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**THIRD PARTY CONSENT SEARCHES AFTER *GEORGIA V. RANDOLPH*: DUELING APPROACHES TO THE DUELING ROOMMATES**

*Renee E. Williams*\*

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INTRODUCTION

The Fourth Amendment to the United States Constitution protects individuals against unreasonable searches and seizures.<sup>1</sup> Generally, a search of

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a person's house conducted without a warrant is per se unreasonable under the Fourth Amendment.<sup>2</sup> There are, however, some specific exceptions to the warrant requirement. One of these exceptions accepts the validity of warrantless searches when an individual possessing authority gives law enforcement consent.<sup>3</sup> The doctrine of third party consent recognizes that, under certain circumstances, individuals other than the householder against whom evidence is sought may validly consent to a search of shared premises.

Recent developments in this area of law have established an additional exception: that a third party with common authority over a residence may consent to a police search that affects an absent co-occupant.<sup>4</sup> The exception for third party consent warrantless searches additionally extends to searches that are based on the consent of a co-occupant whom the police reasonably believe to have common authority over the premises, even if the co-occupant in fact has no such authority.<sup>5</sup> An interesting variation on the typical third party consent scenario involves the case of "dueling roommates," in which one resident of a shared premises (the "third party") consents to a search, while another resident (the "primary party" at whom the search is directed) is present, and objects. This presents the question: Does the constitution permit one co-occupant to consent to the warrantless search of a shared residence over the express refusal of another co-occupant?

Until recently, Supreme Court jurisprudence in the area of third party consent searches followed a consistent path of restricting individual privacy rights while broadening the scope of lawful police searches.<sup>6</sup> The seminal cases in this area of the law, *United States v. Matlock*<sup>7</sup> and *Illinois v. Rodriguez*,<sup>8</sup> both upheld the validity of searches based on third party consent, relying on the rationales of common authority and assumption of risk.<sup>9</sup> As cases involving dueling roommates began to arise, however, the lower courts split in determining whether the third party's consent or the primary party's refusal prevailed.<sup>10</sup> When the Supreme Court granted certiorari to *Georgia v. Randolph*,<sup>11</sup> a case in which a wife gave police consent to search the marital

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<sup>1</sup> U.S. CONST. amend. IV.

<sup>2</sup> See, e.g., *Katz v. United States*, 389 U.S. 347, 357 (1967).

<sup>3</sup> *Georgia v. Randolph*, 126 S. Ct. 1515, 1520 (2006) (citing *Illinois v. Rodriguez*, 497 U.S. 177, 181 (1990)).

<sup>4</sup> See *infra* Part I.A (summarizing the holding and reasoning of *United States v. Matlock*, 415 U.S. 164 (1974)).

<sup>5</sup> See *infra* Part I.B (summarizing the holding and reasoning of *Illinois v. Rodriguez*, 497 U.S. 177 (1990)).

<sup>6</sup> See *infra* Part I.C (discussing the state of third party consent law prior to *Randolph*).

<sup>7</sup> 415 U.S. 164 (1974).

<sup>8</sup> 497 U.S. 177 (1990).

<sup>9</sup> See *infra* Part I.A-B.

<sup>10</sup> See *infra* Part I.C.

<sup>11</sup> 544 U.S. 973 (2005) (granting certiorari).

home over her husband's express and contemporaneous refusal to give such consent, the weight of authority suggested that the co-occupant's consent would render the search reasonable as to the objecting co-occupant. The Court, however, did not uphold the validity of the co-occupant's consent, but rather held that if a warrantless search is conducted on the basis of consent given by one occupant over the express refusal of consent by a physically present co-occupant, then the search is unreasonable as to the objecting co-occupant.<sup>12</sup>

The *Randolph* decision thus appeared to constitute a narrow exception to the general rule that the consent of a third party with apparent authority over the premises suffices to validate a warrantless search. Following the Supreme Court's decision, however, ambiguity arose as to *Randolph*'s scope and the circumstances in which one occupant's refusal would trump another occupant's consent. Lower court decisions interpreting *Randolph* have revealed both a narrow and a broad view of the *Randolph* holding. Under the narrow view, the defendant must be physically present and expressly refuse consent at the time police obtain consent from his co-occupant in order for *Randolph*'s rule that his refusal trumps his co-occupant's consent to apply.<sup>13</sup> In contrast, the broad view requires only that the defendant expressly refuse consent prior to the search; the defendant's physical proximity at the time of the co-occupant's consent is irrelevant.<sup>14</sup>

This recently emerging disparity in the scope of the *Randolph* holding has significant constitutional implications. If the narrow view is correct, then *Randolph* is likely to have only a limited effect on Fourth Amendment jurisprudence.<sup>15</sup> If, however, the broad view prevails, then *Randolph* may have the potential to become a greater guardian for Fourth Amendment home privacy interests than many originally believed. After analyzing both the narrow and broad views of the *Randolph* rule with a focus on existing case law and the principles underlying the Fourth Amendment, this Note concludes that following the broad interpretation of *Randolph* is the best legal approach to the problem of dueling roommates.

Part I of this Note outlines the Supreme Court jurisprudence in the area of third party consent searches. It discusses the seminal cases of *United States v. Matlock* and *Illinois v. Rodriguez* and summarizes the state of the law prior to *Georgia v. Randolph*, including the split among the courts with respect to the dueling roommate situation. Following this background, Part II examines the Supreme Court's treatment of *Georgia v. Randolph* by analyzing both the majority and dissenting opinions of the case. Part III sets forth the narrow and

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<sup>12</sup> *Georgia v. Randolph*, 126 S. Ct. 1515, 1526 (2006).

<sup>13</sup> See *infra* Part III.A (describing the narrow interpretation of *Randolph*).

<sup>14</sup> See *infra* Part III.B (describing the broad interpretation of *Randolph*).

<sup>15</sup> See, e.g., Andrew Fiske, *Disputed-Consent Searches: An Uncharacteristic Step Toward Reinforcing Defendants' Privacy Rights*, 84 DENV. U. L. REV. 721, 736 (2006) (discussing *Randolph*'s limited effect on Fourth Amendment law).

broad views of *Randolph* and discusses the rationales and arguments behind each. Part IV.A then argues that the broad view is the better interpretation of the *Randolph* decision for four reasons. First, the broad view is consistent with the reasoning employed by the Supreme Court in determining whether third party consent is constitutionally sufficient. Second, the broad view leaves the important precedents of *Matlock* and *Rodriguez* undisturbed. Third, the broad view is consistent with several lower court opinions subsequent to *Georgia v. Randolph* which have analyzed the dueling roommate problem. Fourth, the broad interpretation serves the general constitutional principles underlying the Fourth Amendment. Finally, Part IV.B sets out a proposal to qualify the broad view of *Randolph* in a way that will align the doctrine more closely with the values that the Fourth Amendment seeks to implement.

### I. THE HISTORY OF THIRD PARTY CONSENT SEARCHES

Until recently, the law surrounding third party consent searches under the Fourth Amendment had been primarily governed by two U.S. Supreme Court cases.<sup>16</sup> The first is *United States v. Matlock*,<sup>17</sup> which came in the wake of the Court's reaffirmation of the principle that a search of property without a warrant or probable cause is valid under the Fourth Amendment if proper consent is voluntarily given.<sup>18</sup> The second is *Illinois v. Rodriguez*,<sup>19</sup> which addressed an issue expressly reserved in *Matlock*.<sup>20</sup>

#### A. Actual Authority: *United States v. Matlock*

In *Matlock*, the Court faced the issue of whether a third party's voluntary consent to a police search of the defendant's house was "legally sufficient" to render the seized evidence admissible at the defendant's criminal trial.<sup>21</sup> There, police officers had arrested defendant *Matlock* in the front yard of his residence<sup>22</sup> and restrained him in a police squad car some distance away from

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<sup>16</sup> See Joseph D. Robinson, *Who's That Knocking at Your Door?: Third Party Consents to Police Entry*, FLA. B.J., Nov. 2003, at 24 (discussing primarily *Matlock* and *Rodriguez* in setting forth the legal background surrounding third party consents); Elizabeth A. Wright, *Third Party Consent Searches and the Fourth Amendment: Refusal, Consent, and Reasonableness*, 62 WASH. & LEE L. REV. 1841, 1852-57 (2005) (using primarily *Matlock* and *Rodriguez* to explain the requirements and justifications behind valid third party consent searches).

<sup>17</sup> 415 U.S. 164 (1974).

<sup>18</sup> See *Schneekloth v. Bustamonte*, 412 U.S. 218, 248 (1973) (holding that when the State attempts to justify a search on the basis of consent, the Fourth Amendment requires that it "demonstrate that the consent was in fact voluntarily given").

<sup>19</sup> 497 U.S. 177 (1990).

<sup>20</sup> *Id.* at 179.

<sup>21</sup> *United States v. Matlock*, 415 U.S. 164, 166 (1974).

<sup>22</sup> *Id.*

the home<sup>23</sup> where he lived with Mrs. Graff and her son.<sup>24</sup> Although the officers knew the defendant lived in the house, they did not ask him to consent to a search, and the defendant never refused to give consent prior to the search.<sup>25</sup> Instead, some of the officers approached the house and asked Mrs. Graff for her permission to search the house.<sup>26</sup> She voluntarily consented to a search of the home, including the bedroom she claimed to jointly occupy with the defendant.<sup>27</sup> Following the search, which revealed a large amount of cash in the bedroom closet, the defendant was indicted for robbery and filed a motion to suppress the seized evidence.<sup>28</sup> The district court suppressed the evidence, holding that Mrs. Graff did not have actual authority to consent to the search, and the court of appeals affirmed.<sup>29</sup>

In its opinion, the Supreme Court stated the general proposition that “the voluntary consent of any joint occupant of a residence to search the premises jointly occupied is valid against the co-occupant.”<sup>30</sup> The Court further observed, in what is widely considered to be the central holding of *Matlock*,<sup>31</sup> that “the consent of one who possesses common authority over premises or effects is valid as against the absent, nonconsenting person with whom that authority is shared.”<sup>32</sup> In other words, when the State seeks to justify a warrantless search on the basis of consent, it may show that voluntary consent to search was obtained from a third party who possessed “common authority over or other sufficient relationship to the premises or effects sought to be inspected.”<sup>33</sup> Thus, the Court found Mrs. Graff’s voluntary consent legally sufficient to warrant the admission of the evidence seized from her son’s bedroom;<sup>34</sup> Mrs. Graff had actual authority to consent to the search.<sup>35</sup>

*Matlock* established two important justifications for allowing searches based on third party consent: common authority and assumption of risk.<sup>36</sup> Common authority is based on persons’ joint use and control of property; it does not

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<sup>23</sup> *Id.* at 179 (Douglas, J., dissenting).

