No.

IN THE

SUPREME COURT OF THE UNITED STATES

Walter Fernandez,

Petitioner

v.

The State of California,

Respondent

On Petition for a Writ of Certiorari
To The California Court of Appeal, Second Appellate District, Division Four

PETITION FOR WRIT OF CERTIORARI

Gerald P. Peters, Esq.
Law Office of Gerald Philip Peters
P. O. Box 6759
Thousand Oaks, CA 91359

Attorney for Petitioner
Walter Fernandez

Question Presented For Review

Proper interpretation of *Georgia v. Randolph*, 547 U.S. 103, 126 S.Ct. 1515, 164 L.Ed.2d 208 (2006), specifically whether a defendant must be personally present and objecting when police officers ask a co-tenant for consent to conduct a warrantless search or whether a defendant's previously-stated objection, while physically present, to a warrantless search is a continuing assertion of 4th Amendment rights which cannot be overridden by a co-tenant.

Parties to the Proceedings

The parties to the proceedings in the California Court of Appeal are the State of California and petitioner Walter Fernandez. There are no parties to the proceedings other than those named in the petition.

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Opinions Below

The unpublished opinion of the California Court of Appeal, which is the subject of this petition, was filed on August 1, 2012, and is attached as Appendix A. The California Supreme Court's one-page order denying review is attached as Appendix B.

Jurisdiction

The decision of the California Court of Appeal to be reviewed was filed on August 1, 2012. The California Supreme Court denied discretionary review on October 31, 2012. This petition is filed within 90 days of that date. Supreme Court Rule 13.1. Petitioner invokes this Court's jurisdiction under 28 U.S.C. section 1257(a).

Constitutional Provisions Involved

Federal Constitutional Provisions

The 4th Amendment of the United States Constitution provides: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or

affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The 14th Amendment provides: "No State shall . . . deprive any person of life, liberty, or property, without due process of law . . . ."

Statement of the Case

Petitioner Walter Fernandez was charged by Information with committing the offenses of robbery (Cal. Pen., § 211), infliction of corporal injury on a cohabitant (§ 273.5(a)), felon in possession of a firearm (§ 12021(a)(1), possession of a concealed weapon (§ 12020(a)(1)), and felon in possession of ammunition (§ 12316(b)(1)). With respect to the robbery offense, it was alleged that petitioner used a knife during the commission of the offense. (§ 12022(b)(1).) As to all counts, other than infliction of corporal injury on a cohabitant, it was also alleged that the offenses were committed for the benefit of a street gang (§ 186.22(b)(1)(C)) and that petitioner previously served three prior prison terms within the meaning of section 667.5(b). (CT 90-94.)

On October 8, 2010, petitioner pled no contest to counts 3 through 5, and the gang allegation was stricken as to those counts. (CT 222.)

On October 25, 2010, a jury found petitioner guilty of robbery and infliction of corporal injury on a cohabitant. As to the robbery offense, the

jury found true both the gang allegation and an allegation Fernandez used a knife in the commission of the crime. (CT 339-340.)

On March 11, 2011, Fernandez was sentenced to a total term of 14 years. The court imposed a term of 14 years on count 1 [robbery], consisting of the middle term of 3 years, plus 10 years for the gang enhancement and 1 year for the weapon enhancement. The court imposed concurrent sentences of 3 years on count 1, 2 years on count 3, 2 years on count 4, and 2 years on count 5. The court struck the prior prison term enhancements. (CT 406, 407, 428.)

On April 11, 2011, Fernandez filed a timely notice of appeal. (CT 431.) On August 1, 2012, appellant's conviction was affirmed by the California Court of Appeal, 2nd District, Division 4. (App. A.) Petitioner petitioned for discretionary review by the California Supreme Court. On October 31, 2012, that court denied review in an order stating "The petition for review is denied." (App. B.)

Reasons for Granting the Writ

Review is required to determine the proper interpretation of the Court's decision in *Georgia v. Randolph*, 547 U.S. 103, 126 S.Ct. 1515, 164 L.Ed.2d 208, *supra*, specifically whether a defendant must be personally present and objecting when police officers ask a co-tenant for consent to conduct a warrantless search or whether a defendant's previously-stated objection,

while physically present, to a warrantless search has continuing vitality and cannot be overridden by a co-tenant.

A conflict exists as to whether a constitutional objection, once asserted, has continuing vitality or whether, once the defendant is absent from the residence (and not removed by law enforcement personnel for the express purpose of avoiding defendant's assertion of constitutional rights), the defendant's assertion of constitutional rights can be overridden by a co-tenant.

I. THERE IS A CONFLICT AMONG FEDERAL AND STATE COURTS AS TO WHETHER A DEFENDANT'S PREVIOUSLY-STATED OBJECTION TO A SEARCH IS OVERRIDEN BY A CO-HABITANT'S CONSENT IF THE OBJECTING DEFENDANT IS NOT PHYSICALLY PRESENT WHEN CONSENT IS SOUGHT FROM THE CO-HABITANT

In this case, Fernandez, after objecting to police officers entering his apartment, was arrested and removed. Thereafter, Roxanne Rojas, a co-tenant, consented to a search. There is a substantial conflict among federal and state courts as to whether or not the search after Fernandez' objection is constitutionally permissible.

