

06-3623-cv
Moore v. Andreno

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term 2006

(Argued: February 7, 2007 Decided: October 22, 2007)
Docket Nos. 06-3623-cv(L), 06-3748 (XAP)

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RICHARD B. MOORE,

Plaintiff-Appellee-Cross-Appellant,

-- v. --

JOSEPH A. ANDRENO, DELAWARE COUNTY DEPUTY SHERIFF AND
KURT R. PALMER, DELAWARE COUNTY DEPUTY SHERIFF,

Defendants-Cross-Claimants-Appellants-
Cross-Appellees,

COUNTY OF DELAWARE AND THOMAS MILLS, DELAWARE COUNTY
SHERIFF,

Defendants-Cross-Claimants,

RUTH M. SINES,

Defendant-Cross-Defendant.

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B e f o r e : WALKER and SACK, Circuit Judges, and DANIELS,
District Judge.*

Appeal by Defendants Andreno and Palmer from a judgment of
the United States District Court for the Northern District of New
York (Thomas J. McAvoy, Judge) denying their motion for summary
judgment. Because the law governing third-party consent searches

* The Honorable George B. Daniels, of the United States
District Court for the Southern District of New York, sitting by
designation.

1 is unsettled, and because defendants made a reasonable mistake in
2 applying that law to the situation with which they were
3 confronted, we hold that defendants are entitled to qualified
4 immunity and the district court erred in denying them summary
5 judgment.

6 REVERSED and REMANDED.

7 FRANK W. MILLER, East
8 Syracuse, N.Y., for
9 Defendants-Cross-Claimants-
10 Appellants-Cross-Appellees.

11
12 TERRENCE P. O'LEARY, Walton,
13 N.Y., for Plaintiff-Appellee-
14 Cross-Appellant.

15 JOHN M. WALKER, JR., Circuit Judge:

16 Courts have long acknowledged that a person has the right to
17 establish a private sanctum in a shared home, a place to which he
18 alone may admit or refuse to admit visitors. Yet, with the
19 recurrence of domestic violence in our society, we are loath to
20 assume that a man may readily threaten his girlfriend, take her
21 belongings, lock her out of part of his house, and then invoke
22 the Fourth Amendment to shield his actions. Deputies Joseph A.
23 Andreno and Kurt R. Palmer, responding to an emergency call, were
24 faced with reconciling these two competing interests. While they
25 misapplied the relevant constitutional calculus, they are police
26 officers, not lawyers or mathematicians. And thus, because the
27 law governing the authority of a third party to consent to the
28 search of an area under the predominant control of another is

1 unsettled, and because Deputies Andreno and Palmer made a
2 reasonable mistake in applying that law to the situation with
3 which they were confronted, the district court erred in denying
4 them summary judgment on qualified immunity grounds.

5 **BACKGROUND**

6 Richard B. Moore and Ruth M. Sines were on-again, off-again
7 lovers.¹ They lived together in Moore's home for a period of
8 time in 1996-1997 and again in 2001-2002. Sines had a key to
9 Moore's home; her furniture was there and she paid some of the
10 bills. However, Sines was subject to certain restrictions: her
11 children lived with their fathers and Moore's study was "off
12 limits" to her, and it was undisputed that Moore, as she put it,
13 "always kept it locked."

14 On or about April 9, 2002, while traveling to New York from
15 Tennessee, Moore and Sines had an argument, and Moore threatened
16 to kill Sines. Shortly after their return two days later to
17 Moore's home in Delaware County, New York, Sines decided to move
18 out and had begun to pack her belongings when she discovered that
19 her helmet and snorkeling equipment were missing. Sines "went
20 upstairs to see what had been going on upstairs in the last two
21 days," suspecting that Moore had moved her effects. Upstairs,

1 ¹ Like the district court, we rely on the facts set forth in
2 defendants' statement of material facts in light of the
3 plaintiff's failure to respond timely to the defendants' summary
4 judgment motion.

1 she noticed two new locks on the door to Moore's study. Thinking
2 that her missing equipment might be in Moore's study, Sines cut
3 the locks with a bolt cutter.

4 Sometime thereafter, Sines received a telephone call from an
5 unidentified caller. Fearing that it might be Moore and that he
6 could be en route to his home and bent on violence, Sines called
7 the Delaware County Sheriff's Department. The Sheriff's
8 Department dispatched Deputies Andreno and Palmer to the scene.

9 Upon their arrival, a "hysterical" Sines requested the
10 Deputies' assistance in retrieving her belongings from Moore's
11 study.² She explained that she feared that Moore might return at
12 any moment. She also informed the Deputies that she "wasn't
13 allowed in th[e] [study] unless [Moore] was there" and that she
14 had cut the locks off the door. She may also have informed them
15 that the Deputies were likely to find marijuana in the study.

16 In the company of the Deputies, Sines entered the study and
17 searched it, including by opening a desk drawer and rummaging in
18 a closet. In both places, Sines discovered drugs and drug
19 paraphernalia.³ The Deputies then seized the drugs.

