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What the High Court giveth the Lower Courts taketh Away: How to Prevent Undue Scrutiny of Police Officer Motivations without Eroding Randolph's Heightened Fourth Amendment Protections

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WHAT THE HIGH COURT GIVETH THE LOWER COURTS TAKETH AWAY: HOW TO PREVENT UNDUE SCRUTINY OF POLICE OFFICER MOTIVATIONS WITHOUT ERODING RANDOLPH’S HEIGHTENED FOURTH AMENDMENT PROTECTIONS

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I. INTRODUCTION

The Fourth Amendment guarantees “[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures” and ensures that “no Warrants shall issue, but upon probable cause.” 1 The precise wording of these two clauses creates difficult questions, including whether a search warrant is generally required to satisfy the Fourth Amendment, 2 what makes a warrantless search “reasonable,” 3 and whether a police officer’s subjective motivations should affect the reasonableness of a particular warrantless search. 4 In 1967, in answering the first of these questions, the Supreme Court declared that warrants are generally required for police to conduct a valid Fourth Amendment search. 5 However, over the next two decades, the Court created a host of exceptions to that rule such that, by the late 1990s, the exceptions had seemingly swallowed the rule. 6

1 U.S. CONST. amend. IV.

2 See, e.g., United States v. Matlock, 415 U.S. 164, 183 n.1 (1974) (Douglas, J., dissenting) (discussing the origins of the Fourth Amendment and arguing that the Amendment “presupposed that an ‘unreasonable’ search could be avoided only by use of a warrant,” and that “[i]t did not conceive of warrantless searches”) (citing NELSON B. LASSON, THE HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION 97-103 (1970)).

3 As it turns out, the Supreme Court typically evaluates the reasonableness of a particular warrantless search by weighing the governmental interests at stake against the competing privacy interests. See, e.g., Camara v. Mun. Ct., 387 U.S. 523, 535 (1967) (in context of administrative inspections, Court declared that “[i]n determining whether a particular [warrantless] inspection is reasonable . . . the need for the inspection must be weighed in terms of these reasonable goals of code enforcement”); Terry v. Ohio, 392 U.S. 1, 20-27 (1968) (balancing “the nature and extent of the governmental interests involved” against “the nature and quality of the intrusion on individual rights” to determine the reasonableness of a warrantless police search and seizure); Georgia v. Randolph, 547 U.S. 103, 125-27 (2006) (Breyer, J., concurring) (arguing that “the Fourth Amendment does not insist upon bright-line rules,” but instead requires courts to examine the “totality of the circumstances” to determine the “reasonableness” of a particular search).


6 See DRESSLER & MICHAELS, supra note 4, at 173.
The most far-reaching exception to the warrant requirement is consent. So far-reaching, in fact, that legal commentators have begun calling for elimination of the consent exception. In 2006, in Georgia v. Randolph, the U.S. Supreme Court took an unusual step toward reining in the consent exception. Prior to Randolph, the rule of United States v. Matlock was that the consent of any residential occupant is sufficient for police to conduct a warrantless search of shared premises where police discover evidence used to convict an absent co-occupant. The Matlock Court based its ruling on the assumption of risk doctrine, reasoning that co-tenants "assume the risk" that a roommate might allow police to search their shared premises.

In Illinois v. Rodriguez, the Court extended Matlock to cover warrantless entries of shared quarters when based on the consent of a person whom the police reasonably, but incorrectly, believe has common authority over the premises. The Court upheld the consent search in Rodriguez despite the fact that the defendant was asleep inside the home at the time of the consent request. Thus, by 1990, police could lawfully conduct a warrantless search of jointly occupied property when a suspect is located on the premises at the time of consent, but the suspect is left out of the consent inquiry and the consenter has no actual authority to permit entry.

Extending the rationale of Matlock and Rodriguez, lower courts in the 1990s expanded the consent exception to validate searches where consent is obtained from an absent occupant and the occupant actually located on the premises expressly objects to the search. By failing to honor the wishes of the physically present co-

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8 See, e.g., Marcy Strauss, Reconstructing Consent, 92 J. CRIM. L. & CRIMINOLOGY 211 (2002) (arguing that consent searches should be entirely eliminated).
10 See Nathan S. Lew, Nothing to be Worried About: Consent Searches After Georgia v. Randolph, 28 WHITTIER L. REV. 1067, 1067 (2007) (arguing that "by limiting the expansion of the consent doctrine, the Court has strengthened Fourth Amendment protections to be free from unreasonable searches . . . ").
12 Id. at 164.
13 The Matlock Court justified its ruling on the assumption of risk doctrine, declaring that "it is reasonable to recognize that any of the co-inhabitants has the right to permit the inspection in his own right and that the others have assumed the risk that one of their number might permit the common area to be searched." Id. at 171 n.7.
15 See id. at 183-89.
16 See id. at 179-80.
17 See, e.g., People v. Sanders, 904 P.2d 1311, 1313 (Colo. 1995) ("Valid consent of a person with 'common authority' will justify a warrantless search of a residence despite the physical presence of a nonconsenting co-occupant."); United States v. Donlin, 982 F.2d 31, 33 (1st Cir. 1992) (holding that valid consent given by a third party with "common authority" is valid even when defendant specifically objects to it); United States v. Childs, 944 F.2d 491, 494 (9th Cir. 1991) (holding that the consent of a co-occupant with "common authority"
tenant, these decisions deemed the consent of one tenant per se valid as against a co-tenant’s express refusal of consent.

In response to this extension of the Matlock-Rodriguez rationale, Randolph held that an occupant’s consent to search is no longer valid where a physically present co-occupant himself refuses to consent. However, the Randolph Court was careful to confine its rule to situations where a co-tenant both (1) is physically present at the time of the consent request and (2) expressly objects to the search. Adopting a strict interpretation of the physical presence and express objection requirements, the Court refused to overrule Matlock, in effect permitting officers in future encounters to arrest and detain a likely objector, so long as the arrest is lawful, before requesting consent from the suspect’s co-occupant.

With Matlock left intact, the Court feared that police might circumvent Randolph by deliberately removing a likely objector from the scene before requesting consent. In attempting to tie up this “loose end,” the Court made the following qualification:

This is the line we draw, and we think the formalism is justified. So long as there is no evidence that the police have removed the potentially objecting tenant from the entrance for the sake of avoiding a possible objection, there is practical value in the simple clarity of complementary rules, one recognizing the co-tenant’s permission when there is no fellow occupant on hand, the other according dispositive weight to the fellow occupant’s contrary indication when he expresses it.

The Court’s solution to prevent arbitrary application of its already narrow rule may have created more problems than it sought to prevent. In his Randolph

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justifies a warrantless search even if the defendant is present and regardless of whether the defendant consents. But see State v. Leach, 782 P.2d 1035 (Wash. 1989) (holding that cohabitant’s consent to search is insufficient to justify warrantless search where defendant is present and able to object).

In the words of the Randolph Court: “This case invites a straightforward application of the rule that a physically present inhabitant’s express refusal of consent to a police search is dispositive as to him, regardless of the consent of a fellow occupant.” Georgia v. Randolph, 547 U.S. 103, 122-23 (2006).

See Randolph, 547 U.S. at 121-22.

See id. at 120-21 (addressing two “loose ends,” the second being “the significance of Matlock and Rodriguez after today’s decision”).

Id. at 121-22 (emphasis added).


See George M. Dery, III & Michael J. Hernandez, Blissful Ignorance? The Supreme Court’s Signal to Police in Georgia v. Randolph to Avoid Seeking Consent to Search from All Occupants of a Home, 40 CONN. L. REV. 53, 80-83 (2007). In recognizing this same concern, the authors noted: Randolph’s rule provides an incentive to police not only to separate the parties at a residence, but to isolate the individual most likely to refuse consent to entry. Perhaps
dissent, Chief Justice Roberts worried that "[t]he majority's analysis alters a great deal of established Fourth Amendment law." In particular, the Chief Justice worried that "the majority considers a police officer's subjective motive in asking for consent, which we have otherwise refrained from doing in assessing Fourth Amendment questions." The Chief Justice declared, "This Court has rejected subjective motivations of police officers in assessing Fourth Amendment questions, ... with good reason: The police do not need a particular reason to ask for consent to search, whether for signs of domestic violence or evidence of drug possession." In light of the majority's qualification, the Chief Justice was concerned that post-

Randolph courts would routinely question whether police acted with the purpose of avoiding a likely consent objection, a task which necessarily and impractically probes into the subjective motivations of law enforcement.

It has been over two years since Randolph was decided. In that time, a variety of lower courts have addressed arguments of criminal defendants seeking to either apply or extend the Randolph rule. After carefully analyzing nearly every post-

anticipating this trouble, Justice Souter attached a caveat to Randolph's distinction between the absent and the present (and objecting) occupant: "So long as there is no evidence that the police have removed the potentially objecting tenant from the entrance for the sake of avoiding a possible objection . . . ." Yet, in warding off one problem, the Court unfortunately stumbled into another. Randolph's limitation would force courts to attempt to divine the underlying motivation for an officer's physically moving one person away from the scene, an analysis explicitly repudiated in Whren v. United States [517 U.S. 806, 813 (1996)]. Whren flatly ruled that "subjective intent alone . . . does not make otherwise lawful conduct illegal or unconstitutional." . . . Whren further intoned that it had "repeatedly held and asserted" that an officer's motive does not invalidate "objectively justifiable behavior under the Fourth Amendment." Id. at 82-83.

24 Randolph, 547 U.S. at 141 (Roberts, J., dissenting).

25 Id.

26 In a series of Fourth Amendment cases, beginning in 1925 with Carroll v. United States, 267 U.S. 132 (1925), the Supreme Court has explicitly exempted from Fourth Amendment scrutiny any inquiry into whether law enforcement has detained an individual for pretextual reasons—the most commonly asserted pretext being detainment on account of race. See, e.g., David A. Harris, "'Driving While Black' and All Other Traffic Offenses: The Supreme Court and Pretextual Traffic Stops, 87 J. CRIM. L. & CRIMINOLOGY 544, 559 (1997) (listing statements by police officers such as the following: "You can always get a guy legitimately on a traffic violation if you tail him for a while, and then a search can be made."). The modern connection between racial profiling and the Fourth Amendment begins with the Court's controversial comments in Whren v. United States, 517 U.S. 806 (1996). In Whren, the Court held that as long as probable cause objectively exists to conduct an arrest or automobile search, a court may not consider (under the Fourth Amendment) an officer's subjective motivations, even if the defendant's race was the sole motivating factor behind the officer's conduct. See id. at 813. The Court felt instead that "the constitutional basis for objecting to intentionally discriminatory application of laws is the Equal Protection Clause, not the Fourth Amendment," ignoring the fact that to succeed on an equal protection claim, the challenger would have to prove an intent to discriminate, which would force the reviewing court to consider the police officer's subjective motivations anyway. Id.

27 Randolph, 547 U.S. 138.
This Article concludes that Randolph is not the watershed case Chief Justice Roberts feared. Indeed, the reaction has been quite the opposite. Rather than delving into police officer motivations, post-Randolph courts have developed at least five ways to reject an otherwise legitimate Randolph claim: (1) by giving the defendant the difficult burden of proving that police intentionally removed him from the scene for purposes of avoiding a Randolph-type situation; (2) by failing to infer the specific poor motive required by Randolph even where the defendant has presented evidence of police deception; (3) by permitting police to avoid a likely objector through either failing to request consent from a physically present suspected wrongdoer, or by planning a consent request at a time when police know the potential objector will not be home; (4) by siding with the police in a “he-said-she-said” situation, thereby defeating a defendant’s claim that he actually objected to the search; and (5) by eliminating from consideration actual express refusals of consent that are not sufficiently unequivocal, precise, and definite.

Because the vast majority of lower courts post-Randolph have strictly construed Randolph’s physical presence and express objection requirements, Randolph is not the watershed case the dissenters feared. Indeed, not a single post-Randolph court has struck down an otherwise valid search under Randolph’s admonishment of unjustifiable pretext. In addition, only two cases have explicitly extended the Randolph rule, one of which was later vacated, and neither doing so on the grounds feared by the Randolph dissenters. Moreover, because most currently published

28See Appendix A for the full list of the reviewed cases.

29The first three of these five listed methods restrict Randolph’s physical presence requirement; the last two effectively confine the express objection requirement.

30Other commentators have made similar observations. See, e.g., Adrienne Wineholt, Georgia v. Randolph: Checking Potential Defendants’ Fourth Amendment Rights at the Door, 66 Md. L. Rev. 475, 490-98 (2007) (arguing that Randolph’s “bright-line rule” insufficiently protects Fourth Amendment rights and will result in the weakening of potential defendants’ Fourth Amendment rights); Bradley, supra note 22, at 68-69 (describing how Randolph “went out of its way to stress the narrowness of its opinion” and stating that the rule “is so narrow that it’s hard to see why it generated any dissent at all”). See also Renee E. Williams, Note, Third Party Consent Searches After Georgia v. Randolph: Dueling Approaches to the Dueling Roommates, 87 B.U. L. Rev. 937, 951-57 (2007) (noting that Randolph signals a potential change in Fourth Amendment jurisprudence by giving more protection to defendants’ privacy rights, but concluding that the true effect of Randolph remains to be seen).

31See United States v. Hudspeth, 459 F.3d 922 (8th Cir. 2006), rehe’g en banc granted and opinion vacated, rev’d en banc, 518 F.3d 954 (8th Cir. 2008). The panel opinion, which was later reversed by the full court, had extended Randolph’s physical presence requirement by invalidating consent of defendant’s wife to search their marital home where defendant had previously denied consent while in police custody, but was not physically present at the time wife consented to search.

lower court opinions considering *Randolph* claims involve consent searches conducted prior to March 2006 when *Randolph* was decided, *Randolph*’s protections are likely to diminish further.