<sup>24</sup> *Id.* at 166.

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> *Id.* at 166-67. The police made additional seizures in the house but none of them were at issue before the Court. *Id.* at 167 n.1.

<sup>29</sup> *Id.* at 167-69 (discussing the opinions of both lower courts).

<sup>30</sup> *Id.* at 169.

<sup>31</sup> See Wright, *supra* note 16, at 1853.

<sup>32</sup> *Matlock*, 415 U.S. at 170.

<sup>33</sup> *Id.* at 171.

<sup>34</sup> *Id.* at 177.

<sup>35</sup> See *id.* & n.14.

<sup>36</sup> See *id.* at 170-71; Wright, *supra* note 16, at 1857 (citing Sharon E. Abrams, *Third-Party Consent Searches, the Supreme Court, and the Fourth Amendment*, 75 J. CRIM. L. & CRIMINOLOGY 963, 966-76 (1984)).

arise from a third party's mere property interest in the premises.<sup>37</sup> When common authority over an area exists, it is reasonable to recognize that any one co-occupant has the independent right to permit a search of the shared areas.<sup>38</sup> Assumption of risk, on the other hand, signifies that when co-occupants share a common space, each one accepts the possibility that one of his co-occupants may permit the common area to be searched.<sup>39</sup> The two rationales are closely intertwined; assumption of risk may be viewed as part of the larger common authority rationale.<sup>40</sup> As one commentator put it, "[t]he answer to the question, 'why has one joint occupant *assumed the risk* that another joint occupant might consent to a search?' is 'because each joint occupant has *common authority* to consent to a search.'"<sup>41</sup> Thus, *Matlock* established important principles governing third party consent searches under the Fourth Amendment.

B. *Apparent Authority: Illinois v. Rodriguez*

*Illinois v. Rodriguez*<sup>42</sup> presented an issue the Supreme Court had expressly reserved in *Matlock*,<sup>43</sup> namely, whether a third party must have actual authority to validly consent to a warrantless search, or whether apparent authority is sufficient.<sup>44</sup> In answering this question, the Court handed down another foundational opinion in the area of third party consent jurisprudence. In *Rodriguez*, Gail Fischer told police officers that she had been assaulted by her boyfriend, defendant Rodriguez, earlier that day in an apartment.<sup>45</sup> Fischer agreed to lead police to the apartment and unlock the door with her key so that the officers could arrest defendant.<sup>46</sup> Fischer repeatedly referred to the apartment as "our" apartment and indicated that she had personal belongings there.<sup>47</sup> When the police officers and Fischer arrived at the apartment, Fischer unlocked the door with her key and gave the officers her consent to enter.<sup>48</sup> The officers entered the apartment, arrested the defendant, and then also seized drugs and related drug paraphernalia.<sup>49</sup> Throughout the officers' entry and procession through the apartment, the defendant had been asleep in his

<sup>37</sup> *Matlock*, 415 U.S. at 171 n.7.

<sup>38</sup> *See id.*

<sup>39</sup> Wright, *supra* note 16, at 1857; *see Matlock*, 415 U.S. at 171 n.7.

<sup>40</sup> *See* Wright, *supra* note 16, at 1858.

<sup>41</sup> *Id.* (emphasis added).

<sup>42</sup> 497 U.S. 177 (1990).

<sup>43</sup> *Matlock*, 415 U.S. at 177 n.14.

<sup>44</sup> *Rodriguez*, 497 U.S. at 179.

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> *Id.* at 180.

<sup>49</sup> *Id.*

bedroom.<sup>50</sup> At trial, the defendant moved to suppress the drug evidence seized during the search, arguing that Fischer had no authority to consent to the officers' entry because she no longer lived in the apartment.<sup>51</sup> The Illinois trial court granted defendant's motion, finding that Fischer did not have common authority over the apartment at the time she consented to the entry.<sup>52</sup> The appellate court affirmed the trial court's decision.<sup>53</sup>

After briefly discussing the principle of common authority espoused in *Matlock*, the Supreme Court agreed, concluding that Fischer did not have common authority over the apartment at the time she consented to the entry.<sup>54</sup> Nevertheless, the Court also went on to consider the question of whether, even if a third party did not have common authority, and hence lacked actual authority to consent, the third party's consent could be valid if the police, at the time of entry, *reasonably believed* the party possessed common authority over the premises.<sup>55</sup> In its analysis, the Court focused on the "reasonableness" requirement of the Fourth Amendment, which demands not that the factual determinations made by government officials always be correct, but rather that they "always be reasonable."<sup>56</sup> So when police officers are forced to use their judgment in determining the factual question of whether a third party has authority to consent to a search of a residence, all the Fourth Amendment requires is that they make their determination reasonably.<sup>57</sup> Ultimately, the Supreme Court opted to remand the case for a determination of whether, based on the facts, the police officers reasonably believed that Fischer had authority to consent to a search of the apartment.<sup>58</sup>

Thus, *Rodriguez* established the principle that if law enforcement officers reasonably believe that a third party has common authority over the premises, and hence the authority to consent to a search, the third party's consent is valid despite the fact that he or she may not possess the *actual* authority to consent. This is known as the doctrine of "apparent authority."<sup>59</sup> *Rodriguez* therefore signified an expansion of the scope of third party consent as defined by *Matlock*. After *Rodriguez*, police officers can obtain legally sufficient consent not only from a third party who in fact has common authority over the

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<sup>50</sup> *Id.* One corollary of the fact that police found defendant Rodriguez asleep in the bedroom during the course of their search is that they never asked the defendant for his consent prior to the search and the defendant never explicitly refused consent.

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> *Id.* at 182.

<sup>55</sup> *See id.*

<sup>56</sup> *Id.* at 185.

<sup>57</sup> *Id.* at 186.

<sup>58</sup> *Id.* at 189.

<sup>59</sup> Wright, *supra* note 16, at 1854.

premises,<sup>60</sup> but also from a third party who reasonably appears to have common authority over the area to be searched.<sup>61</sup> Until recently, these two important Supreme Court decisions, *Matlock* in 1974 and *Rodriguez* in 1990, governed third party consent jurisprudence under the Fourth Amendment.

C. *The State of Third Party Consent Law Prior to Georgia v. Randolph*

The Supreme Court's third party consent jurisprudence placed significant limitations on defendants' Fourth Amendment privacy rights. *Matlock* extended the consent exception to the Fourth Amendment warrant requirement by recognizing the validity of searches with the voluntary consent of a third party who shares common authority over the premises.<sup>62</sup> *Rodriguez*, in holding that the consent exception extends even to searches with the consent of a co-occupant whom the police reasonably, but erroneously, believe to have common authority over the premises, went even further in expanding the scope of law enforcement's search authority.<sup>63</sup> Thus, prior to *Georgia v. Randolph*, the Supreme Court had established a trend of gradually restricting individual privacy rights under the Fourth Amendment, while at the same time expanding the scope of lawful police searches.<sup>64</sup> Recently, the Court had the opportunity to address the validity of third party consent in the context of two co-occupants, one consenting to a police search and the other expressly refusing consent. In light of the earlier third party consent cases and the Court's trend of eroding individual privacy rights, there appeared to be little doubt that, in the case of dueling roommates, the consent of one roommate would trump the express refusal of the other.<sup>65</sup>

Prior to the Supreme Court's decision in *Georgia v. Randolph*, lower courts were split on the issue of whether the refusal of one co-occupant could trump the consent of another co-occupant.<sup>66</sup> In particular, courts disagreed as to whether *Matlock* applied in those situations where the co-occupant at whom the search was directed was present and refused to consent to the search.<sup>67</sup> On one side of the debate, a long line of cases held that a co-occupant's consent to search would trump his co-occupant's refusal, even if the objecting party was present at the door and expressly refused to give consent.<sup>68</sup> This conclusion

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<sup>60</sup> See *United States v. Matlock*, 415 U.S. 164, 170 (1974).

<sup>61</sup> See *Rodriguez*, 497 U.S. at 188-89.

<sup>62</sup> *Matlock*, 415 U.S. at 170.

<sup>63</sup> See *Rodriguez*, 497 U.S. at 186.

<sup>64</sup> See Fiske, *supra* note 15, at 726 (summarizing several Supreme Court cases that addressed the consent exception to the warrant requirement under the Fourth Amendment).

<sup>65</sup> See, e.g., *id.*; Wright, *supra* note 16, at 1873.

<sup>66</sup> Wright, *supra* note 16, at 1862.

<sup>67</sup> See *id.* at 1852 n.73.

<sup>68</sup> See, e.g., *United States v. Hendrix*, 595 F.2d 883, 885 (D.C. Cir. 1979) (finding that the defendant's wife's consent validated search notwithstanding the defendant's presence and objection to the search); *United States v. Sumlin*, 567 F.2d 684, 687-88 (6th Cir. 1977)

was grounded in the principles of common authority and assumption of risk.<sup>69</sup> Many commentators were of the view that, in light of earlier third party consent cases, this side of the split would prevail when the issue reached the Supreme Court.<sup>70</sup>

Illustrative of this position is *United States v. Sumlin*,<sup>71</sup> a case in which the Sixth Circuit Court of Appeals held a co-occupant's consent to a search to be valid despite the defendant-occupant's refusal to consent prior to the search.<sup>72</sup> In *Sumlin*, police officers went to defendant Sumlin's apartment and arrested him for robbing a bank.<sup>73</sup> The officers then obtained the voluntary consent of the defendant's "female companion" to search the apartment.<sup>74</sup> The defendant contended that he initially refused to consent to the search of the apartment and that the police officers sought and obtained the third party's consent only after the defendant's refusal.<sup>75</sup> While the defendant argued that his initial refusal to consent distinguished his facts from those in *Matlock*, the court nonetheless held that the principles of *Matlock* should govern.<sup>76</sup> In *Matlock*, the *Sumlin* court reasoned, the third party's authority to consent to the search did not depend on the defendant's presence or absence,<sup>77</sup> or on the defendant's consent or refusal.<sup>78</sup> These two factors – the defendant's physical presence and express refusal – were immaterial because, under principles of common authority and assumption of risk, each co-occupant has independent authority to consent to a search of the shared premises, and each co-occupant assumes the risk that any of his co-occupants might allow common areas to be searched.<sup>79</sup> Thus, the *Sumlin* court held that because the third party had common authority over the apartment and her consent was voluntarily given, the search was constitutionally permissible, despite the defendant's initial refusal to consent.<sup>80</sup>

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(concluding that third party had authority to consent to a search despite defendant's explicit refusal to consent); *Primus v. State*, 813 N.E.2d 370, 376 (Ind. Ct. App. 2004) (holding that a primary party's refusal does not outweigh a third party's right to give consent to a search of commonly controlled premises).

