In the

Supreme Court of the United States

UNITED STATES, Petitioner,	)	
vs	)	No. 72-1355
WILLIAM EARL MATTLOCK, Respondent.	)	

Washington, D. C.
December 10, 1973

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UNITED STATES, Petitioner,	:	
v.	:	No. 72-1355
WILLIAM EARL MATTLOCK, Respondent.	:	

Washington, D. C.
Monday, December 10, 1973

The above-entitled matter came on for argument at 2:31 o'clock p.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM O. DOUGLAS, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice

APPEARANCES:

LAWRENCE G. WALLACE, ESQ., Office of the Solicitor General, Department of Justice, Washington, D. C.; for the Petitioner.

DONALD S. EISENBERG, ESQ., 131 West Wilson Street, Madison, Wisconsin 53703; for the Respondent.

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C O N T E N T S

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in No. 72-1355, United States v. Mattlock.

Mr. Wallace, you may proceed whenever you are ready.

ORAL ARGUMENT OF LAWRENCE G. WALLACE, ESQ.,

ON BEHALF OF PETITIONER

MR. WALLACE: Mr. Chief Justice, and may it please the Court:

This case arises on a motion to suppress in connection with respondent's as yet untried indictment for bank robbery. Respondent was arrested by local police officers at about 9:30 a.m. in the yard of a farm house rented by Mr. and Mrs. Walter Marshall. Immediately after his arrest, three officers went to the door of the Marshall house and were admitted by the Marshalls' 21-year-old daughter, Mrs. Gayle Graff, who had her three-year-old son with her, and apparently they were the only ones in the house at the time. The officers had no search warrant. They told her they were looking for money and a gun and asked if they could come in and make a search. She consented and in response to their questions told the officers that she and the respondent jointly occupied an upstairs bedroom in which they slept in the same bed. She specifically gave them permission to search that room.

They found that it contained a double bed with two pillows on it, which gave the appearance of having been slept

in, and there was men's and women's clothing in the closet, and there was also a four-drawer bureau, two drawers of which contained men's clothing and two drawer's of which contained women's clothing, including underclothing.

Mrs. Graff told the officers that the respondent has the two bottom drawers and that the top two drawers were her's. In the closet, the officers found a diaper bag half filled with a large amount of cash, several thousand dollars.

The government's petition in this Court contests only the suppression by the courts below of this cash found in the closet. No issue is raised in this Court with respect to two later searches or the suppression of some of the items found during those searches.

The District Court -- now, I have recounted only the facts known to the officers at the time they conducted the search.

The District Court held --

Q Mr. Wallace, at a later point in the day, not at the time of the consent, that this lady said that she was the common law wife of the respondent?

MR. WALLACE: She did make that remark later in the day at the police headquarters.

The District Court held, on the facts that I have recounted, that prior to the search at issue it reasonably appeared to the searching officers that Mrs. Graff had the right

to consent to the search. In other words, it was reasonable for the officers to rely on her consent in making the search. But the court held that this satisfied only one part of a two-pronged test that the government must meet in this situation. It held that the government must also prove that she actually had the right to consent to the search, and it further held that it excluded all hearsay testimony which was introduced to show the actual right, the government had failed to meet its burden on the second prong of the test.

The Court of Appeals affirmed in all respects, although there was a difference between the two courts in the formulation of the burden of proof on the government, to which I shall allude later.

Our principal contention in this Court is that the two-prong test applied by the courts below is erroneous. In conducting an investigation, we contend, police officers must act on the basis of the facts as they appear at the time of the investigation. What the Fourth Amendment requires is that their action be reasonable at the time it is undertaken. Just as an entry made without probable cause cannot be validated by what the search later turns up, so the reverse is also true, a subsequent discovery that the police were misled by deceptive appearances does not invalidate the search if it was reasonable for them to rely on those appearances in undertaking the search.

That was the holding of this Court in Hill v.

California, in 401 U.S. 797, in which the police conducted a search incident to the arrest of a man they reasonably but mistakenly believed to be the defendant. And in that case the Court emphasized that sufficient probability, not certainty, is the touchstone of reasonableness under the Fourth Amendment, and said that the arrest in that case was, again quoting, "a reasonable response to the situation facing them, the police officers, at the time."

Similarly, here the courts below correctly found, a finding that is not challenged in this Court, that the officers responded reasonably to the situation they found. Since there thus was a total absence of official misconduct, there was, we contend, no Fourth Amendment violation.

Q I gather, Mr. Wallace, what bothered Judge Doyle and Judge Morgan in the Court of Appeals was an example they both cited, the possibility that you could have a valid consent under your theory, given by a complete impostor. Does your theory have some way of dealing with that? Do you accept that as the logical conclusion of your line of argument?