Before examining the five categories of post-*Randolph* case law, Part II of this article summarizes the *Randolph* decision with emphasis on the Court’s express limitations of its rule. Part III describes various post-*Randolph* cases that illustrate the first two categories of cases. Part IV provides examples of cases falling within category three. Part V summarizes cases that hinge on the sufficiency of a purported refusal of consent, thereby encompassing case categories four and five.

Before turning to the article’s proposal, Part VI reviews two opinions that have explicitly extended *Randolph*. The final Part contends that, in light of the lower courts’ dismantling of *Randolph*, the Supreme Court must either allow *Randolph* to die a slow death of narrow interpretation or strengthen *Randolph* by expanding its physical presence and express objection requirements. Part VII presents a solution that would both strengthen *Randolph*, while simultaneously easing the concerns of *Randolph*’s dissenters by ensuring that officer motivations are not overly scrutinized.

The proposal in Part VII targets the express objection requirement. This specific proposal would strengthen *Randolph*’s protections in cases where the police are aware that the defendant is physically present at the time of consent, but where the dispute centers on the sufficiency of the defendant’s purported objection. Under this particular proposal, the burden of proving the defendant did not, in fact, object to the warrantless search would shift to the prosecution in those cases where there is a genuine conflict of evidence on this factual dispute. In particular, in situations where a criminal defendant and at least one other witness claim that the defendant was present and objected to the consent request but where the searching officers testify otherwise, the government would be required to present additional evidence to defeat the defendant’s claim. This solution would maximize Fourth Amendment protections in cases where the evidence of a particular front door exchange is genuinely disputed. Because this solution would likely cause law enforcement to record (either by audio or video) their residential consent requests, this solution would also foreclose inquiry into officer subjective motivations in such cases, thereby easing the concerns of the *Randolph* dissenters.

II. *Randolph*’s Express Limitations of Its Rule

Prior to *Randolph*, the Supreme Court in *Matlock* had ruled that “the consent of one who possesses common authority . . . is valid as against the absent, nonconsenting person with whom that authority is shared.” Because *Matlock*’s rule

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33Because the *Randolph* Court was explicitly concerned with preventing third party consent cases from degenerating into “a test about the adequacy of the police’s efforts to consult with a potential objector,” the physical presence requirement is not ripe for alteration. See *Georgia v. Randolph*, 547 U.S. 103, 138 (2006).

34If the government were unable to meet this burden, the result would be similar to that in *People v. Mikrut*, 864 N.E.2d 958 (Ill. App. Ct. 2007), where the court upheld the trial court’s factual finding that the defendant did, in fact, object to the officers entering his home without a warrant even though testimony of officers and defendant were contradictory.

was expressly limited to "absent non-consenters," lower courts post-Matlock struggled with whether to extend Matlock to validate searches where joint occupants are each physically present.

The Federal Courts of Appeal that had considered the issue had concluded that consent of one occupant remains effective in the face of an express objection by a physically present co-occupant. Most state courts had also ruled against the objecting defendant in such situations. However, some courts had concluded that the consent of both parties is required when they are both physically present. The Randolph Court granted certiorari to resolve the split.

In Randolph, the defendant Scott Randolph and his wife, Janet, separated in May 2001. Shortly thereafter, Janet and her son left their home in Georgia and fled to Canada. Two months later, Janet and the child returned. Upon her return, Janet called the police complaining of a domestic dispute. When the police arrived, Janet told the officers that her husband had taken their son away, that the defendant was a cocaine user, and that there were illegal drugs in the house. The defendant returned to the house and countered Janet's allegations by claiming that Janet, not himself, had been abusing drugs. An officer then asked Scott Randolph for permission to search the house, but he "unequivocally refused." The same officer then turned to Janet and asked for her consent, which she readily gave. Upon searching the home, officers seized a straw containing cocaine residue. After obtaining a search warrant, officers returned to the house and seized additional evidence used to indict Scott Randolph.

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36 See id. at 169-71.


39 See, e.g., State v. Randolph, 604 S.E.2d 835, 837 (Ga. 2004) (distinguishing case from Matlock because Scott Randolph was not "absent" from the colloquy in which the police gained consent to search); State v. Leach, 782 P.2d 1035 (Wash. 1989) (en banc) (holding that the state must prove that defendant did not object to the search to which a joint occupant consented); United States v. Impink, 728 F.2d 1228 (9th Cir. 1984) (reversing defendant's conviction where lessor of a home gave police permission to search the home and where, during the search, police failed to obtain the lessee's consent despite knowing he was present).


41 Id. at 106.

42 Id. at 106-07.

43 Id. at 107.

44 Id.
Prior to trial, the defendant moved to suppress the evidence, arguing that his wife's consent could not override his explicit refusal of consent. The trial court denied the motion, but both Georgia appellate courts ruled for the defendant. On appeal, the U.S. Supreme Court held that "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 the police by another resident."

Drawing an admittedly fine line, the Court emphasized that an objector who is not "physically present" when consent is sought cannot obtain the protections of Randolph. Refusing to overrule Matlock and Rodriguez, the Court stated that "the potential objector, nearby but not invited to take part in the threshold colloquy, loses out."

In addition to the requirements inherent in its rule—that the defendant be "physically present" and that he indicate an "express refusal" of consent—the Court explicitly limited its holding in three ways, creating exceptions for spousal abuse victims, for "recognized hierarchies" of authority, and for exigent circumstances. Aside from these three exceptions, the Randolph Court did not explicitly limit its rule further.

III. THE DEFENDANT'S DIFFICULT BURDEN UNDER RANDOLPH

"Randolph is a narrow holding, and no matter how hard [a criminal defendant] wiggles—like the stepsisters trying to squeeze into Cinderella's glass slipper—he can't fit within its embrace."

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46 Randolph, 547 U.S. at 120. The Supreme Court grounded its reasoning in "widely shared social expectations," and declared that "a caller standing at the door of shared premises would have no confidence that one occupant's invitation was a sufficiently good reason to enter when a fellow tenant stood there saying, 'stay out.'" See id. at 110-16.

47 See id. at 120-21.

48 Id.

49 The Court first created an exception for the victims of spousal abuse, declaring that "spousal abusers and other violent co-tenants" may not gain protection from the Randolph rule. See id. at 117-18 ("The question whether the police might lawfully enter over objection in order to provide any protection that might be reasonable is easily answered yes."). Second, in dicta, the Court noted that its rule would not apply where the objecting co-tenant falls on the short end of a "recognized hierarchy" of authority, such as the child in a parent-child relationship or a lower-ranking officer in a military housing scenario. Id. at 114. Finally, the Court noted that exigent circumstances might justify warrantless entry despite an express objection by a physically present co-occupant. Id. at 117 n.6. As an example, the Court noted that police may disregard a co-tenant's express objection where they have reason to believe that the objector might destroy evidence of drug use before a warrant could be obtained. Id. at 117 n.6, 122-23.

50 United States v. Wilburn, 473 F.3d 742, 744 (7th Cir. 2007).
A. Post-Randolph Courts Require Defendant to Present Evidence that Police Intentionally Removed Him from the Scene

Post-Randolph courts have explicitly acknowledged the Randolph requirement that would strike down a co-tenant’s otherwise valid consent where there is evidence indicating the police removed a potential objector to avoid a possible consent refusal.\(^{51}\) Courts explicitly recognizing this exception, however, have placed the burden on the defendant to present actual evidence of such intentional removal.\(^{52}\) Most courts require a defendant to present evidence consisting of something more than the defendant’s own testimony that the police did, in fact, remove the potential objector for the sake of avoiding a possible rejection. For example, in *McClelland v. State*,\(^{53}\) in rejecting defendant’s contention that he was separated from the consenter so that his objection would not be heard, the court reasoned that “no such facts appear in this record,” and that the police instead “wanted to separate [defendant and consenter] so that [they] could not ... conspire to tell consistent stories.”\(^{54}\)

*United States v. Parker*\(^{55}\) is similarly illustrative. In *Parker*, police were called to a house in South Bend, Indiana, in response to a report of a firearm discharge outside the home. Upon arrival,\(^{56}\) officers observed defendant Parker exiting the house. Officers took Parker into custody and placed him in a squad car. After detaining Parker, officers obtained permission to search the house from co-tenant Linda Johnson, who was on the premises at the time Parker was detained. In their subsequent search of the home, officers located a rifle, which formed the basis for prosecuting Parker.\(^{57}\)

In addressing Parker’s *Randolph* claim, the Seventh Circuit Court of Appeals noted that the “precise circumstances surrounding Parker’s arrest are unclear from

\(^{51}\) See, e.g., People v. Lapworth, 730 N.W.2d 258, 261 (Mich. Ct. App. 2007) (“The Supreme Court in *Randolph* did suggest that where the police purposely remove the suspect so that the suspect will be unable to object, the co-tenant’s consent may not be sufficient.”). See also United States v. Williams, No. 06-20051-B, 2006 WL 3151548, at *5 (W.D. Tenn. Nov. 1, 2006) (recognizing that police may not remove a defendant from the scene for the purpose of avoiding a possible objection); United States v. Dominguez-Ramirez, No. 5:06-CR-6-OC-10GRJ, 2006 WL 1704461, at *9 (M.D. Fl. June 8, 2006) (unreported) (same).

\(^{52}\) See, e.g., Williams, 2006 WL 3151548, at *5 (finding “no evidence” that police had removed defendant from the scene for the purpose of removing a party who would have likely objected to the search). See also Wilburn, 473 F.3d at 745 (“The facts in this case establish that [the defendant] was not ‘physically present’ when [his live-in girlfriend] consented, and the police did not deliberately remove him from the area to avoid hearing him invoke an objection to the search. For these reasons, *Randolph* can offer [defendant] no comfort”); Dominguez-Ramirez, 2006 WL 1704461, at *9 (in upholding co-tenant consent search, court reasoned that defendant, who was in custody at a distant location when his wife consented, had presented no evidence that he had been removed from the premises in order to avoid his possible objection).

\(^{53}\) 155 P.3d 1013 (Wyo. 2007).

\(^{54}\) See id. at 1019.

\(^{55}\) 469 F.3d 1074 (7th Cir. 2006).

\(^{56}\) See id. at 1078 n.3.

\(^{57}\) See id. at 1075-76.
Indeed, the court admitted that it did not know "Parker's exact location when the officers arrived at the house; whether the officers knocked on the door or the door was open; or how or when exactly Officer Bartone arrested Parker." Despite these uncertainties, the court analogized the case to Matlock:

Here, as in Matlock, the police had taken Parker into custody and removed him from the premises before asking a co-tenant for her consent to search the property . . . . Parker does not . . . point to anything in the record that even hints at the possibility that the police had taken him into custody as a mechanism for coercing Johnson's consent. So Johnson's consent to the search was valid as against Parker.

While the Seventh Circuit explicitly acknowledged that police may not purposely remove a potential objector to avoid a likely consent objection, the court was extremely reluctant to infer any such motive in the face of an incomplete record.

In a similar vein, in United States v. Alama, the Eighth Circuit Court of Appeals rejected the defendant's argument that police had removed him from the scene to avoid a possible consent refusal. In Alama, the defendant was charged with methamphetamine production. Following his indictment, Alama was released on bond, but soon violated the terms of his release. He was then spotted at the home of his girlfriend's aunt, Jane Snelling. U.S. Marshals went to Snelling's home to arrest Alama. The officers knocked on the door and ordered everyone out of the house. Snelling and her relatives emerged and were taken across the street, but Alama stayed behind in the home. As Alama was hiding in the home, Snelling consented to a search of the property. Some time later, Alama came out of the house and was immediately taken into custody. The officers then searched the home and found drug evidence. Attempting to suppress this evidence, Alama argued that the police knew he was physically present (thereby triggering potential application of the Randolph rule) and that he would have objected to the search had they requested his permission. Defendant argued that, having "ample opportunity to obtain [his] consent," the police instead obtained Snelling's consent and simply waited until Alama left the residence before conducting the search. The court disagreed. The court reasoned that because Alama had not presented evidence to support his unlawful intent argument, Randolph did not apply.

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58 Id. at 1078 n.3.
59 Id.
60 Id. at 1078 (emphasis added).
61 486 F.3d 1062 (8th Cir. 2007).
62 Id. at 1066.
63 Id. According to the court, "there is no evidence that Alama objected to the search after his arrest and before the search occurred." Id. While not mentioned by the court in support of its decision, the Alama court could have also justified its ruling on the fact that, upon their arrival to the home, the police ordered all occupants out of the house and thereby did not purposefully seek to avoid an encounter with Alama. Rather, it was Alama himself who sought to avoid the police.
In July 2007, the Tenth Circuit Court of Appeals rejected a similar argument in *United States v. McKerrell*, 64 in which the defendant barricaded himself inside his home and was immediately removed to the police station upon his voluntary departure. In appealing the denial of his motion to suppress, 65 McKerrell argued that *Randolph*'s rule against purposeful removal applied. While McKerrell could point to no evidence of intentional removal, he argued that because the officers actually searched his residence after his removal, the court could infer that the officers had planned to search the residence all along and hence removed him for the sake of avoiding his objection. 66 Rejecting the argument, the Tenth Circuit declared:

McKerrell’s argument begs the question by leaping to its conclusion from the innocuous inference that the police searched McKerrell’s residence because they planned to do so “if the legal opportunity developed[.]” Despite McKerrell’s speculations, we must ask only whether the evidence shows that the officers removed McKerrell from the scene to avoid his possible objection. And on this point, there is no evidence that the police removed McKerrell for this reason.