<sup>69</sup> See *infra* note 79 and accompanying text.

<sup>70</sup> See, e.g., *Wright*, *supra* note 16, at 1874.

<sup>71</sup> 567 F.2d 684 (6th Cir. 1977).

<sup>72</sup> *Id.* at 688.

<sup>73</sup> *Id.* at 685-86.

<sup>74</sup> *Id.* at 686 (indicating that the third party had signed a consent form).

<sup>75</sup> *Id.* The Sixth Circuit assumed, for purposes of analysis, that the defendant's version of the facts was true. *Id.* at 687 n.8.

<sup>76</sup> *Id.* at 687-88.

<sup>77</sup> See *id.* at 687 (arriving at this conclusion based on the fact that the defendant in *Matlock* had just been arrested in the front yard of the residence when the third party's consent was obtained).

<sup>78</sup> See *id.* at 688.

<sup>79</sup> See *id.* at 687-88.

<sup>80</sup> See *id.* at 688.

On the other side of the debate, several cases held that a third party's consent was invalid in situations where there existed a present, objecting co-tenant.<sup>81</sup> Generally, these cases reasoned that despite accepted principles of common authority and assumption of risk permitting a co-tenant to consent to searches of the premises in his own right, it was nonetheless unreasonable to presume that a co-tenant assumes this risk when present at the shared premises.<sup>82</sup> This view was the minority position among courts that had considered the issue before *Georgia v. Randolph* reached the Supreme Court.<sup>83</sup> Illustrative of this position is *Silvia v. State*, a case in which the Supreme Court of Florida held that when a party is present and refuses to consent, his authority and non-consent controls over the consent of a co-tenant.<sup>84</sup> In *Silvia*, the defendant's co-occupant gave permission to police to enter and search the shared dwelling.<sup>85</sup> Defendant was present when the police arrived at the house and expressly objected to the search.<sup>86</sup> The court addressed "the validity of a warrantless search when two parties having joint dominion and control are present, and one consents but the other objects."<sup>87</sup> The court found the distinction between the presence and absence of the defendant to be dispositive and determined that in prior cases upholding the validity of a search based on third party consent, the defendant's absence had actually been a crucial factor.<sup>88</sup> The court reasoned further that an objecting party should not have his rights ignored simply because he shares his property with another person.<sup>89</sup> Thus, while a joint occupant has authority to consent to shared premises if the other party is absent, a present, objecting party whose property is the object of a search should have "controlling authority" to refuse to consent to a search.<sup>90</sup>

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<sup>81</sup> See, e.g., *Silvia v. State*, 344 So. 2d 559, 562 (Fla. 1977); *State v. Leach*, 782 P.2d 1035, 1040 (Wash. 1989).

<sup>82</sup> See, e.g., *Leach*, 782 P.2d at 1039; Lesley McCall, *Georgia v. Randolph: Whose Castle is it, Anyway?*, 41 U. RICH. L. REV. 589, 594-95 (2007) (discussing the four state supreme courts that had found third party consent invalid as to a present, objecting co-occupant prior to *Georgia v. Randolph*).

<sup>83</sup> McCall, *supra* note 82, at 595 (explaining that those few pre-*Randolph* cases holding a present, objecting co-tenant's refusal to give consent to trump the consent given by another co-tenant represented a clear minority position).

<sup>84</sup> *Silvia*, 344 So. 2d at 562.

<sup>85</sup> *Id.* at 560.

<sup>86</sup> *Id.*

<sup>87</sup> *Id.* at 562.

<sup>88</sup> See *id.*

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

II. *GEORGIA V. RANDOLPH*A. *Factual Background and Procedural History*

In 2005, the Supreme Court granted certiorari in *Georgia v. Randolph* to resolve the question of whether a warrantless entry and search of premises is lawful “with the permission of one occupant when the other . . . is present at the scene and expressly refuses to consent.”<sup>91</sup> The case arose out of bad blood between a married couple. Scott and Janet Randolph had recently separated when Janet contacted the police, complaining that her husband had taken their son away after a domestic dispute.<sup>92</sup> When police officers reached the house, Janet revealed the couple’s marital problems and informed them that her husband was a drug user.<sup>93</sup> Scott returned home shortly thereafter and explained that he had taken the child to a neighbor’s house because he feared that his wife might leave the country with the child.<sup>94</sup> Janet again accused Scott of using drugs and claimed that there was evidence of such drug use in the house.<sup>95</sup> A police officer then asked Scott for consent to search the home, which Scott “unequivocally refused.”<sup>96</sup> After this refusal, the officer asked Janet for permission to search, which she “readily gave.”<sup>97</sup> The search revealed evidence of drug use and led to Scott’s indictment for possession of cocaine.<sup>98</sup> Scott moved to suppress the evidence, arguing that his express refusal to consent to the search invalidated his wife’s consent, and thus that the warrantless search violated the Fourth Amendment.<sup>99</sup> The trial court denied the motion to suppress, holding that Janet nonetheless “had common authority to consent to the search.”<sup>100</sup>

The Court of Appeals of Georgia reversed, ruling that Scott Randolph’s express refusal to consent rendered the search unreasonable and thus impermissible under the Fourth Amendment.<sup>101</sup> On the State’s petition for certiorari review, the Supreme Court of Georgia affirmed the Court of Appeals, declaring that “the consent to conduct a warrantless search of a residence given by one occupant is not valid in the face of the refusal of another occupant who

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<sup>91</sup> *Georgia v. Randolph*, 126 S. Ct. 1515, 1518-19 (2006).

<sup>92</sup> *Id.* at 1519.

<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

<sup>95</sup> *Id.* Scott denied using drugs and claimed instead that it was in fact his wife who abused drugs and alcohol. *Id.*

<sup>96</sup> *Id.*

<sup>97</sup> *Id.*

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

<sup>101</sup> *See Randolph v. State*, 590 S.E.2d 834, 839 (Ga. Ct. App. 2003).

is physically present at the scene to permit a warrantless search.”<sup>102</sup> The Supreme Court of Georgia distinguished this case from *Matlock* because here, Scott Randolph was not “absent” when the police obtained consent from his co-occupant.<sup>103</sup> The court then addressed *Matlock*’s common authority and assumption of risk rationales by explaining that “the risk assumed by joint occupancy” goes no further than the *Matlock* situation where the primary party is absent.<sup>104</sup>

B. *Analysis of the Supreme Court’s Decision*

When the United States Supreme Court granted certiorari in *Georgia v. Randolph*, commentators speculated that the Court would align with the majority of lower courts confronting this issue and hold that the consent of one co-occupant trumps the objection of another.<sup>105</sup> The decision handed down by the Court, however, was exactly the opposite. In a 5-3 decision which divided the court and resulted in the Justices authoring six separate opinions,<sup>106</sup> the 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.”<sup>107</sup> Thus, the Court affirmed the Supreme Court of Georgia’s decision to suppress the evidence, finding that Scott Randolph’s express refusal to consent to a warrantless search was dispositive as to him and trumped the consent of Janet, his co-occupant.<sup>108</sup>

1. The Majority Decision

The *Randolph* Court’s analysis centered around “reasonableness,” a concept that the majority viewed to be largely determined by “widely shared social expectations.”<sup>109</sup> Justice Souter, writing for the majority, began by reviewing

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<sup>102</sup> State v. Randolph, 604 S.E.2d 835, 836 (Ga. 2004).

<sup>103</sup> See *id.* at 837.

<sup>104</sup> *Id.*

<sup>105</sup> See *supra* notes 65-83 and accompanying text.

<sup>106</sup> See McCall, *supra* note 82, at 598. Justice Souter delivered the majority opinion, in which Justices Stevens, Kennedy, Ginsburg, and Breyer joined; Justices Stevens and Breyer also each wrote concurring opinions. *Georgia v. Randolph*, 126 S. Ct. 1515 (2006). Chief Justice Roberts filed a dissenting opinion, in which Justice Scalia joined; Justices Scalia and Thomas each also wrote dissenting opinions. *Id.* Justice Alito did not participate. *Id.*

<sup>107</sup> *Randolph*, 126 S. Ct. at 1526.

<sup>108</sup> See *id.* at 1528 (explaining that the case called for 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”).

<sup>109</sup> *Id.* at 1521; see also *The Supreme Court, 2005 Term – Leading Cases: Fourth Amendment – Consent Search Doctrine – Co-Occupant Refusal to Consent*, 120 HARV. L. REV. 163, 166 (2006) (discussing the *Randolph* Court’s social expectations analysis).

the Court's third party consent search jurisprudence.<sup>110</sup> He concluded that, in consent cases, "widely shared social expectations" are the "constant element in assessing Fourth Amendment reasonableness."<sup>111</sup> According to the *Randolph* Court, therefore, *Matlock* and its progeny stand for the more general proposition that in determining whether third party consent renders a warrantless search reasonable, courts must look to widely shared social expectations.<sup>112</sup>

The Court applied this "social expectations test" to a hypothetical situation in which one co-occupant invites a visitor into shared premises, while his fellow tenant simultaneously tells the visitor to stay out.<sup>113</sup> The Court reasoned that no sensible person would go inside under these conditions because of the "realization that when people living together disagree over the use of their common quarters, a resolution must come through voluntary accommodation, not by appeals to authority."<sup>114</sup> Analogizing the situation of a social guest to that of a police officer, the Court stated that such a disputed invitation between two fellow occupants does not give a police officer a claim to reasonableness in entering the shared premises.<sup>115</sup> Casting aside the dissent's "red herring" involving concerns with domestic violence, the Court concluded that nothing in social custom favors the idea of permitting police officers to enter private premises to search for evidence in the face of disputed consent over requiring clear justification before police search such premises over an occupant's objection.<sup>116</sup>

After declaring that, based on widely held social expectations, a physically present co-occupant's refusal to consent to a warrantless search prevails over another co-occupant's consent, the Court attempted to reconcile this holding with its prior third party consent cases.<sup>117</sup> The Court admitted that in order for *Matlock* and *Rodriguez* not to be undermined by *Randolph*'s holding, it was necessary to draw a "fine line."<sup>118</sup> The formalistic distinction drawn by the Court was that "if a potential defendant with self-interest in objecting is in fact at the door and objects, the co-tenant's permission does not suffice for a reasonable search, whereas the potential objector, nearby but not invited to take part in the threshold colloquy, loses out."<sup>119</sup> The Court asserted that, as

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<sup>110</sup> See *Randolph*, 126 S. Ct. at 1520-21 (discussing *Matlock* at length and citing *Rodriguez*).