MR. WALLACE: Well, that is not the situation we have here. We think that Hill v. California says a great deal about that hypothetical situation, but I think that the answer has to be that what inquiries are reasonable on the part of the police officers depends on the situation. Here there is no reason for them to doubt that she was rightfully in the house.

It was 9:30 in the morning. She answered the door with her little child with her, and she had previously come out of the door to find out what was going on with respect to the arrest of the respondent whom she referred to as Bill. There was every indication that they resided in the house. So I don't think the Court need deal with the situation of an impostor until that case arises. One might surmise that an impostor, for example a burglar, would be reluctant to consent to a search because of the problem that he might then be arrested if something were found by the officers, and it would then be found out that he was not rightfully there.

Q Well, let's take an extreme situation, Mr. Wallace. Let's assume that the meter reader is on the porch or out in the yard and they ask him if they may enter, and the door is open, and he says "Be my guest," the usual vernacular, and they go in. Would you say that that is covered by your rule, too?

MR. WALLACE: If it reasonably appeared to the police officers, reasonably appeared to them that he had the authority to consent to the search that he was consenting to.

Q Do you need to go that far for this case?

MR. WALLACE: Well, we don't need to because, as I say, the facts here were such that it was readily apparent that she was residing in the house. I think that the general principle really is the same. I don't see that the Fourth

Amendment has any meaning except that the police, in conducting their investigations, have to act reasonably in the context of the situation as it appears to them, not just as it appears to them in good-faith, but as it reasonably appears to them.

Q Well, among other things, it might be relevant then, on the hypothetical case I gave you, it might be relevant to find out whether they asked the man, "Do you live here?" And if they had asked him that question, and he said, "Yes, I do," you might have one result. And if they didn't ask him that question, you might conceivably have another to resolve.

MR. WALLACE: I think the difference is in the circumstances would indicate that it would be reasonable for them to ask additional questions in some situations. In this case, although they did not ask her where she slept, she volunteered that information to them before they undertook the search, and there was no need for them to ask her. She --

Q She was in the house at the kitchen sink washing the dishes, you think they might not have to ask her very much, that would be objective evidence that she was lawfully there and perhaps lived there.

MR. WALLACE: Yes. Now, there might be some question that she might be a domestic employee. In this case, it was apparent from her conduct that she was not addressing the respondent as if she were a domestic employee, besides which, she identified the room where the two of them slept, as being

her room and stated that her clothing was there.

And I think the courts below correctly held that it was reasonable for the police officers to act on that information.

Q Did the officers at the time know she was a Marshall daughter and that the Marshalls owned the house?

MR. WALLACE: The Marshalls rented the house, Mr. Justice. The record is not clear on what they knew. This was a rural area, where a lot of the people knew one another. But the record is not clear on that. It does indicate that one of the officers had observed her living there prior to the day of the search, but it does not indicate whether he knew that she was a daughter of the Marshalls. This later became apparent.

Now, since there was no finding of official misconduct of any kind, it is difficult to see what function and exclusionary rule would perform in a situation of this sort which I think means primarily that there is no reason to hold that there was a Fourth Amendment violation, since the officers conducted a reasonable search. But we contend also that it means even if the Court should hold that there was something technically wrong with the search under the Fourth Amendment, that the exclusionary rule should not be applied to these factual circumstances since the officers acted in a responsible, reasonable way and presumably would act in the same way if the facts were to arise again.

Now, the courts below seemed to believe that consent searches should be treated differently with respect to what this Court has held, that the conduct of the officers and the circumstances that they find, it should be the teachstone. They formulated the situation of a consent search as really involving an agency question or a question of the authority of one person to waive the constitutional rights of someone else. We don't believe that this is the accurate formulation of what is involved here. Indeed, two recent opinions of this Court have indicated that the question is not a question of waiver. I am referring to the opinion in Schneckloth v. Bustamonte and also the opinion in Coolidge v. New Hampshire.

Instead, it is really a question of the joint occupants own right to authorize a search of the premises where she lives. As is indicated in the Court's holding in Frazier v. Cupp, with respect to a jointly used duffle bag which one of the users gave the police permission to search.

Q But what about the four-drawer cabinet where two belonged to one and two belonged to the other, can she give consent to the other two?

MR. WALLACE: We have raised no issue with respect to anything found in the bureau, Your Honor, because we didn't --

Q I know that, so you don't have any problem with it.

MR. WALLACE: That was why we raised no issue with

respect to it, to keep the case from having those additional complications. The only thing contested here is what was found in the closet, which they both used. So our principal --

Q Was it shown that they both use that bag?

MR. WALLACE: There was no showing about it one way or the other.

Q That isn't quite the joint use of the duffle bag, not quite?

MR. WALLACE: There is that difference, but it was joint use of the closet and the bag was hanging in the closet. There is no indication that it wasn't used by either or both of them. And the bag contained nothing but the cash. It was half filled with cash.