The evidence does show that the police removed McKerrell from the scene and transported him to the police station to carry out a lawful arrest. But McKerrell has not directed our attention to anything suspicious about the procedures that the police employed. Instead, his analysis essentially urges us to accept his unjustified speculations and circumvent *Randolph*'s evidentiary requirement . . . . Since there is no evidence that the police prevented McKerrell from objecting to the search when he was at the scene, and since there is no evidence that the officers removed McKerrell for any reason other than completing the arrest, we have no reason to [accept McKerrell’s argument]. 67

As Parker, Alama, and McKerrell illustrate, lower courts post-*Randolph* have explicitly recognized the *Randolph* prohibition of intentional removal, but typically place the burden on the defendant to prove such removal through evidence beyond his own self-serving testimony.

**B. Post-Randolph Courts Are Reluctant to Infer Ill Motive**

Even where defendants have presented actual evidence of poor police motive, courts have been extremely reluctant to infer the specific ill motive required by *Randolph*. In a recent case, the Seventh Circuit disregarded intentionally deceptive police behavior that appeared to be for the purpose of securing a warrantless arrest and simultaneously avoiding a *Randolph* situation.

In *United States v. DiModica*, 68 after being charged with possession of a firearm uncovered in a warrantless search of DiModica’s home, DiModica argued the police

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64 491 F.3d 1221, 1222-23 (10th Cir. 2007).
65 See id. at 1224.
66 Id. at 1228.
67 Id.
68 468 F.3d 495 (7th Cir. 2006).
removed him from his home to avoid his likely objection to their search. In March 2004, DiModica’s wife reported that she had been abused by her husband. She informed the police that she lived with DiModica and that he likely had illegal drugs and firearms in their home. Mrs. DiModica told the officers that her husband was likely at home, and she gave them a key to the home and signed a written consent to search form.

Shortly before midnight, officers drove to DiModica’s residence in blizzard-like conditions. Although the officers had probable cause to arrest DiModica, they did not have an arrest warrant. Without an arrest warrant, officers would have been unable to arrest DiModica absent DiModica’s consent to enter the home. According to the Seventh Circuit:

The officers planned to tell DiModica [falsely] that Anita had been injured in an automobile accident. They hoped that this would cause DiModica to invite them into his home without any confrontation. Once invited inside, the officers planned to arrest DiModica. At the suppression hearing, [Officer] Smith testified that he and Officer Grimyser approached DiModica’s door together. Officer Grimyser knocked on DiModica’s door and when DiModica answered, Officer Grimyser . . . told DiModica that his wife had been badly injured in a car accident and asked if he could come inside to talk to him. According to both officers, DiModica stepped back and ushered the officers into the mudroom of the house. DiModica, who was shirtless, then told the officers that he was going to retrieve a shirt from another room in the house. . . . When DiModica returned to the mudroom, Officer Grimyser arrested him for domestic abuse, placed him in handcuffs, and escorted him to the squad car.

Significantly, during the above encounter, the officers neither requested DiModica’s consent to search, nor did they inform him that they intended to conduct a search upon his arrest.

At the suppression hearing, contrary to the officers’ testimony, DiModica testified that Officer Smith stood by the squad car while DiModica spoke to Officer Grimyser through the screen door. DiModica claimed that he did not invite Officer Grimyser into the house and that Officer Grimyser never asked to enter the home. According to DiModica, he specifically told Officer Grimyser to stay outside prior to retrieving his shirt. DiModica also testified that when he returned to the front door, Officer Grimyser had entered his home without permission. On appeal, DiModica argued that the evidence indicated he directed the officer to wait outside while he retrieved his shirt. According to DiModica, it would be inherently incredible to conclude that, after being invited into DiModica’s home, officers would allow

69 Id. at 500.

70 See Payton v. New York, 445 U.S. 573 (1980) (establishing that, as a matter of settled constitutional law, police may not arrest a person in his or her home without an arrest warrant, absent valid consent or exigent circumstances).

71 DiModica, 468 F.3d at 497 (emphasis added).

72 Id. at 497-98.
DiModica, who was possibly armed and dangerous, to retrieve a shirt from another room.\textsuperscript{73}

The appellate court admitted that "neither [factual] account is completely logical."\textsuperscript{74} However, citing the clearly erroneous standard of review, the court credited the officers' version of events. Incredibly, the court utilized the officers' admitted deception to justify its findings:

That there were blizzard-like conditions that night in Cottage Grove and the officers had told DiModica that Anita had been badly injured in an accident permit the inference that a concerned husband invited the officers into his house. Because . . . DiModica consented to the officers entering his residence, DiModica's arrest was legal and did not taint the officers' subsequent search.\textsuperscript{75}

In challenging his wife's purported consent, DiModica argued that Randolph controlled because he would have refused to allow the police to search his home had he not been illegally arrested and removed from the scene.\textsuperscript{76} The court rejected DiModica's claim, reasoning that "[u]nlike . . . Randolph, DiModica and his wife were not standing together at the doorway, one consenting to the search while the other refused."\textsuperscript{77} The court continued:

DiModica fails to distinguish his case from Matlock . . . . The officers did not remove DiModica to avoid his objection; they legally arrested DiModica based on probable cause that he had committed domestic abuse.\textsuperscript{78} Once DiModica was arrested and removed from the scene, Anita's consent alone was valid and permitted the officers to legally search the residence.\textsuperscript{79}

\textit{DiModica} illustrates the difficulty of proving intentional removal. Despite the arresting officers having been informed that DiModica was likely home, and despite the officers' admission that they planned to tell DiModica that his wife had been injured in an automobile accident in order to coerce an invitation into the home, the court nevertheless ruled that the officers did not "intentionally remove" DiModica to avoid a "Randolph situation. For Seventh Circuit defendants, \textit{DiModica} has made it nearly impossible to prove the requisite ill motive sufficient to trigger \textit{Randolph}'s

\textsuperscript{73}Id. at 499.

\textsuperscript{74}Id.

\textsuperscript{75}Id. Notably, the parties agreed that the officers never asked DiModica for his consent to search the home, and DiModica never told the officers that they could not search the home.

\textsuperscript{76}Id. at 500.

\textsuperscript{77}Id.

\textsuperscript{78}Notably, while the police had probable cause to arrest the defendant, probable cause to arrest does not equate to probable cause to search. \textit{But see} Valdez v. McPeters, 172 F.3d 1220, 1225 (10th Cir. 1999) (holding that an arrest warrant could support the search of a home when (a) the dwelling is the suspect's home, and (b) police have an objectively reasonable belief that the suspect "could be found within at the time of entry").

\textsuperscript{79}Id. at 500 (emphasis added).
admonition against intentional removal. Not surprisingly, in rejecting a similar claim shortly after DiModica, the Seventh Circuit declared that "Randolph is a narrow holding, and no matter how hard [a criminal defendant] wiggles—like the stepsisters trying to squeeze into Cinderella's glass slipper—he can't fit within its embrace."

A similar rhetoric was conveyed by a Michigan appeals court in United States v. Lapworth. In that case, in holding that the defendant's "mere invocation" of the right to remain silent and the right to counsel was insufficient to negate his co-tenant's consent to entry, the Michigan Court of Appeals reasoned:

Randolph did suggest that where the police purposely remove the suspect so that the suspect will be unable to object, the co-tenant's consent may not be sufficient. But the Court did not create a blanket rule covering every situation in which the suspect's absence was attributable to the actions of the police. Rather, the Court was specifically referring to situations where the police intentionally removed the suspect for the express purpose of preventing the suspect from having an opportunity to object.

As Lapworth and DiModica illustrate, the actual intent that a defendant must prove to invoke Randolph is narrow and specific. Not just any intentional removal will suffice. Further, the proof required to demonstrate this specific intent is difficult for criminal defendants to obtain.

IV. LAWFULLY AVOIDING OBJECTIONS THROUGH STRATEGIC POLICE ACTION

Realizing that its physical presence requirement might create an incentive for police to simply choose not to invite a potential objector to take part in the consent conversation, the Randolph Court cautioned that police may not "remove[] the potentially objecting tenant from the entrance for the sake of avoiding a possible objection." On the flip side, the Court stated that police need not "take affirmative steps to find a potentially objecting co-tenant before acting on the permission they ha[ve] already received." Otherwise, "every co-tenant consent case would turn into a test about the adequacy of the police's efforts to consult with a potential objector." In combination, these pronouncements indicate that police need not affirmatively locate a potential objector, but that police also may not impermissibly remove a potential objector if he happens to be present at the time of the consent request. The danger for criminal defendants, of course, is the suggestion that police need not seek out a potential objector.

Matlock and Randolph reveal that when a physically present likely objector has been removed from the premises prior to a consent request, the case may fall into

80 United States v. Wilburn, 473 F.3d 742, 744 (7th Cir. 2007).
82 Id. at 259.
83 Id. at 261 (emphasis added).
85 Id.
86 Id. at 122.
one of three categories that I would describe as “permissible removal,” “impermissible removal,” and the “gray area” in between.

The first category, “permissible removal,” encompasses cases such as Matlock and Parker in which the potential objector is lawfully removed from the scene pursuant to a valid arrest (note that Randolph would have overruled Matlock if such action were not permissible). The second category, “impermissible removal,” encompasses cases where police intentionally remove the potential objector “for the sake of avoiding a possible objection,” which Randolph expressly forbids. The final category is the “gray area” in between, encompassing those cases where a potential objector is not present at the time of a consent request, but the reason for the defendant’s absence is in dispute.

This final category would naturally include both permissible and impermissible removals, and this final category is likely to be home to a great number of Randolph claims. My review of post-Randolph claims confirms this suspicion. Included in this gray area are cases in which police simply ignore—rather than remove—a physically present co-occupant. Although such evasive action is arguably unreasonable, post-Randolph courts have generally refused to require police to actually communicate with all physically present occupants.

A. Police May Lawfully Ignore Physically Present Potential Objectors

To invalidate a warrantless search based on a co-tenant’s consent, Randolph requires the non-consenting tenant to be simultaneously present and objecting. In many cases where the presence requirement is met, police have simply chosen not to request consent from a physically present likely objector, thereby ensuring no objection. According to most courts, failing to request consent from a physically present co-tenant does not equate to the intentional avoidance of a Randolph claim. This ruling typically holds true, even where searching officers are aware that, or have reason to believe that, a potential objector is located on the premises at the time of the request.

87 United States v. Parker, 469 F.3d 1074 (7th Cir. 2006).
88 See Randolph, 547 U.S. at 122.
89 On the permissible side, this category would include cases where the defendant is “absent” from the scene at the time consent is requested and where police would have to expend more than minimal effort to locate them (note: the Randolph majority has already stated that such efforts are not required). On the impermissible side, this category would include cases where the police have, in fact, intentionally removed a likely objector from the scene to avoid his objection, but the defendant is able to present no evidence to support this claim.
90 See Dery & Hernandez, supra note 23, at 80-82 (“The differing results in Randolph and Matlock . . . send a strong signal to police—should you wish to enter a home without a warrant, isolate the most likely potential objector so that you may ask permission from those more willing to allow entry. The logical extension of such reasoning would suggest an unspoken ‘Don’t Ask So the Suspect Won’t Tell’ training policy in order to direct officers to the safe side of the Court’s fine line.”).
91 See Randolph, 547 U.S. at 121.
92 See, e.g., Donald v. State, 903 A.2d 315, 321 (Del. 2006) (ruling that “police are not required to take affirmative steps to seek consent from a potentially objecting co-tenant, even
In *Casteel v. State*, for example, the Nevada Supreme Court upheld the consent of an off-premises co-tenant despite the fact that defendant was located on the premises at the time of the search. In *Casteel*, the defendant had sexually abused his live-in girlfriend's daughter. When the daughter's mother learned of the abuse, she contacted the police and provided written consent to search the defendant's property. Upon arrival at Casteel's property, the detectives knocked on the door several times. Receiving no response, they entered the apartment using a key provided by the mother. Once inside, the officers encountered Casteel in the home. The officers then detained Casteel and transported him to a secure location for questioning. The officers apparently did not inform Casteel of their intent to conduct a warrantless search of his residence.

Over the next two hours, while Casteel was interrogated off premises, several officers stayed behind and searched his apartment. The searching officers found oils, lubricants, and panties in a bag belonging to Casteel. Unable to locate sexually graphic photographs described by the victim, one of the officers drove to the site of detention and asked Casteel where the photographs could be found. When Casteel informed the officer of their location, rather than requesting Casteel's consent to conduct the additional search, the officer called the victim's mother for her further consent. The mother consented to the additional search, and the officer subsequently located the photos.

Prior to trial, Casteel moved to suppress the items found during both searches. The court denied the motion. On appeal to the Nevada Supreme Court, Casteel argued that the search of his apartment was unlawful because the officers did not explicitly seek his consent even though he was readily available during both searches. The court rejected this argument, reasoning that, unlike *Randolph*, Casteel never expressly or impliedly protested the search.

According to the logic of *Casteel*, as long as a resident who is present at the time of the search does not actually object, the joint resident's consent does not implicate *Randolph*. Thus, in future cases, police who confront a physically present suspect

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93 131 P.3d 1 (Nev. 2006).
94 Id. at 2.
95 See id. at 1-3.
96 Id. at 2-3.
97 Id. at 3.
98 Id. at 3-4.
99 See id. at 4 ("Absent an objection by a resident present at the time of the search, a joint resident should most certainly be able to consent to a search of the residence to investigate and terminate the commission of ongoing criminal misconduct at or on the property").
may reduce the likelihood of an express objection by simply not announcing their intent to search.100

The Indiana Court of Appeals employed a similar logic in Starks v. State.101 In Starks, Officer Bragg of the Indianapolis Police Department was notified that a black male was selling drugs out of an Indianapolis home.102 Later that evening, a second individual confirmed this report and informed Officer Bragg that her grandmother, Hazel Civils, owned the home.103 She also reported seeing a makeshift door in the home with a sign warning others to “stay out.”