1 ² It is not clear from the record whether Sines entered
2 Moore's study prior to the arrival of the Deputies in order to
3 verify whether or not her helmet and snorkeling equipment were,
4 in fact, in that room -- and if not, why not. She presumably had
5 an opportunity to do so, as she cut the bolts prior to calling
6 the Sheriff's Department.

1 ³ Sines found a medical bag or briefcase in the closet. Only
2 after opening it -- perhaps thinking her snorkeling equipment

1 On May 8, 2003, a state grand jury indicted Moore on two
2 counts of criminal possession of a controlled substance in the
3 fourth degree and one count of criminal possession of a
4 controlled substance in the fifth degree. On February 9, 2004,
5 the county court, after suppressing the evidence taken from the
6 scene, dismissed the indictment.

7 Moore then filed suit in the United States District Court
8 for the Northern District of New York against, principally,⁴
9 Deputies Andreno and Palmer, asserting claims under 42 U.S.C. §§
10 1981, 1983, 1985, and state law. The gravamen of his complaint
11 is that the Deputies' entry into his study and seizure of his
12 drugs violated the Fourth Amendment to the United States
13 Constitution. Moore does not dispute the legality of the
14 Deputies' entry into his home; he contests only the narrower, and
15 more nettlesome, question of their entry into and search of his
16 study. Cf. United States v. Karo, 468 U.S. 705, 726 (1984)
17 (O'Connor, J., concurring).

18 Defendants Andreno and Palmer moved for summary judgment,
19 arguing in the alternative that their search of the study was not
20 unconstitutional or, if it was, that they were nevertheless

1 might be in the medical bag -- did she discover the drugs.

1 ⁴ Moore also named as defendants the County of Delaware, its
2 Sheriff Thomas Mills, and Ruth Sines. The district court
3 dismissed his claims against those defendants, and he has not
4 appealed.

1 entitled to qualified immunity.

2 The district court (Thomas J. McAvoy, Judge) first
3 considered whether Moore had properly alleged a constitutional
4 violation. The district court inquired whether Sines had actual
5 or apparent authority to consent to a search of the study, or
6 whether other exigent circumstances justified the search. The
7 district court noted that “[a] third party may validly grant the
8 requisite consent if she has joint access or control of the
9 property for most purposes,” Moore v. Andreno, No. 3:05-cv-0175,
10 2006 WL 2008712, at *3 (N.D.N.Y. July 17, 2006), and acknowledged
11 that generally when “co-occupants are residing together not as
12 mere roommates, but as part of an intimate relationship, social
13 expectations are that the co-occupants of the home enjoy full
14 access to the entire home,” id. at *6. The district court
15 nevertheless concluded that “a fair-minded trier of fact could
16 reasonably conclude that [Moore] maintained exclusive control
17 over the study and that Sines did not have actual, apparent, or
18 implied authority to consent to entry into that room.” Id. at
19 *7. The district court likewise held that exigent circumstances
20 could not justify the Deputies’ entry into the study. Although
21 Sines had complained to the Sheriff’s Department of possible
22 domestic violence, her allegations, the district court explained,
23 were stale: they “pertained to conduct that occurred several days
24 earlier. . . . There was nothing urgent or imminent.” Id. at

1 *10. The district court therefore held that Moore had
2 "established a colorable claim of a constitutional violation."
3 Id. at *7.

4 The district court next considered whether the Deputies were
5 entitled to qualified immunity, and denied it. The district
6 court held that "[i]t was clearly established at all times
7 relevant hereto that third-party consent is valid" only under
8 certain, well-defined circumstances. Id. at *8. Without
9 extended discussion, the district court also held that no
10 reasonable officer could have believed that exigent circumstances
11 justified the search. Id. at *11. The Deputies appealed.

12 **DISCUSSION**

13 The Deputies argue that the district court misapplied the
14 law governing third-party consent searches and searches
15 predicated upon exigent circumstances. First, the Deputies
16 contend that the "lower court erred when it concluded that the
17 Deputies could not reasonably have believed that Sines had the
18 authority to enter into [Moore's] study." Appellants' Br. at 20.
19 Second, they liken their behavior to that of the officers in
20 United States v. Miller, 430 F.3d 93 (2d Cir. 2005), who believed
21 that the area they searched harbored an individual posing a
22 danger to others on the scene; on the basis of this comparison,
23 they urge us to reverse the district court's conclusion that
24 exigent circumstances did not justify the search of Moore's

1 study.

2 The Deputies also argue that the district court improperly
3 denied them qualified immunity. Whether or not the search of
4 Moore's study was unconstitutional, they say, it was not so
5 egregious a constitutional violation that reasonable minds could
6 not differ as to its putative legality, especially in light of
7 the confusion in the law surrounding the scope of co-occupants'
8 authority to consent to searches of shared premises.

9 As a general rule, the denial of summary judgment is not
10 immediately appealable. See 28 U.S.C. § 1291. "Under the
11 collateral order doctrine, however, [we will review] the denial
12 of a qualified-immunity-based motion for summary judgment . . .
13 to the extent that the district court has denied the motion as a
14 matter of law." O'Bert ex rel. Estate of O'Bert v. Vargo, 331
15 F.3d 29, 38 (2d Cir. 2003). Unlike in most such appeals,
16 however, the plaintiff here has not filed a statement of material
17 facts, and so, like the district court, we are unable to accept
18 his facts for purposes of deciding whether the Deputies may
19 properly invoke qualified immunity. Cf. Salim v. Proulx, 93 F.3d
20 86, 91 (2d Cir. 1996) (permitting immediate appeal when
21 defendants accepted plaintiff's version of the facts).