Q So it wasn't used by both because she didn't steal it?

MR. WALLACE: Well, there has been no trial yet about who stole anything.

That is our principal contention, and if the Court agrees with that contention, that is the only issue it need decide. Should the Court disagree with that contention, we raise two additional issues with respect to the proof of actual authority that was required in this case. One issue is that under this Court's recent decision in Lego v. Twomey, it is clear that if the government had to prove actual authority, the standard of proof, the burden of proof on the government is to

prove it by a preponderance of evidence. Yet the Court of Appeals, not the District Court, but the Court of Appeals reviewed this case on the basis of what we believe to be a substantially heavier burden of proof, mainly whether the government proved "to a reasonable certainty by the great weight of the credible evidence" that Mrs. Graff had actual authority to consent to the search.

Q What standard did the District Court use?

MR. WALLACE: The District Court used a standard which is essentially the same as preponderance of the evidence, whether the government proved to a reasonable certainty by the greater weight of the evidence, of the credible evidence that she had actual authority.

Q Well, what's the effect of the Court of Appeals then using a stricter standard perhaps than we would approve of or than the District Court used?

MR. WALLACE: Well, we believe the effect is that we didn't get the review we were entitled to by the Court of Appeals in reviewing whether we met our burden of proof because they held us to a stricter burden of proof than was appropriate, against our contention that they should not hold us to that burden of proof. Unfortunately, the government's brief said that that was the burden which the District Court had held us to, that was an error in the government's brief, but that brief did not lead the Court of Appeals into the error they made,

because we said that was the erroneous standard, and the Court of Appeals said no, we adopt that as the correct standard.

Q If you hadn't mentioned it, it never would have been adopted by anybody.

MR. WALLACE: Well, that was unfortunate, but we were not contending for that standard and I don't think that there is any basis for holding the government to that standard of review in the Court of Appeals. As I say, that issue need not be reached if the Court agrees with our principal contention.

There is an additional issue that --

Q I gather, Mr. Wallace, you rely rather heavily on Hill, don't you, for your basic contention?

MR. WALLACE: Yes, the Hill case we believe is virtually controlling here. I mentioned the language that seems most closely in point, as well as the similarity in the facts.

Q Well, the issue of whether you consent as such was not involved in the case?

MR. WALLACE: It was not a consent search. But the Court recently said in Schneckloth v. Bustamonte that consent searches are to be encouraged, just as the Court has repeatedly said in a number of recent opinions that the cooperation of third parties with the police is not to be discouraged. And Miranda v. Arizona is one, in a passage quoted in Schneckloth. And Coolidge is another opinion that has made that point. And it is to be remembered that all of this arises in a context in

which any mistake is made, either on the part of the police, a reasonable good-faith mistake, or in the determinations made at the hearing, are not going to cause a risk of the conviction of an innocent person or any impediment to the truth finding process. At worst, they will lead to the introduction of additional evidence to be considered for its inherent value apart from any errors that occurred during the course of the prior proceedings. And it is likely that this will lead to more accurate determination of the truth, rather than cause any impediment to determination of the truth at the trial.

So for that reason as well, we have raised an additional issue in the case should the Court disagree with our principal contention, otherwise it doesn't arise, and that is that hearsay testimony should be received at a suppression hearing. In this case, the District Court refused to consider any of the very considerable and we think inherently reliable hearsay testimony that was offered by the government to show that indeed Mrs. Graff was living in the bedroom and did have the authority therefore to consent to a search of that room and of the closet which she was using.

Q Where in the room was the money found?

MR. WALLACE: It was found in the closet of the bedroom in a duffle bag hanging in the closet -- not a duffle bag but a diaper bag. And the closet had men's and women's clothing in it. It was the bedroom that they jointly occupied.

We have raised this additional issue which the Court has recently addressed in the Proposed Federal Rule of Evidence in a provision that we quote on page 28 of our brief, and it is a position that is widely supported by the leading scholars in the law of evidence, as we explain in this portion of our brief.

Q Mr. Wallace, do you treat the diaper bag here as we did the duffle bag in --

MR. WALLACE: Well, the evidence is not as specific about the diaper bag itself in this case. The evidence is that she consented to a search of the room, including the closet, and they found the diaper bag in the closet to contain the money. There is nothing in the record about discussion of the diaper bag itself.

Q But in terms of if she had authority to consent or must be deemed to have authority to consent to the search of the room, certainly you would say she had authority to consent to the search of the bag?

MR. WALLACE: That is our position. A bag hanging in the closet that she uses which was in full view of her occupancy and --

Q But if it were a sealed envelope addressed to him lying on the mantle piece, that is something else again?

MR. WALLACE: That is something else again.