Based on this information, Officer Bragg and two other officers went to the home. Civils’ grandson, Edward, answered the door and ushered the officers inside. Edward escorted Officer Patton to Civils’ bedroom. While Officer Patton was speaking with Civils, Officers McPherson and Bragg noticed the basement entrance was blocked by a piece of plywood containing the words “stay out.”

Without verifying whether they had consent to search, the officers moved the plywood and went down to the basement. In the basement, the officers saw Starks sitting on a couch and observed a gun underneath the couch. Officer McPherson then placed Starks in handcuffs. Most significantly, during the time Officers McPherson and Bragg were in the basement, Officer Patton asked Civils for permission to search the house for evidence of illegal activity.104 After Starks had been detained, Officer Patton entered the basement and notified McPherson and

100 Similar to Casteel, United States v. McCurdy, 480 F. Supp. 2d 380 (D. Maine 2007), authorizes police to arrest a defendant and simply not ask for his consent before attempting to conduct a search of defendant’s jointly—occupied property. In McCurdy, the defendant’s live-in girlfriend, Ms. Sawtelle, reported a domestic assault and notified police that the defendant had illegal weapons inside the residence. As Deputy Rolfe was on his way to the home, he was notified that the defendant had been detained in a nearby town. Id. Deputy Rolfe went to speak with McCurdy before heading to the home. Id. Despite his intention to proceed directly to the McCurdy home, Deputy Rolfe did not notify McCurdy of his intent to search the residence. See id. at 383 (indicating that Deputy Rolfe notified McCurdy that he was going to continue to McCurdy’s residence to complete his investigation; however, he did not request McCurdy’s permission to search). Upon Deputy Rolfe’s arrival, Ms. Sawtelle consented to a search. Id.

Officers then discovered evidence used to convict McCurdy. Id. The district court later rejected McCurdy’s Randolph argument, reasoning that “Randolph has little application here, since Mr. McCurdy was not present at the scene to expressly refuse consent to search the [home].” Id. at 390 n.9. The court declared:

Mr. McCurdy [argues] that Randolph controls because he was in police custody and Deputy Rolfe could have contacted him to obtain his consent . . . . [T]he court cannot agree with the Defendant . . . . There is no indication Randolph would extend to absent, but potentially reachable defendants who, if reached, might refuse consent. Id.


102 Id. at 676.

103 See id.

104 Notably, Officer Patton did not testify to what Civils’ answer was to this question, and at her deposition, Civils stated that she remembered the police coming to her home but could not remember the details of their visit. See id. at 677.
Bragg that they had permission to search the residence. At trial, the following exchange took place between Officer Patton and Starks’ attorney:

Q: So you did not get consent to search until after you had talked to Miss Civils?

A: Correct.

Q: And the officers were downstairs in the basement prior to you receiving consent from Miss Hazel Civils to search the home?

A: Yes.\textsuperscript{105}

In an ensuing warrantless search of the basement, the officers found cocaine under the basement couch. Starks later moved to suppress this evidence.\textsuperscript{106} The trial court denied the motion.\textsuperscript{107} Employing a deferential standard of review,\textsuperscript{108} the appellate court affirmed. In distinguishing \textit{Randolph}, the appellate court declared:

\begin{quote}
[A]t the time Civils consented to a search of the residence, Starks was not physically present in Civils’ bedroom nor did he express his refusal to consent to the search. Starks was physically present when Officers McPherson and Bragg entered the basement... \textit{but there is no indication in the record that he expressed a refusal to consent to the officers' later search of that area}. Therefore, \textit{Randolph} is distinguishable and the officers’ search of the basement... was permissible.\textsuperscript{109}
\end{quote}

Despite the physical presence of the defendant at the time of the warrantless search, and despite the searching officers’ lack of consent to enter the basement at the time they first encountered the defendant, the court upheld the search due to Starks’ failure to object. Had the defendant simply shouted “get out” as the officers entered the basement, the court presumably would have reached the opposite result, as the two \textit{Randolph} requirements—physical presence and express objection—would have been simultaneously triggered.

\textsuperscript{105}Id. at 680.

\textsuperscript{106}Notably, at the hearing on Starks’ motion, Edward testified that he heard knocking on the door and that when he went to answer the door, the officers were already inside the house. However, Officer Patton contested Edward’s testimony. Id.

\textsuperscript{107}Id. at 678.

\textsuperscript{108}The court declared that in reviewing a denial of a motion to suppress, the court does not reweigh the evidence, and only considers conflicting evidence that is most favorable to the trial court’s ruling. The appellate court also may consider any uncontested evidence favorable to the defendant. See id.

\textsuperscript{109}Id. at 682 n.1 (emphasis added).
B. Police May Plan a Consent Request for a Time When the Potential Objector Will Not Be Home

As indicated, one likely effect of *Randolph* is to encourage police to circumvent its holding by removing a potential objector from the scene\(^{110}\) (so long as the police do not leave evidence of ill intent in their wake). Despite the police-friendly harbor offered by *Matlock*, where a likely objector is present on the premises at the time the police seek consent, there remains a possibility the suspect will come to the door and object. Effectively removing this possibility and further limiting *Randolph*'s reach, courts have authorized police to plan their consent request for a time when they know the potential objector will not be home.\(^{111}\)

In *Commonwealth v. Yancoskie*,\(^{112}\) a Pennsylvania state court upheld the consent of a defendant's wife even though officers admitted to planning their consent request for a time when they knew defendant was out of town on a fishing trip.\(^{113}\) On appeal from the denial of his motion to suppress, the defendant argued that by purposely timing their search to coincide with his fishing trip, the police in effect “removed” him “from the entrance for the sake of avoiding a possible rejection.”\(^{114}\) The court disagreed, reasoning that by “voluntarily absenting himself from the house,” the defendant assumed the risk that his wife would allow the police to conduct a search.\(^{115}\) The court relied upon the following *Randolph* passage:

> [W]e think it would needlessly limit the capacity of the police to respond to ostensibly legitimate opportunities in the field if we were to hold that *reasonableness* required the police to take affirmative steps to find a potentially objecting co-tenant before acting on the permission they had already received . . . . [Otherwise] every co-tenant consent case would

\(^{110}\) Various commentators predicted this result. *See*, e.g., Andrew Fiske, Comments, *Disputed-Consent Searches: An Uncharacteristic Step Toward Reinforcing Defendants' Privacy Rights*, 84 Denv. U. L. Rev. 721, 735-36 (2006) (arguing that, by refusing to overrule *Matlock*, *Randolph* creates an incentive for police to detain and remove any co-occupant likely to refuse consent); Wineholt, *supra* note 30, at 497-98 (arguing that “[a]lthough the *Randolph* Court indicated that its decision does not permit law enforcement officers to remove a defendant from the doorway to prevent his or her objection to a search, its decision will likely do the opposite”).


\(^{113}\) *Id.* at 115. In its opinion, the *Yancoskie* court noted that “the record supports Appellant’s assertion that the agents timed their request for Wife’s consent to search the house with a time when they knew Appellant was to be out of town.” *Id.*

\(^{114}\) *Id.* (quoting *Randolph*, 547 U.S. at 121).

\(^{115}\) *Id.*
turn into a test about the adequacy of the police’s efforts to consult with a potential objector.\textsuperscript{116}

Taking the Yancoskie reasoning one step further, at least one court has allowed police who were initially confronted with an express refusal to return to the premises at a time when they knew the original objector would not be home. In an unpublished opinion, \textit{United States v. Groves},\textsuperscript{117} the U.S. District Court for the Northern District of Indiana rejected the Randolph claim of a defendant who was physically present on the searched premises and adamantly denied law enforcement’s initial request to search.

In Groves, on July 5, 2004, South Bend police officers received a report that someone was shooting at a home on St. Joseph Street.\textsuperscript{118} Upon their arrival, officers interviewed Groves, a resident of the home from which the shots were allegedly fired. Groves proclaimed his innocence, denied Officer Taylor’s request to search his apartment, and asked the officer to obtain a search warrant. Officer Taylor later testified that Groves was “adamant that we could not go in the apartment.”\textsuperscript{119} Shortly thereafter, the officers applied for a warrant to search Groves’ apartment, but the judge denied the application.\textsuperscript{120}

Sixteen days after the initial visit, a different group of officers returned to Groves’ apartment. The officers knocked on Groves’ door and encountered his girlfriend, Shaunta Foster. When Agent Battani asked for Foster’s consent to search the apartment, Foster stated that she would like to speak to Groves. Agent Battani then told Foster that the consent was not between himself and Groves but rather between himself and Foster. Agent Battani then obtained Foster’s consent and subsequently recovered two 20-gauge shotgun shells and five rounds of ammunition.\textsuperscript{121}

In rejecting Groves’ motion to suppress, the court first found that Foster had actual authority over the premises.\textsuperscript{122} Because Foster exercised common authority over the apartment, as in Yancoskie, the court held that Groves “assumed the risk” that she might permit access to the apartment. Rejecting Groves’ Randolph claim, the court declared:

Groves was not physically present at the apartment when the agents obtained the consent of his live-in girlfriend. . . . When asked on July 5, 2004 whether the officers could search his apartment, Groves told the officers “no” and that they could obtain a search warrant. This Court

\textsuperscript{116}Id. (quoting Randolph, 547 U.S. at 122) (emphasis added).


\textsuperscript{118}Id. at *1.

\textsuperscript{119}Id. at *2.

\textsuperscript{120}Id.

\textsuperscript{121}Id.

\textsuperscript{122}See id. at *4-*5 (reasoning that the telephone at Groves’ apartment was registered in Foster’s name and was paid by Foster, that Foster’s daughter was registered for school using the Groves’ address, that Foster kept various personal belongings at this residence, and that she regularly cleaned the apartment).
finds, however, that these facts are insufficient to invalidate the consent given by Foster.\textsuperscript{123}

The court continued:

While it is true that the officers knew that Groves worked during the day and would likely not be home at 1:30 p.m., the officers did not take any affirmative steps to remove Groves from the premises prior to approaching Foster. Groves simply was not home when the officers returned to his house, and even though the officers knew that Groves would likely not be home at that time, they did not procure his absence to avoid his objection.\textsuperscript{124}

The rationale underlying \textit{Groves} is that it is constitutionally reasonable for law enforcement to circumvent a defendant's express refusal of consent, and their subsequent failure to obtain a search warrant, by returning to the premises at a time when the defendant is no longer home.\textsuperscript{125} Because the officers in \textit{Groves} had more than ample time to obtain a search warrant yet failed to do so, this case purports to legitimize a warrantless search over the defendant's prior express objection where probable cause is lacking. Yet, this ruling seemingly complies with a strict construction of \textit{Randolph}, which requires physical presence at the time of the consent request and a simultaneous objection to such consent.

\textbf{V. DIFFICULTIES IN PROVING AN EXPRESS OBJECTION}

\textit{A. Police Win Most "He Said, She Said" Battles}

As the above discussion indicates, when defendants seek to employ \textit{Randolph}'s rule against purposeful removal, courts are extremely reluctant to explore a police officer's intent in removing a defendant prior to requesting consent. This is somewhat expected, as courts are generally reluctant to scrutinize the subjective motivations of police.\textsuperscript{126} But even in cases not involving inquiries into police intent, defendants seeking \textit{Randolph}'s protections have encountered similar problems of proof. In many decisions, defendants seeking \textit{Randolph}'s protections in cases of

\begin{footnotes}
  \item[123]\textit{Id.} at *6.
  \item[124]\textit{Id.}
  \item[125]\textit{But see United States v. Hudspeth, 518 F.3d 954, 964 (8th Cir. 2008) (en banc) (Melloy, J., dissenting) (arguing that such police practices are, in fact, unreasonable because \textit{Randolph}'s desire to eliminate the need for a "dragnet" to find "potential objectors" does not apply in the case of a previously disputed consent).}
  \item[126]\textit{See, e.g., Stansbury v. California, 511 U.S. 318, 319 (1994) (holding that in determining whether a subject is "in custody," courts are not to consider an "officer's subjective and undisclosed view concerning whether the person being interrogated is a suspect"); Horton v. California, 496 U.S. 128, 138 (1990) ("Evenhanded law enforcement is best achieved by the application of objective standards of conduct, rather than standards that depend upon the subjective state of mind of the officer."); See Berkermer v. McCarty, 468 U.S. 420 (1984) (holding that a traffic stop of the defendant for suspicion of driving under the influence of an intoxicating substance did not render him "in custody" despite the trooper's uncommunicated intent to arrest the defendant upon completion of the trooper's field sobriety examination).}
\end{footnotes}
actual disputed consent have experienced significant difficulties in proving their claims. This is because courts typically side with the police where a defendant's claim to have refused consent is directly disputed by the searching officers.¹²⁷

United States v. Wilson¹²⁸ is illustrative. In Wilson, two officers were dispatched to an Omaha residence in response to a burglary report. When the first officer arrived, Officer Smith spoke with the owner of the residence, Sandra Wilson, and one of her sons, Bart Wilson, who each indicated that jewelry and a firearm were missing. Bart Wilson’s girlfriend was also present during this exchange. Sandra and Bart Wilson each told Officer Smith that they had seen the missing firearm in a drawer in the defendant’s room, who lived in the basement of the residence. Shortly thereafter, the defendant arrived at the residence.