22 Nevertheless, our appellate jurisdiction over this case is
23 not in doubt. The district court's holding that the law
24 governing third-party consent searches was clearly established is

1 a conclusion of law and is thus immediately appealable. See
2 Proulx, 93 F.3d at 89 (noting that the collateral order rule is
3 "easy to apply" when a defendant challenges a denial of qualified
4 immunity on the argument "that the district court erred in ruling
5 that the law the defendant is alleged to have violated was
6 clearly established"). Moreover, while we think it a closer
7 question, the district court's conclusion that "it cannot be said
8 that the Deputies acted reasonably under the circumstances" is
9 also immediately appealable. Moore, 2006 WL 2008712, at *9. The
10 district court's determination on that score did not require
11 resolution of disputed facts; rather, the district court came to
12 its decision on the basis of the uncontroverted, albeit one-
13 sided, record before it. In light of the plaintiff's counsel's
14 failure to oppose the defendants' motion, the only version of
15 facts that the court had before it -- and therefore the
16 undisputed version of the facts -- was that proffered by the
17 defendants.

18 And so, we now turn to the inquiry into the merits of a
19 qualified immunity defense:

20 The first step in a qualified immunity inquiry is to
21 determine whether the alleged facts demonstrate that a
22 defendant violated a constitutional right. If the
23 allegations show that a defendant violated a constitutional
24 right, the next step is to determine whether that right was
25 clearly established at the time of the challenged action --
26 that is, "whether it would be clear to a reasonable officer
27 that his conduct was unlawful in the situation he
28 confronted." A defendant will be entitled to qualified
29 immunity if either (1) his actions did not violate clearly

1 established law or (2) it was objectively reasonable for him
2 to believe that his actions did not violate clearly
3 established law.

4
5 Iqbal v. Hasty, 490 F.3d 143, 152 (2d Cir. 2007) (citations
6 omitted) (quoting Saucier v. Katz, 533 U.S. 194, 202 (2001)).⁵

7 We address these steps in order, beginning with the question of
8 whether the Deputies' conduct, as alleged, violated a
9 constitutional right. We review the district court's conclusions
10 de novo. Savino v. City of New York, 331 F.3d 63, 71 (2d Cir.
11 2003).

12 **I. The Constitutional Violation**

13 **A. Third-Party Consent**

14 The Fourth Amendment forbids "unreasonable" searches and
15 seizures. This constitutional bulwark against government
16 intrusion into the lives of private citizens is made up of an
17 interlacing web of standards and rules. For instance, "[w]e must
18 balance the nature and quality of the intrusion on the
19 individual's . . . interests against the importance of the
20 governmental interests alleged to justify the intrusion," United
21 States v. Place, 462 U.S. 696, 703 (1983), under the "totality of

1 ⁵ Despite continued criticism of this "rigid order of battle,"
2 see Scott v. Harris, 127 S. Ct. 1769, 1774 n.4 (2007) (internal
3 quotation marks omitted), unless and until the Supreme Court
4 heeds the plea to overrule Saucier, we will continue to ask first
5 whether a constitutional violation has occurred and only then ask
6 whether defendants are nevertheless entitled to qualified
7 immunity. Cf. Pierre N. Leval, Judging Under the Constitution:
8 Dicta About Dicta, 81 N.Y.U. L. Rev. 1249, 1275 (2006).

1 the circumstances," United States v. Knights, 534 U.S. 112, 118
2 (2001) (internal quotation marks omitted). Yet the Supreme Court
3 has also admonished that a warrantless search is "per se
4 unreasonable . . . subject only to a few specifically established
5 and well-delineated exceptions." Schneckloth v. Bustamonte, 412
6 U.S. 218, 219 (1973) (omission in original) (internal quotation
7 marks omitted).

8 In United States v. Matlock, the Supreme Court explicated
9 one such "well-delineated" exception: that pertaining to
10 "search[es] of property, without warrant and without probable
11 cause, but with proper consent voluntarily given." 415 U.S. 164,
12 165-66 (1974). Such consent may be given by a third party. As
13 the Court has explained,

14 the authority which justifies the third-party consent . . .
15 [rests on] mutual use of the property by persons generally
16 having joint access or control for most purposes, so that it
17 is reasonable to recognize that any of the co-inhabitants
18 has the right to permit the inspection in his own right . .
19 . .

20
21 Id. at 171 n.7.

22 We have refined the Matlock rule, holding that a third party
23 has authority to consent to a search of a home when that person
24 (1) has access to the area searched and (2) has either (a) common
25 authority over the area, (b) a substantial interest in the area,
26 or (c) permission to gain access to the area. United States v.
27 Davis, 967 F.2d 84, 87 (2d Cir. 1992); see also United States v.

