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The Federal Law Enforcement -Informer-

MONTHLY LEGAL RESOURCE AND COMMENTARY FOR FEDERAL LAW ENFORCEMENT OFFICERS AND AGENTS

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by
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The State of Third Party Consent After *Georgia v. Randolph*[1]

by
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Introduction

The Supreme Court seems to focus attention on co-occupant consent in 16 year increments. Starting with *U.S. v. Matlock*[2] in 1974, the Court ruled that a fellow occupant who shares common authority may consent to a premises search. In 1990, the Court further ruled in *Illinois v. Rodriguez*[3] that a third party who lacks actual authority but who has "apparent authority" has capacity to give lawful consent. Most recently, in *Georgia v. Randolph* the Court settled a split among both federal and state courts by ruling that the objection of a co-occupant who is present prevails over the consent of another. Since *Randolph* was decided in 2006, the federal circuits have considered numerous challenges to law enforcement searches relying on third party consent. The term "present" in the *Randolph* holding has been the subject of the lower courts' examination, along with two cases on third party capacity to consent.

Federal Circuit Court Application of *Randolph*

The Second Circuit

In *Moore v. Andreno*[4] two deputies were sued for unlawfully entering a room where they discovered drugs. They relied on the consent of a live-in girlfriend who was moving out and called for assistance. Believing her boyfriend had hidden some of her belongings in a study that he had always forbidden her to enter, she used a bolt cutter to remove two locks and entered the room. After receiving an unidentified telephone call and fearing that her boyfriend was on his way back to the home to harm her, she called for help. Upon arrival, the deputies accompanied her into the study to retrieve her belongings and she discovered drugs in a drawer. They seized the drugs and the homeowner was indicted. The state court dismissed the indictment after suppressing the evidence and the homeowner sued.

The court ruled that a third party who has been told not to enter a room, who has been prevented from entry by padlocks, who has gained entry only by cutting the locks with bolt cutters, and who has made these facts known to the officers has neither actual nor apparent

[1] 547 U.S. 103 (2006)
[2] 415 U.S 164 (1974).
[3] 497 U.S. 177 (1990).
[4] 505 F.3d 203 (2nd Cir. 2007).

authority to grant consent. The court explained that a third party has authority to consent to a search of a home when that person has access to the area searched and has either (a) common authority over the area, (b) a substantial interest in the area, or (c) permission to gain access to the area.

In granting qualified immunity to the two deputies, the court stated, "with the recurrence of domestic violence in our society, we are loath to assume that a man may readily threaten his girlfriend, take her belongings, lock her out of part of his house, and then invoke the Fourth Amendment to shield his actions."[5] Furthermore, while the two deputies, "…misapplied the relevant constitutional calculus, they are police officers, not lawyers or mathematicians. And thus, because the law governing the authority of a third party to consent to the search of an area under the predominant control of another is unsettled,"[6] the legal mistake they made in this case was a reasonable one.

The Sixth Circuit

In *U.S. v. Purcell*[7] officers arrested a fugitive standing outside a hotel room and obtained consent from his girlfriend to search bags inside the room on the basis of "apparent authority" when she claimed the bags belonged to her. The officers found only male clothing inside the first duffel bag. The court ruled that discovery demonstrated the girlfriend lacked proper authority to consent. The court suppressed the discovery of a firearm found in another bag. The court ruled that the officers could have reestablished her apparent authority by asking her to verify her control over the other bags to be searched.

The Seventh Circuit

U.S. v. Wilburn[8] upheld the discovery of a firearm during a consent search of a duffel bag in a closet given by a live in girlfriend who shared the residence for three months. The defendant had already been arrested for a traffic offense and was held in a patrol car outside in the parking lot when his girlfriend gave consent to search. The court cited *Randolph*, *"…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 (italics added)….* So long as there is no evidence that the police have removed the potentially objecting tenant from the entrance for the sake of avoiding a possible objection, there is practical value in the simple clarity of complementary rules, one recognizing the co-tenant's permission when there is no fellow occupant on hand, the other according dispositive weight to the fellow occupant's contrary indication when he ex-presses it.*"*[9]

[5] *Id*. at 205.
[6] *Id.*
[7] 526 F.3d 953 (6th Cir. 2008).
[8] 473 F.3d 742 (7th Cir. 2007).
[9] *Randolph*, 126 S. Ct. At 1527-1528 (emphasis added by the *Wilburn* court).