At the suppression hearing, Officer Smith testified that at this point, he told the defendant to sit down while he went to the basement to search for the firearm. Both Officer Smith and Officer Reynolds testified that the defendant did not object when Officer Smith stated his intent to retrieve the firearm from the basement.¹²⁹ However, two of the defendant’s witnesses, Sandra Wilson and Bart Wilson’s girlfriend, testified that when Officer Smith stated his intent to search defendant’s basement room, defendant objected.¹³⁰

In rejecting defendant’s motion to suppress, the magistrate judge made the outcome-determinative finding that the defendant did not, in fact, object to Officer Smith going downstairs to search.¹³¹ In affirming, the appellate court also concluded that the defendant did not object to the search.¹³² The court thus ruled that, because of its “credibility findings,” Randolph “is not applicable despite defendant’s assertion.”¹³³

Wilson represents the typical situation. In most cases involving a dispute regarding the details of an exchange between law enforcement and a criminal defendant, the court generally sides with the police.¹³⁴ A notable exception is United States v. Henderson.¹³⁵

While not a reported decision, Henderson is a significant case, as it exemplifies the type of evidence a criminal defendant must present to win a credibility battle with the police. In Henderson, Chicago police responded to a domestic dispute

¹²⁷See generally Strauss, supra note 8.
¹²⁹Id. at *2.
¹³⁰Id.
¹³¹Id. at *3.
¹³²Id. at *4.
¹³³Id.
¹³⁴See also United States v. McKerrell, 491 F.3d 1221, 1223-24 (10th Cir. 2007) (upholding district court’s factual finding that defendant did not actually object to consent search by crediting the testimony of various officers directly contradicting defendant’s testimony that he expressly informed the police several times that he did not want them inside his home).
between Mr. and Mrs. Henderson. When officers arrived at the home, the wife, Patricia Henderson, was standing outside with a noticeable injury. She told the officers that defendant had choked her, and that he threw her out of the house when she called 9-1-1. Patricia gave the officers a key to the home, stating that her husband had weapons in the house and a history of arrests.

The police entered the front door and encountered Mr. Henderson in the living room. At this point, Mr. Henderson claimed to have responded by ordering the police to leave. Rather than complying, the police arrested Mr. Henderson and transferred him to the police station. Officers then searched the home and discovered evidence used to indict Henderson of crimes unrelated to the domestic dispute.

Invoking *Randolph*, Henderson moved to suppress the evidence. At the suppression hearing, more than one officer testified that Henderson did not order the officers to leave (or that they did not recall the defendant making such a statement). The trial court, however, found otherwise. The court declared:

> There is some controversy about whether defendant made this statement to the officers. The notes prepared by the United States Attorney prosecuting this case reflect that one or more of the arresting officers confirmed that defendant told them to “[leave] my house.” At the suppression hearing, however, the officers testified [to the contrary]. Based on the candid and professional representation of the prosecutor, the court finds that defendant in fact made the statement.

Finding that defendant did in fact refuse permission to search the home, the court deemed the subsequent search unreasonable.

The above passage suggests that the officers changed their story in order to avoid the protections of *Randolph*, a practice which commentators have argued is more common in Fourth Amendment cases than one might expect. Further, the court’s account of its receipt of this evidence suggests that, had the prosecutor not come forward with his notes on the case, the defendant would have been unable to rebut the officers’ contradictory testimony.

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136 *Id.* at *1* n.2.

137 Henderson was charged with the federal offenses of possessing with intent to distribute narcotics in violation of 21 U.S.C. § 841(a)(1), and with being a felon in possession of weapons, in violation of 18 U.S.C. §§ 924(c) and 922, and 26 U.S.C. § 586(d). *Henderson*, 2006 WL 3469538, at *1.

138 *Id.* at *1* n.2.

139 *Id.* (emphasis added).

140 *Id.* at *2.

141 See Strauss, *supra* note 8, at 246 (“The extent of police perjury in consent cases is . . . unquantifiable. ‘By their very nature, successful lies remain undetected.’ But anecdotal evidence and some empirical studies document that police perjury is a serious problem. One former Police Chief candidly admitted his belief that most ‘testilying’ occurs at suppression hearings with respect to consent searches . . . . Professor Dripps, after surveying the available studies, concurred: ‘The available evidence strongly indicates that police perjury is a widespread phenomenon.’”) (citing Donald A. Dripps, *Police, Plus Perjury, Equals Polygraphy*, 86 J. CRIM. L. & CRIMINOLOGY 693, 693-94 (1996)).
It goes without saying that it is the rare case that a prosecutor provides the court with evidence that his partner in law enforcement has lied under oath. This is particularly true where the evidence would have the effect of exonerating the defendant, as in Henderson.\textsuperscript{142} Thus, Henderson represents the rare exception where a criminal defendant claims victory on the “he said, she said” \textit{Randolph} battleground.\textsuperscript{143}

\textbf{B. Even a Proven Consent Refusal Must Be Unequivocal, Precise, and Definite}

Even in cases where a defendant proves he actually refused consent, courts have held that the refusal must be sufficiently unequivocal, precise, and definite for \textit{Randolph} to apply.

\textit{1. Rejection Must Be Unequivocal}

In rejecting a \textit{Randolph} claim, the U.S. District Court for the District of Kansas declared that the following objection of a physically-present defendant would be too equivocal to satisfy \textit{Randolph}: “You cannot go in there. It’s not my home, but no [o]ne gave you permission. It belongs to my mother.”\textsuperscript{144} The court declared:

\textit{[T]his objection is significantly different than the objection made by the co-tenant in \textit{Georgia v. Randolph} who “unequivocally refused” the officer’s request to search. Here, defendant was not asked for consent and arguably did not state a personal objection, but instead merely voiced his . . . belief that his mother had not consented.}\textsuperscript{145}

A similar logic was expressed in \textit{United States v. Reed}.\textsuperscript{146} In \textit{Reed}, Officer Severns of the South Bend Police Department stopped and arrested the defendant after he observed the defendant run a stop light. Officer Severns immediately recognized Reed from his prior controlled purchases of cocaine conducted at Reed’s residence, 4009 Bonfield. During an ensuing taped conversation, Officer Severns asked Reed whether he lived at 4009 Bonfield, to which Reed replied, “Yeah, I’ve been there (inaudible).”\textsuperscript{147} Later in the interview, the following exchange took place:

\textsuperscript{142}This is also particularly rare where the evidence comes in the form of an attorney’s personal notes, which are generally considered privileged and confidential under the work product doctrine. \textit{See MODEL RULES OF PROF’L CONDUCT} R. 1.6, cmt. 5 (2007). \textit{See also FED. R. CIV. P. 26(b)(3)} (“Ordinarily, a party may not discover documents and tangible things that are prepared in anticipation of litigation or for trial by or for another party or its representative (including the other party's attorney . . . ”).

\textsuperscript{143}\textit{See also People v. Mikrut}, 864 N.E.2d 958 (Ill. App. Ct. 2007) (upholding trial court’s factual finding that defendant did, in fact, object to the officers entering his home without a warrant even though testimony of officers and defendant were contradictory).

\textsuperscript{144}\textit{United States v. Murphy}, 437 F. Supp. 2d 1184, 1192-93 (D. Kan. 2006). Although the court ultimately discredited the defendant’s testimony and found that he did not actually make the above statement, the court declared that, even assuming the defendant actually did make this particular statement, the statement would be too equivocal to trigger the \textit{Randolph} rule. \textit{See id.} at 1193.

\textsuperscript{145}\textit{Id.}


\textsuperscript{147}\textit{Id.} at *1.
Severns: Ok. You willing to sign a permit to search, go back over there to your place over on Bonfield so we can double check to make sure there's no more stuff there.

Terry Reed: Naw that's not my place, I can't give you permission for that.148

At some point during this conversation, Johanna Foster had driven to a nearby parking lot to observe. Officer Severns, who knew Foster to be Reed's girlfriend, spoke with Foster, who stated that she lived with Reed at 4009 Bonfield. Officer Severns then requested and obtained Foster's consent to search.149

At the Bonfield residence, officers found evidence used to indict Reed. Reed moved to suppress the evidence, arguing that Foster's consent was insufficient in light of his own refusal to consent.150 In rejecting the Randolph claim, the court reasoned:

Mr. Reed didn't object to the search in the sense meant by the Randolph Court. Mr. Reed did not object to officers searching the residence; he did not forbid their entry. He declined to consent because (he claimed, falsely) "that's not my place, I can't give you permission for that." The officers' belief and later confirmation that it was his place didn't change the nature of Mr. Reed's reply. There often is no difference between a speaker telling callers that they can't come in and a speaker telling callers that he can't let them in. Under Randolph, though, there is a difference.151

Cases such as Reed and Murphy indicate that Randolph will not apply unless a criminal defendant denies a consent request directly and unequivocally.

2. Rejection Must Be Precise and Definite

In United States v. Marasco,152 the Eighth Circuit Court of Appeals further limited Randolph by permitting officers to search a hotel room shared by co-defendants over the express objection of one of the physically present defendants. In a ruling which directly contradicts key language in Randolph, the court reasoned that because one defendant consented to a search of the entire hotel room while the objecting tenant only explicitly rejected consent to search her "stuff," officers could lawfully proceed with their warrantless search of the shared room.153

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148 Id.
149 Id. at *2.
150 Id.
151 Id. at *5. The court also reasoned that Randolph requires the objector to be physically present "at the door" when his objection is made, and Reed was not. Id.
152 446 F. Supp. 2d 1073 (D. Neb. 2006), aff'd in pertinent part, 487 F.3d 543 (8th Cir. 2007).
153 The court ultimately ruled that any evidence found in the hotel room that was not obviously a part of the second defendant's "stuff" was admissible against both defendants. See id. at 1085, 1098 (magistrate's report and recommendation).
In *Marasco*, officers observed a male and female entering a hotel room believed to be the site of drug activity. Officers identified the male as defendant Marasco, who was subject to an outstanding felony warrant. Officers knocked on the motel room door and Marasco answered. The officers immediately arrested and handcuffed Marasco. An officer then asked Harms to step outside, which she did. Harms told the officer that both her and Marasco shared the room equally. When the officer asked Harms for permission to search the room, she answered that she would “rather not” have the officers looking through “her stuff.” Harms did not explicitly consent to the search of the rest of the room.

After this exchange with Harms, a different officer asked Marasco for permission to search the room. Curiously, the officer stated that Marasco did not actually need to consent. Marasco consented.

Despite Harms’ failure to consent just moments before, the officers searched the entire room and seized items relating to methamphetamine production. Both defendants were subsequently charged with methamphetamine-related offenses, and both filed motions to suppress the evidence obtained from the hotel room.

With respect to the charges brought against Marasco, in his report and recommendation, Magistrate Judge Thalken determined that *Randolph* permitted the introduction of all evidence obtained from the hotel room against Marasco. Judge Thalken reasoned that the protections of *Randolph* only extend to the person who actually objects to the search. To support the ruling, Judge Thalken quoted the passage from *Randolph* which declares that “a physically present co-occupant’s stated refusal to permit entry prevails, rendering the warrantless search unreasonable and invalid as to him.”

According to the Magistrate Judge, because a warrantless search would only be unlawful “as to” the objecting co-occupant, the very same search conducted in the face of an objection is nonetheless reasonable “as against” the non-objecting co-occupant.

As to the non-objecting co-occupant who is later charged with a criminal offense, this reasoning would significantly reduce the scope of *Randolph’s* protections, as it in effect allows the police to completely disregard a physically present co-occupant’s express refusal and simply proceed forward with their intended search. This ruling flies in the face of the most reasonable interpretation of *Randolph*, which requires the police to obtain a warrant in the event of an express refusal of consent by a physically present co-occupant.

Several lower courts have, in fact, declared this to be the effect of *Randolph’s* rule. The Wyoming Supreme Court, for example, has declared that “[s]o long as the *Randolph* decision represents the law of the land, the police must honor the denial of

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154 Id. at 1077.
155 See id. at 1077, 1098.
156 See id. at 1098.
157 Id. at 1077.
158 Id. at 1078.
159 Id. at 1097 (citing Georgia v. Randolph, 547 U.S. 103, 106 (2006)) (emphasis added).
consent to search, by a cotenant who is present and protests the search. Another cotenant may not override that refusal with his/her consent." Similarly, the Delaware Supreme Court summarized the effect of *Randolph* as "requiring . . . that officers stop a warrantless search based upon the consent of a co-occupant when another co-occupant of the home expressly objects to the search."

Likewise, in *Randolph* itself, the Supreme Court declared that "disputed invitation, without more, gives a police officer no better claim to reasonableness in entering than the officer would have in the absence of any consent at all." Each of the above interpretations directly contradicts the *Marasco* ruling, which allows officers to enter the premises to conduct a warrantless search even when a physically present co-occupant explicitly objects.

The *Marasco* court did not stop there. After finding the entire search valid as to Marasco, the Magistrate Judge then analyzed whether the search was valid as to Harms. Invoking the precise wording of Harms’s refusal of consent—"I would rather not have you looking through my stuff"—the Magistrate Judge found that only the items that were located among items that were clearly a part of "Harms’ stuff" were inadmissible. In particular, only the items seized from Harms’ purse would be inadmissible against her, as Harms’s purse and “some craft items” were the only items in the room readily apparent to the officers to belong to Harms. All remaining items recovered from the hotel room were deemed admissible against both Harms and Marasco.

