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Randolph v. Georgia: "The Beginning of a New Era in Third-Party Consent Cases

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RANDOLPH V. GEORGIA: THE BEGINNING OF A NEW ERA IN THIRD-PARTY CONSENT CASES

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I. INTRODUCTION

In *Georgia v. Randolph (Randolph III)*,[1] the United States Supreme Court held that law enforcement may not conduct a warrantless search of a premises shared by co-occupants where a physically present co-occupant expresses his or her refusal to consent to the search, even if law enforcement obtains the voluntary consent of another co-occupant of the premises.[2] This article will introduce the historical context of the decision and provide an overview of the *Randolph III* opinion. The article also discusses cases that have addressed the impact of *Randolph III* on the future of third-party consent in the context of the Fourth Amendment of the United States Constitution. In conclusion, the author will offer his own observations regarding the opinion.

II. HISTORICAL BACKGROUND—A REFLECTION ON THE PAST

A. *The Fourth Amendment Generally Prohibits Warrantless Searches*

The Fourth Amendment of the United States Constitution provides that no person will be subjected to "unreasonable searches and seizures" of their "persons, houses, papers, and effects."[3] Unlike most constitutional amendments, the Fourth Amendment further includes specific language regarding its application, stating, "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."[4] Consequently, warrantless searches by law enforcement are generally deemed per se unreasonable.[5] With the passage of time, however, courts have carefully loosened the warrant requirement of the Fourth Amendment by carving out a number of limited, well-defined exceptions.[6] Although recognizing that factual circum-

1. 547 U.S. 103, 126 S. Ct. 1515 (2006).
2. *Id.* at 1518–19.
3. U.S. CONST. amend. IV.
4. *Id.*
5. *See* Weeks v. United States, 232 U.S. 383, 393–94 (1914).
6. *See, e.g.*, Warden v. Hayden, 387 U.S. 294, 298–99 (1967) (holding evidence of crime will not be suppressed where officers discover the evidence during a warrantless entry of a home in pursuit of a fleeing felon); United States v. Jeffers, 342 U.S. 48, 51 (1951) (explaining that police may enter a home without a warrant where an exceptional circumstance exists); Johnson v. United States, 333 U.S. 10, 14–15 (1948) (asserting that evidence will not

stances, often of a time-sensitive nature, may justify these exceptions, the United States Supreme Court has been reluctant to infringe upon the protections of the Fourth Amendment that were so specifically outlined by the framers of the United States Constitution.[7] Thus, the Court has observed, "[w]hen the right of privacy must reasonably yield to the right of search is, as a rule, to be decided by a judicial officer, not by a policeman or government enforcement agent."[8]

B. *Valid Consent Is an Exception to the Warrant Requirement of the Fourth Amendment*

Beginning in the early 1900s courts began to realize that a warrantless search by law enforcement with the voluntary consent of the property owner could not logically qualify as an "unreasonable" search.[9] For example, in *United States v. Williams*,[10] officers obtained the permission of a ranch owner to "look the premises over."[11] While on the premises, the officers located what appeared to be evidence of a moonshine operation.[12] In upholding the search, the United States District Court for the District of Montana stated, "[t]his search without warrant, but with [the owner's] consent, was not unreasonable."[13] Armed with this realization, valid consent was later recognized as one of the limited, well-defined exceptions to the warrant requirement of the Fourth Amendment.[14] Further development of this principle over time would soon reveal that valid consent, as an exception to the freedom from warrantless searches, would become a useful tool for law enforcement and expand to encompass a variety of factual scenarios.

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be suppressed based upon warrantless entry where police are confronted with the imminent possibility that evidence will be destroyed).

7. *See* Amos v. United States, 255 U.S. 313, 315–16 (1921).

8. *Johnson*, 333 U.S. at 14.

9. *See, e.g.*, United States v. Williams, 295 F. 219, 220 (D. Mont. 1924); Cass v. State, 61 S.W.2d 500, 501 (Tex. Crim. App. 1933).

10. 295 F. at 220.

11. *Id.* at 219.

12. *Id.*

13. *Id.* at 220.

14. Davis v. United States, 328 U.S. 582, 593–94 (1946); Zap v. United States, 328 U.S. 624, 629 (1946), *vacated*, 330 U.S. 800 (1947).

C. *Valid Consent Does Not Require a "Knowing and Intelligent" Waiver of Fourth Amendment Rights by a Defendant*

Given the overwhelming importance of constitutional rights to the American system of justice, the prosecution bears a heavy burden anytime it attempts to prove that an accused has waived one of those rights.[15] Specifically, in most circumstances, the prosecution is required to prove that the person waiving a constitutional right knew of both the existence of the right as well as his or her right to refuse to waive the right.[16] Commonly referred to as a "knowing and intelligent waiver,"[17] this burden has been applied to a variety of constitutional rights in criminal cases.[18] Therefore, since consent to a warrantless search, at the most basic level, is nothing more than a waiver of a person's Fourth Amendment rights, does law enforcement have to inform an accused of his or her right to refuse to consent to a search? The United States Supreme Court answered this question in the negative in *Schneckloth v. Bustamonte*.[19]

In *Schneckloth*, evidence was obtained against the defendant during a consensual search of a vehicle.[20] Although both California appellate courts affirmed the defendant's conviction, the defendant pursued a writ of habeas corpus in federal court.[21] Setting aside the district court order denying habeas relief, the United States Court of Appeals for the Ninth Circuit held that the prosecution was required to prove that the person granting consent knew he or she had the right to refuse to waive his or her Fourth Amendment rights.[22] The United States Supreme Court reversed, stating, "[w]hile knowledge of the right to refuse consent is one factor to be taken into account, the government need not establish such knowledge as the sine qua non of an effective consent."[23]

The primary significance of *Schneckloth* was that the Supreme Court distinguished the protections of the Fourth Amendment from other constitu-

15. *See* Johnson v. Zerbst, 304 U.S. 458, 464–65 (1938).
16. *Id.*
17. Argersinger v. Hamlin, 407 U.S. 25, 37 (1972).
18. *See* Barker v. Wingo, 407 U.S. 514, 526 (1972) (waiver of the right to a speedy trial); Brookhart v. Janis, 384 U.S. 1, 4 (1966) (waiver of the right to confrontation); Green v. United States, 355 U.S. 184, 191 (1957) (waiver of the right to be free from double jeopardy); Glasser v. United States, 315 U.S. 60, 71 (1942) (waiver of the right to counsel).
19. 412 U.S. 218 (1973).
20. *Id.* at 220.
21. *Id.* at 221.
22. *Id.* at 221–22.
23. *Id.* at 227.

tional "trial rights," such as the right to counsel, which usually require a knowing and intelligent waiver.[24] However, the practical, common sense reasoning utilized by the Court in reaching this conclusion demonstrated the Court's willingness to expand, rather than further restrict, the principles surrounding consent searches except in cases involving coercion or threats. For example, the Court noted that the burden imposed on the prosecution by the Ninth Circuit decision would be unworkable in real world application, as the prosecution would seldom be capable of proving that an unprovoked, consenting defendant knew of his/her right to refuse consent.[25] In so reasoning, the Court stated, "[a]ny defendant who was the subject of a search authorized solely by his consent could effectively frustrate the introduction into evidence of the fruits of that search by simply failing to testify that he in fact knew he could refuse consent."[26] Additionally, the Court observed that it would be completely "impractical"[27] to impose a requirement that law enforcement provide a defendant with a detailed warning in consent search cases.[28] Observing that consent searches often occur under the time pressures of active investigations and in such intimate places as the home, the Court stated, "[t]hese situations are a far cry from the structured atmosphere of a trial where, assisted by counsel if he chooses, a defendant is informed of his trial rights."[29]

D. *Valid Consent May Be Effectively Obtained from a Variety of Persons Other than the Defendant*

In the simplest of cases involving consent searches, a property owner has voluntarily acquiesced directly to law enforcement officers, in their presence, to a warrantless search and evidence unearthed during the search is used against the property owner.[30] In such cases, it should come as no surprise that evidence may be used against the property owner since it is precisely that property owner who has waived his/her very own Fourth Amendment rights by virtue of his/her very own consent.[31] However, the evolution of legal principles over time is seldom as elementary as the reasoning found in the simplest of cases, as varying factual nuances consistently challenge the

24. *Schneckloth*, 412 U.S. at 237–38 (citing Johnson v. Zerbst, 304 U.S. 458, 458 (1938)).
25. *Id.* at 230.
26. *Id.*
27. *Id.* at 231.
28. *Id.*
29. *Schneckloth*, 412 U.S. at 232 (citing Boykin v. Alabama, 395 U.S. 238, 243 (1969)).
30. *See, e.g.*, United States v. Williams, 295 F. 219, 220 (D. Mont. 1924).
31. *Id.*

complacency of seemingly well-settled doctrines. The development of case law involving consent searches provides an excellent example of this constant dilemma.

As more cases involving consent searches began reaching appellate courts, it soon became clear that joint ownership or use of property by multiple persons would present unique questions regarding the effectiveness of consent by one person to the detriment of others.[32] Specifically, courts were faced with the question of whether, via consent, an individual may waive the Fourth Amendment rights of another individual, based upon the fact that the individuals jointly share use and control of the property at issue.[33] For example, in *Stein v. United States*,[34] a wife discovered that her husband possessed and used opium in their home.[35] The couple later separated with the husband moving to his mother's home and the wife eventually moving into a friend's home.[36] The wife later returned to the marital home with federal narcotics agents and permitted the agents to search the home.[37] The agents discovered drug-related evidence that was used against the husband in a prosecution for drug crimes.[38] In rejecting the husband's argument that the search was not permitted by the Fourth Amendment, the Ninth Circuit Court of Appeals held that the wife could unilaterally permit warrantless entry by law enforcement without the consent of her husband.[39] The court relied heavily upon the fact that the husband and wife both had an equal right to possess the home, stating that "[t]he right of [the wife] to enter the house cannot be seriously questioned."[40]

As case law continued to evolve, the authority of persons having equal rights of possession and control of property to authorize a warrantless search to the detriment of other co-occupants or co-owners was further extended to encompass an assortment of factual scenarios.[41] Some courts seemed to fo-

32. *See, e.g.*, Cofer v. United States, 37 F.2d 677, 679 (5th Cir. 1930) (addressing whether a wife's consent was binding on her husband where police coerced her consent).

33. *See, e.g.*, United States v. Eldridge, 302 F.2d 463, 464 (4th Cir. 1962).

34. 166 F.2d 851 (9th Cir. 1948).

35. *Id.* at 852.

36. *Id.* at 853.

37. *Id.*

38. *Id.*

39. *Stein*, 166 F.2d at 855.