U.S. v. Groves[10] is a case where police strategically planned to avoid the presence of a potentially objecting co-tenant. Officers were initially called to the neighborhood for shots fired. Upon arrival they spoke to the defendant, a convicted felon. He admitted to shooting off fireworks but denied having a firearm and repeatedly refused consent to search his apartment. A search warrant application was denied, and officers returned to the residence three weeks later when they determined the defendant would be away at work but his live in girlfriend would be home. After she signed a consent to search form, officers discovered the necessary evidence to charge the defendant with being a felon in possession of a firearm. Citing *Wilburn* and applying the holding from *Randolph*, the court ruled that the police played, "no active role" in removing the defendant from the premises. Since he was not, "objecting at the door" as required by *Randolph*, the search was valid.[11]

U.S. v. Henderson[12] answers a slightly different question than the one raised in *Groves*: Does 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?"[13] The court noted that the two other circuits considering this question are split (see *Hudspeth* and *Murphy* below). In *Henderson*, the police were called to a home for a domestic assault. They met the wife outside where she told them her husband choked her and had a history of gun and drug arrests. Using a key provided by her teenage son, the officers entered the home, and the husband unequivocally ordered them out. Instead, they arrested him for domestic battery. The wife then signed a consent to search form and officers seized a number of weapons and drugs.

Agreeing with the 8th Circuit in *Hudspeth*, the court stated, "Both presence *and* objection by the tenant are required to render a consent search unreasonable as to him. Here, it is undisputed that [the husband] objected to the presence of the police in his home. Once he was validly arrested for domestic battery and taken to jail, however, his objection lost its force, and [his wife] was free to authorize a search of the home."[14]

The Eighth Circuit

In *U.S. v. Hudspeth*[15] the police discovered child pornography on the defendant's business computer during the execution of a search warrant. He refused consent to search his home computer for additional evidence and was arrested. Other officers went to his home and, after informing his wife why he had been arrested, she refused consent to search the home. The officers then asked if they could take the home computer. She asked what would happen if she refused and was told that an officer would remain behind to make sure no evidence was destroyed while another left to obtain a search warrant. She then consented and more evidence was discovered on the home computer.

[10] 530 F.3d 506 (7th Cir. 2008).
[11] *Id.* at 512.
[12] 536 F.3d 776 (7th Cir. 2008).
[13] *Id*. at 781.
[14] *Id*. at 785. (emphasis original).
[15] 518 F.3d 954 (8th Cir. 2008).

The court applied "the narrow holding of *Randolph*, which repeatedly referenced the defendant's physical presence and immediate objection [and] the absent, expressly objecting co-inhabitant has assumed the risk that another co-inhabitant might permit the common area to be searched."[16] Here again, simultaneous physical presence and objection must exist to overcome the consent of a cohabitant.

The Ninth Circuit

Contrary to *Hudspeth* and *Henderson*, the Ninth Circuit has ruled in *U.S. v. Murphy*[17] that "when a co-tenant objects to a search and another party with common authority subsequently gives consent to that search in the absence of the first co-tenant the search is invalid as to the objecting co-tenant."[18] Despite a valid arrest and removal from the scene, followed by a voluntary consent two hours later by another co-tenant, "[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."[19] The court referred to one of the concerns addressed in *Randolph* that the police should not remove a "potentially objecting tenant from the entrance for the sake of avoiding a possible objection."[20] Therefore, "when an objection has been made by either tenant prior to the officers' entry, the search is not valid as to him and no evidence seized may be used against him."[21]

The Tenth Circuit

In *U.S. v. McKerrell*[22] the court addressed the same concern expressed by the Ninth Circuit in *Murphy*. However, the "bare fact"[23] of an arrest and transport to the police station does not support a conclusion that police removed the arrestee to mute a potential objection to a search. When officers arrived at a home to arrest the defendant on outstanding felony drug charges he quickly retreated into the home and barricaded himself inside. His wife quickly came out of the house, leaving their young child inside. After a number of telephone conversations the defendant came outside and surrendered peacefully. He was arrested and transported to the police station. Officers then asked the wife for consent to search and she signed a written authorization. Affirming the search, the court found that merely barricading oneself in a home to avoid arrest on a warrant is not the functional equivalent of an express refusal of consent to search the home. In contrast with the Ninth Circuit, this court found that once a co-tenant is lawfully arrested and removed from the scene, the remaining co-tenant may give a valid consent to search.

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[16] *Id*. at 960-61.
[17] 516 F.3d 1117 (9th Cir. 2008).
[18] *Id*. at 1124.
[19] *Id*. at 1125.
[20] *Randolph*, 547 U.S. at 121.
[21] Murphy, 516 F.3d at 1125.
[22] 491 F.3d 1221 (10th Cir. 2007).
[23] *Id*. at 1229.

Conclusion

It did not take long for the twin requirements of physical presence and express objection to surface in the appellate arena. So far, with the exception of the Ninth Circuit, the lower courts are applying *Randolph* narrowly, construing it to mean that one cohabitant may still provide lawful consent over the objection of another who is not physically present.