VI. THE *RANDOLPH* EXPANSIVE OUTLIERS: *HUDSPETH* AND *SNOW*

Few courts have explicitly extended the *Randolph* rule. My research uncovered just two that did so through principled reasoning—the Eighth Circuit Court of Appeals and the Pennsylvania Court of Common Pleas. The Eighth Circuit’s opinion, however, was vacated and reversed by the full court on *en banc* review.169

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163 *Marasco*, 446 F. Supp. 2d at 1098.
164 *Id*.
165 *See id.* at 1084-85.
166 *See United States v. Marasco*, 487 F.3d 543, 547-48 (2007) (affirming that only the items found in Harms’s “stuff,” which included only her purse, were inadmissible as to Harms).
169 *See United States v. Hudspeth*, 518 F.3d 954 (8th Cir. 2008) (en banc).
In *United States v. Hudspeth,* a three-judge panel of the Eighth Circuit Court of Appeals invalidated the consent of defendant's wife where the defendant, just prior to being arrested at his place of business and not long before his wife's consent, had refused consent to search their shared home. In July 2002, seeking to uncover evidence of excessive sales of ephedrine tablets, officers executed a search warrant at a business owned by defendant Roy Hudspeth. During the search, police discovered evidence of child pornography on a compact disk located on Hudspeth's desk. Believing additional evidence might be found at Hudspeth's home, officers sought Mr. Hudspeth's permission to search his home. Hudspeth rejected the request. Hudspeth was then placed under arrest and transported to the county jail.

Four officers then proceeded to the defendant's home. Officers informed Mrs. Hudspeth they had arrested her husband and indicated the home computer might contain contraband. The officers, however, did not tell Mrs. Hudspeth that her husband objected to the search. After attempting unsuccessfully to contact her attorney, Mrs. Hudspeth consented to the search. Officers then seized additional evidence used to indict Hudspeth.

The trial court denied Hudspeth's motion to suppress the evidence obtained from his home, and he was convicted and sentenced to sixty months of imprisonment. Hudspeth appealed. Invoking *Randolph,* Hudspeth argued that he expressly denied consent, and that his wife's subsequent consent could not "overrule" his denial. The three-judge panel of the Eighth Circuit agreed, reasoning:

"The same constitutional principles underlying the Supreme Court's concerns in *Randolph* apply regardless of whether the non-consenting co-tenant is physically present at the residence, outside the residence in a car, or, as in our case, off-site at his place of employment. Unlike in *Matlock* or in the hypothetical situation discussed in *Randolph* in which a..."

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171 Id. at 930.
172 See id. at 928.
173 Id. at 925.
174 Citing *Matlock* and *Rodriquez,* the en banc court later clarified that "the Fourth Amendment's reasonableness requirement did not demand that the officers inform Mrs. Hudspeth of her husband's refusal." *Hudspeth,* 518 F.3d at 960.
175 *Hudspeth,* 459 F.3d at 926. Hudspeth was indicted on one count of possession of child pornography, in violation of 18 U.S.C. § 2252A(a)(5) and (b)(2), and on one count of producing and attempting to produce child pornography, in violation of 18 U.S.C. § 2251(a) and (d). *Hudspeth,* 459 F.3d at 926.
176 After the district court denied Hudspeth's motion to suppress the evidence obtained from his home, Hudspeth pled guilty to the charges and reserved the right to appeal the denial of his motion. *Id.*
177 See *Id.* at 928.
178 See *Id.* at 929-31. The court, however, ultimately remanded the case back to the district court for a determination of whether there were alternative grounds for the admission of the photos stored on the home computer, such as and including inevitable discovery. *Id.* at 931.
"potential objector, nearby but not invited to take part in the threshold colloquy, loses out," here Hudspeth was invited to participate and expressly denied his consent to search. [citing Randolph, 126 S.Ct. at 1527]. Thus, Mrs. Hudspeth's "disputed invitation, without more, [gave the] police officer no better claim to reasonableness in entering than the officer would have in the absence of any consent at all." [citing Randolph, 126 S.Ct. at 1523].

The court thus concluded "that the police must get a warrant when one co-occupant denies consent to search."\textsuperscript{179}

In 2006, the full court reconsidered Hudspeth en banc,\textsuperscript{180} and in March 2008, the court issued an opinion endorsing the government's view of Randolph.\textsuperscript{181} Judge Riley, who authored the panel's dissent, reasoned that Randolph required both "physical presence" combined with an "immediate objection."\textsuperscript{182} Judge Riley declared that "unlike Randolph, . . . when [the officers] asked for Mrs. Hudspeth's consent, Hudspeth was not present because he had been lawfully arrested . . . . Thus, . . . the narrow holding of Randolph, which repeatedly referenced the defendant's physical presence and immediate objection, is inapplicable here."\textsuperscript{183}

Although the original panel opinion has been vacated, both sets of opinions are significant for suggesting two possible interpretations of Randolph—what I will designate "the constructive presence" interpretation and the "Randolph bright-line rule." The "Randolph bright-line rule" requires physical presence without exception. Under this view, the wishes of any person not physically located at the premises are irrelevant, even if that person has already expressly voiced his wishes. The theory underlying this approach is assumption of risk and is best elaborated in leading third party consent cases such as Matlock\textsuperscript{184} and Frazier v. Cupp.\textsuperscript{185}

Under the alternative "constructive presence" interpretation, police must obtain a search warrant when a co-occupant who is physically incapable of confronting the police at the searched premises expressly denies consent to search. The theory behind this interpretation is that police act "unreasonably"\textsuperscript{186} when, after receiving an

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\textsuperscript{179}Id. at 930-31.
\textsuperscript{180}Id. at 931.
\textsuperscript{181}Id. at 922.
\textsuperscript{182}United States v. Hudspeth, 518 F.3d 954 (8th Cir. 2008) (en banc).
\textsuperscript{183}Id. at 959.
\textsuperscript{184}Id. at 960.
\textsuperscript{185}The Matlock Court justified its ruling on the assumption of risk doctrine, declaring that "it is reasonable to recognize that any of the co-inhabitants has the right to permit the inspection in his own right and that the others have assumed the risk that one of their number might permit the common area to be searched." United States v. Matlock, 415 U.S. 164, 172 n.7 (1990).
\textsuperscript{186}394 U.S. 731, 740 (1969) (upholding warrantless consent search of shared duffle bag under the assumption of risk theory).
\textsuperscript{187}See, e.g., Illinois v. Rodriguez, 497 U.S. 177, 185 (1990) (declaring that the Fourth Amendment does not require the agents "always be correct, but that they always be reasonable").
unequivocal refusal of consent by a co-tenant physically incapable of objecting at the residence, police proceed to the residence to pursue consent from another occupant. This interpretation is grounded both in the reasonableness standards embodied in the Fourth Amendment and in the notion that Fourth Amendment protections are personal such that a co-tenant cannot “waive” another individual’s expressed Fourth Amendment wishes.

While theoretically significant, the approach of the three-judge panel in Hudspeth is easily attacked. The “Randolph bright-line rule” is grounded in the assumption of risk doctrine, and since the late 1960s, this doctrine has carried the day in Fourth Amendment consent jurisprudence. As noted above, most recent case law solidifies this shift away from the individual rights doctrine toward the assumption of risk approach.

Further, most post-Randolph courts have recognized the centrality of Randolph’s physical presence requirement. In United States v. Reed, for example, a case with nearly identical facts as Hudspeth, the court flatly rejected the defendant’s

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188But see United States v. Hudspeth, 518 F.3d 954, 961 (8th Cir. 2008) (en banc) (citations omitted):
The Fourth Amendment does not prohibit warrantless searches and seizures, nor does the Fourth Amendment always prohibit warrantless searches and seizures when the defendant previously objected to the search and seizure. “What ... is assured by the Fourth Amendment itself, however, is ... no such search will occur that is ‘unreasonable.’” As the Supreme Court explains, “it is reasonable to recognize that any of the co-inhabitants has the right to permit the inspection in his [or her] own right.” And the absent, expressly objecting co-inhabitant has “assumed the risk” that another co-inhabitant “might permit the common area to be searched.”

Id.

189See id. at 961-62 (Melloy, J., dissenting) (arguing that the search that occurred in Hudspeth was “unreasonable,” and therefore invalid).

190At oral argument on the en banc rehearing, Hudspeth argued that Randolph’s “physical presence” requirement is satisfied (i.e., “is of no constitutional significance”) where the person whom the evidence is being used against has refused consent to search, even where such refusal occurs away from the property. Hudspeth supported this argument by noting that in Randolph, the Court reasoned that “there is no common understanding that one co-tenant has the right to prevail over the express wishes of another.” See United States v. Hudspeth, Eighth Circuit Oral Argument Database, No. 05-3316, at 13:20-15:20 (May 11, 2007), http://www.ca8.uscourts.gov/oralargs/oaFrame.html (follow “case number” hyperlink on left-hand menu; input case number in search box; follow search button; click on hyperlink that refers to case date).

191See Frazier, 394 U.S. at 740 (upholding warrantless consent search of shared duffle bag under the assumption of risk theory). See also McCall, supra note 22, at 592.

192See supra discussion Part IV.B. (noting Yancoskie and Groves as recent examples).


194See id. at *5. In Reed, the defendant refused consent to search his home while detained at the police station. The officers, however, then proceeded to Reed’s home and obtained the consent of Reed’s co-occupant. Id.
argument that Randolph applied, reasoning that Randolph's physical presence requirement is too integral to be ignored.\textsuperscript{95}

Judge Riley advanced a similar view in each of his Hudspeth opinions.\textsuperscript{196} According to Judge Riley, if the Randolph Court had desired to adopt the broader rule espoused by the defendant, the Court would not have continuously used the phrase "physically present."\textsuperscript{197} Instead, the Court would have invalidated police entry without a warrant whenever the suspect refuses consent to search his residence, regardless of the suspect's precise location at the time of refusal.\textsuperscript{198} According to Judge Riley, the panel's interpretation "makes the 'physically present and objecting' language in Randolph mere surplusage."\textsuperscript{199}

In the only other published opinion explicitly extending Randolph, the Pennsylvania Court of Common Pleas extended Randolph to invalidate a search where the defendant, while showering, objected to a search already underway pursuant to his wife's consent.

In Commonwealth v. Snow,\textsuperscript{200} police responded to a complaint from the defendant's wife that the defendant had been drinking. She stated that she was on her way home, as was defendant Snow. Two police officers arrived at the Snow residence at the same time as defendant and his wife, who arrived in separate vehicles. The officers spoke with Snow's wife in the front yard while Snow went directly into the house. The officers then obtained permission from Mrs. Snow to enter the house. Mrs. Snow opened the front door and led the police into the home.\textsuperscript{201} Once inside, the officers reached a closed bathroom door, where the defendant was showering. Defendant unequivocally voiced his objection to their warrantless presence and ordered the officers to leave.\textsuperscript{202} The officers responded by ordering the defendant to come out of the bathroom and threatening the defendant with serious bodily injury if he refused.\textsuperscript{203} Upon Snow's exiting the bathroom, the

\textsuperscript{95}See id. at *4-*6. Significantly, the Reed court declared:

The importance of this requirement that the objector be "at the door" is underscored by the care with which the [Randolph] Court crafted its opinion, referring always to one who "is present at the scene and expressly refuses to consent," "a second occupant physically present and refusing permission," "a fellow tenant [who] stood there saying, 'stay out,'" "a present and objecting co-tenant," "a physically present resident," and "a physically present inhabitant's express refusal of consent."

\textsuperscript{196}See United States v. Hudspeth, 459 F.3d 922, 932-33 (8th Cir. 2006) (Riley, J., dissenting).

\textsuperscript{197}Id. at 933.

\textsuperscript{198}Id.

\textsuperscript{199}Id.


\textsuperscript{201}See id. at 267-68.

\textsuperscript{202}See id. at 269, 271 ("It is uncontested here that defendant unequivocally told the police to get the 'F... out of his house. Findings of fact, March 8, 2006, ¶11.").

\textsuperscript{203}See id. at 272-73 n.6.
police forced Snow to perform field sobriety tests in the home and arrested him for driving under the influence.204

Recognizing that "[t]he facts in Randolph differ from the facts of [Snow] because defendant here was present in the house when the police received consent to enter their home,"205 the court nonetheless declared that "the rationale in Randolph is equally applicable here."206 Extending Randolph’s physical presence requirement beyond the front door to include the home’s interior, the court concluded that "the warrantless presence of police in a home must cease when a physically present co-occupant refuses to give police consent to remain . . . ."207 Seizing upon Randolph’s "widely shared social expectations" rationale, the court reasoned:

[I]f a co-tenant at the entrance of a house has a widely shared social expectation that his objection to another party’s entry is reasonable and should be obeyed, then it follows that a bathing co-tenant who raises this same objection, even if it is raised after the initial warrantless entry is likewise reasonable and should be honored. A reasonable guest, even if he or she were already in a house, would certainly not feel any more reason to stay in the house if a co-tenant ordered the guest out while bathing, than if the same co-tenant denied entry to the guest at the front door . . . . Defendant’s objection from the bathroom in this case should therefore hold the same weight as a person raising this objection at the front door.209

Notably, if the Supreme Court in future third-party consent cases chooses to extend its "widely shared social expectations" rationale over the alternative assumption of risk theory, cases like Snow would arguably justify the expansion of Randolph’s physical presence requirement.

VII. PROPOSAL

As recent post-Randolph decisions illustrate, because most courts are reluctant to examine police officer subjective motivations in Fourth Amendment cases, Randolph is not the watershed case that Chief Justice Roberts feared. Indeed, post-Randolph courts have gone the opposite direction, developing a variety of methods for rejecting potential Randolph claims.