40. *Id.*

41. *See, e.g.*, Gurleski v. United States, 405 F.2d 253, 260–63 (5th Cir. 1968) (holding that consent of a joint user of an automobile is effective against other users); United States v. Eldridge, 302 F.2d 463, 465 (4th Cir. 1962) (holding that consent of a person who borrows an automobile temporarily, while the automobile is in that person's possession, is effective against the actual owner); *see* Teasley v. United States, 292 F.2d 460, 464 (9th Cir. 1961) (holding that joint occupant of an apartment may consent to a warrantless search to the detri-

cus their reasoning on the fact that the person authorizing the warrantless search possessed the same right to authorize entry by law enforcement as the person against whom the evidence was being used.[42] However, in 1969, the United States Supreme Court articulated an additional justification for permitting warrantless third-party consent searches, which focused on the actions of the person against whom evidence is being used in assuming the risk that other persons may consent to warrantless searches by police.[43]

In *Frazier v. Cupp*,[44] the defendant jointly used a duffel bag with his cousin.[45] The cousin permitted a warrantless search of the bag by law enforcement and evidence was discovered linking the defendant to a murder.[46] In a unanimous opinion written by Justice Thurgood Marshall, the United States Supreme Court "dismissed rather quickly,"[47] the defendant's contention that the search was not authorized by finding that the defendant, as the person against whom the evidence was being used, maintained the duffel bag jointly with his cousin and left the bag in his cousin's home.[48] Consequently, the Court stated that the defendant, "must be taken to have assumed the risk that [his cousin] would allow someone else to look inside."[49] The Court's discussion in *Frazier* regarding third-party consent consumed approximately one page of the published opinion of the Court and was by no means an exhaustive analysis.[50] However, in 1974, the Court would take the liberty to create a more well-defined standard in third–party consent cases in *United States v. Matlock*.[51]

In *Matlock*, the defendant was arrested in the yard of a residence he occupied with other persons for the crime of bank robbery.[52] The arresting officers were aware that the defendant lived in the residence, however, the officers did not request consent from the defendant to search the residence.[53] Instead, the officers approached an individual named Gayle Graff at the door

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ment of other co-occupants); United States v. Sferas, 210 F.2d 69, 74 (7th Cir. 1954) (finding evidence acquired during a warrantless search of a printing plant operation admissible where business partner of the defendant consented to the warrantless search by police).

42. *See Eldridge*, 302 F.2d at 467–68; *Sferas*, 210 F.2d at 74–75.
43. Frazier v. Cupp, 394 U.S. 731, 740 (1969).
44. *Id.* at 731.
45. *Id.* at 740.
46. *Id.*
47. *Id.*
48. *Frazier*, 394 U.S. at 740.
49. *Id.*
50. *See generally id.*
51. 415 U.S. 164 (1974).
52. *Id.* at 166.
53. *Id.*

of the residence who ultimately permitted the officers to come inside.[54] Once inside, Ms. Graff consented to a warrantless search of the home, including a bedroom that she shared jointly with the defendant.[55] The officers obtained evidence against the defendant during the search that was used by the prosecution.[56] The Court held that valid consent may be obtained from someone other than the defendant, "who possessed common authority over or other sufficient relationship to the premises."[57] Although the Court remanded the case for further findings consistent with the opinion,[58] the Court specifically defined "common authority"[59] as not being represented by the person's interest in the premises searched in the context of property law but instead, the Court stated that such authority:

> 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 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.[60]

As a result, the Court defined "common authority" to consent based upon two factors: first, based upon the inherent right of the co-occupant granting the consent to do so; and second, the actions or inactions of the defendant against whom evidence is being used in "assuming the risk" that his/her co-occupant will grant consent.[61]

The *Matlock* decision represents the first time that the United States Supreme Court established significant, guiding principles regarding when one person's consent is valid to the detriment of another. Although questions would soon arise regarding the scope of one's consent under *Matlock*,[62] the opinion reached landmark status as its holding began to be recognized and

54. *Id.*
55. *Id.*
56. *Matlock*, 415 U.S. at 166–67.
57. *Id.* at 171.
58. *Id.* at 178.
59. *Id.* at 171 n.7.
60. *Id.*
61. *Matlock*, 415 U.S. at 171 n.7.
62. *See, e.g.*, United States v. Orejuela-Guevara, 659 F. Supp. 882, 885–89 (E.D.N.Y. 1987) (noting that consent may not be valid where the third-party granting consent does not possess a sufficiently close relationship to the property searched).

applied throughout the federal system.[63] However, the *Matlock* decision specifically reserved the question of whether a warrantless search is permissible when officers reasonably believe that they are obtaining consent from an individual with "common authority" over the premises but, in fact, the person does not have such authority.[64] The Court would not address this issue until approximately sixteen years later in *Illinois v. Rodriguez*.[65]

In *Rodriguez*, police in Chicago were called to the home of an individual named Dorothy Jackson.[66] Upon arrival, the officers met Ms. Jackson's daughter, Gail Fischer, who appeared to be the victim of a physical attack.[67] Fischer informed the officers that Rodriguez had beaten her up earlier in the day at his apartment, which was also located in Chicago, but on a different street.[68] Fischer then traveled with the officers to the apartment in order to arrest Rodriguez; however, the officers did not obtain a search warrant or an arrest warrant.[69] Upon arrival, Fischer entered the apartment using a key and permitted the officers to come inside.[70]

Unknown to the officers at the time, Fischer had taken the key without Rodriguez's permission, and had moved out of the apartment with her children approximately one month prior to the incident.[71] Fischer's name was not on the lease for the apartment, she paid none of the rent for the apartment, and she was not permitted to have guests in the apartment without Rodriguez's permission.[72] However, Fischer referred to the apartment as "our[s]"[73] while conversing with the officers, and indicated that she had clothing and furniture inside the apartment.[74]

Once inside, the officers discovered evidence of drug-related activity in the living room and bedroom where Rodriguez was actually present and sleeping during the search.[75] Rodriguez was arrested on drug related charges and subsequently moved to suppress the evidence found inside his apart-

63. *See* United States v. Sullivan, 544 F. Supp. 701, 714 (D. Me. 1982) (providing a thorough list of federal cases recognizing and applying *Matlock* between 1974 and 1982 throughout the country).
64. *See Matlock*, 415 U.S. at 171 n.7.
65. 497 U.S. 177 (1990).
66. *Id.* at 179.
67. *Id.*
68. *Id.*
69. *Id.* at 180.
70. *Rodriguez*, 497 U.S. at 180.
71. *Id.* at 181.
72. *Id.*
73. *Id.* at 179.
74. *Id.*
75. *Rodriguez*, 497 U.S. at 180.

ment.[76] Finding that Fischer was nothing more than an "'infrequent visitor"'[77] incapable of granting consent to search the apartment, the trial court granted Rodriguez's motion.[78] The Appellate Court of Illinois affirmed,[79] concluding that the officers' belief, no matter how reasonable, that consent was valid is of no consequence to a Fourth Amendment analysis.[80] The State of Illinois's petition for review by the Supreme Court of Illinois was denied and the case ended up before the United States Supreme Court.[81]

The Court began its opinion by expressly stating that the State of Illinois had not met its burden of showing that Fischer possessed "common authority" over the apartment necessary to authorize her to grant consent to the detriment of Rodriguez since she was no longer a joint occupant.[82]

Nevertheless, the Court held that valid consent may be obtained from a third-party where officers reasonably, though erroneously, believed that the consenting third party possesses common authority over the premises.[83] In spite of the fact that Fischer was not a joint occupant of the apartment, the Court reasoned that all that is required in justifying a warrantless search based upon third-party consent is that the police officers make reasonable conclusions from the facts.[84] In determining if police conduct is reasonable, the Court observed that the Fourth Amendment does not require that an officer's assessment always be factually accurate, but only that the officer's assessment of the facts at issue be objectively reasonable.[85]

76. *Id.*
77. *Id.*
78. *Id.*
79. *Id.*
80. *See Rodriguez*, 497 U.S. at 188–89.
81. *Id.* at 180–81.
82. *Id.* at 181 (citing United States v. Matlock, 415 U.S. 164, 171 n.7 (1974)).
83. *Id.* at 186–88.
84. *Id.* at 186.
85. *Rodriguez*, 497 U.S. at 188.

E. *Prior to* Randolph, *Valid Consent Could Be Effectively Obtained from Persons Other than the Defendant, Even If the Defendant Was Present at the Time of the Warrantless Search and Objected to the Search*

Once legally identified as an exception to the Fourth Amendment warrant requirement,[86] valid consent would expand to permit third parties having actual authority,[87] as well as apparent authority,[88] over property to permit law enforcement to conduct a warrantless search to the detriment of a criminal defendant. However, if such a third party consents to a warrantless search but the defendant, having equal authority over the property and present at the time of the search, objects to the search, may the police proceed without a warrant?[89] Approximately thirty-two years after *Matlock*, and sixteen years after *Rodriguez*, the United States Supreme Court would answer this question decisively in the negative.[90] Prior to *Randolph III*, however, every federal circuit to address this question consistently reached the opposite result with little debate.[91]

In allowing warrantless searches under these circumstances, federal courts relied almost exclusively on the standard set forth in *Matlock*.[92] Some federal courts addressed the issue fairly briefly with very little substantive analysis.[93] Utilizing a more extensive analysis, however, other courts expanded the application of the *Matlock* standard to provide that a person with common authority over property may permit a warrantless search by law enforcement even if the defendant has equal authority over the property, is present at the time of the search, and specifically objects to the search.[94] In so reasoning, some courts concluded that when a defendant assumes the risk

86. Davis v. United States, 328 U.S. 582, 593–94 (1946); Zap v. United States, 328 U.S. 624, 630 (1946).

87. *Matlock*, 415 U.S. at 171.

88. *Rodriguez*, 497 U.S. at 186–88.

89. *See, e.g.*, Georgia v. Randolph (*Randolph III*), 547 U.S. 103, 126 S. Ct. 1515, 1520 (2006).

90. *Id.* at 1520–21.

91. *See* United States v. Rith, 164 F.3d 1323, 1328 (10th Cir. 1999); United States v. Morning, 64 F.3d 531, 536 (9th Cir. 1995); Lenz v. Winburn, 51 F.3d 1540, 1548 (11th Cir. 1995); United States v. Donlin, 982 F.2d 31, 33 (1st Cir. 1992); United States v. Baldwin, 644 F.2d 381, 383 (5th Cir. 1981) (per curiam); United States v. Hendrix, 595 F.2d 883, 885 (D.C. Cir. 1979) (per curiam); United States v. Sumlin, 567 F.2d 684, 687 (6th Cir. 1977).

92. *See Rith*, 164 F.3d at 1328; *Morning*, 64 F.3d at 534–36; *Lenz*, 51 F.3d at 1548; *Donlin*, 982 F.2d at 33; *Sumlin*, 567 F.2d at 687–88.

93. *See Lenz*, 51 F.3d at 1548; *Donlin*, 982 F.2d at 33; *Baldwin*, 644 F.2d at 383.