In *Georgia v. Randolph* 547 U.S. 103, 114, *supra*, the Supreme Court held that, while an occupant may have the right to consent to police entry and search, that consent cannot override the objection of a present, non-consenting co-occupant.

> Since the co-tenant wishing to open the door to a third party has no authority in law or social practice over a present and objecting co-tenant, his disputed invitation, without more, gives a police officer no better claim to reasonableness in entering than the officer would have in the absence of any consent at all. Accordingly . . . the cooperative occupant's invitation adds nothing to the government's side to counter the force of an objecting individual's claim to security against the government's intrusion into his dwelling place.

(*Id.* at pp. 114-115.)

Though *Randolph* concerned a "present and objecting co-tenant," it made clear that consent of one tenant would not be valid where the non-consenting tenant was arrested or removed from the scene of the present colloquy for the purpose of presenting an objection from being asserted. (*Id.* at p. 121.)

A conflict exists among federal and state courts regarding proper interpretation of *Randolph*. Some courts conclude that, under *Randolph*, a co-tenant who objects, but is thereafter arrested and removed from the scene (although not for the purpose of preventing an objection), does not lose his constitutional objection when a co-tenant consents to a police entry and search. Other courts hold that, once the objecting defendant is arrested and removed, his objection can be overridden by the consent of a co-tenant.

The 9th Circuit Court of Appeal holds that a search conducted after a co-tenant's objection violates the 4th and 14th Amendments to the Federal Constitution. In *United States v. Murphy*, 516 F.3d 1117, 1124 (9th Circuit 2008), the 9th Circuit states, "[W]hen 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." Further, "Nor, more generally, do we see any reason to limit the *Randolph* rule to an objecting tenant's removal by police. Once 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." (*Id.* at p. 1125.) *Murphy* reasoned, "If 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." (*Id.* at pp. 1124-1125.)

In *Murphy*, the government attempted to distinguish *Randolph* because, since the defendant had been arrested, "the objecting co-tenant was not physically present when the other tenant gave consent to the search." (*Id.* at p. 1124.) *Murphy* saw no reason "why Murphy's arrest should vitiate the objection he had already registered to the search." (*Ibid.*) See also, *Richardson v. City of Antioch*, 722 F.Supp.2d 1133, 1140-1141 (N.D.Cal. 2010) and *Martin v. United States*, 952 A.2d 181, 187, 188 (D.C. 2008) which reach the same result.

This rule was also followed by an Oregon Court of Appeals in *State v. Caster*, 236 Ore.App. 214 (Or. 2010). *Caster*, noting that *Randolph* emphasized the "narrowness" of its holding, observed that nothing in the *Randolph* opinion "hints that a different result would have obtained had Mr. Randolph been arrested immediately after his objection" and that "at no point

did the court suggest that . . . police had the option of simply arresting the defendant and then seeking the co-occupant's consent – something of a glaring omission, given the potential significance of the exception and the depth of treatment given to other hypothetical fact patterns." (*Id.* at pp. 232-233.)

In contrast, several federal circuits have reached the opposite conclusion, concluding that, unless the defendant is personally present at the precise moment consent is sought from a co-habitant, the defendant's objection is overridden by the co-habitant's consent. *See*, *United States v. Shrader*, 675 F.3d 300 (4th Cir. 2012); *United States v. Cook*, 674 F.3d 491 (5th Cir. 2012); *United States v. Hicks*, 539 F.3d 566 (7th Cir. 2008); *United States v. Henderson*, 536 F.3d 776 (7th Cir. 2008); *United States v. Hudspeth*, 518 F.3d 954 (8th Cir. 2008) [en banc]; *United States v. Folster*, 654 F.Supp.2d 389 (E.D.N.C. 2009). State courts in Colorado, New Jersey, and Wisconsin agree. See, *State v. Strimple*, 267 P.3d 1219, 2012 Co. 1 (Colo. 2012); *State v. Lamb*, 2012 WL 2427947 (N.J.Super.A.D. 2012); *State v. St. Martin*, 334 Wis.2d 290, 800 N.W.2d 858 (Wis. 2011).

For example, *Hudspeth* concluded that, since the defendant was arrested and removed before his wife consented to a search of their residence, defendant's objection was overruled by his wife's subsequent consent.

> [W]e note that when Mrs. Hudspeth consented to the seizure of their home computer, Hudspeth already had been arrested and jailed for possession of child pornography. . . [¶] . . . Hudspeth was not

> at the door and objecting and does not fall within *Randolph*'s "fine line." Thus, we must conclude Cpl. Nash's failure to advise Mrs. Hudspeth of her husband's earlier objection to a search of the home computer did not convert an otherwise reasonable search into an unreasonable.