1 Gradowski, 502 F.2d 563, 564 (2d Cir. 1974) (per curiam).⁶

2 Despite the stringency of these rules concerning third-party
3 consent searches, we also ask whether a police officer's
4 objectively reasonable belief that he has obtained consent, even
5 if in fact he has not, renders a search constitutional. See
6 Illinois v. Rodriguez, 497 U.S. 177, 188 (1990) (holding a search
7 constitutional when "the facts available to the officer[s] . . .
8 [would] warrant a man of reasonable caution in the belief that
9 the consenting party had authority over the premises" (internal
10 quotation marks omitted)); see also Florida v. Jimeno, 500 U.S.
11 248, 249 (1991). That is, even if a third party lacks actual
12 authority to consent to a search of a particular area, he still
13 may have apparent authority to consent to the search. See, e.g.,
14 United States v. Buckner, 473 F.3d 551, 555 (4th Cir. 2007).
15 However, "the Rodriguez apparent authority rule applies [only] to

1 ⁶ Another refinement of Matlock is found in United States v.
2 Groves. See 470 F.3d 311, 319 (7th Cir. 2006) (noting that
3 factors indicative of third party's authority include "(1)
4 possession of a key to the premises; (2) a person's admission
5 that she lives at the residence in question; (3) possession of a
6 driver's license listing the residence as the driver's legal
7 address; (4) receiving mail and bills at that residence; (5)
8 keeping clothing at the residence; (6) having one's children
9 reside at that address; (7) keeping personal belongings such as a
10 diary or a pet at that residence; (8) performing household chores
11 at that residence; (9) being on the lease for the premises and/or
12 paying rent; and (10) being allowed into the residence when the
13 owner is not present" (citations omitted)); see also 4 Wayne R.
14 LaFave, Search and Seizure: A Treatise on the Fourth Amendment §
15 8.3(a), at 148 n.22 (4th ed. 2004) ("The Matlock formulation is
16 not a model of clarity.").

1 mistakes of fact [and] not mistakes of law.” 4 Wayne R. LaFave,
2 Search and Seizure: A Treatise on the Fourth Amendment § 8.3(g),
3 at 175 (4th ed. 2004); see, e.g., United States v. Brown, 961
4 F.2d 1039, 1041 (2d Cir. 1992) (per curiam) (“Rodriguez would not
5 validate, however, a search premised upon an erroneous view of
6 the law. For example, an investigator’s erroneous belief that
7 landlords are generally authorized to consent to a search of a
8 tenant’s premises could not provide the authorization necessary
9 for a warrantless search.” (citation omitted)); see also Koch v.
10 Town of Brattleboro, 287 F.3d 162, 167 & nn.3-4 (2d Cir. 2002).

11 Such, then, was the state of the law when Deputies Andreno
12 and Palmer accompanied Sines into Moore’s study, permitted her to
13 forage in his desk and closet for her belongings, and discovered
14 the drugs. Four years later, however, the Supreme Court decided
15 Georgia v. Randolph, 547 U.S. 103 (2006). In Randolph, the Court
16 held that a search conducted on the basis of one co-tenant’s
17 consent is unreasonable as to a physically present and objecting
18 co-tenant. Id. at 120. In doing so, however, Randolph
19 emphasized that the reasonableness of a consent search is
20 informed by “widely shared social expectations.” Id. at 111. For
21 example, “[a] person on the scene who identifies himself, say, as
22 a landlord or a hotel manager calls up no customary understanding
23 of authority to admit guests without the consent of the current
24 occupant.” Id. at 112; see also id. at 111 (“When someone comes

1 to the door of a domestic dwelling with a baby at her hip, . . .
2 she shows that she belongs there, and that fact standing alone is
3 enough to tell a law enforcement officer or any other visitor
4 that if she occupies the place along with others, she probably
5 lives there subject to the assumption tenants usually make about
6 their common authority when they share quarters.”). The Court
7 thus subtly elided the existing distinction between a third
8 party’s actual authority to consent (i.e., Matlock) and his
9 apparent authority to consent (i.e., Rodriguez). Cf. id. at 112
10 (noting an instance “in which even a person clearly belonging on
11 premises as an occupant may lack any perceived authority to
12 consent” (emphasis added)).

13 While the ramifications of Randolph for the Davis rule are
14 not clear, we need not strive to discern them. Under either
15 Davis or Randolph, we see no basis to disturb the district
16 court’s conclusion that Sines lacked sufficient actual authority
17 to consent to the Deputies’ search of Moore’s study. First,
18 under Davis, the law in effect at the time of the search, Sines
19 lacked actual authority to consent to the search of Moore’s study
20 because, though she had obtained physical access to the room by
21 the time the Deputies arrived, she did not have control over the
22 premises. Davis reads Matlock to require that one who asserts
23 that a third party has authority to consent to a search of an
24 area satisfy a conjunctive test: the third party must have both

1 access to and some measure of control (or right to exert control)
2 over the area. See Davis, 967 F.2d at 86-87; cf. United States
3 v. Whitfield, 939 F.2d 1071, 1074-75 (D.C. Cir. 1991)
4 (interpreting Matlock as asking whether a third party has access
5 to and makes "mutual use" of an area). But see United States v.
6 Rith, 164 F.3d 1323, 1329 (10th Cir. 1999) ("[T]he . . . test is
7 disjunctive: a third party has authority to consent to a search
8 of property if that third party has either (1) mutual use of the
9 property by virtue of joint access, or (2) control for most
10 purposes over it.").