94. *See Rith*, 164 F.3d at 1328; *Morning*, 64 F.3d at 534–36; *Lenz*, 51 F.3d at 1548; *Donlin*, 982 F.2d at 33; *Sumlin*, 567 F.2d 684, 687–88.

that others will consent to a warrantless search by cohabiting with other people, he or she essentially waives his or her expectation of privacy to a limited extent.[95] By way of example, in *United States v. Rith*,[96] the Tenth Circuit held that a son, who lived in his parent's home, could not revoke the previously obtained consent of his parents to a warrantless search, even though the revocation was made contemporaneous to the search.[97] The court stated,

> Under *Matlock* and its interpretive progeny, [the son] had no expectation of privacy that negated his parents' consent to a search of their home. To hold otherwise would undermine the gravamen of *Matlock*: "any of the co-habitants has the right to permit the inspection *in his own right* and . . . the others have assumed the risk that one of their number might permit the common area to be searched."[98]

The majority of state appellate courts addressing this issue concurred with the federal courts' conclusion.[99] However, a small minority of state appellate courts, including the Fourth District Court of Appeal of Florida reached a contrary result.[100] Of the courts subscribing to this view, the Supreme Court of Washington provided the most thorough analysis.[101] In *State v. Leach*,[102] the defendant's girlfriend consented to the search of an office that she and the defendant possessed equal control over.[103] The defendant was present at the time of the search but the record in *Leach* did not indicate that he actually objected to the search.[104] The court held that the girlfriend's

95. *Rith*, 164 F.3d at 1328; *Morning*, 64 F.3d at 536; *Sumlin*, 567 F.2d at 688.

96. 164 F.3d at 1323.

97. *Id.* at 1328.

98. *Id.* (quoting United States v. Matlock, 415 U.S. 164, 171 n.7 (1974)); *see also Morning*, 64 F.3d at 536 (citing *Matlock*, 415 U.S. at 171 n.7) (stating that "[a] defendant cannot expect sole exclusionary authority unless he lives alone"); *Sumlin*, 567 F.2d at 688 (stating with regard to a joint occupants ability to object to a warrantless search consented to by a co-occupant that "[t]here is no reasonable expectation of privacy to be protected under such circumstances").

99. *See, e.g.*, Love v. State, 138 S.W.3d 676, 681 (Ark. 2003); People v. Sanders, 904 P.2d 1311, 1315 (Colo. 1995); City of Laramie v. Hysong, 808 P.2d 199, 203–05 (Wyo. 1991); People v. Cosme, 397 N.E.2d 1319, 1321–23 (N.Y. 1979); State v. Ramold, 511 N.W.2d 789, 792 (Neb. Ct. App. 1994); Brandon v. State, 778 P.2d 221, 223–24 (Alaska Ct. App. 1989); State v. Frame, 609 P.2d 830, 832 (Or. Ct. App. 1980).

100. *See, e.g.*, Shingles v. State, 872 So. 2d 434, 437–39 (Fla. 4th Dist. Ct. App. 2004); State v. Leach, 782 P.2d 1035, 1038–40 (Wash. 1989).

101. *See Leach*, 782 P.2d at 1038–40.

102. *Id.* at 1085.

103. *Id.* at 1036.

104. *Id.* at 1036–37.

consent did not justify a warrantless search.[105] The court distinguished *Matlock*, stating that the *Matlock* standard only applied to "absent, nonconsenting" defendants.[106] Since the defendant in *Leach* was present at the time of the search, the court found the warrantless entry by police to be unlawful in spite of the girlfriend's consent.[107]

III. *RANDOLPH V. GEORGIA*—THE PRESENT STATE OF THE LAW

In late May 2001, "Scott Randolph and his wife, Janet [Randolph], separated."[108] Prior to this separation, the coupled resided in a home located in Americus, Georgia that they rented from Scott Randolph's father, Edward Randolph.[109] Both Mr. and Mrs. Randolph considered the home to be their marital residence.[110] However, when the couple separated, Mrs. Randolph traveled to Canada to stay with her parents, taking the couple's child and some belongings with her.[111] Mr. Randolph remained at the home in Americus, Georgia.[112] For reasons unknown, Mrs. Randolph returned to the home in Americus, Georgia in early July 2001.[113]

At approximately 9:00 a.m. on July 6, 2001,[114] Mrs. Randolph requested that local police come to the home regarding a domestic dispute with Mr. Randolph.[115] Upon arrival, Mrs. Randolph complained that Mr. Randolph had taken the couple's child to a neighbor's home following their dispute.[116] Not long after the police arrived, Mr. Randolph returned to the home stating that he had taken the child to a neighbor's home fearing that Mrs. Randolph may attempt to flee to Canada with the child again.[117] Accusations of misconduct soon erupted from both Mr. Randolph and Mrs.

105. *See id.* at 1040.
106. *Leach*, 782 P.2d at 1038 (quoting United States v. Matlock, 415 U.S. 164, 170 (1974)).
107. *Id.* at 1040.
108. Georgia v. Randolph (*Randolph III*), 547 U.S. 103, 126 S. Ct. 1515, 1519 (2006).
109. *Id.* at 1519; *see also* Brief for Petitioner at 3, Georgia v. Randolph (*Randolph III*), 547 U.S. 103, 126 S. Ct. 1515 (2006) (No. 04-1067); Respondent's Response to Petition for Certiorari at 3–4, Georgia v. Randolph (*Randolph II*), 604 S.E.2d 834 (Ga. Nov. 8, 2004) (No. A03A0906).
110. Respondent's Response to Petition for Certiorari, *supra* note 109, at 2.
111. *Randolph III*, 547 U.S. 103, 126 S. Ct. at 1519.
112. Randolph v. State (*Randolph I*), 590 S.E.2d 834, 836 (Ga. Ct. App. 2003).
113. *Randolph III*, 547 U.S. 103, 126 S. Ct. at 1519.
114. *Randolph I*, 590 S.E.2d at 836.
115. *Randolph III*, 547 U.S. 103, 126 S. Ct. at 1519.
116. *Id.*
117. *Id.*

Randolph.[118] Mrs. Randolph accused Mr. Randolph of using substantial quantities of cocaine, thus resulting in financial problems for the couple.[119] Mr. Randolph denied the allegations and, in retaliation, alleged that it was Mrs. Randolph who abused both drugs and alcohol.[120] In fact, at subsequent hearings in the case, Mr. Randolph would accuse Mrs. Randolph and an unknown male companion of consuming as many as thirty-six bottles of beer in the twenty-four hour period prior to the incident with police.[121] He described her as being unsteady on her feet, smelling of alcohol, and experiencing dilated pupils at the time of the encounter with police.[122] Although police denied witnessing Mrs. Randolph in a state of intoxication or incapacity, the police acknowledged that there was hostility and animosity between the couple at the time.[123]

One of the officers, Sergeant Brett Murray,[124] traveled with Mrs. Randolph to the neighbor's home in order to retrieve the child.[125] Upon returning to the home, Mrs. Randolph continued to complain about Mr. Randolph's drug abuse and further stated that there was evidence of his drug-related activities inside the home.[126] Sergeant Murray asked Mr. Randolph about his drug abuse[127] and requested his consent to search the home.[128] Mr. Randolph, an attorney, "unequivocally refused" to grant consent.[129] Sergeant Murray then requested the consent of Mrs. Randolph which she "readily gave."[130] Mrs. Randolph then proceeded to take the officer inside the home to the couple's upstairs bedroom.[131] Inside the bedroom, Sergeant Murray discovered what appeared to be a straw with cocaine residue on it, consistent with an instrument used to ingest cocaine.[132]

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118. *Id.*; *Randolph I*, 590 S.E.2d at 836.
119. *Randolph III*, 547 U.S. 103, 126 S. Ct. at 1519; *Randolph I*, 590 S.E.2d at 836.
120. *Randolph III*, 547 U.S. 103, 126 S. Ct. at 1519.
121. Respondent's Response to Petition for Certiorari, *supra* note 109, at 3–4.
122. *Id.* at 4.
123. Brief for Petitioner, *supra* note 109, at 4.
124. Brett Murray is now a Major with the Sumter County Sheriff's Department in Americus, Georgia. Major Brett Murray, Sumter County Sherrif's Office, http://www.sumterga.com/sheriff/index.html (last visited June 4, 2007).
125. *Randolph III*, 547 U.S. 103, 126 S. Ct. at 1519.
126. *Id.*
127. *Id.*; Randolph v. State (*Randolph I*), 590 S.E.2d 834, 836 (Ga. Ct. App. 2003).
128. *Randolph III*, 547 U.S. 103, 126 S. Ct. at 1519.
129. *Id.*
130. *Id.*; *Randolph I*, 590 S.E.2d at 836.
131. *Randolph III*, 547 U.S. 103, 126 S. Ct. at 1519.
132. *Id.*; *Randolph I*, 590 S.E.2d at 836.

Sergeant Murray left the home in order to obtain an evidence bag so that he could properly collect and store the evidence.[133] He also contacted the local district attorney's office and was instructed to stop the search and obtain a warrant.[134] As Sergeant Murray approached the home in order to retrieve the straw, Mrs. Randolph withdrew her consent to the search.[135] Sergeant Murray then took the straw, as well as the Randolphs, to the local police station and obtained a search warrant for the home.[136] A subsequent search of the home pursuant to the warrant revealed numerous drug-related items.[137]

Mr. Randolph was subsequently indicted for possession of cocaine.[138] Mr. Randolph moved to suppress the evidence, contending that the search violated his Fourth Amendment rights.[139] The trial court denied the motion, but the Court of Appeals of Georgia granted Mr. Randolph's application for interlocutory appeal.[140]

The Court of Appeals of Georgia reversed the trial court.[141] In particular, the court favored a bright-line rule that police must always obtain a warrant before conducting a warrantless search where officers received competing responses to a request for consent to search from co-occupants having equal authority over the property at issue.[142] The court reasoned that it is "inherently reasonable" in the context of the Fourth Amendment for police to always honor and respect the refusal of a co-occupant to grant consent.[143] In so reasoning, the court observed that if "common authority" is the basis for one co-occupant's right to consent, then "common authority" is likewise a basis for another co-occupant's right to refuse to consent.[144] Consequently, the court stated, "[i]nherent in the power to grant consent is the power to vitiate that consent."[145] Regarding cases involving a marital residence, the court further noted that such a holding would also protect the sanctity of marriage by not permitting a wife to overrule the objection of her husband.[146]

133. *Randolph III*, 547 U.S. 103, 126 S. Ct. at 1519.
134. *Id.*
135. *Id.*
136. *Id.*
137. *Id.*
138. *Randolph III*, 547 U.S. 103, 126 S. Ct. at 1519.
139. *Id.*
140. *Id.*; Randolph v. State (*Randolph I*), 590 S.E.2d 834, 836 (Ga. Ct. App. 2003).
141. *Randolph I*, 590 S.E.2d at 840.
142. *Id.* at 836–37.
143. *Id.* at 837.
144. *Id.*
145. *Id.*
146. *Randolph I*, 590 S.E.2d at 837.

