No. 12-7822

In the Supreme Court of the United States

WALTER FERNANDEZ,

Petitioner,

v.

STATE OF CALIFORNIA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
CALIFORNIA COURT OF APPEAL, SECOND APPELLATE DISTRICT, DIVISION FOUR

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Georgia v. Randolph, 547 U.S. 103, 121 (2006), held that, under the Fourth Amendment's co-occupant consent rule, a physically present occupant's objection proscribes a warrantless entry, despite a co-occupant's contemporaneous consent to search. *Randolph*, however, recognized a complementary rule, whereby a potential objector, who is nearby but not part of the threshold colloquy, "loses out," unless the police had removed him for the purpose of avoiding an objection. *Id.*

The question presented is:

Whether petitioner's objection to police entry into his shared apartment proscribed a subsequent warrantless search based on his co-tenant's consent given after petitioner had been removed from the premises for domestic violence and then lawfully arrested for a prior robbery, where there was no showing that the arrest was a pretext for the search.

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Contrary to the statement in the petition (Pet. i), the California Court of Appeal's opinion was certified for partial publication, and is reported at *People v. Fernandez*, 145 Cal.Rptr.3d 51 (Cal. Ct. App. 2012). (Pet., App. A.) The California Supreme Court denied petitioner's petition for review. (Pet., App. B.)

STATEMENT OF THE CASE

Petitioner's convictions comprised three sets of crimes—(1) the armed robbery of Abel Lopez; (2) the domestic abuse of his girlfriend, Roxanne Rojas; and (3) the illegal possession of a firearm and ammunition. On the early afternoon of October 12, 2009, petitioner approached Lopez on the street, issued a gang challenge and tried to stab Lopez. When Lopez resisted, petitioner called to some accomplices, who helped him to subdue and rob the unarmed victim. Petitioner fled into the nearby apartment he shared with Rojas, where pursuing police officers heard a verbal altercation. A bloodied Rojas opened the door for the investigating officers. Upon detaining petitioner, the officers discovered that he matched the robbery suspect's description. After Lopez identified petitioner as the robber, the police arrested him. With petitioner either in the squad car or en route to the police department, the police returned to the apartment, where they obtained Rojas's consent to search the residence—and discovered the illegal firearm and ammunition, among other items.

Before trial, petitioner brought a pretrial motion to suppress evidence seized during the warrantless search of his apartment following his arrest, seeking to exclude various items including a 20–gauge shotgun and ammunition, and a knife.

After the trial court denied the suppression motion, petitioner pleaded no contest to three counts of firearm and ammunition possession.

Following a trial on the remaining two counts, the jury found petitioner guilty of second degree robbery of Lopez with knife- and criminal-street-gang findings, and inflicting corporal injury on his cohabitant, Rojas. The trial court imposed a fourteen-year sentence.

A. The Suppression Motion Evidence

At 12:15 p.m. on October 12, 2009, Police Officer Joseph Cirrito received a radio call as to an assault with a deadly weapon at Venice Boulevard and Magnolia Avenue—the Lopez robbery. The officer and his partner, Detective Kelly Clark, drove to petitioner's apartment building, a known location for the Drifters gang, based on a report that one of the suspects had a Drifters tattoo. They parked in the alley behind the apartment building, within a quarter mile of the robbery site on Venice. Officer Cirrito saw a male wearing a light blue t-shirt run across the alley toward the apartment.

While Officer Cirrito waited to hear a response to his radio request for a description of the suspect's clothes, he heard loud yelling and screaming from the second floor of the apartment building. He and Detective Clark waited less than thirty minutes for backup support before walking up the apartment building's back staircase. Officer Cirrito knocked on the door of the unit from which he had heard the yelling—the same apartment that he had seen the male suspect run inside. A

woman in her twenties (Rojas) opened the door, holding an infant. Her forehead was swollen and her shirt and hand were smeared with fresh blood.

Officer Cirrito and Detective Corona, one of the backup officers, asked Rojas to step outside the apartment into the hallway. Officer Cirrito questioned her about the blood, the yelling and whether there was anyone else in the apartment. Officer Cirrito saw petitioner inside. He was sweaty, hostile-looking and wore only boxer shorts. Petitioner yelled, "Get out. I know my rights. You can't come in." From the way petitioner and Rojas looked, the officer believed a battery or domestic violence incident between them had just taken place. The officer decided it was important to separate them. He was also concerned there might be someone else in the apartment.