11 As a preliminary matter, "we note that no case in this
12 circuit has delimited the requisite 'access' necessary to satisfy
13 the first prong of the Davis test." Ehrlich v. Town of
14 Glastonbury, 348 F.3d 48, 53 (2d Cir. 2003). In the instant
15 case, it is arguable whether Sines possessed the requisite access
16 to Moore's study. On the one hand, by the time the Deputies
17 arrived, she had already cut the locks on the study door and
18 therefore had physical access to the room. On the other hand,
19 Sines's access was acquired by force, and we stated in Ehrlich
20 that "we have never adopted as the clear law of this circuit
21 [the] view that access must mean physical access and not legal
22 access." Id. at 60; see also id. at 54 (noting our lack of
23 "clear precedential guidance . . . on . . . whether some amount
24 of physical force is permissible under the access prong of

1 Davis"). Thus, while she had physical access to the study, Sines
2 may have lacked "legal access." In other cases, we have found
3 the access requirement to be satisfied when the party who
4 consented to the search had a key to the searched area, see
5 United States v. Buettner-Janusch, 646 F.2d 759, 765 (2d Cir.
6 1981), or was the owner of the searched container and could "get
7 into [it] whenever he wanted" despite not having the key, see
8 Davis, 967 F.2d at 87 n.3. These were not the circumstances
9 under which Sines acted.

10 Regardless of whether Sines's forced access to the study was
11 enough to satisfy the first prong of Davis, she lacked authority
12 to consent to the search because she failed to satisfy the second
13 prong: Sines did not have any real measure of control over the
14 study. First, she had no common authority over the area as she
15 and Moore were not married and did not share ownership of the
16 house. See Davis, 967 F.2d at 87 ("Cleare's ownership and actual
17 possession of the trunk in his bedroom, coupled with his ready
18 access to it, indicate that, at the very least, he retained
19 common authority over it."); see also United States v. Backus,
20 349 F.3d 1298, 1304 (11th Cir. 2003) (holding that an estranged
21 wife who was a domestic violence victim and co-owner of a home
22 could consent to a search even though her husband had changed the
23 locks); United States v. Duran, 957 F.2d 499, 505 (7th Cir. 1992)
24 ("[A] spouse presumptively has authority to consent to a search

1 of all areas"); United States v. Brannan, 898 F.2d 107,
2 108 (9th Cir. 1990) (affirming a wife's actual authority to
3 consent to a search of her home, despite the fact that her
4 husband had changed the locks, when she had left the home due to
5 fear of her husband); United States v. Long, 524 F.2d 660, 661
6 (9th Cir. 1975) (same).

7 Second, Sines did not have a substantial interest in the
8 study, as required by Davis. Her only interest in that room came
9 from her personal belief that some of her belongings were being
10 kept there. Sines's intuition, standing alone, did not give her
11 a "substantial" interest in the study. While no case in this
12 circuit has yet defined what constitutes a "substantial interest"
13 for purposes of the Davis test, the Supreme Court has stated that

14 [c]ommon authority is . . . not to be implied from the mere
15 property interest a third party has in the property. The
16 authority which justifies the third-party consent does not
17 rest upon the law of property, with its attendant historical
18 and legal refinements, but rests rather on mutual use of the
19 property by persons generally having joint access or control
20 for most purposes, so that it is reasonable to recognize
21 that any of the co-inhabitants has the right to permit the
22 inspection in his own right and that the others have assumed
23 the risk that one of their number might permit the common
24 area to be searched.

25 Matlock, 415 U.S. at 171 n.7 (citations omitted). It would be
26 inconsistent with these principles to define "substantial
27 interest" in terms of a property interest alone, particularly in
28 a case in which the third party lacked common authority and joint
29 access, and in which the property interest itself was purely

1 speculative.⁷

2 In Davis, the court determined that Cleare, the consenting
3 party, had a substantial interest in the searched container based
4 on the fact that "it was his trunk and he kept personal items of
5 some importance in it." 967 F.2d at 87. But in addition to
6 Cleare's property interest in the trunk and in the items
7 contained therein -- and consistent with the spirit of Matlock --
8 the elements of mutual use, joint access, control, and assumption
9 of risk were also present:

10 [Cleare] testified that he owned the footlocker, that he
11 could open it at any time he wished "if [he] had to," and
12 that he kept various personal items in it, including
13 photographs of present and former girlfriends. Cleare also
14 testified that Content never asked him not to look inside
15 the containers that Content had placed in the footlocker,
16 and that "nothing could have stopped" him from inspecting
17 them. He added that Content never forbade him to show the
18 footlocker or its contents to others.

19
20 Id. at 86 (alteration in original) (footnote omitted). While we
21 do not mean to say that all of these factors must be present for
22 the substantial interest requirement to be met, the fact that
23 none of them was present in this case strongly indicates that
24 Sines did not have a substantial interest in Moore's study.