Rejecting a case-by-case analysis, the majority also concluded that a bright-line rule would provide more defined guidance to law enforcement when faced with similar circumstances to those presented in *Randolph* by simply instructing officers to obtain a warrant.[147] Additionally, responding to the dissent, the majority distinguished *Matlock* based upon the fact that, unlike the defendant in *Matlock*, Mr. Randolph was present at the time of the search and unequivocally refused consent.[148] More specifically, the court stated,

> *Matlock* and its progeny stand for the proposition that, in the absence of evidence to the contrary, there is a presumption that a co-occupant has waived his right of privacy as to other co-occupants. However, when police are confronted with an unequivocal assertion of that co-occupant's Fourth Amendment right, such presumption cannot stand.[149]

Judge Ellington and Judge Phipps each wrote their own concurring opinions.[150] Judge Ellington simply reiterated his belief that the conclusion of the majority effectively protected the privacy rights of citizens while simultaneously providing clear guidelines for law enforcement.[151] Judge Phipps, however, wrote his own special concurrence in order to express his disagreement with the bright-line approach used by the majority in a number of respects.[152] Relying upon *Matlock* and its progeny, Judge Phipps advocated a more case-by-case, fact intensive approach based upon a reasonableness standard.[153] Judge Phipps ultimately agreed with the conclusion of the majority, however, because Sergeant Murray was faced with "bickering spouses" and possessed "no hard evidence" of a crime and, accordingly, did not act reasonably in conducting a warrantless search based upon Ms. Randolph's consent alone.[154] Under those circumstances, Judge Phipps concluded that the officers should have obtained a warrant.[155] Arguing that his approach would provide "reasonably clear guidance" to law enforcement, Judge Phips stated:

147. *Id.* at 838.
148. *Id.*; *see* United States v. Matlock, 415 U.S. 164 (1974).
149. *Randolph I*, 590 S.E.2d at 838.
150. *Id.* at 840–43.
151. *Id.* at 840 (Ellington, J., concurring).
152. *Id.* (Phipps, J., concurring).
153. *Id.* at 840–43.
154. *Randolph I*, 590 S.E.2d at 843.
155. *Id.*

> If there is some objective verification that a crime has been committed, the police may search the common areas of a residence with the consent of one occupant or spouse even if another co-occupant or spouse objects. If one co-occupant or spouse simply summons the police to a residence and accuses his or her co-occupant or spouse of illegal conduct, the matter should be submitted to a neutral and detached magistrate if another co-occupant or spouse is present on the premises and objects. As always, in cases of doubt and in the absence of exigent circumstances, a warrant should be obtained.[156]

Judge Blackburn joined Judge Andrews in a dissenting opinion.[157] Arguing that the majority misconstrued and misapplied the Fourth Amendment's reasonableness standard, Judge Blackburn focused almost exclusively on *Matlock* and its progeny. With regard to the specific facts of *Randolph*, Judge Blackburn concluded:

> Because the defendant shared dominion over the property with his wife at the time consent was given by her, the waiver of his expectation of privacy with regard to the premises remained in effect. With his expectation of privacy still waived with regard to his wife, the defendant had no right to trump her consent to search their home.[158]

The Supreme Court of Georgia granted the State of Georgia's petition for writ of certiorari.[159] However, in a remarkably brief opinion, the court affirmed the decision of the Court of Appeals of Georgia.[160] The court began by recognizing that a co-occupant who possesses common authority over property may consent on behalf of all others, as set forth in *Matlock*.[161] The court further acknowledged the reasoning of *Matlock*, which states that a co-occupant possesses "his own right" to consent and other co-occupants have "assumed the risk" that he or she will exercise that right in their absence.[162] Nonetheless, the court distinguished *Matlock* based solely on the fact that Mr. Randolph, unlike the defendant in *Matlock*, was present at the time of the search and objected to it.[163] Regarding the assumption of risk language

156. *Id.*
157. *Id.* at 843–52.
158. *Id.* at 845.
159. State v. Randolph (*Randolph II*), 604 S.E.2d 835, 836 (Ga. 2004).
160. *Id.* at 837.
161. *Id.* at 836–37 (citing United States v. Matlock, 415 U.S. 164, 170 (1974)).
162. *Id.* at 837 (quoting *Matlock*, 415 U.S. at 171 n.7).
163. *Id.*

in *Matlock*, the court stated that "the risk 'is merely an inability to control access to the premises [in] one's absence.'"[164] Consequently, the court chose to follow the lead of the Supreme Court of Washington in *Leach* and invalidated the search of Mr. Randolph's home.[165]

Three justices joined in a dissenting opinion.[166] The dissent began by pointing out that the weight of existing authority disfavored the majority's conclusion.[167] The dissent, also relying upon *Matlock*, concluded that Mr. Randolph "assumed the risk" his wife would grant consent in her "own right" and, therefore, Mr. Randolph could not subsequently invalidate his wife's consent by way of his objection.[168]

The United States Supreme Court granted certiorari.[169] In the end, however, the Court adopted the same bright-line approach as the Georgia appellate courts below.[170] Specifically, the Court held, "a warrantless search of a shared dwelling for evidence over the express refusal of consent by a physically present resident cannot be justified as reasonable as to him on the basis of consent given to police by another resident."[171]

The Court began its analysis by briefly exploring the history of third-party consent cases, beginning with the adoption of valid consent as an exception to the Fourth Amendment warrant requirement, and concluding with the holding in *Rodriguez*.[172] The Court noted the standard set forth in *Matlock*, to the extent that a co-occupant with common authority over property, may permit a warrantless search to the detriment of other absent co-occupants.[173] Nevertheless, the Court observed that none of the prior third-party consent cases from the United States Supreme Court dealt with the issue of whether police may rely on the consent of one co-occupant in conducting a warrantless search in the face of an expressed refusal to allow the search by another, present co-occupant.[174] Thus, the Court concluded that

164. *Randolph II*, 604 S.E.2d at 837 (quoting 3 WAYNE R. LAFAVE, SEARCH & SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 8.3(d) (3d ed. 1996)).

165. *Id.* (referring to State v. Leach, 782 P.2d 1035, 1040 (Wash. 1989)).

166. *Id.* at 837.

167. *Id.* at 837–38 (Hunstein, J., dissenting).

168. *Id.* at 838.

169. Georgia v. Randolph (*Randolph III*), 547 U.S. 103, 126 S. Ct. 1515, 1520 (2006).

170. *See id.* at 1527–28.

171. *Id.* at 1526.

172. *Id.* at 1518–19, 1527–28 (citing Illinois v. Rodriguez, 497 U.S. 177, 181 (1990); United States v. Matlock, 415 U.S. 164, 170 (1974); Schneckloth v. Bustamonte, 412 U.S. 218, 222 (1973); Jones v. United States, 357 U.S. 493, 499 (1958)).

173. *Id.* at 1519 (citing *Matlock*, 415 U.S. at 170–71).

174. *Randolph III*, 547 U.S. 103, 126 S. Ct. at 1519.

"[t]he significance of such a refusal turns on the underpinnings of the co-occupant consent rule, as recognized since *Matlock*."[175]

The Court then provided insight into the meaning and significance of the "common authority" necessary under *Matlock* to justify a warrantless search.[176] The Court pointed out that "great significance [is] given to widely shared social expectations" based, in part, on property law in determining the reasonableness of a Fourth Amendment search.[177] As such, the Court stated that the objective reasonableness of a search under *Matlock*, "is in significant part a function of commonly held understanding[s] about the authority that co-inhabitants may exercise in ways that affect each other's interests."[178]

After citing a number of cases in which no "common authority" could justify a warrantless search based on third-party consent,[179] the Court turned to the question of whether one co-occupant's consent to a search may override an objection to the search by another, physically present co-occupant.[180] In this regard, the Court observed by way of example that "no sensible person" would enter a home where one co-occupant invites him/her inside, and another co-occupant expressly refuses.[181] The Court explained that such a result is necessary because no socially recognized understanding, or legally recognized doctrine of property law, exists as to the superior or inferior authority of one co-occupant over the other in these circumstances.[182] Accordingly, the Court decided that "there is no common understanding that one co-tenant generally has a right or authority to prevail over the express wishes of another, whether the issue is the color of the curtains or invitations to outsiders."[183] Armed with this conclusion, the Court further reasoned that a "police officer [has] no better claim to reasonableness" in conducting a warrantless search under these circumstances, as one occupant's consent bears no greater weight than another occupant's objection.[184]

The Court next turned its attention to the potential impact that its decision may have on future investigations stating, "[y]es we recognize the con-

175. *Id.* at 1520.
176. *Id.* at 1521–22 (citing *Matlock*, 415 U.S. at 170).
177. *Id.* at 1521.
178. *Id.*
179. *Randolph III*, 547 U.S. 103, 126 S. Ct. 1515, 1522 (citing Minnesota v. Olsen, 495 U.S. 91, 99 (1990); Stoner v. California, 376 U.S. 483, 489 (1964); Chapman v. United States, 365 U.S. 610, 617 (1961); United States v. Jeffers, 342 U.S. 48, 51 (1951)).
180. *Id.* at 1522.
181. *Id.* at 1522–23.
182. *Id.*
183. *Id.* at 1523.
184. *Randolph III*, 547 U.S. 103, 126 S. Ct. at 1523.

senting tenant's interest as a citizen in bringing criminal activity to light."[185] Recognizing the competing interests of bringing new crimes to light, and, at the same time, protecting the Fourth Amendment rights of the citizens, the Court suggested a couple of ways that both interests may be preserved in future cases.[186] Specifically, the Court explained that nothing in its decision prevents future co-occupants from delivering evidence of crime directly to law enforcement without a warrantless search,[187] and law enforcement may still rely upon information obtained from the consenting co-occupant to obtain a search warrant from a magistrate, regardless of whether another co-occupant objects.[188] Responding directly to Chief Justice Roberts's dissent, the majority also asserted that the decision would have "no bearing on the capacity of the police to protect domestic victims"[189] as police are still permitted to enter a home without a warrant any time there is good reason to believe that a threat of domestic violence exists.[190] The Court, however, did acknowledge that, in close cases, the rule it adopted may prevent police from conducting a search for evidence where no exigency or other legally recognized exception authorizes warrantless entry.[191] Nevertheless, the Court decided that such a risk was ultimately justified in order to adequately secure the Fourth Amendment rights of the citizens.[192]

At the conclusion of the majority opinion, the Court attempted to address what it viewed as "two loose ends" created by its ruling.[193] First, the Court addressed the language of *Matlock,* which states that a co-occupant of shared property mutually used by multiple occupants possesses "his own right" to consent to a search, and thus, reliance on the co-occupant's consent by law enforcement is reasonable.[194] With regard to this loose end, the Court observed that even though the co-occupant may possess "his own right" to authorize warrantless police entry, the right is not so superior or powerful that it may override the competing and equal right of the other co-occupants to refuse to consent.[195] The second loose end the Court sought to clarify was the impact the decision would have on the standards set forth in *Rodriguez*