204Id. at 264.
205Id. at 269.
206Id.
207Id.
208See id. at 272 ("[I]f a co-tenant, while showering, demands to be left alone, no recognized authority in law or social practice exists for another co-tenant to allow unwelcome third parties to order the non-consenting co-tenant out of the bathroom. The warrantless presence of the police became unreasonable at this point for Fourth Amendment purposes.").
209Id. at 272. See also State v. Udell, 141 P.3d 612 (Utah Ct. App. 2006) (granting defendant’s motion to suppress under Randolph where the defendant’s wife consented to a warrantless search while speaking with officers in the front yard, but where defendant promptly and explicitly objected when officers entered the home pursuant to that consent).
In light of the lower courts' narrow reading of *Randolph*, the Supreme Court must either allow *Randolph* to die a slow death of narrow interpretation, or give teeth to *Randolph*'s protections through a broader interpretation of its core requirements.\(^{210}\)

Despite recent criticisms of the consent doctrine,\(^{211}\) and despite arguments to the contrary,\(^{212}\) I argue that *Randolph* should remain a relatively narrow holding, but that it should be strengthened in cases of allegedly disputed consent. This Part proposes a limited solution that would strengthen *Randolph*'s protections for defendants who claim to have objected to a co-tenant's consent, while simultaneously foreclosing undue inquiry into police officer motivations.

### A. The Case for Protecting Police Officer Motivations

Most significantly, my proposal would curtail undue scrutiny of police officer motivations, a possibility that troubled Chief Judge Roberts in *Randolph* and would undermine recent Fourth Amendment jurisprudence—most notably *Whren v. United States*.\(^{213}\)

In *Whren*, the Court held that as long as probable cause exists to conduct an automobile search, it would not consider an officer’s subjective motivations under Fourth Amendment analysis, even if the defendant’s race were the sole motivating factor behind the officer’s conduct.\(^{214}\) In *Whren*, plainclothed officers were patrolling a known high drug area in an unmarked car. They passed a vehicle occupied by four young black men. At this time, Officer Soto had probable cause to believe that various provisions of the traffic code had been violated.\(^{215}\) When Officer Soto made a U-turn in an attempt to head back toward the vehicle, the vehicle turned suddenly to its right without signaling and sped off at an “unreasonable” speed. Officer Soto then arrested the occupants and retrieved illegal drugs from the vehicle.

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\(^{210}\) See McCall, *supra* note 22, at 590 (“The rule announced by the [*Randolph*] majority is murky and will probably require further refinement.”).

\(^{211}\) See, e.g., George C. Thomas III, *Terrorism, Race and a New Approach to Consent Searches*, 73 Miss. L.J. 525, 541-42 (2003) (“Consent is an acid that has eaten away the Fourth Amendment. It allows police to ‘fish’ for evidence without any suspicion whatsoever. One police detective said that as many as ninety-eight percent of the searches he conducts are consent searches . . . . Almost everyone gives consent when asked by police, and, surprisingly, a large percentage of guilty suspects consent to the very search that will turn up evidence against them.”).

\(^{212}\) See Williams, *supra* note 30, at 958-68 (arguing that courts should adopt a “broad” interpretation of *Randolph*, where any express refusal of consent prior to the search would suffice, and where the defendant’s physical proximity at the time of the co-occupant’s consent would be irrelevant).


\(^{214}\) See id. See also Michael L. Birzer & Gwynne Harris Birzer, *Race Matters: A Critical Look at Racial Profiling. It’s a Matter for the Courts*, 34 J. CRIM. JUST. 643, 648 (2006), available at http://www.sciencedirect.com (arguing that “the *Whren* decision allows police to use race as a basis for a stop while hiding behind the traffic violation, no matter how minor, as the pretext for the stop”).

\(^{215}\) Officers testified the truck had been stopped at a stop sign for an unusually long time of nearly twenty seconds. *Whren*, 517 U.S. at 808.
Petitioners challenged the legality of the stop and resulting seizure of the drugs. Before the Supreme Court, they argued that the stop had not been justified by probable cause to believe the petitioners were engaged in illegal drug-dealing activity and that the asserted reason for approaching the vehicle—i.e., to warn of traffic violations—was pretextual. Petitioners argued that, because probable cause is easy to establish under traffic laws, police might decide which motorists to stop based on the race of the car’s occupants. To avoid this danger, they argued, the Fourth Amendment test for traffic stops should not be whether probable cause exists to justify the stop, but rather whether a reasonable police officer would have made the stop for the stated reasons. Had the Court accepted the argument, petitioners’ proposed rule would have enabled courts to probe the reasonableness of the officer’s subjective motivations.

Dismissing the claim, the Court held that the constitutional reasonableness of traffic stops does not depend on the actual motivations of the arresting officers. Citing a long line of cases, the Court concluded:

We think these cases foreclose any argument that the constitutional reasonableness of traffic stops depends on the actual motivations of the individual officers involved. We of course agree . . . that the Constitution prohibits selective enforcement of the law based on considerations such as race. But the constitutional basis for objecting to intentionally discriminatory application of laws is the Equal Protection Clause, not the Fourth Amendment. Subjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis.

Along with the Court’s refusal to scrutinize police officer motivations in Fourth Amendment jurisprudence, there are several practical and theoretical problems with

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216 Id. at 810.
217 See id. (arguing that the use of automobiles is so heavily and minutely regulated that total compliance with traffic and safety rules is nearly impossible).
218 Id.
219 Id.
220 Id. at 813.
221 Id. at 812-13 (citing United States v. Villamonte-Marquez, 462 U.S. 579, 584 (1983) (holding that an otherwise valid warrantless boarding of a vessel by customs officials was not rendered invalid “because the customs officers were accompanied by a Louisiana state policeman, and were following an informant’s tip that a vessel in the ship channel was thought to be carrying marihuana,” and dismissing the argument that an ulterior motive might invalidate the search); United States v. Robinson, 414 U.S. 218, 221 n.1 (1973) (holding that a traffic-violation arrest would not be rendered invalid by the fact that it was “a mere pretext for a narcotics search”); Scott v. United States, 436 U.S. 128, 138 (1978) (in wiretapping case, Court declared that “[s]ubjective intent alone . . . does not make otherwise lawful conduct illegal or unconstitutional”).
222 Id. at 813.
conditioning the outcome of a suppression motion on officer motivations. First, to obtain the benefit of Randolph, courts require evidence consisting of something more than the defendant's own testimony indicating that the police did, in fact, remove the potential objector for the sake of avoiding a consent refusal. However, it is extremely difficult, if not impossible, for a defendant to divine the secret motivations of the police without the police volunteering that information. As commentators have noted, a dishonest officer has a strong incentive to lie if his subjective beliefs will ultimately control the admissibility of the evidence, as in the typical Randolph claim. Further, even the most truthful officer may be unable to testify with certainty regarding his thought processes on an earlier occasion.

Second, courts are understandably reluctant to infer ill motive on the part of the police, and a judge forced to determine a police officer's motivations is predisposed toward giving the officer the benefit of the doubt.

Third, the cost of examining officer motivations is substantial because, by simply engaging in the dispute, the integrity of the police and the judiciary suffer. As Professor David Cole has argued, people's views about the legitimacy of authority "are strongly connected to the judgments of the fairness of the procedures through which authorities make decisions," and probing inquiries into those procedures may create negative impressions of law enforcement. This, in turn, may make certain individuals less likely to play by the rules. As such, "the catch is not worth the

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223 I do not attempt to engage in a comprehensive discussion of the merits of subjective versus objective standards of criminal procedure, as this endeavor is beyond the scope of this article. For an overview of this debate, see Dressler & Michaels, supra note 4 at 38-40.

224 See McClelland v. State, 155 P.3d 1013, 1019 (Wyo. 2007) (rejecting defendant's contention that he was separated from individual who consented to the search so that his likely objection to the search would not be heard, the court reasoned that "no such facts appear in this record," that instead defendant "was arrested . . . because [police] had probable cause to believe that he had committed a felony," and that "[t]he record is clear that they wanted to separate [defendant and consenter] so that [they] could not . . . conspire to tell consistent stories").

225 See Birzer & Birzer, supra note 214, at 648 ("While it is true that in a general sense, a person often intends the consequences of his/her actions, it is virtually impossible to determine by any objectivity what a person is thinking inside of his/her head. This has always been the problem with proving any form of racial discrimination . . . .").

226 See Dressler & Michaels, supra note 4 at 39-40.

227 Id.

228 See, e.g., Stansbury v. California, 511 U.S. 318, 319 (1994) (holding that in determining whether a subject is "in custody," courts are not to consider an "officer's subjective and undisclosed view concerning whether the person being interrogated is a suspect."); Horton v. California, 496 U.S. 128, 138 (1990) (declaring that "evenhanded law enforcement is best achieved by the application of objective standards of conduct, rather than standards that depend upon the subjective state of mind of the officer").

229 See Strauss, supra note 8 at 244-45.


231 See id.
trouble of the hunt when courts set out to bag the secret motivations of policemen.\textsuperscript{232}

Finally, today's Fourth Amendment jurisprudence is grounded in objective "reasonableness,"\textsuperscript{233} making objective standards most appropriate. Rodriguez, for example, held that the Fourth Amendment's "reasonableness" requirement does not "require[] that the government agent always be correct in his or her factual determinations," but rather "that they always be reasonable."\textsuperscript{234} This makes sense. When a warrantless search is conducted pursuant to a mistake of fact, the officer's actions are truly inadvertent and consequently not unreasonable. And because police often confront ambiguous situations when executing their duties, courts must allow room for honest mistakes.\textsuperscript{235} An objective reasonableness standard provides this necessary wiggle room.\textsuperscript{236}


\textsuperscript{233}See, e.g., Daniel R. Williams, \textit{Misplaced Angst: Another Look at Consent-Search Jurisprudence}, 82 Ind. L.J. 69, 75 (2007) ("Reasonableness, not voluntariness, is the touchstone of Fourth Amendment jurisprudence. Reasonableness, in practice if not in words, has always been the touchstone of Fourth Amendment analysis."). \textit{See also} Thomas, \textit{supra} note 211, at 529 (arguing that the Supreme Court's Fourth Amendment jurisprudence is unprincipled and instead balances the degree of intrusion against the need for the search). \textit{See also} Scott v. Harris, 127 S.Ct. 1769, 1777-78 (2007) ("Although respondent's attempt to craft an easy-to-apply legal test in the Fourth Amendment context is admirable, in the end we must still slosh our way through the factbound morass of 'reasonableness.' Whether or not [respondent's] actions constituted application of 'deadly force,' all that matters is whether Scott's actions were reasonable."); Illinois v. Rodriguez, 497 U.S. 177, 183-84 (1974) (noting that "[i]t)here are various elements . . . that can make a search of a person's house 'reasonable'—one of which is the consent of the person" with authority over the premises); Terry v. Ohio, 392 U.S. 1, 19 (1968) (declaring "the central inquiry under the Fourth Amendment" to be "the reasonableness in all the circumstances of the particular governmental invasion of a citizen's personal security"); Camara v. Mun. Ct., 387 U.S. 523 (1967) (invoking a balancing test to determine "reasonableness," under which the individual's and society's interests in administrative searches are weighed against one another).

\textsuperscript{234}Rodriguez, 497 U.S. at 185.

\textsuperscript{235}See Brinegar v. United States, 338 U.S. 160, 176 (1949) ("Because many situations which confront officers in the course of executing their duties are more or less ambiguous, room must be allowed for some mistakes on their part. But the mistakes must be those of reasonable men, acting on facts leading sensibly to their conclusions of probability. The rule of probable cause is a practical, nontechnical conception affording the best compromise that has been found for accommodating these often opposing interests. Requiring more would unduly hamper law enforcement. To allow less would be to leave law-abiding citizens at the mercy of the officers' whim or caprice.").

\textsuperscript{236}In this manner, "evenhanded law enforcement is best achieved by the application of objective standards of conduct, rather than standards that depend upon the subjective state of mind of the officer." Horton v. California, 496 U.S. 128, 138 (1990). But note that if the true inquiry in Fourth Amendment consent jurisprudence is the acceptability of methods of law enforcement, then it makes sense to inquire into the subjective motivations of law enforcement in order to more fully understand the reasons why an officer chooses to apply those particular methods in a given case.
B. Shifting Burden for Proving an Express Objection

In consent search cases, scrutiny of police officer motivations is problematic. However, a limited solution that would simultaneously strengthen Randolph’s express objection requirement while respecting Chief Judge Roberts’ concerns is possible. This specific proposal would strengthen Randolph’s protections in cases where the police are aware that the defendant is physically present at the time of consent, but where the dispute centers on the sufficiency of the defendant’s purported objection. As such, this proposal would impact category four of the five post-Randolph case categories identified in Part I above.

Under this particular proposal, the government would carry additional burdens in proving that the defendant did not, in fact, object to their warrantless search where the evidence is hotly disputed on this issue. In particular, in situations where a criminal defendant and at least one other witness claim that the defendant was present and objected to the consent request, but where the searching officers testify otherwise, the government would then be required to present more than the disputed officer testimony to defeat the defendant’s claim. If the defendant fails to present the second witness’s testimony, the burden would never shift to the government, and the Randolph claim would typically be denied. If the defendant is able to meet his initial burden, however, the burden would shift to the government to present evidence beyond the officers’ disputed testimony. If the government meets this burden, the Randolph claim would generally be rejected. If not, the claim would be upheld. Thus, this test would operate in a manner similar to established burden-shifting tests, such as the Batson v. Kentucky test used for assessing prima facie cases of discriminatory jury selection.\(^{237}\)

Because the government would carry additional evidentiary burdens in many future Randolph claims, this solution would have the likely effect of forcing law enforcement to record either by audio or video their residential consent requests. With the details of the exchange readily viewable and available for corroboration, it is highly doubtful that any party would fabricate the details of a given request. Such objective and reliable evidence would necessarily foreclose much of the inquiry into officer motivations in these disputed cases, thereby easing the concerns of the Randolph dissenters. On the flip side, because courts typically require a defendant to present evidence consisting of something more than the defendant’s own testimony to establish that the police did, in fact, remove the potential objector for the sake of avoiding a possible rejection,\(^{238}\) the routine videotaping of consent requests would provide defendants with a meaningful chance to meet that burden.\(^{239}\) In addition,


\(^{238}\)See, e.g., McClelland v. State, 155 P.3d 1013, 1019 (Wyo. 2007) (in rejecting defendant’s contention that he was separated from individual who consented to the search so that his likely objection to the search would not be heard, the court reasoned that “no such facts appear in this record,” that instead defendant “was arrested . . . because [police] had probable cause to believe that he had committed a felony,” and that “[t]he record is clear that they wanted to separate [defendant and consenter] so that [they] could not . . . conspire to tell consistent stories.”).