Q Or a locked briefcase or a suitcase that was his?

MR. WALLACE: Then there would be --

Q And this bag is something you would say was reasonable assume was joint occupancy of that also, or joint rights --

MR. WALLACE: That's right, that her occupancy of the room and the closet gave her the authority to open the bag, since it was right there hanging in her closet.

Q Her closet?

MR. WALLACE: Well, it is the closet that she jointly uses. It was as much her closet as it was the duffle bag of the man who gave the consent in Frazier v. Cupp, Mr. Justice.

Q But they don't both use the same duffle bag.

MR. WALLACE: Well, that was the situation there.

Q And they both didn't use the same diaper bag.

MR. WALLACE: Well, there is no proof on that one way or the other about any uses that that bag has been put to in the past. The likelihood is that she was using it for her child, otherwise why would they have a diaper bag?

Q To carry money in.

MR. WALLACE: Well, that was its current use, but the reasonable inference is that the lady with the three-year-old boy was the one who would be using the diaper bag.

Q Where were the owners of the house at the time of the search?

MR. WALLACE: There is nothing in the record --

Q The owners of the house.

MR. WALLACE: Oh, the owners of the --

Q The owners were her parents, is that right?

MR. WALLACE: No, they rented the house, Mr. Justice. The owners were somebody named Burke.

Q Well, where were the lessees?

MR. WALLACE: There is nothing in the record at all about her father. Her mother was at work and came home later in the afternoon. And there is no indication that anyone else was in the house at the time.

Q Except for the woman and her baby?

MR. WALLACE: That is correct.

I think I will reserve the balance of my time for rebuttal.

MR. CHIEF JUSTICE BURGER: Mr. Eisenberg?

ORAL ARGUMENT OF DONALD S. EISENBERG, ESQ.,

ON BEHALF OF THE RESPONDENT

MR. EISENBERG: Mr. Chief Justice, and may it please the Court:

I had somewhat of an advantage over Mr. Wallace in that I was at all of the proceedings, including the Court of Appeals. And I might just say for openers that when Mr. Mattlock or somebody, because we don't know who yet, allegedly robbed the Bank of Wyocena, they did get all of their money.

I think the government is wrong in many respects, and

I must start by saying that we do have in this case a test of Judge Doyle, namely it is a two-prong test, a test of apparent authority as well as the magic words that the Court of Appeals used and that Judge Doyle used, namely actual authority to search.

Now, the government leaves out a couple of very, very important things, and the first question, and that question was asked in the Court of Appeals, why no search warrant? That is the most important thing that I can think of. That goes to the heart of the Fourth Amendment.

The officers admitted they were in no danger. All of the testimony from every officer, I specifically asked, were you in danger of your life -- no. Where was the defendant at this time? He was handcuffed in the car in front of the property.

Now, the facts in regard to that I believe are important, the defendant was arrested outside of the house. He either went out to walk the dogs -- but, anyway, he was outside when the Columbia County Sheriff's Department came upon him. They put him in the car, they admitted at that time that they had no knowledge that any fruits of any alleged crime were in the house. They never asked the defendant his permission to search the house. They never asked him if he was a tenant in the house. They never asked him whether or not he paid rent. All they did was put him in the car and knock on the door. Now,

there is a conflict in testimony as to whether or not they did in fact knock on the door or whether or not they in effect burst in.

The court, both the lower court and the Court of Appeals, did find that Gayle Graff, the paramour, the mistress, whatever you want to call her, in fact did consent to the police officers coming in.

Q She thought she was the wife of the defendant, didn't she?

MR. EISENBERG: Well, it is hard to tell what she -- no, she knew she wasn't the wife.

Q She said she was.

MR. EISENBERG: Not then, Your Honor.

Q I am speaking of later on in the case.

MR. EISENBERG: Some other time --

Q She did say that she was his wife.

MR. EISENBERG: She said that she was his common law wife.

Q Well, that is wife.

MR. EISENBERG: Not in Wisconsin, Your Honor. In southern jurisdictions and other jurisdictions, it might well be.

Q Including the neighboring State of Minnesota.

MR. EISENBERG: You know that better than I do, Your Honor. I don't know.

Q How recently had the bank robbery occurred?

MR. EISENBERG: Earlier that day.

Q Earlier that same day?

MR. EISENBERG: Yes, sir.

Q This was the morning of November 12?

MR. EISENBERG: Yes.

MR. CHIEF JUSTICE BURGER: We will resume there in the morning, Mr. Eisenberg.

MR. EISENBERG: Thank you, Your Honor.

[Whereupon, at 3:00 o'clock p.m., the Court was adjourned, to reconvene on Tuesday, December 11, 1973, at 10:00 o'chock a.m.]