<sup>111</sup> *Id.* at 1521.

<sup>112</sup> See *id.*

<sup>113</sup> *Id.* at 1522-23.

<sup>114</sup> *Id.* at 1523.

<sup>115</sup> *Id.*

<sup>116</sup> *Id.* at 1526.

<sup>117</sup> *Id.* at 1527 (referring to the significance of *Matlock* and *Rodriguez* after the Court's decision in the present case as a "loose end").

<sup>118</sup> *Id.*

<sup>119</sup> *Id.*

long as there is no indication that the police removed the tenant from the doorway for the purpose of avoiding a potential objection, there is practical value in having these complementary rules based on such a distinction.<sup>120</sup> In conclusion, the Court stated that the case involved “a straightforward application of the rule that a physically present inhabitant’s express refusal of consent . . . is dispositive as to him, regardless of the consent of a fellow occupant,” and affirmed the judgment of the Supreme Court of Georgia to suppress the unlawfully seized evidence.<sup>121</sup>

## 2. The Dissenting Opinion of Chief Justice Roberts

Chief Justice Roberts, joined by Justice Scalia, wrote a powerful dissent in which he heavily criticized the majority’s social expectations test. He attacked the basic premise underlying the social expectations test, contending that shifting social expectations are not a proper foundation to ground a constitutional rule upon.<sup>122</sup> His dissent also argued that the majority had erroneously applied the social expectations concept to the issue of consent under the Fourth Amendment.<sup>123</sup> While the Court had previously looked to social expectations to determine when a search had occurred and whether a person had standing to object, it had never relied on such social expectations to evaluate the validity of third party consent.<sup>124</sup> Finally, the dissent argued that the social expectations test was flawed because the Fourth Amendment seeks to protect a legitimate expectation of privacy, not social expectations.<sup>125</sup> As a result, the majority’s test is fundamentally inconsistent with the protection traditionally afforded by the Fourth Amendment because, although a person might not expect his friends to admit the government into shared common areas, that person nonetheless cannot retain a legitimate expectation of privacy

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<sup>120</sup> *Id.*

<sup>121</sup> *Id.* at 1528.

<sup>122</sup> *Id.* at 1531-32 (Roberts, C.J., dissenting) (faulting the majority for its basic assumption – that any social guest faced with a disagreement between co-occupants would simply go away – by pointing to various hypothetical situations which illustrate the wide variety of similar social situations each of which might give rise to very different social expectations).

<sup>123</sup> *Id.* at 1532.

<sup>124</sup> *Id.* (explaining that when the Court determines whether a search has occurred and whether a particular person has standing to object, it asks “whether a person has a subjective expectation of privacy in a particular place, and whether the expectation [is] one that society is prepared to recognize as ‘reasonable’”).

<sup>125</sup> *Id.* at 1533 (illustrating the divergence of social expectations and privacy expectations by explaining that if two roommates share a computer and one keeps pirated software on a shared drive, even though his *social expectation* might be that his roommate will not disclose this to authorities, that person has nonetheless given up his *privacy* with respect to his roommate by saving the software on their shared computer).

in such common areas when he has assumed the risk that his co-occupants might consent to a search.<sup>126</sup>

After outlining the problems inherent in the social expectations test, the dissent then proceeded to criticize the result of applying that test in the case at hand.<sup>127</sup> The dissent criticized the arbitrariness of the majority's rule, contending that the rule applies so randomly that it will still fail to protect individual privacy, which is the fundamental value underlying the Fourth Amendment.<sup>128</sup> Moreover, the dissent argued that the scope of the majority's rule would be "obscure,"<sup>129</sup> and that the rule's consequences would be "particularly severe," most notably in the domestic abuse context.<sup>130</sup> The dissent maintained that "the correct approach" to the issue in *Randolph* would be based on the assumption of risk analysis that had been utilized throughout the Court's prior third party consent jurisprudence.<sup>131</sup> According to the dissent, assumption of risk analysis is preferable to the majority's random line-drawing because it is a "more reasonable approach," it "flows more naturally" from the Court's cases concerning Fourth Amendment reasonableness, and it is "logically grounded in the concept of privacy underlying [the Fourth] Amendment."<sup>132</sup>

### III. DUELING INTERPRETATIONS OF THE DUELING ROOMMATE SITUATION

The decision in *Georgia v. Randolph* departed from the Supreme Court's prior trend in Fourth Amendment jurisprudence of constricting defendants' privacy rights, while correspondingly broadening the search authority afforded to law enforcement officials.<sup>133</sup> As evidenced by Chief Justice Roberts's sharp dissent, the majority invoked a method of analysis that diverged somewhat from its prior third party consent cases in order to protect the defendant's privacy rights in that case.<sup>134</sup> The *Randolph* Court, however, took great care to

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<sup>126</sup> *See id.* at 1536.

<sup>127</sup> The dissent quotes the majority's rule as follows: "[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." *Id.*

<sup>128</sup> *Id.* (describing the rule as drawing "random and happenstance lines").

<sup>129</sup> *Id.* at 1536-37 (discussing the majority's statement that the search is only "unreasonable and invalid as to [the non-consenting co-tenant]" and the majority's "puzzling" differentiation between entry focused on discovering domestic violence and entry focused on searching for evidence).

<sup>130</sup> *Id.* at 1537-38.

<sup>131</sup> *See id.* at 1531.

<sup>132</sup> *Id.* at 1536.

<sup>133</sup> *See supra* note 64 and accompanying text.

<sup>134</sup> *See Randolph*, 126 S. Ct. at 1539 (Roberts, C.J., dissenting) ("[T]he majority has taken a great deal of pain in altering Fourth Amendment doctrine, for precious little (if any) gain in privacy.").

ensure that its analysis did not undercut its precedents and ultimately succeeded in reconciling the social expectations test with both *Matlock* and *Rodriguez*.<sup>135</sup> In the end, *Matlock* and *Rodriguez* survived, but only because the court narrowly confined the circumstances under which a co-occupant's express refusal would trump another co-occupant's consent. Thus, *Randolph* appeared on its face to be a very narrow holding carving out a limited exception to the general rule that the consent of a third party with apparent authority over the premises is sufficient to validate a warrantless search.<sup>136</sup>

In the wake of *Randolph*, however, the question of just how narrow the Court's holding actually is remains unsettled. The resolution of this question is of great import, given that *Randolph* signaled a potential change in the direction of Fourth Amendment jurisprudence in favor of giving more protection to defendants' privacy rights. The scope of the rule announced in *Randolph* is somewhat unclear and will probably require further explanation, partly due to the fact that the majority and dissenting opinions failed to clarify the "present versus absent objector" distinction in reference to Fourth Amendment rights.<sup>137</sup> Recent lower court decisions interpreting *Randolph* have revealed a new split and competing approaches, one narrow and one broad, to this continuing problem of the "dueling roommates." In light of Supreme Court precedent and the principles underlying the Fourth Amendment, this Note ultimately argues that the broad interpretation is the correct approach.

#### A. *The Narrow Interpretation of Randolph*

The "narrow view" of *Randolph* takes the *Randolph* opinion at face value. It confines application of *Randolph*'s rule that a co-occupant's refusal defeats another co-occupant's consent to the exact circumstances present in the *Randolph* case. The *Randolph* 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."<sup>138</sup> A literal reading of this language suggests that two factors will determine the outcome of future third party consent cases: (1) whether the potential objector expressly refused consent, and (2) the presence or absence of the potential objector at the time police officers requested consent from another occupant.<sup>139</sup> Under this narrow

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<sup>135</sup> See *Randolph*, 126 S. Ct. at 1521-22, 1527.

<sup>136</sup> See *supra* Part I.A-B (discussing the holdings of *Matlock* and *Rodriguez*).

<sup>137</sup> See McCall, *supra* note 82, at 590; *infra* Part III.A-B.

<sup>138</sup> *Randolph*, 126 S. Ct. at 1526.

<sup>139</sup> See, e.g., *People v. Ledesma*, 140 P.3d 657, 705 n.16 (Cal. 2006) (indicating that the holding in *Georgia v. Randolph* did not apply because the defendant was not present when the police received consent to enter his residence and the defendant did not refuse consent); McCall, *supra* note 82, at 611 ("[T]wo factors will be dispositive in future cases: 'presence'

interpretation, if *Matlock* and *Rodriguez* are not to be undercut by *Randolph*, the rule that a defendant-occupant's refusal trumps his co-occupant's consent should be invoked only when a potential defendant is both *present* and *objecting*.<sup>140</sup>

According to this narrow view of *Randolph*, incongruities will arise in third party consent law if courts begin to deemphasize the importance of the presence or absence of the objecting co-occupant. This argument is premised on the notion that the *Randolph* opinion placed dispositive weight on the defendant's proximity to the consent colloquy. The *Randolph* Court phrased the issue it was facing as "the reasonableness of police entry in reliance on consent by one occupant *subject to immediate challenge by another*" and held that a co-occupant's consent is invalid where a "*physically present*" co-occupant expressly refuses to permit entry.<sup>141</sup> Under this view, the *Randolph* Court distinguished *Matlock* and *Rodriguez* based on the proximity of the objecting occupant at the time the police received consent from the co-occupant.<sup>142</sup> Therefore, as the narrow view posits, *Randolph* does not apply to a case in which the defendant was not physically present at the front door when the co-occupant gave consent to search, even if the defendant had previously conveyed his express refusal to consent.<sup>143</sup> This perspective contends that if the *Randolph* Court had intended to create a broader rule, it would not have continually referred to the "physically present" defendant and would have instead held that a warrantless search is unreasonable whenever a suspect refuses to consent, regardless of his location at the time of refusal.<sup>144</sup> Many commentators have supported this narrow view, suggesting that *Randolph* represents a very narrow holding that will have little effect on Fourth

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or 'absence' at the time of the request for consent, and whether or not the subject of the search actually refused consent at that time . . .").