\(^{239}\)See Malcolm A. Heinicke, America’s Warrantless Home Videos: An Analysis of the Fourth Amendment Implications Raised When the Police Videotape Searches, 32 BEVERLY HeinOnline  --  56 Clev. St. L. Rev.  700 2008

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audio and video evidence is steadily gaining approval with the current Court, making its widespread application less problematic than one might conceive.\(^{240}\)

In addition to the more widespread use of objective audio or video evidence, this solution would have four primary advantages. First, by giving the defendant the benefit of the doubt in a "he said, she said" \textit{Randolph} situation, this proposal would preserve the true spirit of the \textit{Randolph} ruling—to respect the right of a physically present defendant to refuse consent.

Second, this solution would comport with the current practice of requiring the government, rather than the defendant, to prove exceptions to the warrant requirement. The initial presumption in Fourth Amendment analysis is that warrantless searches are per se unreasonable, and as such, the government generally bears the burden of proving exceptions to the warrant requirement.\(^{241}\) For example, courts place the burden of proving an exigency on the government.\(^{242}\)

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\(^{240}\) A recent Supreme Court case illustrates the Court's willingness to rely on video evidence in Fourth Amendment analysis. In \textit{Scott v. Harris}, 127 S.Ct. 1769 (2007), the Supreme Court overturned the Eleventh Circuit's refusal to grant qualified immunity to a police officer who ended a high-speed chase by ramming the suspect's vehicle from behind. In reaching this result, the Court focused on the disparity between the Eleventh Circuit's statement of facts, and the video evidence of the chase itself. The Court first noted that, in qualified immunity cases decided at the summary judgment stage, courts usually adopt the plaintiff's version of the facts (as the Eleventh Circuit did here). \textit{Id.} at 1775. However, because the video contradicted the plaintiff's version of the facts in many respects, the Court chose to depart from this typical practice. \textit{Id.} The Court declared: "There is, however, an added wrinkle in this case: existence in the record of a videotape capturing the events in question \ldots{} The videotape quite clearly contradicts the version of the story told by respondent and adopted by the Court of Appeals." \textit{Id.} After noting several instances in which the video contradicted the plaintiff's story, the Court concluded:

When opposing parties tell two different stories, one of which is blatantly contradicted by the record, so that no reasonable jury could believe it, a court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment. That was the case here with regard to the factual issue whether respondent was driving in such fashion as to endanger human life. Respondent's version of events is so utterly discredited by the record that no reasonable jury could have believed him. The Court of Appeals should not have relied on such visible fiction; it should have viewed the facts in the light depicted by the videotape.

\textit{Id.} at 1776. Notably, the Court included digital access to the videotaped evidence within the opinion itself. \textit{See id.} at 1775 n.5 (containing a website address where the video can be accessed and viewed).

\(^{241}\) \textit{See Arkansas v. Sanders}, 442 U.S. 753, 759-60 (1979) (quoting United States v. Jeffers, 342 U.S. 48, 51 (1951)) ("Because each exception to the warrant requirement invariably impinges to some extent on the protective purpose of the Fourth Amendment, the few situations in which a search may be conducted in the absence of a warrant have been carefully delineated and 'the burden is on those seeking the exemption to show the need for it.'").

\(^{242}\) \textit{See, e.g., United States v. Howard}, 106 F.3d 70, 74 (5th Cir. 1997) ("The Government bears the burden of demonstrating exigent circumstances existed.").
party consent cases, the government has the burden of proving common authority.\textsuperscript{243} Placing this burden on the government makes sense. If an officer chooses not to take advantage of the preferred means of conducting a search by failing to obtain a search warrant,\textsuperscript{244} prosecutors should later account for the officer’s actions by providing proof that would justify disregarding that requirement.

Third, unlike other recent proposals for strengthening \textit{Randolph}'s protections,\textsuperscript{245} this proposal works within the existing \textit{Matlock-Randolph} framework. By working within the existing framework, this specific proposal would respect \textit{Randolph}'s decision to affirm \textit{Matlock} and avoid substantial change from prior precedent.\textsuperscript{246}

A final advantage of a proposal that would avoid overruling \textit{Matlock} and \textit{Randolph} is its consistency with the assumption of risk theory underlying those cases.\textsuperscript{247} As noted,\textsuperscript{248} \textit{Randolph}'s bright-line rule is ultimately grounded in the

\textsuperscript{243}See United States v. Matlock, 415 U.S. 164, 172 n.7 (1990) (“[C]ommon authority ... rests ‘on mutual use of the property by persons generally having joint access or control for most purposes . . .’ ” The burden of establishing that common authority rests upon the State).

\textsuperscript{244}In recent years, commentators have argued that the “warrant requirement” has become more of a “preference” for warrants.

\textsuperscript{245}With respect to the physical presence requirement, for example, one could argue that rather than assigning criminal defendants the extremely difficult burden of proving that officers intentionally avoided a \textit{Randolph} situation through inappropriate removal from the scene, the Court should simply require officers to seek the consent of any occupant actually located within the home’s curtilage at the time of request. This proposal would have two primary advantages. First, by tying \textit{Randolph}'s physical presence requirement to established Supreme Court jurisprudence extending the home’s heightened Fourth Amendment protections to the curtilage, this proposal would ratify the personal nature of Fourth Amendment rights and would preserve the special protections afforded the home in Fourth Amendment jurisprudence. Second, this proposal would not unduly burden law enforcement, as it would merely require officers to inquire as to whether any occupants are located on the premises before making a consent request. Such a proposal, however, flatly contradicts \textit{Randolph}'s statement that police need not “take affirmative steps to find a potentially objecting co-tenant.” Otherwise, “every co-tenant consent case would turn into a test about the adequacy of the police’s efforts to consult with a potential objector.” Georgia v. \textit{Randolph}, 547 U.S. 103, 122 (2006).

\textsuperscript{246}In leaving \textit{Matlock} intact, the Court seemed expressly satisfied, stating, “[t]his is the line we draw, and we think the formalism is justified,” and noting that “there is practical value in the simple clarity of complementary rules.” \textit{Id}.

\textsuperscript{247}But there is a rather strong counter-argument here. Arguably, an occupant’s ability to control the premises is not subordinated to his joint occupant when the occupant remains on the premises and is capable of objecting to access by others. \textit{See} State v. \textit{Leach}, 782 P.2d 1035, 1038-40 (Wash. 1989) (en banc) (adopting this argument); Black, \textit{supra} note 111, at 333 (“The risk assumed by an absent occupant of shared premises does not exist when he is present. By sharing property with another, a person invites a dilution of his privacy . . . . However, when present, a person has every right and every capability to withstand an invasion of her privacy. It should logically follow that a person should have the same ability when asserting her constitutionally protected rights against warrantless police searches.”). In other words, while it is reasonable for the law to presume that an individual has assumed the risk that a co-tenant will permit others to enter during his absence, when that co-tenant is actually present, it is not reasonable to imply that he has assumed such risk. \textit{See Leach}, 782 P.2d 1035 at 1039. Indeed, this is precisely the reasoning underlying the \textit{Randolph} decision, which
assumption of risk doctrine, and since the late 1960s, this doctrine has carried the
day in Fourth Amendment consent jurisprudence. Reverting back to the individual
rights/agency approach would only confuse Fourth Amendment doctrine, thereby
making law enforcement more difficult.

The assumption of risk approach is not only consistent with prior Supreme Court
precedent and, at least in part, with the Randolph majority, but also with the views of
Chief Justice Roberts and Justice Scalia. In his Randolph dissent, in which Justice
Scalia joined, Chief Justice Roberts declared:

The rule the majority fashions does not implement the high office of the
Fourth Amendment to protect privacy, but instead provides protection on
a random and happenstance basis, protecting, for example, a co-occupant
who happens to be at the front door when the other occupant consents to a
search [where the assumption of risk doctrine would presumably not apply], but not one napping or watching television in the next room
[where the assumption of risk doctrine would apply]. And the cost of
affording such random protection is great, as demonstrated by the
recurring cases in which abused spouses seek to authorize police entry
into a home they share with a nonconsenting abuser.

The correct approach to the question presented is clearly mapped out in
our precedents: The Fourth Amendment protects privacy. If an individual
shares information, papers, or places with another, he assumes the risk
that the other person will in turn share access to that information or those
papers or places with the government.

declared 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.” See Randolph, 547 U.S. at 114 (“Since the co-tenant
wishing to open the door to a third party has no recognized authority in law or social practice
to prevail over a present and objecting co-tenant, his disputed invitation, without more, gives a
police officer no better claim to reasonableness in entering than the officer would have in the
absence of any consent at all.”). See also Lloyd L. Weinreb, Generalities of the Fourth
Amendment, 42 U. Chi. L. Rev. 47, 63 (1974). While a co-inhabitant can be said to “assume
the risk” that his co-tenant will grant the police authority to consent to a search of their shared
premises in his absence, this risk only extends to co-tenants that are not present at the time of
consent or who have already been permisibly removed from the scene. See Randolph v.

See supra notes 191 and 192 and accompanying text.

See Frazier v. Cupp, 394 U.S. 731, 740 (1969) (upholding warrantless consent search of
shared duffle bag under the assumption of risk theory); see also McCall, supra note 22, at 592.

The Randolph majority declared that “it would needlessly limit the capacity of the
police to respond to ostensibly legitimate opportunities in the field if we were to hold that... police [must] take affirmative steps to find a potentially objecting co-tenant before acting on
the permission they had already received.” Randolph, 547 U.S. at 122. Otherwise, “every co-
tenant consent case would turn into a test about the adequacy of the police’s efforts to consult
with a potential objector.” Id. Such rhetoric suggests that the Court is more concerned with
expedient law enforcement than with greatly expanding the scope of Fourth Amendment
protections.

Id. at 128 (Roberts, C. J., dissenting) (emphasis added).
While the assumption of risk theory is sound, the theory should only be applied to actual instances of non-disputed consent. The flaw in Chief Justice Roberts’ approach is that it would potentially expand the assumption of risk theory beyond its justifiable ends. Arguably, an occupant’s ability to control shared premises is not subordinated to his joint occupant when the occupant remains on the premises and is capable of objecting to access by others. While it is reasonable to presume that an individual has assumed the risk that a co-tenant will permit others to enter during his absence, when that co-tenant is actually present, it no longer becomes reasonable to infer such an assumption. This very rationale underlies the majority opinion in Randolph, which declares 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.” In short, while a tenant can be said to “assume the risk” that his co-tenant will consent to a search of their shared premises in his absence, this risk only extends to co-tenants who are not present at the time of consent or who have been permissibly removed from the scene.

VIII. CONCLUSION

Beginning in 1969 with Frazier v. Cupp and extending through early 2006, the Supreme Court followed a trend of expanding the scope of lawful warrantless consent searches and correspondingly limiting privacy rights under the Fourth Amendment. Most likely, Randolph will be remembered as a bump along the road toward an ever-expanding consent doctrine. Despite Chief Justice Roberts’ concerns, post-Randolph case law reveals that Randolph is not the watershed case its dissenters feared. Not a single post-Randolph case in the two years following Randolph has struck down an otherwise valid search on grounds of unjustifiable

252 See McCall, supra note 22, at 606 (arguing that Chief Justice Roberts’s reasoning would expand the “assumption of risk” theory to the point where it “decimates the Fourth Amendment protections” of the ninety percent of Americans who live with one or more other individuals, and that this expansion is based on the flawed premise that a present, objecting co-occupant surrenders his ability to object to a warrantless search merely by deciding to live with another person).

253 See State v. Leach, 782 P.2d 1035, 1038-40 (Wash. 1989) (en banc) (adopting this argument); Black, supra note 111, at 333 (“The risk assumed by an absent occupant of shared premises does not exist when he is present. By sharing property with another, a person invites a dilution of his privacy . . . . However, when present, a person has every right and every capability to withstand an invasion of her privacy. It should logically follow that a person should have the same ability when asserting her constitutionally protected rights against warrantless police searches.”).

254 See Leach, 782 P.2d at 1039.

255 See Randolph, 547 U.S. at 114 (“Since the co-tenant wishing to open the door to a third party has no recognized authority in law or social practice to prevail over a present and objecting co-tenant, his disputed invitation, without more, gives a police officer no better claim to reasonableness in entering than the officer would have in the absence of any consent at all.”); see also Weinreb, supra note 247, at 63.


257 See Fiske, supra note 110, at 738-39.
pretext. Only a handful of cases have explicitly extended the *Randolph* rule, and the leading case in this category was quickly vacated and overruled. Because post-*Randolph* courts have developed multiple means of rejecting an otherwise legitimate *Randolph* claim, the Court must now consider whether to allow *Randolph* to die a slow death of narrow interpretation. To prevent the further erosion of *Randolph* without overruling *Matlock* and without deviating from the assumption of risk doctrine, the Court should strengthen *Randolph*’s express objection requirement while simultaneously preventing unnecessary intrusion into officer motivations.
IX. APPENDIX A

In preparing this Article, the author carefully reviewed all post-\textit{Randolph} opinions published between March 2006 and March 2008 that provide more than a cursory discussion of the \textit{Randolph} claim. The following cases were included in the author's review:

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