100] was misguided.[101] In *Olson*, the Supreme Court held that an individual's status as a house guest is sufficient to confer standing to challenge the warrantless entry by police.[102] The New Mexico Court of Appeals determined, however, that *Olson* did not hold that an individual's status as an overnight guest is a condition precedent to the right to assert a legitimate expectation of privacy under the Fourth Amendment.[103]

Moreover, the *Wright* court stated that the framers of Article II, Section 10 of the New Mexico Constitution did not intend an individual's freedom from unreasonable searches and seizures to be so narrowly construed.[104] Because the defendant was in the bedroom with the door closed and with the permission of the owner, the court concluded that she had a reasonable expectation of privacy in the bedroom.[105] The court of appeals also disagreed with the State's reliance on *State v. Hensel*.[106]

Finally, the court distinguished *United States v. Rosario*,[107] by acknowledging that the defendant in *Rosario* had rented a hotel room with another person, thereby making the defendant's expectation of privacy contingent on the decisions of the consenting party.[108] Following this same reasoning, the New Mexico Court of Appeals ruled that an individual's reasonable expectation of privacy in a bedroom with the door closed could not be surrendered, except in the case of a co-occupant of the bedroom.[109] The *Wright* court concluded that the trial court should

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98. *Id.* at 563, 893 P.2d at 459. *Compare* State v. Esguerra, 113 N.M. 310, 313, 825 P.2d 243, 246 (Ct. App. 1991) (stating that one who owns, controls, or lawfully possesses property has a legitimate expectation of privacy in that property protected by the Fourth Amendment) *with* State v. Hensel, 106 N.M. 8, 9, 738 P.2d 126, 127 (Ct. App. 1987) (stating that mere presence on the premises is not enough to convey a legitimate expectation of privacy in the premises).

99. *Wright*, 119 N.M. at 563, 893 P.2d at 459.

100. 495 U.S. 91 (1990).

101. *See Wright*, 119 N.M. at 563, 893 P.2d at 459.

102. *See id.* (citing *Olson*, 495 U.S. at 98-99).

103. *Wright*, 119 N.M. at 563, 893 P.2d at 459.

104. *Id. See Gutierrez*, 116 N.M. at 440, 863 P.2d at 1061 (stating that the New Mexico Supreme Court had "demonstrated a willingness to undertake independent analysis of our state constitutional guarantees when federal law begins to encroach on the sanctity of those guarantees.").

105. *See Wright*, 119 N.M. at 563-64, 893 P.2d at 459-60.

106. *See id.* at 563, 893 P.2d at 559. The *Wright* court noted that in *Hensel* there was evidence that the defendant did not have permission to be on the premises, but in the present case, the State had conceded that the defendant had permission to enter the trailer and occupy the bedroom. *Id.*

107. 962 F.2d 733 (7th Cir. 1992).

108. *See Wright*, 119 N.M. at 563, 893 P.2d at 459 (citing *Rosario*, 962 F.2d at 737).

109. *Id.* at 564, 893 P.2d at 460.

have granted the motion to suppress the contraband discovered in the bedroom and on the defendant.[110]

V. ANALYSIS AND IMPLICATIONS

The court of appeals' decision in *Wright* is the most recent in a series of cases in which New Mexico construes its search and seizure provision to accord defendants more protection than the federal courts accord under the Fourth Amendment.[111] The court of appeals' willingness to reject the federal apparent authority exception should be commended. The apparent authority exception unnecessarily broadens the consent exception to the warrant requirement.

The *Wright* court provides little rationale in the opinion for its decision to reject the apparent authority exception. Nevertheless, the policy underscored by the *Wright* decision is correct. The New Mexico Court of Appeals demonstrates its unwillingness to defer to law enforcement officials by rejecting the further factual inquiry required by the federal apparent authority exception.[112] The federal exception requires that the court go through a factual analysis to determine if the third party's consent is valid. If it is found invalid, the court must determine from the subjective perceptions of the officer whether she could have reasonably believed that the third party possessed authority to consent to a search.[113] The confusion in other jurisdictions over how to determine when the subjective perception of an officer is reasonable is one important implication avoided by the *Wright* decision.[114]

After *State v. Gutierrez*, in which the New Mexico Supreme Court held that an officer's "good faith" belief in a search warrant that later proved invalid would not preserve otherwise excludable evidence,[115] it would have been difficult for the New Mexico Court of Appeals to uphold the federal apparent authority to consent doctrine. New Mexico has supported the dissenting Justices' view in *Illinois v. Rodriguez*.[116] The underlying rationale for allowing third-party-consent searches is that a "person may voluntarily limit his expectation of privacy by allowing others to exercise authority over his premises."[117] In *Wright*, the court held that as a matter of law, the defendant had a legitimate expectation of privacy in the bedroom that could not be surrendered except in the

110. *Id.* at 565, 893 P.2d at 461.