Carl Milazzo graduated from Western Illinois University in 1984 and Chicago Kent College of Law in 1987. After serving as an Army JAG officer, Carl joined the Fayetteville, North Carolina Police Department as its Police Attorney, becoming a sworn officer and working on the Chief's staff. In January 2001 Carl became the Assistant Executive Director of the AELE Law Enforcement Legal Center. He arrived at FLETC in June 2002 as a Senior Instructor in the Legal Division, was promoted to Branch Chief in the Enforcement Operations Division in October 2003and then Legal Division Chief in 2005.

FRCrP 41 Change

Effective December 1, 2008

Search Warrants for Foreign Locations

Barring congressional action, on December 1 of this year, Federal Rule of Criminal Procedure 41, Search and Seizure, will be amended to add the provision below authorizing U.S. Magistrate Judges to issue search warrants for specified locations outside of the United States.

(b) Authority to Issue a Warrant. At the request of a federal law enforcement officer or an attorney for the government:

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(5) a magistrate judge having authority in any district where activities related to the crime may have occurred, or in the District of Columbia, may issue a warrant for property that is located outside the jurisdiction of any state or district, but within any of the following:

(A) a United States territory, possession, or commonwealth;

(B) the premises — no matter who owns them — of a United States diplomatic or consular mission in a foreign state, including any appurtenant building, part of a building, or land used for the mission's purposes; or

(C) a residence and any appurtenant land owned or leased by the United States and used by United States personnel assigned to a United States diplomatic or consular mission in a foreign state.

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CASE SUMMARIES

CIRCUIT COURTS OF APPEALS

7th CIRCUIT

Osagiede v. U.S., 2008 U.S. App. LEXIS 19237, September 09, 2008

Article 36 of the Vienna Convention on Consular Relations imposes three separate obligations on a detaining authority (the government): (1) inform the consulate of a foreign national's arrest or detention without delay; (2) forward communications from a detained national to the consulate without delay, and (3) inform a detained foreign national of "his rights" under Article 36 without delay.

Although the government's failure to comply with the Convention's requirements will not alone support exclusion of evidence or statements otherwise lawfully obtained, dismissal of an indictment, or reversal of a conviction or sentence, defense counsel's failure to inform her client of these rights can support a Sixth Amendment claim of ineffective assistance of counsel.

Click **HERE** for the court's opinion.

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U.S. v. Jennings, 2008 U.S. App. LEXIS 19560, September 15, 2008

Officers executing a search warrant have categorical authority to detain any occupant of the subject premises during the search. *Muehler v. Mena*, 544 U.S. 93, 98 (2005); *Michigan v. Summers*, 452 U.S. 692 (1981). This authority exists in part because the probable cause underlying a warrant to search a premises gives police reason to suspect that its occupants are involved in criminal activity, and also because the officers have a legitimate interest in minimizing the risk of violence that may erupt when an occupant realizes that a search is underway.

The rule of *Summers* also permits police to detain people who approach a premises where a search is in progress. Jennings' intrusion into the apartment parking lot within the security perimeter of officers preparing to serve a search warrant permitted his detention. The crack cocaine was in plain view in his vehicle and is therefore admissible evidence.

The 3rd and 6th circuits agree (cites omitted).

Click **HERE** for the court's opinion.

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9th CIRCUIT

U.S. v. Craighead, 539 F.3d 1073, August 21, 2008

Craighead was in "custody" for *Miranda* purposes in his own home for the twenty to thirty minute interview when eight law enforcement officers, representing three different agencies (five FBI agents, a detective from the Pima County Sheriff's Department, and two members from the OSI) went to Craighead's residence to serve a search warrant; all of these law enforcement officers were armed and some of them unholstered their firearms in Craighead's presence; all of the FBI agents were wearing flak jackets or "raid vests;" an agent, accompanied by a detective who wore a flak jacket and firearm, directed Craighead to a storage room at the back of his house, "where they could have a private conversation;" the door was shut "for privacy;" and the detective placed himself between Craighead and the door.

"Custody" existed in those circumstances despite the fact that Craighead was told he was not under arrest; that any statement he might make would be voluntary; that he would not be arrested that day regardless of what information he provided; that he was free to leave; and despite the fact that no force, threats or promises were used to induce Craighead to speak.

Click **HERE** for the court's opinion.

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U.S. v. Nader, 2008 U.S. App. LEXIS 18976, September 05, 2008

Looking at this issue for the first time, the Court decides:

The Travel Act, 18 U.S.C. § 1952(a), provides that "[w]hoever . . . uses the mail or any facility in interstate or foreign commerce" with intent to carry on unlawful activity is guilty of a crime. Since telephones are instrumentalities of interstate commerce, even completely intrastate telephone calls involve the use of a facility "in" interstate commerce in violation of the Travel Act. As in 18 U.S.C. § 1958, the murder-for-hire statute, the Travel Act does not require actual interstate activity.

The 2nd, 5th, and 8th circuits agree (cites omitted).

Click **HERE** for the court's opinion.

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