185. *Id.* at 1524 (citing Coolidge v. New Hampshire, 403 U.S. 443, 488 (1971)).
186. *Id.* 1524–25.
187. *Id.*
188. *Id.* (citing United States v. Ventresca, 380 U.S. 102, 107 (1965)).
189. *Randolph III*, 547 U.S. 103, 126 S. Ct. at 1525.
190. *Id.*
191. *Id.* at 1525–26.
192. *See id.* at 1526.
193. *Id.* at 1527.
194. *Randolph III*, 547 U.S. 103, 126 S. Ct. at 1527 (citing United States v. Matlock, 415 U.S. 164, 171 n.7 (1974)).
195. *Id.*

and *Matlock*.[196] As noted by the Court, those cases rested upon similar facts as to those at issue in *Randolph III*.[197] The defendants in those cases, like Mr. Randolph, were physically nearby or actually present at the time of the searches at issue.[198] In particular, the defendant in *Matlock* was in a police car at the time of the search, and the defendant in *Rodriguez* was asleep in a bedroom at the time of the search.[199] Highlighting the formalistic character of its decision, the Court stated:

> If [*Matlock* and *Rodriguez*] are not to be undercut by today's holding, we have to admit that we are drawing a fine line; if a potential defendant with self-interest in objecting is in fact at the door and objects, the co-tenant's permission does not suffice for a reasonable search, whereas the potential objector, nearby but not invited to take part in the threshold colloquy, loses out.[200]

Accordingly, *Randolph III* imposes no obligation on law enforcement to proactively seek the approval of any absent, or even nearby, co-occupant prior to conducting a warrantless search based upon the consent of a present co-occupant.[201]

Justice Stevens and Justice Breyer both wrote their own concurring opinions.[202] Justice Stevens argued that the *Randolph III* decision validates his view that the Court cannot focus solely upon the original understanding of constitutional amendments and ignore the "relevance of changes in our society."[203] Justice Stevens pointed out that when the Fourth Amendment was adopted, a husband would have superior authority over premises than that of his wife; thus, his consent would be the only relevant inquiry.[204] Therefore, Justice Stevens noted that if the Court followed an original understanding of the Fourth Amendment, an arbitrary, if not blatantly discriminatory, result may prevail.[205] According to Justice Stevens, however, the present society recognizes that both husband and wife have equal constitutional rights regarding property, and "[a]ssuming that both spouses are competent,

196. *Id.* at 1527.
197. *Id.*
198. *Id.*
199. *Randolph III*, 547 U.S. 103, 126 S. Ct. at 1527.
200. *Id.*
201. *Id.* at 1527.
202. *Id.* at 1528–29 (Stevens, J., concurring), 1529–31 (Breyer, J., concurring).
203. *Id.* at 1528 (Stevens, J., concurring).
204. *Randolph III*, 547 U.S. 103, 126 S. Ct. at 1529.
205. *Id.*

neither one is a master possessing the power to override the other's constitutional rights to deny entry to their castle."[206]

Justice Breyer, on the other hand, wrote his own separate, concurring opinion in order to express his agreement with the majority's conclusion and articulate his own reasoning on how that conclusion should be reached.[207] Justice Breyer advocated a more fact-specific approach, based upon the totality of circumstances that, rather than imposing bright-line rules, focuses upon the reasonableness of the officer's actions in conducting a warrantless search.[208] Finding Sergeant Murray's search for evidence in the face of Mr. Randolph's present objection to be unreasonable, Justice Breyer stated that were the circumstances to change significantly, so should the result.[209] Hinting as to how he may decide future cases, Justice Breyer noted that evidence of exigency, or an invitation to police by a potential abuse victim, may provide a "special reason" for an immediate entry by police, unlike the circumstances in *Randolph III*.[210]

Chief Justice Roberts, joined by Justice Scalia, wrote a dissenting opinion.[211] Chief Justice Roberts began his opinion by summarizing his disagreement with the majority and stating his own opinion regarding what rule should have been applied.[212] Specifically, Chief Justice Roberts complained that the majority's approach was too "random and happenstance" to adequately protect privacy.[213] Alternatively, Chief Justice Roberts argued the Court should have held that any time a person shares a place with another, he or she assumes the risk that person will permit law enforcement to enter, even if he or she objects.[214]

Chief Justice Roberts then attacked the majority's reliance on understandings regarding "social expectations" in formulating its holding.[215] Chief Justice Roberts observed that concepts of what constitutes socially acceptable conduct on the part of persons who share living arrangements jointly does not provide a solid foundation on which to rest constitutional, Fourth Amendment standards.[216] In direct contradiction to the majority's observations regarding social expectations, Chief Justice Roberts pointed out

206. *Id.*
207. *Id.* at 1529–31 (Breyer, J., concurring).
208. *Id.*
209. *Randolph III*, 547 U.S. 103, 126 S. Ct. at 1530.
210. *Id.* at 1530.
211. *Id.* at 1531–39 (Roberts, C.J., dissenting).
212. *Id.* at 1531.
213. *Id.*
214. *Randolph III*, 547 U.S. 103, 126 S. Ct. at 1531 (Roberts, C.J., dissenting).
215. *Id.*
216. *Id.* at 1531–32.

that different factual situations within a social setting may give rise to different social expectations.[217] Through examples, Chief Justice Roberts noted that the relationship among the parties, the reason for the visit, or perhaps even the distance a visitor has traveled, may lead a visitor to enter a home at the invitation of one co-occupant, even over the objection of another co-occupant. [218] Chief Justice Roberts further observed that with the exception of determining when a Fourth Amendment search has occurred, and when a person has standing to raise a Fourth Amendment challenge, the Court has not looked to concepts of social expectations in determining when a search is reasonable in previous cases.[219] Instead, Chief Justice Roberts explained that the Court's Fourth Amendment precedents focus more on the protection of privacy than the impact on social expectations by looking to whether a person has a legitimate expectation of privacy in gauging the reasonableness of a search.[220] As such, Chief Justice Roberts asserted:

> A wide variety of often subtle social conventions may shape expectations about how we act when another shares with us what is otherwise private, and those conventions go by of a variety of labels—courtesy, good manners, custom, protocol, even honor among thieves. The Constitution, however, protects not these but privacy, and once privacy has been shared, the shared information, documents, or places remain private only at the discretion of the confidant.[221]

To support this assertion, Chief Justice Roberts highlighted a number of cases in which an individual was found to have waived his or her expectation of privacy in such things as oral conversations,[222] personal property,[223] and private information.[224] Chief Justice Roberts observed further that the *Matlock*[225] and *Rodriguez*[226] decisions are consistent with this line of cases as both decisions share the "common thread" found in all third-party consent cases that one who shares control over property with others, assumes the risk

217. *Id.*
218. *Id.*
219. *Randolph III*, 547 U.S. 103, 126 S. Ct. at 1531–32 (Roberts, C.J., dissenting).
220. *Id.* (quoting Katz v. United States, 389 U.S. 347, 361 (1967) (Harlan, J., concurring)).
221. *Id.* at 1533 (Roberts, C.J., dissenting).
222. *Id.* (citing United States v. White, 401 U.S. 745, 752 (1971)).
223. *Id.* (quoting Frazier v. Cupp, 394 U.S. 731, 740 (1969)).
224. *Randolph III*, 547 U.S. 103, 126 S. Ct. at 1533–34 (quoting United States v. Jacobsen, 466 U.S. 109, 117 (1984)).
225. United States v. Matlock, 415 U.S. 164, 177–78 (1974).
226. Illinois v. Rodriguez, 497 U.S. 177, 189 (1990).

that his or her co-occupants may consent to a warrantless search.[227] Consequently, Chief Justice Roberts stated:

> The law acknowledges that although we might not expect our friends and family to admit the government into common areas, sharing space entails risk. A person assumes the risk that his co-occupants—just as they might report his illegal activity or deliver his contraband to the government—might consent to a search of areas over which they have access and control.[228]

Chief Justice Roberts then shifted his focus to the practical consequences of the *Randolph III* decision.[229] First, Chief Justice Roberts stated that the opinion is "so random in its application" that it cannot effectively protect one's privacy.[230] In particular, Chief Justice Roberts noted that the opinion will afford no protection of a person's privacy right "if a co-owner happens to be absent when police arrive, in the backyard gardening, asleep in the next room, or listening to music through earphones so that only his co-occupant hears the knock on the door."[231] Next, Chief Justice Roberts pointed out that by not allowing police to search based on a co-occupant's consent, simply because another co-occupant is present and objects, may lead to retaliation against the consenting co-occupant by the objecting co-occupant, or even destruction of evidence once the police leave the home.[232] Moreover, with reference to domestic abuse case, Chief Justice Roberts explained that the exigency necessary to justify a warrantless search may not always exist in every case.[233] Additionally, Chief Justice Roberts determined that the newly announced "'consent plus a good reason'" rule in domestic abuse cases "spins out an entirely new framework for analyzing exigent circumstances."[234] Therefore, the rule seems contrary to the majority's apparent disdain for a co-occupant's consent since such consent is a key factor in determining whether police have a "'good reason'" to enter the home.[235]

Summarizing his perceived inconsistency in the majority opinion, Chief Justice Roberts stated:

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227. *Randolph III*, 547 U.S. 103, 126 S. Ct. at 1534–35 (Roberts, C.J., dissenting).
228. *Id.* at 1536.
229. *Id.*
230. *Id.*
231. *Id.*
232. *Randolph III*, 547 U.S. 103, 126 S. Ct. at 1537.
233. *Id.*
234. *Id.* at 1538.
235. *Id.*

> The majority reminds us, in high tones, that a man's home is his castle, but even under the majority's rule, it is not his castle if he happens to be absent, asleep in the keep, or otherwise engaged when the constable arrives at the gate. Then it is his co-owner's castle. And, of course, it is not his castle if he wants to consent to entry, but his co-owner objects.[236]

As a result, Chief Justice Roberts concluded:

> Rather than constitutionalize such an arbitrary rule, we should acknowledge that a decision to share a private place, like a decision to share a secret or a confidential document, necessarily entails the risk that those with whom we share in turn chose to share—for their own protection or other reasons—with the police.[237]

An originalist no doubt, Justice Scalia apparently felt called out by Justice Stevens' concurrence and, thus, issued his own dissenting opinion.[238] First, Justice Scalia explained that the fact that the Fourth Amendment, as part of an "unchanging [c]onstitution," often cross-references to the ever-changing area of property law presents no major hurdle in the path of an originalist.[239] Additionally, Justice Scalia "express[ed] grave doubt that today's decision deserves Justice Stevens' celebration as part of the forward march of women's equality," given the possible negative impact the decision may have on law enforcement efforts to investigate domestic violence against women by men.[240]

