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Fourth Amendment - Search and Seizure: The Seventh Circuit Holds that Evidence Obtained in a Warrantless Search of a Home May Be Used against a Present and Objecting Occupant after They Are Arrested and Removed from the Home and Co-Occupant with Authority

Amanda Dodds

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FOURTH AMENDMENT – SEARCH AND SEIZURE: THE SEVENTH CIRCUIT HOLDS THAT EVIDENCE OBTAINED IN A WARRANTLESS SEARCH OF A HOME MAY BE USED AGAINST A PRESENT AND OBJECTING OCCUPANT AFTER THEY ARE ARRESTED AND REMOVED FROM THE HOME AND A CO-OCCUPANT WITH AUTHORITY CONSENTS TO THE SEARCH.

Amanda Dodds

IN *United States v. Henderson*, a divided panel of the Seventh Circuit held that evidence obtained from a warrantless search of a home conducted with the consent of a co-occupant may be used against a present and objecting occupant after they were arrested and removed from the home.¹ This Note argues that the Seventh Circuit erroneously found that the defendant's Fourth Amendment rights were not violated and failed to properly apply Supreme Court precedent. In *Georgia v. Randolph*, the Supreme Court held "that a warrantless search of a shared dwelling for evidence over the express refusal of consent by a physically present resident cannot be justified as reasonable as to him on the basis of consent given to the police by another resident."² By distinguishing the *Henderson* case from *Randolph*, the Seventh Circuit has made the holding in *Randolph* meaningless, as a police officer could simply arrest the present and objecting occupant in order to use the consent of a co-occupant to search the premises.

In late November 2003, police officers responded to a report of domestic abuse at the home of James Henderson (Henderson) and Patricia Henderson (Mrs. Henderson).³ The police found Mrs. Henderson standing in front of the home, and she told the police that Henderson had choked her and removed her from the house.⁴ Before the police entered

1. *United States v. Henderson*, 536 F.3d 776, 783-84 (7th Cir. 2008).

2. *Georgia v. Randolph*, 547 U.S. 103, 120 (2006).

3. *Henderson*, 536 F.3d at 777.

4. *Id.*

the house using a key provided by the Hendersons' teenage son, Mrs. Henderson informed the police that her husband had weapons in the house and had previously been arrested on drug and weapons charges.⁵ The officers used the key to enter the home and found Henderson in the living room.⁶ Henderson explicitly told the officers to leave the house, which constituted an objection to a search.⁷ Police officers arrested Henderson and took him to the police station.⁸ After Henderson was removed from the home, Mrs. Henderson signed a consent form allowing the police to search the home.⁹ During the search, police discovered crack cocaine, drug-dealing paraphernalia, multiple guns, ammunition, a machete, a crossbow, and an explosive device.¹⁰ Mrs. Henderson also consented to a search of the family car, during which the police uncovered additional crack cocaine.¹¹

The Government filed charges against Henderson in the Northern District of Illinois for possession of crack cocaine with the intent to distribute, various firearms-related offenses, and possession of an explosive device.¹² Henderson moved to suppress the evidence obtained from the search of the house, arguing that the Supreme Court's holding in *Randolph* required the suppression.¹³ The district court, relying on *Randolph*, granted Henderson's motion to suppress.¹⁴ The court reasoned that the evidence obtained from the search of the home "was not incident to the defendant's arrest, but was clearly evidentiary in nature."¹⁵ The district court re-affirmed its decision to suppress the evidence seized from the defendant's home, however, it denied the defendant's motion to suppress the evidence seized in the car.¹⁶

The Government appealed, and the Seventh Circuit, in a 2-1 decision, reversed the district court's suppression of the evidence after reviewing the matter *de novo*.¹⁷ The Seventh Circuit relied on the limiting language in *Randolph* that the Supreme Court intended "to maintain the validity of *Matlock* and *Rodriguez*"¹⁸ and Justice Breyer's concurrence in *Randolph*, in which he stated that the opinion in *Randolph* was case specific and "does not apply where the objector is not present and objecting."¹⁹ Further, the Seventh Circuit agreed with the reasoning of the Eighth Cir-

5. *Id.*

6. *Id.*

7. *Id.* at 778-79.

8. *Id.* At 778.