When petitioner refused to step outside the apartment, Officer Cirrito and Detective Corona took him out, handcuffed him and escorted him down the back stairwell to keep him apart from Rojas. As petitioner walked down the stairs, Officer Cirrito saw a tattoo on petitioner's head. It matched the description of the robbery suspect. After Officer Cirrito confirmed the suspect's description with the officers at the robbery scene, Lopez was driven to the alley behind the apartment building where he identified petitioner as the person who robbed him.

Officer Cirrito returned to the apartment and saw Rojas standing at the front door. She said she lived in the apartment with petitioner and her children. Detective Clark received Rojas's oral and written consent to search the apartment. Approximately an hour had passed since petitioner had been handcuffed and

escorted down the apartment stairwell. During the apartment search, the officers recovered clothing and a knife that might have been used in the robbery, along with a shotgun and ammunition.

For the defense, Rojas testified that she heard a knock at her door and opened it to find six or seven police officers outside. She denied anything was happening. The officers asked to enter, but before she could answer, they saw petitioner and pushed their way inside. The officers wrestled petitioner to the floor and some of them dragged him down the stairs, while others stayed inside. Detective Clark took her son aside and began questioning him without her permission. Officer Cirrito refused her request to be present with her son, and threatened to take her children away. She did not want to sign the consent form, but felt the officers "pretty much" pressured her into consenting to the search. The officers stayed inside the apartment for four to five hours, while they tried to convince her to say that petitioner hit her, despite her denial.

On rebuttal, Officer Cirrito testified that he initially asked Rojas who was inside the apartment. She did not mention petitioner, but said it was herself and her children. Officer Cirrito had Rojas step outside of the apartment because he believed a fight had just taken place inside, and he needed to search immediately to investigate whether the domestic violence suspect was inside. Also, he had seen the robbery suspect run to the apartment building, and thought he might be inside the unit. Officer Cirrito further explained that, while he was escorting petitioner out of the apartment, other officers were performing a "protective sweep" of the kitchen

and living room areas. One of those officers showed Officer Cirrito a folding stainless steel "butterfly knife" found during that sweep.[1]

With regard to the initial confrontation at the apartment door, Officer Cirrito stressed that he had encountered an ongoing domestic violence incident. He described his thought process as follows: He saw "a female with an infant" and "blood, swelling, the yelling, the possibility someone's in there. Is she just trying to blow me off, or is there somebody in there? Are there children? Is he holding a child hostage?" The officer did not know what was happening inside. When he saw petitioner approaching from the kitchen area, the officer became concerned for the safety of the other officers because petitioner was visibly angry.

Contrary to Rojas's testimony, Officer Cirrito explained that only two officers initially detained petitioner inside the apartment, and that he was never taken down onto the ground. Nor was petitioner pushed or dragged down the stairs. It was only after Lopez had identified petitioner as the robbery suspect that Officer Cirrito and Detective Clark returned to the apartment, where they received Rojas's written consent to search. Officer Cirrito never threatened Rojas to obtain her consent. At some point during the interview with Rojas, she told Officer Cirrito that petitioner

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[1] Although Lopez testified that the knife was consistent with the one respondent used during the robbery, there was conflicting testimony as to whether it was recovered in the initial protective sweep or in the subsequent consensual search. However, as Lopez had been stabbed in the wrist, the knife's recovery was hardly crucial to the prosecution's armed robbery case. It was only the firearm and ammunition possession convictions that depended on the consensual search.

struck her in the face after the two argued about a confrontation with another woman.

B. The Trial and Appellate Rulings

The trial court denied the suppression motion, finding the police acted reasonably in investigating a potential crime—domestic violence—when they knocked on the apartment door after hearing the sound of a serious verbal altercation. Their reasonable suspicions were confirmed when Rojas answered and the officers saw her injuries. When petitioner approached them in a hostile manner, the police not only had further cause to investigate the domestic violence incident, but they had a legitimate basis to detain petitioner briefly for officer safety reasons. As such, the initial detention and handcuffing of petitioner amounted to a valid investigatory stop pursuant to *Terry v. Ohio*, 392 U.S. 1 (1968). Upon Officer Cirrito's observation of petitioner's tattoo, which was consistent with that of the robbery suspect, there was cause to detain him further to conduct the field show-up. When the victim identified petitioner, it gave the officers reasonable cause to arrest him.