<sup>140</sup> See *Randolph*, 126 S. Ct. at 1527 (explaining the line that must be drawn if *Matlock* and *Rodriguez* are not to be "undercut" by the *Randolph* holding).

<sup>141</sup> *Id.* at 1522, 1519 (emphasis added); see *United States v. Hudspeth*, 459 F.3d 922, 932-33 (8th Cir. 2006) (Riley, J., concurring in part and dissenting in part).

<sup>142</sup> See *Randolph*, 126 S. Ct. at 1527-28; *United States v. Matlock*, 415 U.S. 164, 170 (1974) (holding that "the consent of a co-occupant who possesses common authority over premises . . . is valid as against the *absent*, non-consenting person with whom that authority is shared" (emphasis added)); *Hudspeth*, 459 F.3d at 933 (Riley, J., concurring in part and dissenting in part).

<sup>143</sup> See *Hudspeth*, 459 F.3d at 933 (Riley, J., concurring in part and dissenting in part) (contending that *Randolph* could not apply due to the fact that the defendant was not physically present at the home when his co-occupant gave consent and finding the fact that the officer knew the defendant had previously refused consent insufficient to invoke the *Randolph* rule).

<sup>144</sup> *Id.*; see *Randolph*, 126 S. Ct. at 1519, 1526.

Amendment jurisprudence.<sup>145</sup> To some, *Randolph* is “far too fact-bound and narrow to count as a truly important Fourth Amendment case.”<sup>146</sup>

At least one lower court case provides support for the narrow view of *Randolph*, suggesting that both factors – physical presence and express refusal – must exist for a defendant to come within the purview of the *Randolph* rule.<sup>147</sup> In *United States v. Groves*, defendant Groves expressly denied a police officer’s request to search his apartment on July 5, 2004.<sup>148</sup> Over two weeks later, on July 21, police returned to Groves’s residence when Groves was not at home and obtained consent to search the apartment from Groves’s co-occupant.<sup>149</sup> Thus, the case presented the situation of a defendant who expressly refused to give consent to a search at a prior time, but who was not present and objecting at the time of the police entry. The *Groves* court determined that the case was distinguishable from *Randolph* and more closely aligned with the holding in *Matlock* because “Groves was not physically present at the apartment when the agents obtained the consent of his live-in girlfriend.”<sup>150</sup> Furthermore, the court acknowledged that this case was also distinguishable from *Matlock* and its progeny because here police asked the defendant whether they could search his apartment, and the defendant unequivocally refused.<sup>151</sup> The court found, however, that these particular facts were insufficient to invalidate the co-occupant’s subsequent consent, specifically citing the more than two-week interval separating Groves’s refusal

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<sup>145</sup> See, e.g., Craig M. Bradley, *The Case of the Uncooperative Husband*, 42 TRIAL 68, 68-69 (2006) (describing how the *Randolph* Court “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”); Fiske, *supra* note 15, at 736 (discussing the *Randolph* decision’s “limited effect on Fourth Amendment jurisprudence” because the authority of the opinion is confined to “such a unique set of circumstances”); David A. Moran, *The End of the Exclusionary Rule, Among Other Things: The Roberts Court Takes on the Fourth Amendment*, 2006 CATO SUP. CT. REV. 283, 291-93 (explaining that it would be wrong to think that *Randolph* marked a major expansion in Fourth Amendment rights because the opinion is so narrowly drawn that it will rarely apply).

<sup>146</sup> Moran, *supra* note 145, at 293.

<sup>147</sup> See generally *United States v. Groves*, No. 3:04-CR-76, 2007 WL 171916 (N.D. Ind. Jan. 17, 2007) (holding that the third party’s consent rendered a search reasonable as to the defendant because the defendant was not physically present at the time of the search, despite the fact that he had earlier refused consent). There are several other lower court cases which may appear to adopt the narrow view of *Randolph*, but closer inspection indicates that they may in fact be more consistent with the broad view. See *infra* Part IV.A.3.

<sup>148</sup> *Groves*, 2007 WL 171916, at \*2.

<sup>149</sup> *Id.* at \*2, \*6 (indicating that the officers knew that Groves worked during the day and thus would not likely be home, but that they also did not take any affirmative steps to remove Groves from the premises).

<sup>150</sup> *Id.* at \*6.

<sup>151</sup> *Id.*

and the co-occupant's consent.<sup>152</sup> Ultimately, the court rejected the defendant's *Randolph* claim because he was not physically present at the time of the search, even though he had previously refused to give his consent. *Groves*, therefore, is illustrative of the narrow view of *Randolph*, which maintains that the defendant's absence is dispositive.

B. *The Broad Interpretation of Randolph*

While *Randolph* appears on its face to be a narrow holding, appropriately invoked only when the defendant is both physically present and expressly refusing consent, *Randolph* could potentially be interpreted to instead represent a somewhat broader rule. Under this "broad view" of *Randolph*, the only dispositive factor in the analysis is whether the suspect expressly refused consent prior to the search, leaving the suspect's physical proximity at the time police obtained consent from his co-occupant irrelevant.<sup>153</sup> This more expansive line of reasoning assumes that only one factor was essential to the *Randolph* holding, namely whether the suspect refused to consent to a search of his home at any time prior to the police entry. The *Randolph* Court therefore drew its "fine line" at the suspect's express refusal, without regard to the suspect's presence at the time of the search. Accordingly, *Matlock* and *Rodriguez* can co-exist with *Randolph* if a search based on the consent of a suspect's co-occupant is treated as invalid whenever the suspect has expressly refused to give consent prior to the search, regardless of whether the suspect was present or absent at the time the search occurred.

As opposed to the arguments for the narrow application of *Randolph*, which are based on a more formalistic, literal reading of the Court's language,<sup>154</sup> the rationale for the broader view is rooted more deeply in the Fourth Amendment's underlying principles. Advocates for the broad view insist that the constitutional principles underlying the Court's concerns in *Randolph* indicate that the physical proximity of the non-consenting co-tenant is not dispositive.<sup>155</sup> This view posits that the Supreme Court distinguished

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<sup>152</sup> *Id.*

<sup>153</sup> See *United States v. Hudspeth*, 459 F.3d 922, 931 (8th Cir. 2006) (stating that *Randolph* applies even though defendant was not physically present at the time police obtained consent from defendant's wife and distinguishing *Matlock* because here, defendant was invited to participate in the colloquy and expressly denied his consent before the officers obtained permission from defendant's wife); *United States v. Henderson*, No. 04-CR-697, 2006 WL 3469538, at \*2 (N.D. Ill. Nov. 29, 2006) (concluding that "the police acted unreasonably by conducting a search based upon the later consent of the co-tenant" after the defendant had refused to give the police permission to search and had been removed from the premises). There is no suggestion that these cases came out the way they did because police removed the potentially objecting tenant from the premises in order to avoid a possible objection. See *Georgia v. Randolph*, 126 S. Ct. 1515, 1527 (2006) (indicating that the *Matlock* rule would not apply under such circumstances).

<sup>154</sup> See *supra* Part III.A.

<sup>155</sup> See *Hudspeth*, 459 F.3d at 930-31.

*Randolph* from *Matlock* and *Rodriguez* based not upon the proximity of the non-consenting tenant, but rather upon the fact that in *Randolph*, the defendant “expressly denied consent to search, whereas in [both] *Matlock* [and *Rodriguez*] the defendant was silent.”<sup>156</sup> Furthermore, this interpretation also finds support in particular language from the *Randolph* decision. The *Randolph* Court stated that “there is no common understanding that one co-tenant generally has a right or authority to prevail over the *express wishes* of another,” and referred to the “*disputed invitation*” and “[*d*]isputed permission” as providing an insufficient claim to reasonableness under the Fourth Amendment.<sup>157</sup> Thus, the language utilized by the *Randolph* Court indicates that the suspect’s proximity is not the main concern under the Fourth Amendment and that *Randolph*’s rule should apply regardless of whether or not the co-occupant who previously refused consent is physically present at the residence.<sup>158</sup>

At least two lower court decisions have explicitly adopted reasoning that embodies the broad view of *Randolph*.<sup>159</sup> In *United States v. Hudspeth*, police officers found contraband on the defendant’s business computer in the course of searching his work office.<sup>160</sup> After defendant refused to consent to an officer’s request to search his home computer, the officer had the defendant placed under arrest and taken to jail.<sup>161</sup> Several police officers then went to defendant’s home, where defendant’s wife gave her consent for the officers to seize the computer.<sup>162</sup> The defendant filed a motion to suppress the evidence, and on appeal, the Eighth Circuit addressed defendant’s argument that, because he “expressly denied consent,” his wife’s consent should not “overrule his denial.”<sup>163</sup> The court held that, based on the Supreme Court’s jurisprudence regarding co-tenants’ ability to consent to searches in *Matlock* and *Randolph*, the wife’s consent to the seizure of the home computer was invalid because her consent could not “overrule” the defendant’s prior express refusal to give consent.<sup>164</sup>

At the same time, the Eighth Circuit explicitly acknowledged that *Randolph*’s rule did not directly apply to the situation presented in *Hudspeth*, “in which a co-tenant is not physically present at the search but expressly

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<sup>156</sup> *Id.* at 931.

<sup>157</sup> *Randolph*, 126 S. Ct. at 1523-24 (emphasis added); see *Hudspeth*, 459 F.3d at 930 (quoting *Randolph*).

<sup>158</sup> See, e.g., *Hudspeth*, 459 F.3d at 930-31.

<sup>159</sup> See *Hudspeth*, 459 F.3d at 930-31; see also *United States v. Henderson*, No. 04-CR-697, 2006 WL 3469538, at \*2 (N.D. Ill. Nov. 29, 2006) (finding the reasoning in *Hudspeth* persuasive and deciding the instant case by following *Hudspeth*’s reasoning).

<sup>160</sup> *Hudspeth*, 459 F.3d at 925.

<sup>161</sup> *Id.*

<sup>162</sup> *Id.*

<sup>163</sup> *Id.* at 926, 928.