25 Finally, Sines did not have permission to gain access to the
26 searched area, as Moore expressly forbade her to enter the study.
27 See Davis, 967 F.2d at 86 (finding valid consent when the

1 ⁷ There is no evidence that Sines's personal property was
2 actually being kept in the study; she was unable to find the
3 missing items during her search.

1 consenting party was never asked not to look inside the searched
2 containers and never forbidden to show them to others); cf.
3 United States v. Zapata-Tamallo, 833 F.2d 25, 27 (2d Cir. 1987)
4 (per curiam) (concluding that a host may consent to a search of
5 his guest's bag when the guest failed to show that the bag was
6 "'obviously' his"); Buettner-Janusch, 646 F.2d at 765 ("[T]o
7 perform his laboratory duties, Macris was authorized to enter any
8 part of the laboratory and to open any jars of chemicals found
9 there."); United States v. Perez, 948 F. Supp. 1191, 1200-01
10 (S.D.N.Y. 1996) (noting that the defendant never "prohibited his
11 father from examining the contents of the storage bins kept in
12 the closet and the armoire of [his] bedroom"). Having failed to
13 satisfy both parts of the Davis test, Sines was without authority
14 to consent to a search of the study, and the Deputies therefore
15 cannot rely on consent to argue that the search was reasonable.

16 Under Randolph, the constitutional calculus of determining
17 whether the search was unreasonable might be somewhat different.
18 See 547 U.S. at 111 ("[T]he reasonableness of a search is in
19 significant part a function of commonly held understanding about
20 the authority that co-inhabitants may exercise in ways that
21 affect each other's interests."). But we see no common
22 understanding of social practices, as Randolph uses that concept,
23 that could have led the officers to believe that Sines, who
24 admitted to the officers that she had broken the locks on Moore's

1 study and lacked permission to enter it, had authority to consent
2 to a search of the room. Cf. id. at 112 (“Matlock relied on what
3 was usual and placed no burden on the police to eliminate the
4 possibility of atypical arrangements, in the absence of reason to
5 doubt that the regular scheme was in place.” (emphasis added)).

6 A study is commonly thought to be a private place. See
7 Lloyd L. Weinreb, Generalities of the Fourth Amendment, 42 U.
8 Chi. L. Rev. 47, 62 (1974) (“[W]ithout special information one
9 [might] suppose that husband and wife have independent authority
10 to admit persons to the living room and the kitchen, and probably
11 to the bathroom and bedroom; neither would have authority to
12 admit persons to the other’s study”). Moore, moreover,
13 locked the door to his study, see United States v. Andrus, 483
14 F.3d 711, 718 (10th Cir. 2007) (“The inquiry into whether the
15 owner . . . has indicated a subjective expectation of privacy
16 traditionally focuses on whether the subject . . . is physically
17 locked.”); United States v. Kinney, 953 F.2d 863, 866 (4th Cir.
18 1992); United States v. Block, 590 F.2d 535, 537 (4th Cir. 1978),⁸
19 and refused Sines permission to enter, see Rith, 164 F.3d at 1331
20 (noting that “an agreement or understanding between the defendant
21 and the third party that the latter must have permission to enter

1 ⁸ The presence of a lock is not dispositive in all cases. It
2 is not certain that, had Moore locked his study only after his
3 altercation with Sines, he could have terminated any preexisting
4 authority on her part to consent to its search. See, e.g.,
5 Brannan, 898 F.2d at 108; Long, 524 F.2d at 661.

1 the defendant's room" would vitiate consent).

2 As Chief Justice Roberts has explained, at a bare minimum,
3 "a person [who] wants to ensure that his possessions will be
4 subject to a consent search only due to his own consent, . . .
5 [may] place these items in an area over which others do not share
6 access and control, [like] . . . a private room." Randolph, 547
7 U.S. at 135 (Roberts, C.J., dissenting) (third emphasis added);
8 United States v. Morning, 64 F.3d 531, 536 (9th Cir. 1995) ("A
9 defendant cannot expect sole exclusionary authority unless he . . .
10 . has a special and private space within the joint residence."),
11 abrogated by Randolph, 547 U.S. at 108 n.1; Zapata-Tamallo, 833
12 F.2d at 27; United States v. Robinson, 479 F.2d 300, 302 (7th
13 Cir. 1973) (upholding consent when "the defendant [did not] claim
14 exclusive dominion and control over a specific room or portion of
15 a room or particular area of the apartment"). That is precisely
16 what Moore did, and his ability to do so is unaffected by his
17 decision otherwise to share his home with another.

18 With these social expectations operating in the background,
19 and with the specific knowledge that Sines was not permitted to
20 enter the study and had used force to gain access, the Deputies
21 could not validate their warrantless search of Moore's study on
22 the basis of consent.