111. *See* Campos v. State, 117 N.M. 155, 870 P.2d 117 (1994); State v. Gutierrez, 116 N.M. 431, 863 P.2d 1052 (1993); State v. Cordova, 109 N.M. 211, 784 P.2d 30 (1989).

112. *See Wright*, 119 N.M. at 564, 893 P.2d at 460.

113. *See* Illinois v. Rodriguez, 497 U.S. 177, 188 (1990).

114. *See supra* note 49 and accompanying text.

115. *See supra* note 97.

116. *See Rodriguez*, 497 U.S. at 189-98 (Marshall, Brennan, & Stevens, JJ., dissenting).

117. *Id.* at 190. The dissent stated that "an individual's decision to permit another 'joint access [to] or control [over the property] for most purposes;'" (quoting United States v. Matlock, 415 U.S. 164, 171 n.7 (1974)) "limits that person's 'reasonable expectation of privacy and to that extent limits his Fourth Amendment protections.'" *Id.*

case of a co-occupant of the bedroom.[118] Therefore, the defendant's Article II, Section 10 protections were only limited to that extent. The court of appeals would not allow unlawfully obtained evidence to be admitted at trial no matter how reasonable the officer's beliefs were that the third party possessed the authority to consent.[119]

In *State v. Gutierrez*, the New Mexico Supreme Court focused on New Mexico's constitutional guarantees.[120] The New Mexico courts must be encouraged to continue to undertake independent analysis of the New Mexico Constitution because the United States Supreme Court continues to be unwilling to limit law enforcement's discretionary power,[121] which allows the police to become "judges in their own cause."[122] Although there is undoubtedly an argument that only the guilty are protected by the *Wright* court's decision, in fact, the *Wright* decision affords to all of New Mexico's citizens what is guaranteed to them by Article II, Section 10 of the New Mexico Constitution.

The *Wright* decision demonstrates that New Mexico will continue to protect its citizens from the trend in the United States Supreme Court of the free-floating creation of "reasonable exceptions to the warrant requirement."[123] The New Mexico Court of Appeals has enforced its mandate to exclude any evidence that is unlawfully obtained. If a third party did not have the necessary actual authority to consent to a search, the consent is invalid, the search is unlawful, and the evidence must be excluded. The evidence seized at the trailer may have resulted in the defendant's conviction. Nevertheless, in New Mexico, a person will not be convicted at any cost.

VI. CONCLUSION

The *Wright* decision held that the State may not justify warrantless searches by the apparent authority of a third party to consent. Although the *Wright* decision would have been more helpful if the court had expanded its discussion of its reasoning for invalidating the apparent authority to consent exception in New Mexico, the law in New Mexico pertaining to third-party consent is clear. Despite the fact that evidence needed to convict may be excluded, if the third-party consent is found

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118. *Wright*, 119 N.M. at 564, 893 P.2d at 460.

119. *Id.* at 565, 893 P.2d at 461.

120. *See supra* notes 85-86 and accompanying text.

121. *See Rodriguez*, 497 U.S. at 197 (The dissent noted that precedent has demonstrated that third-party consent searches are constitutional only because they rest on consent by a party empowered to do so.).

122. *See* Tracey Maclin, *The Central Meaning of the Fourth Amendment*, 35 WM. & MARY L. REV. 197, 213-214 (1993) (citing Jacob W. Landynski, *In Search of Justice Black's Fourth Amendment*, 45 FORDHAM L. REV. 453, 462 (1976)).

123. *Rodriguez*, 497 U.S. at 198. The *Rodriguez* dissent noted that:

> Instead of judging the validity of consent searches, as we have in the past, based on whether a defendant has in fact limited his expectation of privacy, the Court today carves out an additional exception to the warrant requirement for third party consent searches . . . .

Id. at 197. *See also* Maclin, *supra* note 122, at 228-29.

to be invalid, then the subsequent search and seizure are also invalid. With this decision New Mexico reaffirms its mandate to analyze the New Mexico Constitution independently of federal law when federal law encroaches upon the rights of New Mexico's citizens.

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