<sup>164</sup> *Id.* at 930-31 (discussing the *Matlock* and *Randolph* decisions at length).

denied consent to search prior to the police seeking permission from the consenting co-tenant who is present on the property.”<sup>165</sup> Consistent with the broad view, however, the court denied that the objecting co-tenant’s physical presence at the search was a dispositive factor in *Randolph* analysis.<sup>166</sup> According to the Eighth Circuit, “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.”<sup>167</sup> *Hudspeth* is distinguishable from *Matlock* – and simultaneously within the grasp of *Randolph* – because, unlike *Matlock* and the hypothetical situation discussed in *Randolph* in which a potential objector is nearby but not asked for his consent, here the defendant had been invited to participate in the “threshold colloquy” and at that time had expressly refused to give his consent to search.<sup>168</sup> The *Hudspeth* court concluded that the Supreme Court’s jurisprudence had “made it clear that the police must get a warrant when one co-occupant denies consent to search,” and thus, that the wife’s consent in the *Hudspeth* case could not override the defendant’s refusal.<sup>169</sup>

*United States v. Henderson* followed the reasoning of *Hudspeth*, and therefore also suggests an expansion of *Randolph*. In *Henderson*, the District Court for the Northern District of Illinois found the Eighth Circuit’s reasoning in *Hudspeth* to be persuasive, and found the facts in *Henderson* to be even more favorable for the defendant than they were for the defendant in *Hudspeth*.<sup>170</sup> In *Henderson*, the defendant was physically present in his own home when he expressly refused to consent to police entry, and his instruction for the police to leave necessarily included a direction that they also refrain from searching the home.<sup>171</sup> After his express denial of consent, the police removed him from the premises and subsequently conducted a search based on the consent of the defendant’s co-occupant.<sup>172</sup> Thus *Henderson* again presented the situation of a defendant who had previously refused consent, but who was not physically present and objecting at the time police obtained consent to search from his co-occupant. Consistent with the broad view of *Randolph*, the *Henderson* court held that the police acted unreasonably in conducting their search and granted the defendant’s motion to suppress.<sup>173</sup>

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<sup>165</sup> *Id.*

<sup>166</sup> *Id.*

<sup>167</sup> *Id.* at 930-31.

<sup>168</sup> *Id.* at 931 (internal quotation marks omitted).

<sup>169</sup> *Id.*

<sup>170</sup> *United States v. Henderson*, No. 04-CR-697, 2006 WL 3469538, at \*2 (N.D. Ill. Nov. 29, 2006).

<sup>171</sup> *Id.* at \*1, \*2 (detailing facts of case and emphasizing that when the police entered the home and encountered the defendant in his living room, the defendant had told the police: “Get the fuck out of my house”).

<sup>172</sup> *Id.* at \*2.

<sup>173</sup> *Id.*

## IV. THE BEST APPROACH TO DUELING ROOMMATES

The central problem in resolving future third party consent cases will be deciding what factors are necessary to invoke application of *Randolph*'s rule. If physical absence of the suspect is dispositive, even if the suspect expressly refused to consent at some time prior to the search, then *Randolph* is an extremely narrow holding, and "no matter how hard [a defendant] wiggles – like the stepsisters trying to squeeze into Cinderella's glass slipper" – he is going to have a very difficult time trying to "fit within its embrace."<sup>174</sup> If, on the other hand, the principles underlying *Randolph* dictate that the dispositive factor is whether the suspect has expressly refused to give consent, regardless of his physical proximity to the premises at the time police were able to obtain consent from a co-occupant, *Randolph* might afford greater protection to individual privacy interests than initially anticipated.

A. *The Broad View of Randolph Is the Correct Approach*

This Note proposes that the broad interpretation of *Randolph* is the correct approach; that is, that a co-tenant's express refusal to consent prior to a police search is, in itself, sufficient to invoke the *Randolph* rule that a primary party's refusal trumps a third party's consent. The *Randolph* rule, extended in this way, is consistent with Supreme Court third party consent jurisprudence and continues to preserve the "fine line" between *Matlock* and *Rodriguez* on the one hand, and *Randolph* on the other.<sup>175</sup>

1. The Broad View of *Randolph* Is Consistent with the Supreme Court's Reasoning in Determining Whether Third Party Consent Is Constitutionally Sufficient

The *Randolph* Court makes clear that in assessing the reasonableness of consent searches under the Fourth Amendment, great significance should be afforded to widely-shared social expectations.<sup>176</sup> Under this social expectations test, the *Randolph* rule may logically be extended to invalidate the consent of a suspect's co-occupant whenever the suspect has expressly refused consent prior to the search, regardless of the suspect's physical proximity to the search. Pervading notions of social understanding suggest that when police officers are aware that a co-tenant has refused consent prior to a search of his dwelling, it would be patently unreasonable for those officers to justify their search of the premises based on subsequent consent obtained from the objector's co-tenant, whether or not the objector was present when the

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<sup>174</sup> See *United States v. Wilburn*, 473 F.3d 742, 744 (7th Cir. 2007).

<sup>175</sup> *Georgia v. Randolph*, 126 S. Ct. 1515, 1527 (2006) (articulating the "fine line" by explaining that "if a potential defendant with self-interest in objecting is in fact at the door and objects, the co-tenant's permission does not suffice for a reasonable search, whereas the potential objector, nearby but not invited to take part in the threshold colloquy, loses out").

<sup>176</sup> See *id.* at 1521 (discussing *Matlock*).

subsequent consent was obtained.<sup>177</sup> A review of the social expectations test as it was applied in *Matlock* and *Rodriguez* is instructive on this point.

The *Matlock* Court relied on the common social expectation that “shared tenancy is understood to include an ‘assumption of risk,’ on which police officers are entitled to rely.”<sup>178</sup> While some co-occupants might have an exceptional arrangement, people who live together usually understand that any one of them may invite a guest into the premises, even if that visitor is obnoxious to another occupant.<sup>179</sup> As the *Randolph* Court stated, “*Matlock* relied on what was usual and placed no burden on the police to eliminate the possibility of atypical arrangements, *in the absence of reason to doubt that the regular scheme was in place.*”<sup>180</sup> In *Matlock*, there were no objective circumstances, such as a co-tenant refusing to consent, that would have given the officers reason to doubt that each tenant had assumed the risk that one of his co-occupants would admit an obnoxious visitor.<sup>181</sup> Therefore, the police were entitled to rely on the typical scheme of joint tenancy as it bears on Fourth Amendment reasonableness.<sup>182</sup>

The broad *Randolph* rule, which holds that a search based on the consent of a co-occupant is unreasonable whenever another co-occupant expressly refused consent prior to the search, is in harmony with this conception of social expectations. While it is commonly understood that shared tenancy includes assumption of risk, social expectations are very different where a co-occupant overtly refuses to give his consent to a search of the shared premises.<sup>183</sup> According to *Matlock*, police are entitled to rely on what is commonly understood, but only when they have been given no reason to doubt that the regular scheme is in place.<sup>184</sup> When police *know* that a co-tenant has previously conveyed his or her express refusal to give consent, the police have good reason to doubt that the ordinary scheme of joint tenancy and assumption of risk is operating, whether or not the objecting co-tenant is present at the time of the search.<sup>185</sup> In short, police confronted with dueling roommates are not entitled to rely on widely shared social expectations regarding joint tenancy, because knowledge of a co-tenant’s express refusal to give consent renders

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<sup>177</sup> See *infra* notes 183-185 and accompanying text.

<sup>178</sup> *Randolph*, 126 S. Ct. at 1522.

<sup>179</sup> *Id.* at 1521-22.

<sup>180</sup> *Id.* at 1522 (emphasis added).

<sup>181</sup> See *United States v. Matlock*, 415 U.S. 164, 179 (1974) (Douglas, J., dissenting) (explaining that when the police arrived on the premises, they had arrested defendant without incident); *id.* at 166 (majority opinion) (emphasizing that when the officers went to the door of the house and were admitted by Mrs. Graff, she clearly appeared to belong there, as she was dressed in a robe and holding her baby).

<sup>182</sup> *Randolph*, 126 S. Ct. at 1527.

<sup>183</sup> See *id.* at 1523.

<sup>184</sup> See *supra* note 180 and accompanying text.

<sup>185</sup> See *Randolph*, 126 S. Ct. at 1527.

reliance on such common understandings unreasonable. The broad view of *Randolph* is therefore consistent with the social expectations test as it is embodied in *Matlock*.

The broad view of *Randolph* also comports with the Court's reasoning in the *Randolph* decision itself, which primarily focused on social expectations regarding the authority of one tenant to prevail over the express wishes of another and the significance of a "disputed invitation."<sup>186</sup> Remarkably, there was a complete lack of social expectations analysis with respect to the specific issue of a co-tenant's physical presence or absence.<sup>187</sup> The Court explained 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."<sup>188</sup> For the Court, it followed that "disputed permission" is no match for an individual's Fourth Amendment claim to security against government intrusion.<sup>189</sup> Throughout the social expectations analysis, the Court periodically referred to the physical proximity of the objecting co-tenant,<sup>190</sup> but never engaged in a separate analysis regarding the common understandings that surround a co-tenant's presence or absence.<sup>191</sup> Rather, the Court's analysis emphasized that no social expectations indicate one roommate's decision should prevail over the wishes of another; in doing so, it sometimes referred to the physical presence of the objecting co-occupant, and sometimes ignored that fact altogether.<sup>192</sup>

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<sup>186</sup> See *id.* at 1523-24.

<sup>187</sup> See *id.* at 1521-24.

<sup>188</sup> *Id.* at 1523. It is significant that the Court analogized a decision of whether to invite a guest into the home to a decision of what color the curtains should be and concluded that in both cases, there exists no common understanding that one co-tenant has a right to overrule the other. While there may be implications regarding an objecting co-tenant's presence or absence with respect to a disputed invitation to a visitor standing at the door, there seems to be no comparable implication concerning the objecting co-tenant's physical proximity with respect to a dispute over home décor. Thus, the common understanding appears to be that one co-tenant generally has no authority to prevail over the express wishes of another, regardless of the objector's physical presence at the time the disputed action is consummated.

<sup>189</sup> *Id.* at 1523-24.

<sup>190</sup> See, e.g., *id.* at 1522-23 (explaining that a visitor would not think that one occupant's invitation was sufficient to enter the premises when the other occupant "*stood there saying, 'stay out'*" (emphasis added)); *id.* at 1523 ("[T]he co-tenant wishing to open the door to a third party has no recognized authority . . . to prevail over a *present* and objecting co-tenant . . . ." (emphasis added)).