Justice Thomas issued his own dissenting opinion in which he concluded that *Coolidge v. New Hampshire*[241] squarely controlled the outcome in *Randolph III*.[242] In *Coolidge*, while investigating a murder, police asked the wife whether her husband owned any guns.[243] Thinking her cooperation would exonerate her husband, the wife obtained a number of her husband's guns from the couple's bedroom and gave them to police.[244] The Court later rejected the husband's Fourth Amendment challenge on the grounds his wife

236. *Id.* at 1539 (citations omitted).
237. *Randolph III*, 547 U.S. 103, 126 S. Ct. at 1539.
238. *Id.* at 1539–1541 (Scalia, J., dissenting).
239. *See id.* at 1540.
240. *Id.* at 1540.
241. 403 U.S. 443 (1971).
242. *Randolph III*, 547 U.S. 103, 126 S. Ct. at 1541–43 (Thomas, J., dissenting) (citing *Coolidge*, 403 U.S. at 486–90).
243. *Coolidge*, 403 U.S. at 486.
244. *Id.*

searched his home as an "instrument" of law enforcement.[245] The Court reasoned that the wife was not converted to a government agent simply by virtue of the fact that she made her own decision to cooperate with police.[246] Therefore, based on *Coolidge*, Justice Thomas concluded that no Fourth Amendment search occurred in *Randolph III* since Ms. Randolph acted on her own accord in directing police to the drug-related area and was not acting as an agent of the government.[247]

IV. SUBSEQUENT CASES—A GLIMPSE OF THE FUTURE

A. *An Expressed Objection of a Co-occupant to a Warrantless Search May Override the Voluntary Consent of Another Co-occupant Even if the Objecting Co-occupant Is Not Physically Present at the Time of the Search.*

The first Florida court to address significant issues related to *Randolph III* was the United States District Court for the Middle District of Florida.[248] In *United States v. Dominguez-Ramirez*,[249] agents with the Immigration and Customs Enforcement (ICE) agency intercepted a shipment of furniture crossing the Mexican border in El Paso, Texas that contained marijuana and was ultimately destined for Ocala, Florida.[250] Law enforcement officers from various local and federal agencies across the country decided to conduct a controlled delivery of the narcotics to the address in Ocala, Florida in an attempt to further the investigation.[251] The narcotics were delivered to a Florida address where the defendant, his brother, and one other individual were arrested.[252] During a subsequent, late-night interview of the defendant, law enforcement officers asked for the defendant's consent to search his residence, located on a different street in Ocala, Florida.[253] The defendant authorized the officers to search his home "in the morning" and not that night

245. *Id.* at 487.
246. *Id.* at 487–88.
247. *See Randolph III*, 547 U.S. 103, 126 S. Ct. at 1541–43 (Thomas, J., dissenting) (citing *Coolidge*, 403 U.S. at 488–98).
248. *See* United States v. Dominguez-Ramirez, No. 5:06-cr-6-Oc-10GRJ, slip op. (M.D. Fla. June 8, 2006).
249. *Id.*
250. *Id.* at 2.
251. *Id.*
252. *Id.* at 3–4.
253. *Dominguez-Ramirez*, No. 5:06-cr-6-Oc-10GRJ, slip op. at 4.

because his wife was apparently taking insulin for a medical condition, and consequently, he "did not want her disturbed" that evening.[254]

Law enforcement also interviewed the defendant's brother, who lived in a room inside the defendant's home.[255] The brother consented to a search of his room inside the home and was transported to the residence.[256] The defendant's wife came to the door of the residence and the officers informed her of her husband's arrest and her brother-in-law's consent to search his room.[257] The defendant's wife permitted the officers to come into the home and the officers began searching the defendant's brother's room.[258] The officers ultimately obtained consent from the defendant's wife to search the entire home.[259]

In denying the defendant's motion to suppress, the court made two observations.[260] First, the court noted that the defendant never actually refused to grant consent.[261] Instead, the defendant gave a qualification that the officers could only search the home "[in] the morning."[262] In this regard, the court stated, "[t]hus, in this case there was never a refusal to search by the co-owner husband sufficient to raise the issue of whether both tenants must consent before a search is conducted of jointly owned property."[263] Next, the court distinguished *Randolph III* based upon the fact that the defendant was not physically present at the time of the search.[264] Noting that the holding in *Randolph III* was limited to its facts and that *Randolph III* did not overrule the holding in *Matlock*, the court found this distinguishing characteristic significant enough that the consent of the wife justified the warrantless search.[265] In particular, the court stated, "[t]he *Randolph* [*III*] Court, however, left intact the rule that the consent of only one co-tenant is sufficient so long as the objector is not present and the police have not removed the objecting tenant from the entrance for the sake of avoiding a possible objection."[266]

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254. *Id.*
255. *Id.*
256. *Id.*
257. *Id.* at 5.
258. *Dominguez-Ramirez*, No. 5:06-cr-6-Oc-10GRJ, slip op. at 5.
259. *Id.* at 3.
260. *Id.* at 17.
261. *Id.*
262. *Id.*
263. *Dominguez-Ramirez*, No. 5:06-cr-6-Oc-10GRJ, slip op. at 17.
264. *Id.*
265. *Id.* at 17–18.
266. *Id.*

The holding in *Dominguez-Ramirez* seems to indicate that some courts may adopt a narrow, limited view of the holding in *Randolph III*.[267] Under this view, even where police receive an objection from a co-occupant to a warrantless search, subsequent consent to the search by a different co-occupant may still justify the warrantless search so long as the objecting co-occupant is not physically present at the time of the search and there is no evidence that the officers purposefully removed the defendant from the location in order to stifle any objection.[268] Indeed, given the United States Supreme Court's own acknowledgement that its holding in *Randolph III* draws a "fine line,"[269] such an application may seem legally sound.[270] However, this approach is at odds with the result reached by the only federal circuit court of appeals to address substantial questions relating to the *Randolph III* decision as of the date of this writing.[271]

In *United States v. Hudspeth*,[272] law enforcement offices in Missouri obtained a search warrant for a business, Handi-Rak Service, Inc., in relation to sales of large quantities of pseudoephedrine-based products.[273] The defendant was the Chief Executive Officer of the company and was present during the search.[274] As part of the search, officers discovered a compact disc containing child pornography.[275] The officers requested the defendant's permission to search his personal residence, which he refused.[276] The officers took the defendant to jail and then traveled to the defendant's residence where they were greeted by the defendant's wife.[277] The defendant's wife permitted the officers to enter the residence.[278] The officers explained that they had found inappropriate material on her husband's business computer, but did not inform her that he had already refused consent to search the cou-

267. *See id.*

268. *See, e.g.*, Georgia v. Randolph (*Randolph III*), 547 U.S. 103, 126 S. Ct. 1515, 1519–20 (2006).

269. *Id.* at 1527.

270. *See* United States v. Reed, No. 3:06–CR–75 RM, slip op. at 4, 9 (N.D. Ind. Aug. 3, 2006) (reaching the same conclusion as the court in *Dominguez-Ramirez* on similar facts and determining that applying the *Randolph III* standard to objecting co-occupants that are not physically present at the time of the search would require the court to redraw the "fine line" established by the United States Supreme Court).

271. *See generally* United States v. Hudspeth, 459 F.3d 922 (8th Cir. 2006).

272. *Id.* at 922.

273. *Id.* at 924.

274. *Id.*

275. *Id.* at 925.

276. *Hudspeth*, 459 F.3d at 925.

277. *Id.*

278. *Id.*

ple's private residence.[279] The wife informed the officers that the couple had two computers, one in their children's room and one in the garage of their home; however, the wife refused to grant consent to conduct a search of the residence.[280] One of the officers then requested that the officers be allowed to take the computers and some computer CDs with them.[281] The wife ultimately acquiesced.[282] A subsequent search of the computer revealed nude videos of the defendant's step-daughter that were taken without her knowledge by a web camera.[283] The defendant moved to suppress the evidence found on both the business computer and the home computer, which the district court denied.[284] The defendant then entered a conditional guilty plea, reserving the right to appeal the suppression issue to the Eighth Circuit Court of Appeals.[285] The Eighth Circuit upheld the search of the business computer, but reversed the decision with regard to the search of the home computer.[286] The court did, however, remand the case back to the trial court so that the parties could further develop the record regarding other secondary grounds for admission of the evidence, such as inevitable discovery.[287]

In its opinion, the court observed the distinguishing characteristics of both *Matlock* and *Randolph*.[288] With regard to *Matlock*, the court noted that the case at bar did not involve a situation where the defendant was present but either did not object or was not invited to object.[289] Additionally, in relation to *Randolph*, the court pointed out, "*Georgia v. Randolph* does not directly address the situation present in this case, in which a co-tenant is not physically present at the search but expressly denied consent to search prior to the police seeking permission from the consenting co-tenant who is present on the property."[290] Nevertheless, the court found *Randolph* to be the controlling case.[291] In particular, the court stated that constitutional concerns identified in *Randolph* did not change simply because the objecting co-

279. *Id.*
280. *Id.*
281. *Hudspeth*, 459 F.3d at 925.
282. *Id.*
283. *Id.* at 926.
284. *Id.*
285. *Id.*
286. *Hudspeth*, 459 F.3d at 932.
287. *Id.* at 931.
288. *Id.* at 930–32.
289. *Id.* at 930–31.
290. *Id.* at 930.
291. *Hudspeth*, 459 F.3d at 930–31.

occupant, who expressly objected to the search, was not physically present at the time of the search.[292]

The court then attempted to address the concerns outlined in both the majority and dissenting opinions in *Randolph* regarding the fear of retribution against a domestic abuse victim, who offers warrantless entry to law enforcement over the objection of his or her co-inhabitant.[293] The court observed that since the objecting co-inhabitant is not actually present at the time of police entry in situations such as those presented in *Hudspeth*, these concerns would appear moot.[294] Specifically, the court noted, "to some degree, the case for respecting the denial of consent by a non-present occupant is stronger than the refusal of the physically-present occupant."[295]

Circuit Judge Riley wrote a partial dissenting opinion in which he reached a similar conclusion to that of the United States District Court for the Middle District of Florida in *Dominguez-Ramirez*.[296] Accusing the majority of misreading *Randolph III*, Judge Riley pointed out that the Court in *Randolph III* adopted a very narrow and specific rule that only applies when the objecting co-occupant is physically present.[297] Thus, Judge Riley stated,

> If the [United States] Supreme Court desired to adopt the broader rule espoused by the majority here, the Court would not have continuously used the phrase "physically present," and would have ruled [that] police entry without a warrant is unreasonable whenever the suspect refuses consent to search his residence, regardless of where the suspect may be located at the time of his express refusal.[298]

Judge Riley also observed that the majority opinion created policy issues in real world application.[299] In short, Judge Riley characterized the majority opinion as promoting a "don't ask" and "ignorance is bliss" policy by law enforcement,[300] stating that, "the majority's holding encourages law enforcement, in seeking consent, to bypass the suspect lest the suspect refuse [to] consent, and instead seek only the consent of an authorized co-occupant, thereby avoiding the knowledge bar."[301]

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292. *Id.*
293. *Id.* at 931.
294. *Id.*
295. *Id.*
296. *Hudspeth*, 459 F.3d at 933 (Riley, J., dissenting).
297. *See id.* at 932–33.
298. *Id.* at 933.
299. *See id.*
300. *Id.*
301. *Hudspeth*, 459 F.3d at 933–34 (Riley, J., dissenting).