As to the apartment search, the trial court found co-occupant Rojas gave the officers her valid consent. Based on its observation of Rojas's demeanor and her repeated statements that she thought about consenting before she decided to sign the form, the court found she was not coerced, despite feeling some pressure. The trial court specifically found the officers did not conduct a protective search for weapons, but rather a proper, limited and reasonable preliminary search to

determine whether any other dangerous person was in the apartment for purposes of officer safety.

On appeal, petitioner contended the search of his apartment was unreasonable under the Fourth Amendment, based on the co-occupant consent rule in *Georgia v. Randolph*, 547 U.S. 103, 121, which held that the police may not make a warrantless entry of a home despite an occupant's consent to search where a physically present co-occupant objects to the search. The Court of Appeal rejected the claim, holding Rojas's consent to a search of the apartment she shared with petitioner was valid and justified the officers' actions. *People v. Fernandez*, 145 Cal. Rptr. 3d at 63-66.

The appellate court observed that *Randolph* barred a warrantless search only when co-occupants were both present and disagreed about whether to consent. Unlike the objecting occupant in *Randolph*, petitioner had been arrested and removed from the apartment before Rojas gave her consent. The court found petitioner's "absence from the home when Rojas consented to a search of the apartment" to be "determinative." *People v. Fernandez*, 145 Cal. Rptr. 3d at 65. In the absence of evidence that the police had removed petitioner from the scene to avoid a possible objection, the court "believe[d] that the line we draw is consistent with that drawn by the Supreme Court in *Randolph*," as it "distinguish[ed] between cases in which a defendant is present and objecting to a search, and those in which a defendant has been lawfully arrested and thus is no longer present when a cotenant consents to a search of a shared residence." *Id.* at 65-66. The court noted its agreement with four federal circuits and two state supreme courts that had

recognized this distinction, and its disagreement with one federal circuit that had not. *Id.* at 62-66.

Petitioner petitioned for review to the California Supreme Court, which summarily denied his petition.

REASONS WHY THE WRIT SHOULD BE DENIED

According to petitioner, certiorari should be granted to resolve a conflict in the federal and state courts as to the proper interpretation of this Court's co-occupant consent rule: Whether, under *Georgia v. Randolph*, 547 U.S. 103 (2006), one occupant's initial objection to a warrantless search made when physically present remains effective, such that it cannot be overridden by a co-occupant's subsequent consent given to law enforcement officers when the first occupant is no longer present to object. (Pet. 3-4.) In essence, petitioner argues for adoption of the general rule set forth by the Ninth Circuit in *United States v. Murphy*, 516 F.3d 1117, 1124 (9th Cir. 2008): "[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."[2] (Pet. 5-6.)

1. The petition should be denied for several reasons. First, the conflict in the state and federal courts is heavily lopsided against petitioner's position. *Murphy*'s reasoning has been correctly, and almost universally, rejected, with the great weight

[2] *See also Murphy*, 516 F.3d at 1125 ("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.").

of authority interpreting *Randolph* in the same way as the California Court of Appeal. *Murphy* therefore stands as an outlier, and is likely to pass into desuetude. No federal circuit court has agreed with *Murphy*, while the Fourth, Fifth, Seventh and Eighth Circuits, along with the Colorado and Wisconsin Supreme Courts, have rejected it.[3] The only published authorities to endorse *Murphy* are an intermediate appellate court in Oregon and the District of Columbia Court of Appeals, along with federal district courts in the Northern District of California and the Eastern District of Michigan.[4] And, most of these decisions can be distinguished from, and harmonized with, the contrary line of authorities.

Moreover, the Ninth Circuit has read *Murphy* narrowly, casting doubt on the viability of the broad rule on which petitioner seeks to rely. In *United States v. Brown*, 563 F.3d 410 (9th Cir. 2009), the court placed *Murphy*'s statement that the police "'cannot arrest a co-tenant and then seek to ignore an objection he has already made'" in the context of *Randolph*'s bad-faith exception to valid co-occupant consent—that is, "a pretextual arrest made for the specific purpose of preventing the arrestee's subsequent objection to the search . . . ." *Brown, supra,* 563 F.3d at 417

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[3] *United States v. Shrader*, 675 F.3d 300 (4th Cir. 2012); *United States v. Cooke*, 674 F.3d 491 (5th Cir. 2012); *United States v. Henderson*, 536 F.3d 776 (7th Cir. 2008); *United States v. Hudspeth*, 518 F.3d 954 (8th Cir. 2008); *People v. Fernandez*, 145 Cal. Rptr. 3d at 62-66; *People v. Strimple*, 267 P.3d 1219 (Colo. 2012); *State v. St. Martin*, 800 N.W.2d 858 (Wis. 2011).