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IN THE SUPREME COURT OF THE UNITED STATES

UNITED STATES, Petitioner,	:	
v.	:	No. 72-1355
WILLIAM EARL MATTLOCK, Respondent.	:	

Washington, D. C.
Tuesday, December 11, 1973

The above-entitled matter came on for further argument at 10:07 o'clock a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM O. DOUGLAS, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice

APPEARANCES:

LAWRENCE G. WALLACE, ESQ., Office of the Solicitor General, Department of Justice, Washington, D. C.; for the Petitioner.

DONALD S. EISENBERG, ESQ., 131 West Wilson Street, Madison, Wisconsin 53703; for the Respondent.

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will resume arguments in United States v. Mattlock.

Mr. Eisenberg?

ORAL ARGUMENT OF DONALD S. EISENBERG, ESQ.,

ON BEHALF OF THE RESPONDENT -- Resumed

MR. EISENBERG: Mr. Chief Justice, and may it please the Court:

I hardly got a chance to say anything yesterday except good afternoon.

I would briefly like to reiterate the facts as set forth by the government, because I think they are important in this case, especially in light of Robinson, which Mr. Justice Rehnquist just gave his opinion.

The important things in this case are that Mr. Mattlock was arrested in the yard outside of the house. He was placed in the police car. The officers all admitted that they were in no danger. The house was under seige, it was surrounded. They had no knowledge that any fruits of any crime were in the house. No questions were asked as to the defendant's relationship as an owner, as a tenant, as a husband, or anything else in relation to the Marshall residence.

The officers, even though they had Mr. Mattlock completely under control in the car, never asked his permission to search the premises. When they did go to the door, of course,

they did not have that very important thing and that is a search warrant. They never asked Gaylr Graff who she was. The officers' testimony is clear that when they came into the door, she was standing with her two or three-year-old baby, they never asked who she was, whether she was a daughter, a wife, or anything else. They asked whether or not they could search the house, she consented to the search of the house.

I think it is important that we remember in this case that it is Mr. Mattlock's constitutional rights that are at stake here and not Gaylr Graff's.

The government argues that there was a joint occupancy of that bedroom. Now --

Q Mr. Eisenberg, where is Pardeeville, Wisconsin?

MR. EISENBERG: Pardeeville is about 15 to 20 miles north of Madison.

Q A small town?

MR. EISENBERG: A very small town.

Q In the same county as Madison?

MR. EISENBERG: No, Columbia County. Madison is Dane County. Pardeeville is famous, Your Honor, for the manufacture of athletic scoreboards. They are made in Pardeeville, Wisconsin. That is their claim to fame. That and fishing, I think. It is in Columbia County, and this search was conducted by the Columbia County Sheriff's Department, along with, at the second and third search, the FBI. And even in the second and

third searches, which aren't material to this case, the FBI didn't bother to get a search warrant either.

Q I take it there is nothing in the record about the local police knowing Gayle or Mr. Mattlock?

MR. EISENBERG: One of the deputies, I believe his name was Cross, later testified -- and he wasn't there during the first search -- he testified that he knew that Gayle Graff was a daughter of Mr. and Mrs. Marshall, and he testified that even though he didn't know the relationship of Bill Mattlock to Gayle Graff, that at one time when he was visiting the house he saw Bill Mattlock come down from the upstairs. But that testimony isn't important, I don't believe, because he wasn't one of the officers who was involved in the first search wherein they found the money.

Now, getting back to this joint occupancy, the government has used that term quite often, and I don't believe it is in the record. Gayle Graff was asked whether or not they could search the bedroom and she said, "Yes, you may, you can search the whole house." And I believe the testimony is that from time to time she slept in that bedroom. But as far as joint occupancy goes, there is nothing in the record to show that they jointly occupied the bedroom as husband and wife or on a regular basis.

As a matter of fact, there is evidence in the record that Gayle Graff did have a bedroom of her own on the first

floor of that residence.

Q Wasn't there some testimony that she had the first top two drawers in the dresser and he had the bottom two?

MR. EISENBERG: Yes, sir.

Q You don't think that permits any inference of joint occupancy?

MR. EISENBERG: No, I don't, because that, Your Honor, is something that came out again after the first search and after the money was found in the closet. Now, had they inquired or had they told them -- that is an issue that isn't in this case also -- had they told Gayle Graff, "You don't have to consent," or had they asked her, "Are you the wife, do you have joint occupancy of the bedroom," fine, but they never asked. And finally it was subsequent to, I believe, all of the searches that she -- or I guess it was at the second or third search, which aren't material -- where she said, yes, the upper two drawers are mine and the bottom two drawers are Bill's. Now, in that regard, Your Honor, I think the inference could just as well be that there wasn't room in the house to store all clothes and people were using everybody's closets. I think that the testimony was very clear in this case that at no time did anybody ask for instance whose dresses were hanging up in the closet. They could have been Mrs. Marshall's. That is not in the record, that they were Gayle Graff's.