B. *The Objection of a Non-probationer, Co-occupant May Override the Prior Consent of His or Her Probationer Co-occupant Even if the Probationer Co-occupant Has Consented to Searches of His or Her Premises as a Condition of Probation*

In the criminal justice system it is common for a defendant to be sentenced to a period of probation instead of incarceration.[302] Upon being sentenced to probation, the probationer often accepts a waiver of his or her Fourth Amendment rights as a term of probation, whereby the probationer consents to a warrantless search of his or her premises by certain law enforcement officers.[303] So what happens when the probationer shares common authority over premises with a non-probationer co-occupant and that co-occupant expressly objects to a warrantless search in spite of the probationer's limited waiver of his or her Fourth Amendment rights? Can a warrantless search continue in the face of such an expressed objection and, if so, can evidence of culpable conduct be used against the non-probationer? As of the date of this writing, these questions remain largely unresolved, especially at the federal level.

The United States District Court for the Northern District of New York, however, came close to addressing this issue in July of 2006.[304] In *Taylor v. Brontoli*,[305] officers attempted to search the home of a probationer pursuant to the terms of the probationer's waiver of her Fourth Amendment rights.[306] The probationer's boyfriend, who was not on probation but shared common authority over the premises, expressly objected to the search.[307] The officers searched the premises anyway and uncovered a firearm.[308] The boyfriend was arrested in relation to the firearm.[309] He subsequently filed a lawsuit against the officers pursuant to title 42, section 1983 of the *United States Code* claiming that his Fourth Amendment rights were violated by the warrantless search to which he expressly objected.[310] On summary judgment the officers argued, *inter alia,* that the probationer's girlfriend had previously consented to the search through the terms of her probation.[311] Denying all

302. *See, e.g.*, FLA. STAT. § 948.01 (2006).
303. *See, e.g.*, Smith v. State, 383 So. 2d 991, 992 (Fla. 5th Dist. Ct. App. 1980).
304. *See* Taylor v. Brontoli, No. 1:04-CV-0487, slip op. at 1 (N.D.N.Y. July 12, 2006).
305. *Id.* at 1.
306. *Id.* at 4.
307. *Id.*
308. *Id.* at 5.
309. *Taylor*, No. 1:04-CV-0487, slip op. at 5.
310. *Id.* at 1, 6.
311. *Id.* at 9.

motions for summary judgment by all parties with leave to resubmit, the court invited the parties to address the impact of the recent decision in *Randolph* on the facts of the case.[312] The court appropriately observed that, "[f]or the purposes of this case, the issue becomes whether a non-probationer can refuse consent to a search of a home where he may have a legitimate expectation of privacy, which is subject to searches by another occupant's probationary status."[313]

At least one state appellate court has held that a non-probationer co-occupant may refuse consent to a warrantless search even if he/she resides with a probationer that has previously consented to warrantless searches as a condition of probation.[314] A review of state cases at the time of this writing reveals no other state or federal cases addressing this issue. Consequently, the impact of the *Randolph* decision on cases involving facts similar to those presented in *Taylor* remains an open question.

V. CONCLUSION—TWO OBSERVATIONS

A. *The Court in* Randolph *Seemed to Abandon the "Good Faith" Exception Established in* Illinois v. Rodriguez

At the time of the search in *Rodriquez*, the officers did not factually have any legal basis whatsoever to conduct a warrantless search of the defendant's apartment.[315] The officers were not in pursuit of a felon,[316] there was no imminent threat of an emergency[317] or destruction of evidence,[318] and the officers did not possess valid consent to conduct a warrantless search.[319] In fact, the individual who permitted the search had no actual authority to permit entry by the police, or anyone else, since she was nothing more than an "infrequent visitor,"[320] who allowed the police to enter the apartment using a key that had been apparently stolen from Rodriguez.[321] Therefore, using the strictest application of the Fourth Amendment warrant requirement, the stan-

312. *Id.*
313. *Id.* at 8.
314. *See* Donald v. State, 903 A.2d 315, 321 (Del. 2006).
315. *See* Illinois v. Rodriguez, 497 U.S. 177, 182 (1990).
316. *Compare id., with* Warden v. Hayden, 387 U.S. 294, 298 (1967).
317. *Compare Rodriguez*, 497 U.S. at 182, *with* United States v. Jeffers, 342 U.S. 48, 52 (1951).
318. *Compare Rodriguez*, 497 U.S. at 182, *with* Johnson v. United States, 333 U.S. 10, 14–15 (1948).
319. *See Rodriguez*, 497 U.S. at 180.
320. *Id.*
321. *Id.* at 181.

dard set forth in *Matlock*[322] was clearly breached and Rodriguez's rights were unquestionably violated. Nonetheless, the Court in *Rodriguez* seemed to establish a good faith exception to the warrant requirement in third-party consent cases.[323] Specifically, the Court determined that even where the police are wholly incorrect as a factual matter in concluding that they have been given valid consent to search by an authorized third party, fruits of the warrantless search will not be suppressed if the officer's conclusion was objectively reasonable.[324]

The Court in *Randolph* concluded that Sergeant Murray did not have the authority to conduct a warrantless search of the Randolphs' home based upon the consent of Mrs. Randolph.[325] As in *Rodriguez*, the prosecution in *Randolph III* ultimately failed to establish that Sergeant Murray had a legally sound justification for conducting a warrantless search under the *Matlock* standard.[326] However, applying the exception set forth in *Rodriguez*,[327] it would seem that the relevant question was not whether Mrs. Randolph's consent gave Sergeant Murray authority to conduct a warrantless search as purely a matter of fact but instead, the question is, "would the facts available to [Sergeant Murray] at the moment . . . 'warrant a man of reasonable caution in the belief' that [Ms. Randolph] had authority over the premises?"[328]

Much like the officers in *Rodriguez*,[329] the facts presented led Sergeant Murray to conclude that he had permission to conduct a warrantless search of the Randolphs' home from a person with both actual and apparent authority over the premises.[330] Mrs. Randolph readily gave Sergeant Murray permission to search her marital residence.[331] As a spouse having equal rights to the home, it was plausible for Sergeant Murray to conclude that Mrs. Randolph possessed her own right to permit Sergeant Murray, or anyone else, to enter the home, in spite of Mr. Randolph's objection to the search.[332]

322. *See* United States v. Matlock, 415 U.S. 164, 171 n.7 (1974).

323. *Rodriguez*, 497 U.S. at 188, *cf.* United States v. Leon, 468 U.S. 897, 921–22 (1984) (holding that where officers, in good faith, reasonably rely on a warrant signed by a magistrate that lacks probable cause, fruits of the search will not be suppressed).

324. *Id.*

325. Georgia v. Randolph (*Randolph III*), 547 U.S. 103, 126 S. Ct. 1515, 1519 (2006).

326. *See id.* at 1519–21; *Rodriguez*, 497 U.S. at 181; *see also Matlock*, 415 U.S. at 170, 171 n.7.

327. *Rodriguez*, 497 U.S. at 188.

328. *Id.* (quoting Terry v. Ohio, 392 U.S. 1, 21–22 (1968)) (internal quotations omitted).

329. *See id.* at 179–80.

330. *Randolph III*, 547 U.S. 103, 126 S. Ct. at 1519.

331. *Id.*

332. *See* United States v. Matlock, 415 U.S. 164, 171 n.7 (1974). *But see Randolph III*, 547 U.S. 103, 126 S. Ct. at 1529–31 (Breyer, J., concurring) (arguing that Sergeant Murray's decision to search was unreasonable).

This is especially true in light of the fact that Mrs. Randolph voluntarily led Sergeant Murray through the intimate areas of the home and into an area where drug-related material was discovered.[333] Moreover, at the time of the search, the overwhelming weight of federal and state authority legally supported Sergeant Murray's decision to conduct the search, even in the face of Mr. Randolph's present objection.[334] Thus, as with the officers in *Rodriguez*, at the very moment of the search, Sergeant Murray's conduct was entirely reasonable under an objective standard.

As specifically noted in *Rodriguez*, the Court has historically applied a good-faith, objective standard to police conduct in the context of Fourth Amendment searches, even where officer's conduct was based solely upon inaccurate conclusions.[335] In short, prior to *Randolph*, the Court seemed consistently reluctant to engage in after-the-fact, Monday morning quarterbacking of decisions by police, made during the intensity of criminal investigations, to conduct a warrantless search so long as there was no evidence of coercion and the officer's conclusions were objectively reasonable. However, *Randolph* seems to alter, if not in part overrule, the holding of *Rodriguez* by applying a bright-line, all-inclusive approach that does not acknowledge the reasonableness of the officer's conduct.

B. *Justice Breyer Is the Member of the Court Most Likely to Change His Position in Future Cases*

Although Justice Breyer concurred with the decision of the majority in *Randolph*, his core reasoning was quite different.[336] The majority created a bright-line, all-inclusive approach that will be applied in all future cases re-

333. *Randolph III*, 547 U.S. 103, 126 S. Ct. at 1519.

334. *See generally* United States v. Rith, 164 F.3d 1323, 1328 (10th Cir. 1999); United States. v. Morning, 64 F.3d 531, 536 (9th Cir. 1995); Lenz v. Winburn, 51 F.3d 1540, 1548 (11th Cir. 1995); United States v. Donlin, 982 F.2d 31, 33 (1st Cir. 1992); United States v. Baldwin, 644 F.2d 381, 383 (5th Cir. 1981); United States v. Hendrix, 595 F.2d 883, 885 (D.C. Cir. 1979); United States v. Sumlin, 567 F.2d 684, 687–88 (6th Cir. 1977); Love v. State, 138 S.W.3d 676, 680 (Ark. 2003); People v. Sanders, 904 P.2d 1311, 1314–15 (Colo. 1995); City of Laramie v. Hysong, 808 P.2d 199, 203–05 (Wyo. 1991); People v. Cosme, 397 N.E.2d 1319, 1321–23 (N.Y. 1979); State v. Ramold, 511 N.W.2d 789, 792 (Neb. Ct. App. 1994); Brandon v. State, 778 P.2d 221, 223–24 (Alaska Ct. App. 1989); State v. Frame, 609 P.2d 830, 832 (Or. Ct. App. 1980).