[4] *State v. Caster*, 234 P.3d 1087, 1097 (Or. App. 2010); *Martin v. United States*, 952 A.2d 181, 188 (D.C. 2008); *Richardson v. City of Antioch*, 722 F. Supp. 2d 1133, 1140 (N.D. Cal. 2010); *United States v. Phillips*, No. 12-20245, 2013 WL 943522 (E.D. Mich. 2013).

(quoting *Murphy*, 516 F.3d at 1124-25, and referring to *Randolph*, 547 U.S. at 121-22). In *Brown*, as in petitioner's case, there was no evidence the arrest was motivated by any such pretext. *Id.* at 417 ("there is no evidence that Brown's arrest was motivated by any purpose other than removing from the streets of Spokane" a felon on an outstanding warrant). Thus, it is far from clear that petitioner would prevail even under the Ninth Circuit precedent on which he relies.

2. Second, to the extent a legitimate split of authority exists, this case does not present a proper vehicle for resolving it. In *Murphy*, prior to his arrest and his co-tenant's later consent, the defendant-occupant had objected to a direct request by the police to conduct a warrantless search. Here, in contrast, petitioner spontaneously volunteered his objection to police entry before the police said anything to him, much less requested his consent to search. Instead, the police were in the process of responding to an ongoing domestic violence dispute between the co-occupants. The *Randolph* court made it clear there could be no Fourth Amendment objection when the police enter a residence to protect a victim of domestic violence. *Randolph*, 547 U.S. at 118. Therefore, petitioner's attempt to keep the police from entering the premises during an ongoing domestic violence investigation puts his objection on a different footing from that of an occupant like the one in *Murphy*, as it is not clear whether petitioner's objection will count as invoking the Fourth Amendment's warrant requirement as to a later search after his arrest for a robbery. It follows that the resolution of this case is unlikely to reach the issue posed by *Murphy* and the solid line of authority rejecting its reasoning.

I. THE CALIFORNIA COURT OF APPEAL CORRECTLY INTERPRETED *RANDOLPH*; ANY SPLIT OF AUTHORITIES IS LOPSIDED IN FAVOR OF THE CALIFORNIA COURT OF APPEAL'S OPINION

It is easy to see why the Ninth Circuit's broad statement in *Murphy*—that a defendant's refusal of consent, once given, remains effective in perpetuity against the consent of a co-occupant until personally revoked, despite the defendant's legitimate, intervening arrest—has garnered so little support: It cannot be squared with the clear rule set forth in *Randolph*, unless it is read in the narrow way suggested by the Ninth Circuit in *United States v. Brown*, 563 F.3d at 417. *Randolph*'s holding is straightforward: "[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." *Randolph*, 547 U.S. at 120 (footnote omitted).

To forestall potential ambiguity and to preserve the viability of two prior Fourth Amendment holdings,[5] *Randolph* purposefully drew a "fine line," emphasizing the need to be physically present at the time consent is sought in order to enforce the warrant requirement: "[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." *Id.* at 121. Thus, a

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[5] *United States v. Matlock*, 415 U.S. 164, 170 (1974), and *Illinois v. Rodriguez*, 497 U.S. 177, 181 (1990).

cohabitant who has no opportunity to make a contemporaneous objection at the residence's threshold because he or she is in a nearby squad car, *United States v. Matlock*, 415 U.S. 164, 170 (1974), or asleep inside the apartment, *Illinois v. Rodriguez*, 497 U.S. 177, 181 (1990), is subject to the consent of a co-occupant. *Randolph*, 547 U.S. at p. 121.

Recognizing the potential for abuse that its ruling might have, *Randolph* posited a bad-faith exception: A co-occupant's consent would not be effective in the face of "evidence that the police have removed the potentially objecting tenant from the entrance for the sake of avoiding a possible objection." *Randolph*, 547 U.S. at 121. Subject to that exception, *Randolph* emphasized the "practical value in the simple clarity" of its "complementary rules, one recognizing the co-tenant's permission when there is no fellow occupant on hand, the other according dispositive weight to the fellow occupant's contrary indication when he expresses it." *Randolph*, 547 U.S. at 121-22. Therefore, an occupant who cannot voice an objection because he or she, like petitioner, has been legitimately taken into police custody implicitly "loses out" under the first of *Randolph*'s complementary rules.