The District Court, Judge Doyle, found that the

government had not proved by the greater weight of the credible evidence that there was joint occupancy of that bedroom. He, of course, also found that there was no evidence except this "reliable hearsay" that there was any evidence that Gayle Graff was married to Bill Mattlock, or that she had authority to consent.

What the government would ask this Court to do at this time is to say that apparent authority is sufficient and you don't need actual authority.

Now, another thing that I believe is important in the case is the government has argued before this Court yesterday that Gayle Graff said, "It's my room." Now, she never said that, and that is not in the record.

Q He didn't undertake to prove, for example, that he rented that room and paid $75 a month and that it was his room exclusively.

MR. EISENBERG: We did. We showed that at the suppression hearing, Your Honor.

Q Exclusively.

MR. EISENBERG: The question of exclusitivity never came up. I believe on my examination of Mr. Mattlock -- or of Mrs. Marshall, we asked the questions of how was he there, what was he doing, and she said, "He is a paying tenant, he paid $100 a month, and he was current," and the judge, Judge Doyle, made a finding that he was current in his rent. No

question was ever asked -- and I don't think it was inadvertent or on purpose, Your Honor -- no question was ever asked whether or not Gayle Graff also was a paying guest. But the police officers never asked, either. It was myself who asked on direct examination of Mrs. Marshall what the situation was as far as rent goes. The officers never inquired, at any time.

Now, I agree with the law -- of course, I agree with it -- that two persons who have equal rights may give legal consent, and that is very clear. But here, Your Honor -- and that was my next point -- there was no inquiry as to whether or not Gayle Graff was standing in the position of the defendant's wife, whether or not she also was paying for that bedroom, or whether or not she was sleeping any place else.

Mr. Justice Marshall yesterday raised the question of the joint use of the diaper bag, and there again, that is a question that was never raised yesterday. There is no doubt about it, that a diaper bag in this situation, the very strong inference is, is that it was used for diapers for Gayle Graff's two or three-year-old son. That question was never gone into in the suppression hearing.

The main question in this case, and the only real question, is whether or not a third party who consents is in fact or "in appearance" a joint possessor. The Seventh Circuit placed upon the police the burden of determining whether a person encountered at the door has the authority to consent.

Now, we cited numerous cases and the government has also. They rely, for instance, on the Gorg case. Now, the differentiation in that case is that in Gorg the police acted in good faith. They had consent and they had the request of the homeowner to search the house. The only question in that case was the right of the person who occupied the room, the son in that case, if you remember, marihuana plants were found in the room after the son was arrested, the question of the right to refuse consent was not present.

The Court or the government also cites Schneckloth, the only question in Schneckloth was the voluntariness of the consent to search. They cite Hopper, and in that case the Court never reached the question of actual authority because it ruled that the consenter didn't even have apparent authority to consent.

Now, yesterday the question was asked Mr. Wallace of whether or not he relied upon Hill. And I would say today, yes, he does rely upon Hill, and he also, I would assume, Mr. Justice Rehnquist, that he now would rely upon Robinson. Robinson is analogous to Hill in one thing, and it is differentiated from Mattlock in that in Hill, the search was incidental to an arrest. And I think those are the magic words that take Mattlock out of the Hill decision and out of the Robinson decision. This search was not in any manner, shape or form incidental to any arrest of William Mattlock.

The government would have this Court adopt a theory that ignorance is bliss. We cited on our brief at pages 12 and 13 a very short argument in that regard, and I said, "To accept the government's 'apparent authority' position would be to assume that 'ignorance is bliss' when it comes to a warrantless police search. The less the officer knows, and the less he takes the time to find out, and the less he actually finds out, the better off the search becomes."

The government says that a warrantless search is reasonable if consented to by one who may appear to have authority to consent, even if in fact he does not have that authority. Now, Mr. Chief Justice Burger came up with the thing that I wish I had thought of, and that is mainly the meter reader being in the house. I think I can probably do you one better, Your Honor, in all due respect. Let's take the weekend guest, let's take the mother-in-law who comes to visit, and everybody is out of the house except mother-in-law, and up in the bedroom of the 16-year-old son he has got marihuana and heroin and LSD and all the other good things. And the police have a very reliable informant who says there are these things in the boy's bedroom. And they walk in and ring the doorbell and mother-in-law opens the door and they said, "I am the police, we want to search the house, especially that bedrsom," and she says okay.

Now, I don't think that that situation is any

different than the Mattlock situation here, and I would submit that in that case a search without a search warrant should not be upheld by this Court or any other court.

Q Well, on the suppression hearing, however, the testimony would be developed, I assume, that this woman was, like the meter reader, not really an occupant of that house and had neither actual nor apparent authority to consent to any entry.