23 B. Exigent Circumstances

24 The Deputies also argue that their entry into the study was

1 justified because they worried that Moore might arrive and wish
2 to (or already be on the premises prepared to) do violence to
3 Sines. We need not tarry long on this argument. The exigency of
4 a situation may insulate a warrantless search from constitutional
5 attack if "law enforcement agents were confronted with an 'urgent
6 need' to render aid or take action." United States v. McDonald,
7 916 F.2d 766, 769 (2d Cir. 1990) (en banc) (quoting Dorman v.
8 United States, 435 F.2d 385, 391 (D.C. Cir. 1970) (en banc)).
9 See generally Brigham City v. Stuart, 126 S. Ct. 1943, 1947
10 (2006) ("One exigency obviating the requirement of a warrant is
11 the need to assist persons who are seriously injured or
12 threatened with such injury."). We have explained that the
13 "urgency" of the officers' need depends on six factors:

14 (1) the gravity or violent nature of the offense with
15 which the suspect is to be charged; (2) whether the
16 suspect "is reasonably believed to be armed"; (3) "a
17 clear showing of probable cause . . . to believe that
18 the suspect committed the crime"; (4) "strong reason to
19 believe that the suspect is in the premises being
20 entered"; (5) "a likelihood that the suspect will
21 escape if not swiftly apprehended"; and (6) the
22 peaceful circumstances of the entry.

23
24 McDonald, 916 F.2d at 769-70 (omission in original).

25 _____Considering the situation confronted by Deputies Andreno and
26 Palmer in light of these factors (adapted to the circumstances of
27 this case), we do not think that the Deputies had an "urgent
28 need" to enter the study and thus that "exigent circumstances"
29 could justify the search. The Deputies entered Moore's home

1 peacefully and Sines told them that Moore was not there. Cf.
2 Tierney v. Davidson, 133 F.3d 189, 197 (2d Cir. 1998) ("It was
3 reasonable for Davidson to believe that someone inside had been
4 injured or was in danger, that both antagonists remained in the
5 house, and that this situation satisfied the exigent
6 circumstances exception." (emphasis added)). The Deputies stayed
7 with Sines for "quite a while" and at no time did they instruct
8 Sines to hurry, nor did they look elsewhere in the home for
9 Moore.

10 Moreover, if the Deputies had suspected that Moore might be
11 in the house, they would only have been justified in conducting a
12 protective sweep of those spaces "where [he] m[ight] [have]
13 be[en] found." Maryland v. Buie, 494 U.S. 325, 335 (1990).
14 There is no suggestion that anyone thought Moore might have
15 concealed himself in the erstwhile locked study.

16 **_____ C. Conclusion**

17 _____ For the foregoing reasons, we think that the Deputies'
18 search of Moore's study was unreasonable and violated the Fourth
19 Amendment. Sines lacked the authority to consent to the
20 Deputies' search -- both because she did not have the requisite
21 access to and control over the study and because the particulars
22 of her relationship with Moore were not such that society would
23 expect her to have common authority over the study. Moreover,
24 the Deputies had no urgent need to enter the study, as Moore was

1 not yet on the premises, and there was no indication that his
2 arrival was imminent.

3 **II. Lack of a Clearly Established Right**

4 We turn next to the Deputies' argument that, even if they
5 violated Moore's constitutional rights, they are entitled to
6 qualified immunity because the law regarding third-party consent
7 to access in a shared dwelling was not clearly established at the
8 time of the search. If, as here, "a constitutional right would
9 have been violated on the facts alleged," Saucier, 533 U.S. at
10 200, the next inquiry is "whether the right was clearly
11 established," id. The Supreme Court has clarified that "[t]he
12 relevant, dispositive inquiry in determining whether a right is
13 clearly established is whether it would be clear to a reasonable
14 officer that his conduct was unlawful in the situation he
15 confronted." Id. at 202; see also Demoret v. Zegarelli, 451 F.3d
16 140, 148-49 (2d Cir. 2006). Normally, it is only the "plainly
17 incompetent or those who knowingly violate the law" -- those who
18 are not worthy of the mantle of office -- who are precluded from
19 claiming the protection of qualified immunity. Malley v. Briggs,
20 475 U.S. 335, 341 (1986).

21 The district court concluded that the law governing consent
22 searches "was clearly established at all times relevant hereto."
23 Moore, 2006 WL 2008712, at *8. It further held that "reasonable
24 officers could only conclude that [neither consent nor] exigent

1 circumstances" justified the Deputies' search of Moore's study.
2 Id. at *11. We disagree.

3 For constitutional suits like this one to deter misconduct,
4 without also deterring citizens from taking jobs in the public
5 sector, police officers must be able to understand the legal
6 constraints on their conduct. See Back v. Hastings on Hudson
7 Union Free Sch. Dist., 365 F.3d 107, 129 (2d Cir. 2004) ("The
8 compromise between remedy and immunity that we have chosen turns
9 critically upon notice."). See generally Hope v. Peltzer, 536
10 U.S. 730, 739-40 (2002). Thus, it is not enough to say that it
11 was clearly established that a warrantless search of an area is
12 unconstitutional absent probable cause or the voluntary consent
13 of a person with authority to consent to such a search. "To be
14 clearly established, a right must have been recognized in a
15 particularized rather than a general sense." Sira v. Morton, 380
16 F.3d 57, 81 (2d Cir. 2004). Indeed, "[t]he question is not what
17 a lawyer would learn or intuit from researching case law, but
18 what a reasonable person in the defendant's position should know
19 about the constitutionality of the conduct." McCullough v.
20 Wyandanch Union Free Sch. Dist., 187 F.3d 272, 278 (2d Cir.
21 1999).