The leading federal appellate case applying *Randolph* to a co-occupant's consent given after the defendant's arrest is *United States v. Hudspeth*, 518 F.3d 954 (8th Cir. 2008) (en banc). There, the police found child pornography on the defendant's office computer. The defendant refused consent to search the personal computer at his home. After arresting the defendant, the police went to the residence where his wife gave consent to search. *Id.* at 955-56. The Eighth Circuit

distinguished *Randolph*'s holding and found the consent valid, based primarily on the defendant's absence from the home at the time consent was given: "Hudspeth was not present because he had been lawfully arrested and jailed based on evidence obtained wholly apart from the evidence sought on the home computer. Thus, this rationale for the narrow holding of *Randolph,* which repeatedly referenced the defendant's physical presence *and* immediate objection, is inapplicable here." *Id.* at 960.

In *United States v. Shrader*, 675 F.3d 300 (4th Cir. 2012), the Fourth Circuit followed *Hudspeth* and rejected *Murphy*, in a matter in which the defendant's earlier pre-arrest refusal to consent was at the same premises where the co-occupant gave her subsequent consent: "Because Shrader was absent from the premises, and there was no evidence that he was arrested for the purpose of nullifying his refusal to consent to the search, his aunt's consent provided adequate permission for the police to search the house, notwithstanding his earlier objection." *Id.* at 307; *see also id.* (declining "to adopt the more expansive view of the Ninth Circuit which permits a defendant's refusal to operate indefinitely, 'barring some objective manifestation that he has changed his position and no longer objects'") (quoting *Murphy,* 516 F.3d at 1125).

Similarly, in *United States v. Cooke*, 674 F.3d 491, 499 (5th Cir. 2012), the Fifth Circuit "agree[d] with the Seventh and Eighth Circuits that the objection of an absent cotenant does not vitiate the consent of a physically present cotenant under *Randolph*." In *Cooke*, the defendant, who was jailed in another county, refused to

consent to the search of the residence he shared with his mother. The police, however, went to the residence, where they obtained his mother's consent. *Id.* at 493, 496. The Fifth Circuit reasoned that "*Randolph* self-consciously emphasized the importance of Randolph's presence by repeatedly noting it when declaring and reiterating the holding." *Cooke*, 674 F.3d at 499. Moreover, in rejecting the Ninth Circuit's interpretation of *Randolph*, the Fifth Circuit explained that "although it is a close question, social convention normally allows for a visitor to feel invited into a home when invited by a physically-present resident, even if an absent cotenant objects to it, rather than the visitor's assuming he is *verboten* forever until the objector consents." *Id.* (footnote omitted).

In *United States v. Henderson*, 536 F.3d 776 (7th Cir. 2008), the Seventh Circuit held that a co-occupant's consent was valid under *Randolph* in circumstances analogous to those in petitioner's case. There, police officers responded to a domestic abuse report at the home shared by the defendant, his wife and their son. The wife, who was standing on the front lawn of the home, told the officers that her husband had choked her and thrown her out of the house. She "had noticeable red marks around her neck that substantiated her story." *Id.* at 777. The defendant's teenage son gave the officers a house key, and the wife told them the defendant "had weapons in the house and had a history of drug and gun arrests." *Id*

The officers used the key to enter the home, and found the defendant in the living room. "After a brief exchange, Henderson told the officers to '[g]et the [expletive] out of my house'—which the district court reasonably construed as an

objection to a search." *Henderson*, 536 F.3d at 777-78. The defendant was arrested for domestic battery and taken to the police station. A few minutes after that, defendant's wife agreed to a search of the home and signed a consent form. *Id.* at 778.

The Seventh Circuit therefore was faced with the same question raised in the instant petition: "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'?" *Henderson*, 536 F.3d at 781. The *Henderson* court followed *Hudspeth*, and applied *Randolph* to answer the question in the negative, rejecting *Murphy*'s interpretation in the process.[6] *Id.* at 781-85. As the Seventh Circuit pointed out: "The Ninth Circuit's decision in *Murphy* essentially reads the presence requirement out of *Randolph,* expanding its holding beyond its express terms and giving rise to many questions with no readily identifiable principles to turn to for answers." *Id.* at 784.