MR. EISENBERG: Well, Your Honor, there the apparent authority is there. The police officer walks in, he sees a nice elderly woman, or maybe she is not so elderly, maybe she is in her fifties, as some mothers-in-law still are, and just assume that she may be the mother. They just assume that she has that authority, apparent authority. That is what happened in this case, except in Mattlock I don't even think that the officers assumed that Gayle Graff had apparent authority. That question never entered their mind. They had the man outside under arrest and they were going to search that house, and that was it.

I don't think it makes any difference, Your Honor. The apparent authority rule, whether it be the meter reader or the mother-in-law, or even a burglar, let's take a sophisticated burglar in the house who is come upon by the doorbell ringing, and he is dressed well and he goes to the door and says, "Well, I am going to fool whoever is knocking at the door," and he opens the door and he is an imposter, completely, and they say,

"May we search the house," and he says okay. Now, that is the theory, that is the law that the government wants this Court to adopt, and I just don't think it is right, Your Honor.

Q Well, then at your suppression hearing you would demonstrate the infirmities of his situation, wouldn't you?

MR. EISENBERG: That he was an imposter. In this case, in the Mattlock case, the burden of course -- I wouldn't have to, Your Honor. Let me disagree a little bit there. I wouldn't have to, because there is no doubt, and the government admits, that the burden is upon the government.

Q No question about it.

MR. EISENBERG: Okay. So it would be the government, and if they did not, as the court, as both courts found in this case, that the government did not meet their buden by the greater weight of the credible evidence, then they are out of court.

The next question here, after we -- if we get by that fact that this search was done without authority, is whether or not the lower courts used the right rule as far as burden of proof. And in that regard I don't really think that the government argues with either court. They have cited in their brief, and we cite in ours, Black's Law Dictionary which says in effect that greater weight of the credible evidence, preponderance of the evidence are really the same thing. The government cited, which I am thankful for, the Wisconsin Jury

instructions, which Judge Doyle followed. And in the legislative comment or in the comment attached to the Wisconsin Jury Instructions, the court noted or the drafters of those instructions noted "greater weight is exact synonym for fair preponderance." So under either theory, I don't think it makes any difference, I think they are the same.

I agree that the Court of Appeals made a typographical or an error when they said "great weight" rather than "greater weight." But I assuming, Your Honors, and I think it is apparent from the record in this case, that what they really meant was greater weight and not great weight. It does show that they read the government's brief very thoroughly because that is where the mistake was first apparent in their own brief.

Q Could you straighten me out? Did the two lower courts here go on the basis that there was not actual authority for the search?

MR. EISENBERG: That is correct, Your Honor.

Q And both of them found there was apparent authority?

MR. EISENBERG: They found it reasonably appeared to the officers that she had apparent authority.

Q Let's assume the rule was that it was a reasonable search if there was apparent authority. Now, if that were the rule, both courts would have sustained the search below?

MR. EISENBERG: That is correct, Mr. Justice White.

Q And so you ask us to in effect disagree with both courts with respect to the apparent authority in the first place?

MR. EISENBERG: No, I don't ask that.

Q You don't? I thought you said that there was no apparent authority in this case.

MR. EISENBERG: Oh, all right. Okay. All right. Thank you.

Q Do you ask us then to -- do you say, all right, there was apparent authority or not? Both courts found that to be true.

MR. EISENBERG: I would not argue with their finding of apparent authority.

Q Well, there was apparent authority and you rest your case then on that there must be actual authority in addition to apparent authority?

MR. EISENBERG: Yes, Mr. Justice White.

Q That is what the case turns up?

MR. EISENBERG: Yes, sir.

Q Okay.

MR. EISENBERG: The last argument that the government makes is whether or not the "reliable hearsay" is admissible or not admissible, and in that regard my only argument is that hearsay testimony, or what they call reliable hearsay testimony, is not substantive evidence. They ask that this Court adopt

rule 104(a) of the proposed New Federal Rules of Evidence, and I submit, of course, that they should not be applied, they are not the law.

Q They are being applied in many districts, aren't they?

MR. EISENBERG: They are, Your Honor, much to my chagrin.

Q How about Wisconsin, are the district judges generally applying them now?

MR. EISENBERG: No, Your Honor. I was in a federal court in the Northern District of Indiana, where the court is applying them. Wisconsin to my knowledge is not yet. I recently appeared in Minnesota before Judge Lord, and I am not so sure that he is yet or not.

The other thing I would like to say, Your Honors, is the government states that the leading scholars in the law of evidence say that this hearsay should be admissible. And I would, in all deference to Mr. Wigmore and Mr. McCormick, say that you are the leading scholars in this area and I would bow to your authority in this regard, and I think the lower courts, both of them, both Judge Doyle and the Seventh Circuit, were correct in holding that this evidence was not admissible to prove the truth of the facts therein. That, of course --

Q Do you think it was admissible to prove apparent authority?