<sup>191</sup> See *id.* at 1521-24.

<sup>192</sup> See, e.g., *id.* at 1523 (stating first that "there is no common understanding that one co-tenant generally has a right or authority to prevail over the express wishes of another" and stating in the very next sentence that "the co-tenant wishing to open the door to a third party has no recognized authority . . . to prevail over a *present* and objecting co-tenant" (emphasis added)).

2. The Broad View of *Randolph* Leaves *Matlock* and *Rodriguez* Undisturbed

If *Randolph* holds that a suspect's refusal trumps his co-occupant's consent, regardless of the suspect's presence or absence at the time of the search, it remains entirely consistent with *Matlock* and *Rodriguez*. *Matlock* and *Rodriguez*, which both upheld warrantless searches based on consent given by the suspect's co-occupant,<sup>193</sup> can be distinguished from *Randolph* on their facts. In *Matlock*, the suspect "was not present with the opportunity to object, he was in a squad car not far away."<sup>194</sup> Similarly, in *Rodriguez*, the suspect "was actually asleep in the apartment, and the police might have roused him with a knock on the door before they entered with only the consent of an apparent co-tenant."<sup>195</sup> Thus, in both *Matlock* and *Rodriguez*, the suspects were never asked by police for their consent to search, and in both cases the suspects never explicitly denied consent. On the other hand, application of the broad *Randolph* rule only defeats the consent of a suspect's co-occupant when the suspect has had the opportunity to expressly refuse to give consent prior to the search. Therefore, the validity of the *Matlock* and *Rodriguez* holdings are in no way undercut by the broad view of *Randolph*. Rather, the outcomes remain the same regardless of whether the suspects were present or absent at the time police obtained consent from their co-occupants because neither the suspect in *Matlock* nor *Rodriguez* had explicitly refused to give consent prior to the search.

The notion that the broad view of *Randolph* is consistent with Supreme Court precedents is further supported by observing how the majority in *Randolph*, "[i]n its attempt to avoid undercutting *Matlock* [and *Rodriguez*] . . . failed to distinguish 'absent' and 'present' in any significant way."<sup>196</sup> While the language in *Matlock* refers to the "absent, nonconsenting person,"<sup>197</sup> the *Randolph* majority concedes that the suspects in *Matlock* and *Rodriguez* were "not far away."<sup>198</sup> In fact, in drawing its "fine line," the *Randolph* Court describes the *Matlock* and *Rodriguez* side of that line by stating that "the potential objector, *nearby* but not invited to take part in the threshold colloquy, loses out."<sup>199</sup> By using the word "nearby" in reference to the defendants in *Matlock* and *Rodriguez*, it is difficult to argue that the Court meant to afford any constitutional significance to the defendant's "presence" or "absence" in distinguishing *Randolph*. Indeed, the defendants in *Matlock* and *Rodriguez* have even been described and interpreted by some jurists as being "present."<sup>200</sup>

<sup>193</sup> See *supra* Part I.A-B.

<sup>194</sup> *Randolph*, 126 S. Ct. at 1527 (discussing *Matlock*).

<sup>195</sup> *Id.* (discussing *Rodriguez*).

<sup>196</sup> McCall, *supra* note 82, at 601; see also *Randolph*, 126 S. Ct. at 1527.

<sup>197</sup> *United States v. Matlock*, 415 U.S. 164, 170 (1974).

<sup>198</sup> *Randolph*, 126 S. Ct. at 1527.

<sup>199</sup> *Id.* (emphasis added).

<sup>200</sup> See *id.* at 1534 (Roberts, C.J., dissenting) (referring to the suspects in both *Matlock* and *Rodriguez* as being "present" at the time their co-occupants consented to the searches);

This confusion regarding the suspect's physical proximity to the consent inquiry further supports the view that *Matlock* and *Rodriguez* are entirely consistent with the broad view of *Randolph*. Thus, under the *Randolph* rule, the co-occupants' consent in *Matlock* and *Rodriguez* validated the warrantless searches not because the suspects were absent, but rather because the suspects never explicitly refused consent prior to the search.

3. Lower Court Opinions Are Most Consistent with the Broad View of *Georgia v. Randolph*

In addition to those cases that explicitly adopt the broad view<sup>201</sup> and those that support the narrow view,<sup>202</sup> there are a number of lower court cases addressing defendants claiming the protections of the *Randolph* rule which have not explicitly adopted either view.<sup>203</sup> Many of these lower court decisions might appear to follow the narrow view of *Randolph*; however, they are actually more consistent with the broad view. Significantly, these cases never explicitly cite the defendant's presence or absence as a finding necessary to the holdings, lending support to the notion that the only dispositive factor in these decisions is whether or not the defendant expressly refused consent prior to the search.<sup>204</sup>

For example, in *United States v. DiModica*, the defendant's wife went to the police department and gave her written consent for police to enter and search the residence she shared with defendant.<sup>205</sup> The officers then drove to defendant's residence, and without asking defendant for his consent to search the home, arrested defendant for domestic abuse, placed him in the squad car, and took him to the police station.<sup>206</sup> The defendant "argue[d] that *Randolph*

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*United States v. Sumlin*, 567 F.2d 684, 687-88 (6th Cir. 1977) (reasoning that the defendant's presence in the case at hand was irrelevant because the suspect in *Matlock* had been present in the front yard); *McCall*, *supra* note 82, at 601 n.90.

<sup>201</sup> See *supra* notes 159-173 and accompanying text (discussing *Hudspeth* and *Henderson*).

<sup>202</sup> See *supra* notes 147-152 and accompanying text (discussing *Groves*).

<sup>203</sup> See generally sources cited *infra* note 204.

<sup>204</sup> See, e.g., *United States v. Uscanga-Ramirez*, No. 06-3192, 2007 WL 251474, at \*3 (8th Cir. Jan. 31, 2007) (denying defendant's *Randolph* claim based on the fact that there was no evidence that the defendant expressly refused police entry into his home at any time, with no mention of defendant's physical proximity at the time police gained entry); *United States v. Wilburn*, 473 F.3d 742, 745 (7th Cir. 2007) (citing both the fact that defendant was not physically present when the third party consented to the search and the fact that the police did not hear the defendant object to the search as reasons why the defendant could not claim the protections of the *Randolph* rule). Three more cases that fit into this category are discussed more extensively in the remainder of this section. *United States v. Parker*, 469 F.3d 1074 (7th Cir. 2006); *United States v. DiModica* 468 F.3d 495 (7th Cir. 2006); *United States v. Davis*, No. 1:06-CR-69, 2006 WL 2644987 (W.D. Mich. Sept. 14, 2006).

<sup>205</sup> *DiModica*, 468 F.3d at 496-97.

<sup>206</sup> *Id.* at 497-98.

controlled because had he not been illegally arrested and removed from the scene, he would have refused” to consent to the search.<sup>207</sup> The court distinguished the case from *Randolph*, however, because the defendant and his wife were not standing at the doorway together, one consenting and the other refusing, and the defendant never expressly refused to consent to the search.<sup>208</sup> Given that this case was outside the purview of *Randolph*’s holding, the wife’s consent alone was therefore valid and permitted the search.<sup>209</sup>

In determining that *Randolph* did not apply, the *DiModica* court did refer to both the defendant’s physical proximity to the scene and whether he had previously refused to consent to a search. Nowhere in its reasoning, however, did the *DiModica* court state that both factors were necessary for its disposition of the case.<sup>210</sup> The court did not need to address the constitutional significance of each factor independently because both were lacking here; thus, the case was factually indistinguishable from *Matlock*, and the co-tenant’s consent validated the search.<sup>211</sup> This type of reasoning, therefore, is wholly consistent with the broad view of *Randolph*, which concludes that a search based on consent given by a suspect’s co-occupant is invalid only when the suspect has previously refused to consent to the search. Under this view, *Randolph* does not apply to cases such as *DiModica* solely due to the fact that the defendant did not expressly deny consent; the defendant’s location at the time of the search is irrelevant.<sup>212</sup>

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<sup>207</sup> *Id.* at 500. The facts of *United States v. Parker* are very similar to those in *DiModica*. In *Parker*, police officers were called to the defendant’s residence, took the defendant into custody, and then placed him into a squad car. *Parker*, 469 F.3d at 1075-76. Subsequently, the officers spoke with Linda Johnson, who shared the house with the defendant, and obtained her permission to search the house. *Id.* at 1076. The defendant sought to suppress the evidence found in the search on the ground that his co-tenant’s consent was invalid. *Id.* at 1077.

<sup>208</sup> *DiModica*, 468 F.3d at 500 (citing the Supreme Court’s language in *Randolph* that preserved the holding in *Matlock*).

<sup>209</sup> *Id.*

<sup>210</sup> *See id.*

<sup>211</sup> *See id.* (explaining that the defendant had failed to distinguish his case from *Matlock* and that any other differences were immaterial).

<sup>212</sup> Likewise, the reasoning in *Parker* is consistent with the broad view of *Randolph*. In *Parker*, the court held that because “[t]here [was] no evidence . . . that [defendant] was asked for his consent to search the house and . . . refused” or evidence that the defendant had “objected in any way to a search of the house,” the case was not controlled by the *Randolph* decision. *Parker*, 469 F.3d at 1077. Instead, this case was factually analogous to *Matlock* in that “police had taken [defendant] into custody and removed him from the premises before asking a co-tenant for her consent to search the property,” and the defendant “was nearby but not invited to take part in the [threshold] inquiry as to whether the officers could search the house.” *Id.* at 1078.

Also in this line of cases is *United States v. Davis*. In *Davis*, the defendant's co-occupant gave police officers consent to enter the defendant's house.<sup>213</sup> Upon arriving at the house, the officers knocked on the door and yelled into the house, but the defendant was asleep in a bedroom and did not respond.<sup>214</sup> At trial, the defendant argued that the evidence obtained in the subsequent search of his house should have been suppressed because his co-occupant's consent was invalid.<sup>215</sup> The *Davis* court rejected defendant's *Randolph* claim on the ground that "[the defendant] was *present* in the house, but it is undisputed that he was asleep and did not raise any objection."<sup>216</sup> Thus, as indicated by the emphasized language, the *Davis* court apparently assumed, for purposes of its analysis, that the defendant was "present" within the meaning of *Randolph*. Nevertheless, the court determined that despite defendant's physical presence at the time of the search, the *Randolph* rule did not apply because defendant never expressly denied consent to the search.<sup>217</sup> The result in *Davis* is therefore entirely consistent with the broad view of *Randolph*, as the dispositive factor in determining whether to apply the *Randolph* rule was whether or not the defendant ever objected to the search.