Moreover, as the Seventh Circuit explained, Justice Breyer's concurring opinion in *Randolph* provided additional reasons for refusing to extend its narrow holding. *Henderson*, 536 F.3d at 776 (citing *Randolph*, 547 U.S. at 127 (Breyer, J., concurring)). Not only did Justice Breyer's separate opinion "emphasize[] the majority's acknowledgment that police may properly enter a home, despite a

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[6] *See also* United *States v. Reed*, 539 F.3d 595, 598-99 (7th Cir. 2008) (finding valid co-occupant consent given after the police stopped defendant's vehicle and arrested him on a outstanding warrant, despite the defendant's refusal to consent to the search of his shared apartment).

present occupant's objection, in order to protect a victim from an ongoing or imminent crime and in certain other exigent circumstances," but it "declared the outer limits of the Court's holding: 'The Court's opinion does not apply where the objector is not present and objecting.'" *Id.* (quoting *Randolph*, 547 U.S. at 126 (internal quotation marks omitted).

Finally, two state courts of last resort have construed *Randolph* in the same manner as the California Court of Appeal and the Fourth, Fifth, Seventh and Eighth Circuits. In *People v. Strimple,* 267 P.3d 1219 (Colo. 2012), the Colorado Supreme Court held that a warrantless search was permissible and consistent with *Randolph* in circumstances analogous to those in petitioner's case. There, the police responded to a report of domestic abuse by the defendant's common law wife. The defendant refused entry and threatened to kill the officers. After a stand-off, the defendant surrendered and was taken into custody. His wife then consented to have the police search the residence. *Strimple,* 267 P.3d at 1221-22.

The *Strimple* court held that the defendant's pre-arrest objection to entry did not override his wife's consent to search that resulted in the seizure of firearms, explosives and drugs. It followed the Seventh Circuit's reasoning in *Henderson* and rejected the Ninth Circuit's approach in *Murphy*, concluding that *Randolph*'s cautionary language concerning pretextual arrests made for the purpose of avoiding a co-occupant's objection (which it referred to as dicta), did not apply to "'an otherwise valid third-party consent search where the objecting tenant is removed from the home based on a *legitimate,* nonpretextual arrest.'" *Strimple,* 267 P.3d at

1226 (quoting *Henderson,* 536 F.3d at 783 n.5 (emphasis in *Henderson*)).

Similarly, in *State v. St. Martin,* 800 N.W.2d 858, 859-60 (Wis. 2011), *cert. denied,* ___ U.S. 1003, 132 S. Ct. 1003, 181 L. Ed. 2d 745 (2012), the Wisconsin Supreme Court held that the consent of the defendant's girlfriend was valid, despite the fact that he had refused to consent while inside a police vehicle parked nearby. The state high court emphasized that there was "no evidence that taking St. Martin into custody was a pretext to remove him from the premises so that police could search for the cocaine." 800 N.W.2d at 867.

The *St. Martin* court agreed with *Hudspeth* and *Henderson* "that the *Randolph* Court incorporated an express requirement of physical presence in its shared-dwelling consent rule." *St. Martin*, 800 N.W.2d at 868. Therefore, it held that "under the justified formalism of the rules set forth by the United States Supreme Court, St. Martin was 'nearby' and 'not invited to take part in the threshold colloquy,' and that he therefore does not fall within the rule stated in *Randolph* such that the search should have been barred and the evidence gained from it suppressed." *Id.*

In contrast, no other federal circuit court has endorsed *Murphy*. Indeed, as stated above, the Ninth Circuit itself has read the decision narrowly, such that the validity of its broad interpretation of *Randolph* has been rendered questionable.