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.*; United States v. Henderson, No. 04 CR 697, 2006 WL 3469538, at *1 (N.D. Ill. Nov. 29, 2006).

13. *Henderson*, 536 F.3d at 778; *Henderson*, 2006 WL 3469538, at *1.

14. *Henderson*, 2006 WL 3469538, at *1.

15. *Id.*

16. *Id.* at *3.

17. *Henderson*, 536 F.3d at 779, 785.

18. *Id.* at 785.

19. *Id.* at 784 (quoting *Georgia v. Randolph*, 547 U.S. 103, 126 (2006)).

cuit's opinion in *United States v. Hudspeth* that "the contemporaneous presence of the objecting and consenting cotenants [is] indispensable to the decision in *Randolph*." ²⁰

The *Henderson* court acknowledged that "[t]he sole issue on appeal [was] whether *Randolph* requires exclusion of evidence obtained in a warrantless search of a home after a present and objecting occupant is arrested and removed from the home and a co-occupant with authority consents to the search,"²¹ or in other words, "[d]oes a refusal of consent by a present and objecting resident remain effective to bar the voluntary consent of another resident with authority after the objector is arrested and is therefore no longer present and objecting?" ²² The Seventh Circuit answered in the negative, holding that *Randolph* "applies only when the defendant is both present and objects to the search of his home."²³ Although *Henderson* was initially home and objecting, "his objection lost its force when he was validly arrested and taken to jail."²⁴

The decision in *Henderson* extends from an exception to the Fourth Amendment. The Fourth Amendment guarantees "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures."²⁵ One exception to the Fourth Amendment is voluntary consent given by individuals that possess, or the police reasonably believe to possess, shared occupancy of the premises.²⁶ The Supreme Court's decision in *Randolph* limits the application of this exception, holding that "a physically present co-occupant's stated refusal to permit entry prevails [over another co-occupant's consent], rendering the warrantless search unreasonable and invalid as to him."²⁷

In its holding, the *Henderson* Court focuses its analysis on the limiting language in *Randolph* as well as Justice Breyer's concurrence in *Randolph*. The majority in *Randolph* specifically upheld the court's decisions in *Matlock* and *Rodriguez* by stating that its decision

required [the court] to "draw [] a fine line" between a defendant who is both present and objecting and one who is either not present (though nearby) or present but not objecting: "[I]f 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."²⁸

20. *Id.* at 776, 783. See also *United States v. Hudspeth*, 518 F.3d 954, 955 (8th Cir. 2008).

21. *Henderson*, 536 F.3d at 779.

22. *Id.* at 781 (internal quotation marks omitted).

23. *Id.* at 777.

24. *Id.* at 777.

25. U.S. CONST. amend. IV.

26. *Georgia v. Randolph*, 547 U.S. 103, 109 (2006); *Illinois v. Rodriguez*, 497 U.S. 177, 186 (1990); *United States v. Matlock*, 415 U.S. 164, 171 (1974); *SCHNECKLOTH v. BUS-TAMONTE*, 412 U.S. 218, 222 (1973).

27. *Randolph*, 547 U.S. at 106.

28. *Henderson*, 536 F.3d at 780 (quoting *Randolph*, 547 U.S. at 121).

Further, Justice Breyer's concurrence in *Randolph* stated that the holding was case specific and that "[t]he Court's opinion does not apply where the objector is not present and objecting."²⁹

Additionally, the *Henderson* court noted that although the issue was one of first impression, the Seventh Circuit had recently declined to extend *Randolph* in a case where police obtained evidence during a search of the suspect's house, consented to by a co-occupant, when the suspect had objected to the search several weeks earlier.³⁰ The Seventh Circuit held that the evidence from the search could be used against the suspect because he was not physically present when the co-occupant consented and the district court had concluded that the officers "had no active role in securing [his] absence."³¹ Further, the Circuit noted that the two other circuits that have addressed the issue are split in their decisions.³² The Eighth Circuit in *United States v. Hudspeth* held that *Randolph* did not extend to the present issue and that its application was limited to the particular facts in *Randolph*; thus it held that the search was valid despite the suspect's objection, because he was not present and objecting at the time of the consent.³³ On the other hand, the Ninth Circuit in *United States v. Murphy* extended *Randolph*, holding that "[o]nce a co-tenant has registered his objection, his refusal to grant consent remains effective barring some objective manifestation that he has changed his position and no longer objects."³⁴ The *Henderson* court found the reasoning of the Eighth Circuit persuasive and held that "the contemporaneous presence of the objecting and consenting cotenants [i]s indispensable to the decision in *Randolph*."³⁵ The court disagreed with the Ninth Circuit's decision in *Murphy*, arguing that it "reads the presence requirement out of *Randolph*, expanding its holding beyond its express terms."³⁶