335. Illinois v. Rodriguez, 497 U.S. 177, 184–85 (1990) (citing Maryland v. Garrison, 480 U.S. 79, 88 (1987)) (stating that evidence obtained in a search of an apartment should not be suppressed where officers reasonably decided to search what is later determined to be two separate apartments pursuant to an erroneous search warrant).

336. *See Randolph III*, 547 U.S. 103, 126 S. Ct. at 1529–31 (2006) (Breyer, J., concurring).

gardless of the facts at issue.[337] Justice Breyer, however, advocated a more case-specific, fact-intensive approach which focuses primarily upon whether the circumstances of the case demonstrate that law enforcement officers acted reasonably in conducting a warrantless, consent search.[338] Consequently, in future cases involving consent searches, Justice Breyer is the most likely member of the Court to permit the specific facts of the case to dictate the ultimate outcome, and possibly shift the voting ratio of the Court in favor of a more crime control oriented, pro-law enforcement result.

A review of the oral arguments in *Randolph* reveals that Justice Breyer feared that a bright-line approach to the question of reasonableness might have horrific results in future warrantless search cases with different facts than those presented in *Randolph*.[339] Justice Breyer raised few questions throughout oral arguments until attorney Thomas C. Goldstein began his argument on behalf of Scott Randolph.[340] Mr. Goldstein advocated a narrow, bright-line approach that all warrantless searches of a home are per se unreasonable whenever law enforcement receives an expressed objection to their search from a person having common authority over the premises.[341] Justice Breyer interrupted Mr. Goldstein's argument at one point stating, "[t]he two words that come into my mind are 'spousal abuse.'"[342] Justice Breyer then explained that he was troubled by the prospect that in ambiguous cases, where no exigency exists, a bright-line approach may result in law enforcement officers not being able to effectively investigate spousal abuse.[343] Specifically, Justice Breyer provided an example wherein police receive an anonymous tip from a person that heard something "odd" at a neighbor's home and, as a result, proceed to the home.[344] When the police arrive, the wife, who is sitting at the kitchen table, looks "oddly" at the officer and tells the officer that she would like him to follow her upstairs to her bedroom.[345] The husband is present and objects to the officer entering the home.[346] Under the circumstances of the example, Justice Breyer expressed grave concern that police would not be able to enter the home in order to hear what the wife wanted to tell the police in her bedroom that she was too afraid to say in

337. *See id.*
338. *See id.*
339. Transcript of Oral Argument at 37–40, Georgia v. Randolph (*Randolph III*), 547 U.S. 103, 126 S. Ct. 1515 (2006) (No. 04–1067).
340. *See generally id.* at 1–30.
341. *Id.* at 31.
342. *Id.* at 37.
343. *Id.*
344. Transcript of Oral Argument, *supra* note 339, at 38.
345. *Id.*
346. *Id.*

front of her husband.[347] Indeed, Justice Breyer stated to Mr. Goldstein, "[a]nd I [a]m telling you, quite frankly, that's what bothers me a lot."[348]

In spite of what seemed to be an aversion to Mr. Randolph's position during oral arguments, Justice Breyer ultimately agreed with the conclusion of the majority.[349] Justice Breyer, however, made it very clear that he did not support a bright-line approach to the issue in *Randolph*, by stating in the first sentence of his concurring opinion, "[i]f Fourth Amendment law forced us to choose between two bright-line rules, (1) a rule that always found one tenant's consent sufficient to justify a search without a warrant and (2) a rule that never did, I believe we should choose the first."[350] Instead, Justice Breyer favored a more fact specific approach that focuses on the totality of the circumstances to determine whether the officers acted reasonably in conducting a warrantless search.[351] Justice Breyer noted that the spirit of the Fourth Amendment recognizes that the circumstances of cases involving warrantless searches can be very different and, consequently, where certain facts may justify a warrantless search as being reasonable, others may not.[352] Thus, Justice Breyer focused on four factual circumstances of the case in *Randolph III* that supported his conclusion that Sergeant Brett Murray did not act reasonably in conducting a search of the Randolph's home, specifically that: 1) the search was only a search for evidence; 2) Randolph was present and expressly objected to the search; 3) there was no inference from the facts that destruction of evidence was a concern of the officers; and 4) the officers could have easily obtained a warrant prior to conducting the search.[353] As during oral arguments, Justice Breyer also made it clear in his written concurring opinion that he was very concerned about domestic abuse cases and that he would be inclined to rule a different way if future facts demonstrate that a possible abuse victim were inviting the police into a home.[354] In fact, Justice Breyer stated, "[i]n that context, an invitation (or consent) would provide a special reason for immediate, rather than later, police entry."[355]

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347. *Id.* at 39.

348. *Id.*

349. Georgia v. Randolph (*Randolph III*), 547 U.S. 103, 126 S. Ct. 1515, 1530 (2006) (Breyer, J., concurring).

350. *Id.* at 1529.

351. *Id.*

352. *Id.*

353. *Id.*

354. *Randolph III*, 547 U.S. 103, 126 S. Ct. at 1529–31 (Breyer, J., concurring); *see* Transcript of Oral Argument at 37–40, *supra* note 339.

355. *Randolph III*, 547 U.S. 103, 126 S. Ct. at 1530–31 (Breyer, J., concurring).

A close reading of the dissent written by Chief Justice Roberts may lead one to speculate that Justice Breyer may have been initially inclined to support the conclusion of the dissenters or, perhaps, he was at the very least on the fence prior to the opinion being finalized.[356] Since Justice Alito took no part in the decision, only eight members of the Court voted in the case.[357] In addressing the perceived unsoundness of Justice Breyer's concurring opinion, Chief Justice Roberts states that Justice Breyer, "joins what becomes the majority opinion," which seems to indicate that Justice Breyer was the tie breaking vote in one respect or another.[358] Nonetheless, the majority opinion of the Court certainly seems to reverse the trend of expanding the scope of consent in third-party consent cases.[359] However, it would seem that Justice Breyer has left the door open for the government to possibly persuade him to side with the government in future cases.[360]

One can further speculate, with reasonable certainty, that Justice Breyer will not strike down a warrantless search where there is solid evidence of possible spousal abuse.[361] His questioning during oral arguments and his statements in the written, concurring opinion reveal that Justice Breyer is certainly opposed to placing overly restrictive barriers in the path of law enforcement efforts to thoroughly investigate such cases.[362] This is even more likely where the potential victim indicates a desire to seek the aid of law enforcement.[363] However, Justice Breyer's willingness to review the facts of the case, instead of applying a bright-line approach, indicates that he may be persuaded to side with law enforcement in other, non-domestic abuse cases as well.[364] For example, where officers are greeted by five residents of an apartment who consent to a search for evidence, and one resident objects, perhaps the totality of the circumstances would make a warrantless search reasonable.[365] Or, as a further example, where police are searching a home for a possible kidnapping victim as opposed to a mere search for evidence, it seems likely that the officers' conduct might be viewed as reasonable by Justice Breyer.[366]

356. *See id.* at 1531–39 (Roberts, C.J., dissenting).
357. *See id.* at 1528 (majority opinion).
358. *Id.* at 1539 (Roberts, C.J., dissenting).
359. *See generally id.* at 1518–28 (majority opinion).
360. *See Randolph III*, 547 U.S. 103, 126 S. Ct. at 1529–30 (Breyer, J., concurring).
361. *See id.*
362. *See generally id.*; Transcript of Oral Argument, *supra* note 339, at 36–39, 49–50.
363. *See Randolph III*, 547 U.S. 103, 126 S. Ct. at 1530 (Breyer, J., concurring).
364. *See id.*
365. *See id.*
366. *See id.*

In addition, Justice Breyer has not been reluctant in past Fourth Amendment search cases to make decisions, crime control oriented or otherwise, based upon specific factual nuances of a case. This is especially true when addressing issues of reasonableness on the part of law enforcement in the context of Fourth Amendment searches of homes. By way of example, in *Minnesota v. Carter*,[367] an officer observed narcotics-related activity occurring inside of a basement-level apartment by looking through a window of the apartment covered by venetian blinds.[368] The officer was positioned approximately one to one and a half feet from the window in a publicly accessible area outside of the apartment and observed the activity through a space in the blinds.[369] Relying upon this information, the officer obtained a search warrant for the home and a subsequent search revealed evidence of narcotics trafficking.[370]

The majority opinion of the Court never reached the issue of whether the officer's conduct constituted an unreasonable search.[371] Instead, the majority concluded that the petitioner in the case lacked standing to bring a constitutional challenge.[372] However, as in *Randolph*, Justice Breyer wrote a separate concurring opinion in which he agreed with the ultimate outcome of the case, but for different reasons.[373] While Justice Breyer concluded that the petitioner did have standing to challenge the unlawful search,[374] he further observed that the actions of the officer in viewing the criminal activity from a publicly accessible area outside of the home in plain view of all passersby was not an unreasonable search.[375] Focusing on the facts of the case, Justice Breyer specifically stated, "[o]ne who lives in a basement apartment that fronts a publicly traveled street, or similar space, ordinarily understands the need for care lest a member of the public simply direct his gaze downward."[376]

On the other hand, a little more than one year later, Justice Breyer joined a rather unusual majority of Justices Scalia, Souter, Thomas, and Ginsburg in holding that conduct by police that was arguably similar to the conduct at issue in *Carter* constituted an unreasonable search under the

367. 525 U.S. 83 (1998).
368. *Id.* at 85, 103.
369. *Id.* at 103 (Breyer, J., concurring).
370. *Id.* at 85 (majority opinion).
371. *See id.* at 87–91.
372. *See Carter*, 525 U.S. at 91.
373. *See id.* at 103–06 (Breyer, J., concurring); *see also* Georgia v. Randolph (*Randolph III*), 547 U.S. 103, 126 S. Ct. 1515, 1529–30 (2006) (Breyer, J., concurring).
374. *See Carter*, 525 U.S. at 103.
375. *Id.* at 104.
376. *Id.* at 105.

Fourth Amendment.[377] In *Kyllo v. United States*,[378] officers utilized a thermal imaging device from a public street to scan the exterior of a home in order to detect infrared radiation coming from the home as a result of high intensity heat lamps used to grow marijuana believed to be inside the home.[379] The scan revealed an unusual amount of radiation coming from certain areas of the home and, relying on this and other information, officers obtained a search warrant.[380] The majority reasoned that, by using this equipment, the officers were privy to more than what the naked eye could see from observing the exterior of the home from the street.[381] Engaging in a fact-intensive analysis, the majority concluded, "[w]here, as here, the Government uses a device that is not in general public use, to explore details of a home that would previously have been unknowable without physical intrusion, the surveillance is a 'search' and is presumptively unreasonable without a warrant."[382]

377. Kyllo v. United States, 533 U.S. 27, 29, 40 (2001).
378. *Id.* at 27.
379. *Id.* at 29–30.
380. *Id.* at 30.
381. *Id.* at 33.
382. *Kyllo*, 533 U.S. at 40.