In *United States v. Brown*, 563 F.3d at 416-18, the Ninth Circuit found a co-tenant's consent valid, despite having been given after the defendant had been arrested. Distinguishing *Murphy*, the Ninth Circuit explained that its prior statement that the police "'cannot arrest a co-tenant and then seek to ignore an objection he

has already made,'" was made in reference to *Randolph*'s bad faith exception to a co-occupant's valid consent—"a pretextual arrest made for the specific purpose of preventing the arrestee's subsequent objection to the search

. . . ." *Brown, supra,* 563 F.3d at 417 (quoting *Murphy*, 516 F.3d at 1124-25, and referring to *Randolph*, 547 U.S. at 121-22). It therefore appears that *Brown* reads *Murphy* as implicitly finding that by arresting the defendant after he refused to consent, taking him into custody, and then returning to two hours later to obtain consent from the co-tenant, the arrest had been a pretext for preventing the defendant from insisting on a search warrant. *See Brown*, 563 F.3d at 417-18 (citing *Murphy*, 516 F.3d at 1124-25). That exception was found not to apply in *Brown* because the defendant did not make a pre-arrest objection and there was "no evidence that Brown's arrest was motivated by any purpose other than removing from the streets of Spokane a felon wanted on an outstanding warrant for second degree assault and reportedly in possession of firearms." *Id.* at 417.

Indeed, construing *Randolph* in a manner consistent with the Fourth, Fifth, Seventh and Eighth Circuits, the *Brown* court found "[t]he fact that the police had an additional opportunity obtain Brown's consent, does not alter the fact that Brown was justifiably absent from the search colloquy." *Brown*, 563 F.3d at 417-18. "Moreover, in light of the policy justifications provided in *Randolph* for the 'fine line' drawn therein, Agent Watson's decision not to seek consent from Brown does not invalidate the consent spontaneously volunteered by [the co-tenant]." *Id.* at 418.

Decisions following *Murphy* are few. The first, *Martin v. United States*, 952

A.2d 181, 188 (D.C. 2008), is easily distinguished. There, the District of Columbia Court of Appeals held a warrantless search invalid in the face of the defendant's refusal to consent. Ignoring the defendant's refusal, the police officers summoned his mother to the residence and obtained her consent in the defendant's (silent) presence. *Id.* at 183. The *Martin* court followed *Murphy*'s interpretation of *Randolph* and held that "appellant's mother's later consent in this case did not vitiate her son's earlier denial of consent. After his initial refusal, the police could have obtained valid consent to the search only from appellant." *Id.* at 187.

Martin's presence at the time his co-occupant gave consent renders that decision distinguishable from *Murphy*, as well as from petitioner's case. In *Martin*, the defendant not only voiced his objection to the search, but remained present (although silent) when the police summoned his co-tenant and obtained her consent. *Martin*, 952 A.2d at 187.[7] Additionally, the *Martin* court noted "at least some evidence that the police may have prevented Martin from speaking to his mother when she arrived on the scene." *Id.* at 187 n.10.

Richardson v. City of Antioch, 722 F. Supp. 2d 1133, 1140 (N.D. Cal. 2010) (a section 1983 action), is similarly distinguishable because it involved a *contemporaneous dispute* as to consent. While the tenants consented to police entry, the guests and the homeowner herself refused to give their consent. The defendant

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[7] *United States v. Phillips*, No. 12-20245, 2013 WL 943522 (E.D. Mich. March 11, 2013), presents similar facts. There, the police ignored the defendant's refusal of consent to search, and obtained his mother's consent in defendant's presence. *Id.* at *6.

"had previously informed the Officers that they should not enter her home without a warrant," and there was "no dispute that her house guests reiterated that position when the Officers began to knock and announce their presence." *Id.* at 1140. Indeed, there was "no dispute that the Officers heard the occupants deny them admission and reiterate the need for a warrant to enter." *Id.* (footnote omitted). Therefore, "[a]ccording to the explicit holding in *Randolph,* the tenants' consent, counter to the other occupants' objections to the entry, does not qualify as an exception to the warrant requirement under the Fourth Amendment." *Id.*

Finally, in *State v. Caster*, 234 P.3d 1087, *rev. denied*, 246 P.3d 744 (2010), the defendant expressly objected to a warrantless search, and was arrested and removed from the premises. Shortly thereafter, the police obtained consent from the defendant's wife, who had been present when the defendant insisted on a search warrant. *Id.* at 1088. The Oregon Court of Appeals invoked *Murphy* to hold that one co-occupant lacks authority to admit the police "over the then-present objection of the other occupant, whether or not the objecting occupant is subsequently arrested at the scene." *Id.* at 1097. It would therefore appear that *Caster* is the only non-distinguishable published authority to endorse the broad reading of *Murphy* upon which petitioner relies. However, Oregon's court of last resort has not ruled on the issue, and, as of this date, no court has invoked *Caster* as authority for interpreting *Randolph*.