In dissent, Judge Rovner argued "that Henderson's objection survived his involuntary removal from the home, thus precluding the search in the absence of a warrant."³⁷ Henderson's arrest is the only reason why he was not "present and objecting" to the search of his home.³⁸ Judge Rovner stated that he would have held that *Randolph* "is a limited holding that 'expressly disinvents' any application to cases with materially different facts," and thus agreed with the Seventh Circuit's decision in *Groves*.³⁹ However, as is the case in *Henderson*, when the police are responsible for removing the objecting tenant from the premises, "his ob-

29. *Id.* at 781 (quoting *Randolph*, 547 U.S. at 126 (Breyer, J., concurring)).

30. *Id.* (citing *United States v. Groves*, 530 F.3d 506, 511-12 (7th Cir. 2008)).

31. *Id.* (quoting *Groves*, 530 F.3d at 512 (7th Cir. 2008)).

32. *Id.* at 781.

33. *Id.* at 782 (citing *United States v. Hudspeth*, 518 F.3d 954 (8th Cir. 2008)).

34. *Id.* at 782-83 (quoting *United States v. Murphy*, 516 F.3d 1117, 1125 (9th Cir. 2008)).

35. *Id.* at 783.

36. *Id.* at 784.

37. *Id.* at 786 (Rovner, J., dissenting).

38. *Id.*

39. *Id.* at 786-87 (quoting *United States v. Groves*, 530 F.3d 506, 512 (7th Cir. 2008)).

jection ought to be treated as a continuing one that trumps his co-tenant's consent and so precludes a search of the premises unless and until the police obtain a warrant."⁴⁰ The fact that Henderson's arrest was lawful does not alter the analysis, since "[a]n individual does not lose all Fourth Amendment rights upon his arrest."⁴¹ Since the "police may not remove a tenant in order to prevent him from objecting to a search of his home,"⁴² they cannot arrest the tenant and ignore an objection he has already made.⁴³ Further, Judge Rovner noted that some questions, such as how long one's objection would remain valid, are hard questions, but these questions were not at issue in the present case and did not need to be decided at that time.⁴⁴

As the dissent correctly identified, the majority failed to properly consider the effect of Henderson's arrest on the application of *Randolph*. Until the moment of Henderson's arrest, he was both present and objecting to the search of his home, and his involuntary removal from the premises should have precluded the search and required suppression of the evidence found.⁴⁵ Support for this conclusion can be found in *Randolph* itself, where the Supreme Court states that "[s]o long as there is no evidence that the police have removed the potentially objecting tenant from the entrance for the sake of avoiding a possible objection."⁴⁶ Thus, as the Ninth Circuit stated, "[i]f the police cannot prevent a co-tenant from objecting to a search through arrest, surely they cannot arrest a co-tenant and then seek to ignore an objection he has already made."⁴⁷ Considering this, the facts in *Henderson* are identical to those in *Randolph* and thus, the search should have been held to be a violation of Henderson's Fourth Amendment rights. Additionally, this analysis distinguishes *Henderson* from *Groves* because the police actively secured Henderson's absence by arresting him, whereas in *Groves* they did not.⁴⁸

Further, the majority misinterpreted the limiting language in *Randolph*. The limiting language simply upheld the Supreme Court's decisions in *Matlock* and *Rodriguez*. In both *Matlock* and *Rodriguez*, the defendants never voiced an objection to the search.⁴⁹ The court failed to distinguish between lack of consent and express objection, yet these two concepts are not synonymous.⁵⁰ Because this language does not extend

40. *Id.* at 787.

41. *Id.* at 788 (citing *Maryland v. Buie*, 494 U.S. 325, 336 (1990)).

42. *Id.* (citing *Georgia v. Randolph*, 547 U.S. 103, 121 (2006)).