22 The law applying and interpreting Davis was not clearly
23 established at the time of the search. As we noted earlier, this
24 court has never adequately defined the meaning of "access" under

1 Davis. See Ehrlich, 348 F.3d at 53. Nor have we ever passed on
2 how "substantial" an interest must be to vest a third party with
3 authority to consent to a search over an area in which she has
4 such an interest. And, indeed, it is not even clear what metric
5 we would use to measure substantiality, for it surely cannot
6 depend on the presence or absence of a property right in an area,
7 see Randolph, 547 U.S. at 110-11. Finally, the difference
8 between "access" and "permission to gain access" is also obscure.
9 For instance, the dictionary definition of "access" given by the
10 district court includes "permission to approach." See Webster's
11 Third International Dictionary 11 (1981) (defining access to
12 include "permission, liberty, or ability to enter").

13 Thus, it was not clear at the time of the search whether the
14 physical access Sines gained by forcibly cutting off the locks to
15 the study satisfied the access requirement of Davis. The fact
16 that Davis distinguishes between access and permission to gain
17 access -- part 2(c) of the test -- could suggest that even though
18 Sines's access was improperly obtained, it nevertheless
19 constituted access within the meaning of the first prong.
20 However, because we have never decided whether physical force is
21 permissible under the access prong, Ehrlich, 348 F.3d at 54, a
22 reasonable officer could not be sure that Sines did not have the
23 requisite access to the study, see also id. at 60 ("Since the
24 issue before us is the existence of qualified immunity, we need

1 not delimit the specific boundaries of the access requirement.”).
2 Moreover, based on the ambiguity in the law, an officer could
3 have reasonably believed that Sines’s suspicion that Moore had
4 hidden her personal effects in his study was sufficient to
5 constitute a substantial interest that could validate her
6 consent. And “[i]f the officer’s mistake as to what the law
7 requires is reasonable, . . . the officer is entitled to the
8 immunity defense.” Saucier, 533 U.S. at 205.

9 In concluding that, for purposes of qualified immunity, the
10 Deputies could have reasonably believed that Sines had authority
11 to consent to the search, we note that this analysis is distinct
12 from that in Part I.A., in which we concluded that, for purposes
13 of determining whether there had been a constitutional violation,
14 common understanding could not have supported a belief that Sines
15 had authority to consent. The latter concerns the question of
16 whether the search itself was unreasonable, in violation of the
17 Fourth Amendment (i.e., the first part of the qualified immunity
18 test), based on common social understanding as clarified in
19 Randolph; the former concerns the question of whether the
20 officers’ belief in the lawfulness of their conduct was
21 unreasonable, thereby precluding a qualified immunity defense
22 (i.e., the second part of the qualified immunity test), based on
23 the state of the existing law, which of course pre-dated
24 Randolph. In Anderson v. Creighton, a warrantless search case,

1 the Supreme Court highlighted the distinction between these two
2 analyses and noted that it was possible for officers to have
3 conducted an unreasonable search based on a reasonable mistaken
4 belief. 483 U.S. 635, 643-44 (1987) (suggesting that it is
5 possible "to say that one 'reasonably' acted unreasonably"); see
6 also Saucier, 533 U.S. at 202 ("In Anderson, . . . we rejected
7 the argument that there is no distinction between the
8 reasonableness standard for warrantless searches and the
9 qualified immunity inquiry.").

10 Thus, in this case, we conclude that the Deputies acted
11 unreasonably when they searched the study because "no . . .
12 authority [to consent] could sensibly be suspected." Randolph,
13 547 U.S. at 112. However, we also conclude that because the law
14 was unclear, the Deputies could reasonably have believed that
15 Sines had access and a substantial interest and therefore had
16 authority to consent to the search. Cf. Saucier, 533 U.S. at 203
17 ("We acknowledged that there was some 'surface appeal' to the
18 argument that, because the Fourth Amendment's guarantee was a
19 right to be free from 'unreasonable' searches and seizures, it
20 would be inconsistent to conclude that an officer who acted
21 unreasonably under the constitutional standard nevertheless was
22 entitled to immunity because he 'reasonably' acted unreasonably.
23 This superficial similarity, however, could not overcome . . .
24 our history of applying qualified immunity analysis to Fourth

1 Amendment claims against officers." (internal quotation marks and
2 citation omitted)).

3 Because we believe that, at the time of the search, the law
4 was not clearly established as to whether Sines had authority to
5 consent to a search of the study, Deputies Andreno and Palmer are
6 entitled to qualified immunity. We therefore do not need to
7 decide whether the law governing searches purportedly justified
8 by the exigency of the circumstances was clearly established at
9 the time the Deputies searched Moore's study.

10 **CONCLUSION**

11 For the foregoing reasons, the judgment of the district
12 court is REVERSED. The case is REMANDED to the district court so
13 that it may enter summary judgment in defendants' favor.

14