In sum, the Court of Appeal correctly applied the Fourth Amendment's co-occupant consent jurisprudence in a straightforward interpretation of *Randolph*'s

bright-line holding that only a physically present occupant's objection proscribes a warrantless entry in the face of a co-occupant's contemporaneous consent to search. An occupant like petitioner who is absent from the threshold colloquy with police due to his legitimate, non-pretextual arrest is bound by the co-occupant's consent. Given that the great weight of authority is against petitioner's interpretation of *Randolph*, the split of authority does not present a compelling reason for granting certiorari in this case. Moreover, because most of the authorities that followed *Murphy* were predicated on circumstances in which there was a dispute over consent between physically present co-occupants, there is good reason to believe that the conflicting authorities could be largely harmonized.

II. THE UNIQUE FACTS OF PETITIONER'S CASE MAKE IT A POOR VEHICLE FOR RESOLVING ANY SPLIT OF AUTHORITY AS TO THE EFFECT OF AN INTERVENING ARREST ON A CO-OCCUPANT'S PRIOR OBJECTION

In *Murphy*, the Ninth Circuit was confronted with the question of the effectiveness of a second co-occupant's consent to a warrantless search made after the first co-occupant had been arrested and removed from the premises after refusing consent. In petitioner's case, however, that issue is complicated and obscured by a domestic-violence investigation overlay, as well as the fact that the police never sought to obtain petitioner's consent. Rather, petitioner spontaneously volunteered his objection to police entry when the officers were in the midst of responding to an ongoing domestic violence investigation.

Therefore, before reaching the question of whether, or to what extent, a co-occupant's pre-arrest insistence on a search warrant remains effective following his or her lawful arrest and removal, this Court would have to determine whether

petitioner's attempt to preempt the officers' domestic violence investigation counted as a refusal to search under the Fourth Amendment. Under *Randolph*, there is good reason to believe that a negative resolution of the preliminary issue would obviate consideration of the question that is the subject of this petition.

The *Randolph* court made it clear there could be no Fourth Amendment objection when the police enter a residence to protect a victim of domestic violence. *Randolph*, 547 U.S. at 118.

> No question has been raised, or reasonably could be, about the authority of the police to enter a dwelling to protect a resident from domestic violence; so long as they have good reason to believe such a threat exists, it would be silly to suggest that the police would commit a tort by entering, say, . . . to determine whether violence (or threat of violence) has just occurred or is about to (or soon will) occur, however much a spouse or other co-tenant objected. . . . Thus, the question whether the police might lawfully enter over objection in order to provide any protection that might be reasonable is easily answered yes.

Randolph, 547 U.S. at 118.

As is well established, "this Court has continuously emphasized that '[r]easonableness . . . is measured . . . by examining the totality of the circumstances.'" *Randolph*, 547 U.S. at 125 (Breyer, J., concurring) (quoting *Ohio v. Robinette,* 519 U.S. 33, 39 (1996)). In his concurring opinion, Justice Breyer cautioned that "were the circumstances to change significantly, so should the result," and "the risk of an ongoing crime or other exigent circumstance can make a critical difference." *Id.* Here, petitioner objected when the officers sought to protect the visibly injured Rojas after they heard a serious verbal altercation. When

petitioner objected, therefore, it was in the context of precisely the kind of police activity that *Randolph* placed outside the reach of the Fourth Amendment's warrant requirement. This would seem the type of factual scenario likely to be considered critically different under *Randolph*.

There are other factual aspects of petitioner's case that complicate the consent issue in a unique way. Petitioner was removed from the premises and placed in the squad car after the police noticed the telltale tattoo that potentially tied him to a crime independent of the domestic violence incident. Not only that, but the officers did not seek Rojas's consent until Lopez had identified petitioner as the robber. That is, petitioner was absent from the threshold colloquy because he had been arrested for a separate crime from the one that occasioned the officer's initial entry and his objection. Therefore, the social expectation analysis set forth in *Randolph* would likely play out differently: There is little reason to think a person would assume a co-occupant's refusal of entry during a domestic-violence investigation had prospective, preclusive effect after he had been arrested for a separate armed robbery.

Therefore, given the unique factual circumstances of this case, granting review would hardly assure resolution of the co-occupant consent question petitioner seeks to have resolved.

CONCLUSION

The petition for writ of certiorari should be denied.

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Respectfully submitted

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