MR. EISENBERG: No, I don't, Your Honor.

Q Well, it isn't offered then as for the truth of any facts then. It is offered to prove that some words were said, just the fact of some statements having been made which apparently was the basis for the apparent authority findings of the courts below.

MR. EISENBERG: Well, Your Honor, here is the problem that we have, and here is the problem I --

Q Well, isn't that true so far? If you are going on apparent authority, with respect to apparent authority, you might get a different answer on admissibility than with respect to actual authority?

MR. EISENBERG: If you are going on apparent authority except for the fact that when the search was made the officers didn't even know that. You see, that is the funny thing, you see.

Q That is a different right.

MR. EISENBERG: Right.

Q That isn't a hearsay objection.

MR. EISENBERG: And that -- well, two, and that is why the last question you asked me about --

Q That is just an irrelevancy, but it is not a hearsay.

MR. EISENBERG: I agree. But now, if we come to the apparent authority question, when the police officers made the

search wherein they found the money in the closet, there was not even any apparent authority at that time, and there I would disagree with the lower courts. The apparent authority came in later, after the search was done.

Q It sounds to me like you almost have to disagree with the lower courts --

MR. EISENBERG: I do, Your Honor.

Q -- with respect to apparent authority.

MR. EISENBERG: I agree with them after they found the apparent authority as an afterthought, after the fact. But when the search was made, Your Honor, there was no apparent authority.

Q Well, you are running against two courts on that, I must say.

Q Do you have any constitution on those --

MR. EISENBERG: No, we haven't, Your Honor.

Q -- on those issues?

MR. EISENBERG: I think the main issue here is the actual authority and --

Q But the test, the legal test is what this case is going to turn on?

MR. EISENBERG: Correct, Your Honor, whether or not actual authority is necessary, as well as apparent authority. That is the main thing.

Thank you very much.

MR. CHIEF JUSTICE BURGER: Thank you.

Mr. Wallace, do you have anything further?

REBUTTAL ARGUMENT OF LAWRENCE G. WALLACE, ESQ.,

ON BEHALF OF PETITIONER

MR. WALLACE: Well, I just want to reinforce what has already been said, that the courts have found apparent authority in this case. On page 12a of the appendix of the petition are the District Court's findings on which this was based, and those findings, right in the middle of the page, include very specifically that she told the officers that the east bedroom was occupied by the defendant and by her.

Q Where is that?

MR. WALLACE: I am on page 12a of the appendix of the petition for certiorari, Your Honor, where we have the District Court's opinion reprinted, right in the middle of the page, the findings on which the District Court based its holding, that there was apparent authority, include the statement right in the middle of page 12a, she told the officers that the east bedroom was occupied by the defendant and by her.

Q Yes.

MR. WALLACE: She then consented to a search of the east bedroom. Now, she told the officers that she used the top two drawers of a dresser in the east bedroom and the defendant used the bottom two drawers. This was upheld, these findings were upheld by the Court of Appeals, on page 3a of the same appendix, at the end of the paragraph that ends at the

top of the page, page 3a. She then told the officers that she and the defendant both occupied the east bedroom, and that the women's clothing therein contained were hers, and she told the officers that she used the two upper drawers of the dresser in the room and the defendant used the two lower drawers.

Without burdening the Court to read all the excerpts in the record which support that, I can cite in the printed appendix to page 13, page 15, page 16, and page 18, which is testimony by each of the three officers who conducted the search, all supporting that she said that this was her bedroom, or that she slept in the same bed with the defendant there.

Now, there is just one other fact in response to the question Mr. Justice Blackmun has been asking, about whether any of the officers who conducted the search knew who she was. The only indication in the record on that does not relate to her specifically but to Mr. Mattlock, the respondent himself, and that appears in a portion of the transcript that was not reproduced in the appendix, on page 78 of the transcript in the course of the interrogation of Officer Cross, who was one of the officers who conducted this search. They asked him, "Did you know whether or not he lived in that house?" And he said, "Yes, sir." "How did you know that?" "Well, I had seen him there. My father knew the Marshall family, and through that I knew he was staying there." That is all that appears in the record on that subject.

Unless there are further questions, that is all I have.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Wallace.

Mr. Eisenberg, you appeared here at our request, and by our appointment?

MR. EISENBERG: Yes, Your Honor.

MR. CHIEF JUSTICE BURGER: On behalf of the Court, I express our appreciation for your help not only to your client but to the Court.

MR. EISENBERG: Thank you, Your Honor. I appreciate that.

[Whereupon, at 10:30 o'clock a.m., the case was submitted.]

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