43. *Id.* (quoting *United States v. Murphy*, 516 F.3d 1117, 1124-25 (9th Cir. 2008)).

44. *Id.*

45. *Id.* at 786.

46. *Randolph*, 547 U.S. at 121 (2006).

47. *United States v. Murphy*, 516 F.3d 1117, 1124-25 (9th Cir. 2008).

48. Compare *Henderson*, 536 F.3d at 778 with *United States v. Groves*, 530 F.3d 506, 512 (7th Cir. 2008).

49. See *Illinois v. Rodriguez*, 497 U.S. 177, 180 (1990); *United States v. Matlock*, 415 U.S. 164, 166 (1974).

50. See *United States v. Hudspeth*, 518 F.3d 954, 962-63 (8th Cir. 2008) (Melloy, J., dissenting).

the application of *Matlock* and *Rodriguez* to situations where the suspect has expressly objected to a search, *Randolph* should have controlled.

Additionally, the majority's reliance on Justice Breyer's concurrence in *Randolph* is misplaced. First, a concurrence is not binding precedent and should not be given significant weight. Second, Justice Breyer stated that these cases should be analyzed by looking at the "totality of the circumstances."⁵¹ There is no indication that Justice Breyer's statement that "[t]he Court's opinion does not apply where the objector is not present and objecting," applies to a situation in which the present and objecting occupant is arrested and removed from the premises and then a co-occupant consents to the search.⁵² It is illogical to conclude that either the limiting language in the majority opinion or the concurrence extends to this situation.

Additionally, the majority's reliance on *Hudspeth* is also misplaced. The facts in *Hudspeth* were materially different than the facts in *Randolph*, as well as those in *Henderson*. In *Hudspeth*, the police arrested Hudspeth after uncovering child pornography on his work computer while executing a search warrant of his office.⁵³ At the time, the police officer asked Hudspeth for permission to search his home computer, which Hudspeth denied.⁵⁴ The police arrested Hudspeth at his office, transported him to jail, and later received reluctant consent from his wife to search their home computer, on which they found additional evidence.⁵⁵ These facts differ from those in *Randolph* and *Henderson* because the suspect was never present and objecting at the premises that were to be searched. The facts in *Hudspeth* are more similar to those in *Matlock* and *Rodriguez* because a suspect was not present to enforce his objection to the search. These facts differ from *Henderson* because the suspect was present and objecting until the police removed him from the premises against his will. Otherwise, he would have remained present and objecting. Thus, the Supreme Court's decision in *Randolph* should have controlled.

Finally, the Seventh Circuit's holding in *Henderson* renders the Supreme Court's decision in *Randolph* meaningless. If the police can override a suspect's objection to the search of his home by simply arresting him and receiving consent from another co-occupant, there are very few situations in which *Randolph* could be applied. The Seventh Circuit read the *Randolph* decision too narrowly. Thus, *Randolph* should have required the exclusion of evidence obtained in a warrantless search of a home after a present and objecting occupant is arrested and involuntarily removed from his home and another co-occupant with authority consents to the search. This is not to say that in every situation in which a suspect

51. *Randolph*, 547 U.S. at 126 (Breyer, J., concurring).

52. *See id.* (internal quotation marks omitted).

53. *See Hudspeth*, 518 F.3d at 955.

54. *See id.*

55. *Id.* at 955-56.

objects to the search of his house that the police may never secure a valid search with the consent of an authorized co-tenant. The decisions should be limited to their particular facts, and other cases should be determined on a case-by-case basis, until the Supreme Court gives further guidance.

In conclusion, the Seventh Circuit erred in its decision to allow evidence secured during a warrantless search of a suspect's home, where he was present and objecting until the police arrested and removed him from the premises and subsequently received consent from a co-occupant to search premises. The court misinterpreted the limiting language in *Randolph*, over-emphasized Justice Breyer's concurrence and took it out of context, and relied on cases whose facts were materially different. Instead, the court should have followed *Randolph*. The facts in *Henderson* were identical to those in *Randolph*, up until the police arrested the suspect and removed him from the premises. Relying on the Supreme Court's language, the rationale in *Randolph* should be extended to *Henderson* because the police should not be allowed to secure a suspect's absence in order to prevent an objection to a search. This extension would prevent the Supreme Court's decision in *Randolph* from losing precedential value.