(518 F.3d at pp. 959-960.)

In *Henderson*, the 7th Circuit framed the question as follows, "Among the questions left unanswered by *Randolph* is the one presented here: 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 removed and is no longer 'present and objecting'?" (536 F.3d at p. 781.) The Court concluded that defendant's removal from the scene, by his arrest, ended his objection.

> Here, it is undisputed Henderson objected to the presence of the police in his home. One he was validly arrested for domestic battery and taken to jail, however, his objection lost its force, and Patricia was free to authorize a search of the home. This she readily did. Patricia's consent rendered the warrantless search reasonable under the Fourth Amendment. . .

(536 F.3d at p. 785.)

But, strong dissents were raised in cases decided by the 7th (*Henderson*) and 8th (*Hudspeth*) Circuits, as well as the decisions of the Supreme Courts of Colorado (*Strimple*) and Wisconsin (*St. Martin*). See, *United States v. Henderson*, 536 F.3d 776, 785-788, *supra*, Rovner, C.J., dis.; *United States v. Hudspeth*, 518 F.3d 954, 961-965, *supra*, Melloy, C.J., Wollman, C. J., and Bee, C.J., dis.; *State v. Strimple*, 267 P.3d 1219, 1227-1229, *supra*, Bender,

C.J., dis.; *State v. St. Martin*, 334 Wis.2d 290, 315-323, 800 N.W.2d 858, 870-874, J. Bradley and Abrahamson, C.J., dis.

For example, in *Hudspeth*, Judge Melloy wrote, in dissent:

> Notably, none of Supreme Court's relevant co-tenant consent jurisprudence presented a factual scenario identical to that presented in the instant case. The differences between the cases are plain. In *Matlock* and *Rodriguez*, the co-tenant challenging the admission of evidence against him never voiced an objection to the warrantless search. . . . Randolph, of course, objected to the warrantless search of his home . . . , as did Hudspeth. Randolph objected while standing at the threshold of the shared residence. . . whereas Hudspeth's objection occurred off-site. The question is whether these differences are of constitutional import. The majority glosses over the difference between lack of consent and express objection, and instead focuses on geography, concluding that the location of a defendant, not whether he expressly objects, is determinative. Mindful that the Supreme Court "decides[s] the case before [it], not a different one," . . . I reach a contrary conclusion. . . . I conclude a warrantless search conducted despite the timely express objection of a co-tenant of equal status cannot be considered reasonable, regardless of where the objection occurs.

518 F.3d at p. 962. Similarly, in *United States v. Henderson*, 536 F.3d 776, 785-786, Justice Rovner wrote in dissent.

> There is only one reason that this case is not on all fours with *Georgia v. Randolph*: When Kevin Henderson told the police to "get the fuck out" of his house, the officers arrested and removed *him* instead. Henderson was both a present and actual objector to the search of his home. Had he remained on the premises, his objection would have foreclosed the police from searching the house

> regardless of his wife's consent. . . . My colleagues conclude that Henderson's valid arrest and removal from the scene sapped his objection of its force and allowed the police to search the house with Patricia Henderson's consent. . . I would hold that Henderson's objection survived his involuntary removal from the home, thus precluding the search in the absence of a warrant. . .

(Emphasis in original.)

Likewise, in *State v. Strimple*, 267 P.3d 1219, 1228, *supra*, decided by the Colorado Supreme Court, Chief Justice Bender dissented, "I find the Ninth Circuit's impeccable logic and reasoning persuasive and in line with the letter and purpose of the Fourth Amendment, exceptions to which are 'jealously and carefully drawn.' . . . . There is no reason that Strimple's arrest should vitiate the objection he had already raised to the search." (Citation omitted.) Similarly, in *State v. St. Martin*, 800 N.W.2d 858, 870-871, *supra*, Justice Bradley, of the Wisconsin Supreme Court, dissented:

> The majority appears, at times, to construe "physically present" to mean that the objecting inhabitant must be standing squarely under the doorframe when he registers his objection to the search. To the extent the majority limits the holding from *Randolph*, it endorses a test that will yield arbitrary results and impermissibly affords citizens fewer Fourth Amendment protections than does the United States Supreme Court.
>
> Contrary to the majority, I conclude that this case falls squarely within the rule enunciated in *Randolph*. Because I determine that St. Martin was physically present when he refused to consent to the search, I respectfully dissent.

A deep and irreconcilable split has developed among federal and state courts as to proper application of *Randolph's* rule. Review is required to resolve this split.

II. CONCLUSION

For the foregoing reasons, petitioner requests that the Court grant this petition for a writ of certiorari to review the judgment and opinion of the California Court of Appeal, Second Appellate District, affirming his sentence.

Dated: December 14, 2012

Respectfully submitted,

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Gerald P. Peters
Attorney for Petitioner
Walter Fernandez