#### 4. The Broad View of *Randolph* Gives Effect to Fourth Amendment Principles Generally

The broad view of *Randolph* is consistent with Fourth Amendment principles generally. For example, *Minnesota v. Olson*,<sup>218</sup> a case prior to *Randolph*, dealt with the Fourth Amendment rights of a social guest when the police make a warrantless entry into a house in which the guest is staying.<sup>219</sup> In holding that overnight guests have a legitimate expectation of privacy in their temporary quarters, the Court emphasized the fact that a host would be unlikely to admit a visitor who wants to see a guest over that guest's objection.<sup>220</sup> Notably, the Court in no way implied that the guest could only claim the protections of the Fourth Amendment if he was standing at the door

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<sup>213</sup> *United States v. Davis*, No. 1:06-CR-69, 2006 WL 2644987, at \*1 (W.D. Mich. Sept. 14, 2006).

<sup>214</sup> *Id.*

<sup>215</sup> *See id.*

<sup>216</sup> *Id.* at \*2 (emphasis added).

<sup>217</sup> *See id.*

<sup>218</sup> 495 U.S. 91 (1990).

<sup>219</sup> *See id.* at 93-94.

<sup>220</sup> The Court explained:

The point is that hosts will more likely than not respect the privacy interests of their guests, who are entitled to a legitimate expectation of privacy despite the fact that they have no legal interest in the premises and do not have the legal authority to determine who may or may not enter the household.

*Id.* at 99.

and objecting at the time of the police entry.<sup>221</sup> Instead, the Court relied on the notion that such a “customary expectation of courtesy or deference is a foundation of Fourth Amendment rights of a houseguest.”<sup>222</sup> The *Randolph* Court explained that an inhabitant of shared premises may claim at least as much privacy as a houseguest, and that the co-inhabitant likely has an even stronger claim to such privacy.<sup>223</sup> Thus, consistent with the broad view of *Randolph*, a co-occupant who has expressly denied consent to search should have the opportunity to claim the “expectation of courtesy or deference” that is the foundation of his Fourth Amendment rights, regardless of whether or not he was physically “present” at the time of the search.<sup>224</sup>

*B. Suggestions for Articulating a Broad Approach to Applying Randolph*

This Note has argued that the broad view of *Randolph* is the correct approach under the Fourth Amendment and is consistent with Supreme Court jurisprudence in the area of third party consent searches. Problems may arise, however, if we adhere strictly to a rule stipulating that a search based on the consent of a co-occupant is unreasonable as to the suspect if the latter explicitly refused consent *at any time* prior to the search. This is because such a rule imposes no limitations regarding the *specificity* of a refusal to a particular search. The specificity of a co-tenant’s refusal to a particular search would seem to bear heavily on a police officer’s subjective impression of the reasonableness of a subsequent search based on the consent of another co-tenant. The *Randolph* Court, to some extent, may have been using an objector’s physical presence as a proxy for this specificity concept, representing the idea that the suspect’s express refusal must be sufficiently specific to the search at issue in order to invalidate the consent of a co-occupant.<sup>225</sup> Additionally, a major justification for the *Randolph* holding was that one co-occupant has no commonly understood “right . . . to prevail over the express wishes of another.”<sup>226</sup> As a result, there must be some mechanism in place to ensure that the “express wishes” of the objecting co-tenant in fact pertained to the search at issue, because as time passes and intervening events occur, a suspect’s claim that he was objecting to a particular search necessarily loses force.

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<sup>221</sup> *Id.* (evidencing the absence of such a statement).

<sup>222</sup> *Georgia v. Randolph*, 126 S. Ct. 1515, 1522 (2006) (discussing *Olson*).

<sup>223</sup> *Id.*

<sup>224</sup> *Id.*

<sup>225</sup> *See id.* (stating the issue as “the reasonableness of police entry in reliance on consent by one occupant subject to immediate challenge by another”). By using the word “immediate” instead of directly referring to the objector’s presence, the Court was presumably concerned, to some extent, with the specificity of the suspect’s refusal to the search at issue. *See id.*

<sup>226</sup> *Id.* at 1523.

A hypothetical may serve to illustrate this point. Imagine a drug dealer, Jake, who is paranoid that his live-in girlfriend might one day consent to a warrantless police entry into the couple's home. To avoid any possibility of police entering the premises based on his girlfriend's consent, Jake posts a sign outside of his home stating that he categorically refuses to consent to all searches of the premises, no matter what any co-occupant of the premises may tell the police. While the *Randolph* Court was concerned with protecting the privacy interests of an objecting co-tenant,<sup>227</sup> it was prudent in its approach, avoiding sweeping conclusions and relying carefully on social expectations to justify its results. The type of broad, blanket refusal Jake gives in this hypothetical is therefore problematic because it would not serve the principles underlying *Randolph*. Nevertheless, the *Randolph* rule stipulates that reasonableness is determined by assessing the objective information available to the police officer when he began his warrantless search based on third party consent. Accordingly, a sign voicing Jake's categorical refusal to give consent to any searches would necessarily have a bearing on the reasonableness of any subsequent search based on the consent of Jake's co-tenant, as the police officer would necessarily have knowledge of a co-tenant's express refusal to consent. The question becomes: What limitations can courts impose upon *Randolph*'s application so that its underlying principles are not jeopardized by an overly broad interpretation of its scope?

Given that the justifications for the broad view of *Randolph* begin to weaken as a suspect's refusal becomes disconnected from a particular search based on his co-occupant's consent, the broad view could be improved if it were circumscribed by a specificity component. Under this view, in deciding whether a suspect's prior express refusal is sufficient to render a search based on his co-occupant's consent unreasonable, courts should consider the specificity of the suspect's refusal to the search at issue. Various factors would be relevant in determining whether the suspect's refusal is sufficiently specific. For example, courts could consider the amount of time that passed between the suspect's initial refusal and the subsequent search; as time passes, a suspect's refusal would become increasingly disconnected from a particular search. Additionally, the suspect's physical presence has a bearing on specificity; an immediate refusal by a physically-present suspect would be more specific to a particular search than would a prior refusal by a physically-absent suspect.<sup>228</sup>

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<sup>227</sup> See *id.* at 1523-24 (stating that "disputed permission" is no match for an individual's claim to security against government intrusion into his home).

<sup>228</sup> Note that this "circumscribed" broad view of *Randolph* is still very different from the narrow view. Under this conception of the broad view, the suspect's physical presence has a bearing on the specificity component, which in turn speaks to the reasonableness of a particular search. This is very different, however, from the narrow view of *Randolph*, which suggests that physical presence is constitutionally required for the refusal of one occupant to trump the consent of another occupant. Under the circumscribed broad view, physical presence is one factor to be considered in determining the reasonableness of a search, but it is not categorically dispositive.

In fact, if the broad view of *Randolph* were circumscribed by specificity considerations to properly give effect to the Fourth Amendment principles involved in *Randolph*-type cases, this suggests that *United States v. Groves* could also be aligned with the broad view of *Randolph*, rather than with the narrow view.<sup>229</sup> As discussed above, the *Groves* court found that *Randolph* did not apply because defendant was not physically present at the apartment when the officers obtained the consent of his co-tenant.<sup>230</sup> The court recognized that defendant had previously refused to consent to a search, but dismissed that fact as insufficient to invalidate the consent because defendant's "refusal . . . came more than two weeks prior to the date" on which police obtained his co-tenant's consent.<sup>231</sup> Thus, if the broad view of *Randolph* holds that a defendant's refusal trumps a co-tenant's consent only if the refusal is specifically connected to the search at issue, *Groves* is entirely consistent with such a broad view. According to this reasoning, in dismissing the defendant's prior refusal as insignificant, the *Groves* court did not adopt the narrow view of *Randolph*, which deems the defendant's presence or absence dispositive. Instead, the court implicitly endorsed the broad view of *Randolph*, which recognizes the defendant's prior refusal as the deciding factor *only if the refusal was sufficiently specific to the particular search at issue*. Accordingly, the *Groves* court simply found that the time period in excess of two weeks sufficiently decreased the specificity of defendant's refusal to the particular search, such that the prior refusal no longer carried dispositive weight in the analysis.

#### CONCLUSION

The Supreme Court has made clear that in determining whether third party consent is sufficient to justify a warrantless search under the Fourth Amendment, courts should afford great significance to widely-shared social expectations. The social expectations test espoused by the *Randolph* Court asks whether, from the point of view of the police officer, the police conduct looked objectively reasonable, based on common social understandings. *Matlock*, *Rodriguez*, and *Randolph* can all be reconciled under this principle, as it simply can not be objectively reasonable under any societal understanding to enter shared premises based on the consent of one co-occupant when the police officer knows that another co-occupant has expressly refused to give consent. The physical presence of the objecting co-occupant has no substantial bearing on the interests that the social expectations test is meant to protect, and

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<sup>229</sup> See *supra* notes 147-152 and accompanying text (discussing *United States v. Groves* and explaining how the holding provides support for the narrow view of *Randolph*).

<sup>230</sup> *United States v. Groves*, No. 3:04-CR-76, 2007 WL 171916, at \*6 (N.D. Ind. Jan. 17, 2007).

<sup>231</sup> The court held that the fact that *Groves* expressly denied consent in the past was "insufficient to invalidate the consent given by Foster. *Groves*'s refusal to local police officers to search his apartment came more than two weeks prior to the date on which federal agents approached Foster for her consent to search the premises." *Id.*

thus the broad view of *Randolph* represents the correct approach to the dueling roommate situation.

The *Randolph* Court addressed and incorporated into its holding the physical presence of the defendant merely because the facts of the case required it to do so. If, however, the Supreme Court was presented with a case factually similar to *Hudspeth*, in which the defendant refused to consent to a search but was not present at the time police obtained consent from his co-occupant, the broad interpretation of *Randolph* should be adopted because it is an approach better aligned with general Fourth Amendment principles regarding privacy and Supreme Court precedent. Therefore, so long as the defendant's objection or refusal to give consent to a search was sufficiently specific to the search of shared premises, the defendant's express refusal should trump the later consent of his co-occupant, without regard to whether or not the defendant was physically "present" to object at the time the search occurred.