FOURTH AMENDMENT — SEARCH AND SEIZURE — EIGHTH CIRCUIT HOLDS THAT A COTENANT'S CONSENT AT THE TIME OF THE SEARCH CAN OVERRULE A SUSPECT'S RECENT OBJECTION. — *United States v. Hudspeth*, 518 F.3d 954 (8th Cir. 2008) (en banc).

"[T]here are few areas of Fourth Amendment jurisprudence of greater practical significance than consent searches."[1] However, some have described the Supreme Court's current consent doctrine as a legal fiction, imputing consent where none existed.[2] One situation in which this fiction has run into trouble is when two people have standing to consent, but they disagree. The Supreme Court touched on this problem in *Georgia v. Randolph*,[3] holding that one tenant's consent could not overrule her present cotenant's objection. Recently, in *United States v. Hudspeth*,[4] the Eighth Circuit held that a suspect's wife's consent was valid regarding the seizure of the family's home computer, despite the suspect's previous objection.[5] In doing so, the court laid down an arbitrary rule that creates perverse incentives for law enforcement to obtain consent by keeping objecting suspects away from their homes and unreasonably ignoring their stated objections.

In 2002, officers investigating the illegal sale of pharmaceuticals executed a search warrant on Handi-Rak Service, Inc.[6] During the search, investigators discovered child pornography on several compact discs in the office of Roy Hudspeth, Handi-Rak's Chief Executive Officer.[7] Hudspeth gave a Missouri state trooper, Corporal Nash, oral and written consent to search the computer, which contained additional images of child pornography.[8] Based on information provided by Hudspeth and evidence collected at Handi-Rak, Corporal Nash believed there was also child pornography on Hudspeth's home computer.[9] Corporal Nash requested permission to search Hudspeth's home computer, but Hudspeth refused.[10] Hudspeth was subsequently arrested and taken to the county jail.[11]

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[1] 1 JOSHUA DRESSLER & ALAN C. MICHAELS, UNDERSTANDING CRIMINAL PROCEDURE § 16.01, at 261 (4th ed. 2006).

[2] *See, e.g.*, Tracey Maclin, *The Good and Bad News About Consent Searches in the Supreme Court*, 39 MCGEORGE L. REV. 27, 81–82 (2008) (providing an anecdote "expos[ing] the fictional quality of the [Supreme] Court's consent search doctrine").

[3] 126 S. Ct. 1515 (2006).

[4] 518 F.3d 954 (8th Cir. 2008) (en banc).

[5] *Id.* at 961.

[6] United States v. Hudspeth, 459 F.3d 922, 924 (8th Cir. 2006).

[7] *Id.* at 925.

[8] *Id.*

[9] *Hudspeth*, 518 F.3d at 955.

[10] *Hudspeth*, 459 F.3d at 925.

[11] *Id.*

Corporal Nash went with three other officers to the Hudspeth home.[12] After informing Mrs. Hudspeth that they had arrested her husband, Corporal Nash asked her for permission to search the home. He did not tell Mrs. Hudspeth that her husband had previously objected to the search.[13] When she refused, Corporal Nash requested permission to take the family computer.[14] Mrs. Hudspeth "said she did not know what to do," and asked what would happen if she refused.[15] Corporal Nash told her that he would apply for a search warrant while an armed uniformed officer remained at her home to make sure no evidence was destroyed. After a failed attempt to contact her attorney, Mrs. Hudspeth consented to the seizure of the computer. The officers discovered additional images of child pornography on Hudspeth's personal computer.[16]

Hudspeth was indicted on one count of possession of child pornography and one count of producing and attempting to produce child pornography.[17] After the district court denied his motion to suppress the evidence found on both computers, Hudspeth pled guilty to the possession charge, reserving his right to appeal the denial of his motion.[18] The district court sentenced Hudspeth to sixty months of incarceration.[19] Hudspeth appealed, arguing that the district court erred in denying his motion to suppress.[20]

A panel of the Eighth Circuit affirmed in part and reversed in part.[21] Writing for the panel, Judge Melloy[22] examined Hudspeth's objection to the search of the home computer in light of *Randolph*, which was handed down by the Supreme Court after oral argument but before the opinion was issued by the panel.[23] In *Randolph*, an officer met both husband and wife at the door to their home.[24] When the husband refused to consent to a search, the officer turned to the wife, who consented.[25] The Court held that the wife's consent was in-

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[12] *Id.*

[13] *Id.*

[14] *Id.*

[15] *Id.*

[16] *Id.* at 926. The images included videos of Hudspeth's stepdaughter appearing nude. *Id.*

[17] These were violations of 18 U.S.C. §§ 2251 and 2252A. *Hudspeth*, 459 F.3d at 926.

[18] *Hudspeth*, 459 F.3d at 926.

[19] *Id.*

[20] *Id.* Hudspeth also alleged that the district court erred in its application of the United States Sentencing Guidelines. *Id.*

[21] *Id.* at 932. The Eighth Circuit affirmed the district court's finding that the officers' search of Hudspeth's business computer did not exceed the scope of the original search warrant. *Id.* at 927–28. However, the court "reversed [the district court's] judgment that there was a valid consent to the search and seizure of his home computer." *Id.* at 932.

[22] Judge Heaney joined Judge Melloy's opinion.

[23] *Hudspeth*, 518 F.3d at 956.

[24] Georgia v. Randolph, 126 S. Ct. 1515, 1519, 1527 (2006).

[25] *Id.* at 1519.

sufficient in the face of her physically present husband's contemporaneous objection.[26] Applying *Randolph*, Judge Melloy found Mrs. Hudspeth's consent invalid because it could not "overrule Mr. Hudspeth's denial of consent."[27] Judge Riley concurred in part and dissented in part.[28] He believed that *Randolph* did not apply because it was limited to situations where the objecting occupant was physically present during the co-occupant's consent.[29]

On rehearing en banc, the Eighth Circuit reversed in part, affirming the district court's decision in full.[30] Now writing for the majority, Judge Riley began with a detailed examination of the Supreme Court's decisions in *United States v. Matlock*,[31] *Illinois v. Rodriguez*,[32] and *Randolph*.[33] In *Matlock*, police arrested the defendant in his front yard, then sought and received consent to search the residence from a cotenant.[34] The Supreme Court held that the cotenant's consent was valid and that the officers were not required to seek the consent of the defendant, who was sitting in a squad car out front.[35] In *Rodriguez*, the Court held that "a police officer's reasonable belief that a person with common authority over the premises consented to the search [satisfied] the reasonableness requirement under the Fourth Amendment," where officers were invited into an apartment by a woman who purported to live there.[36] Judge Riley stressed that the *Randolph* Court had carefully preserved both *Matlock* and *Rodriguez*, distinguishing them on the grounds that Randolph was physically present at the time of the search.[37] He went on to hold that, because Hudspeth was not

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[26] *Id.* at 1528.

[27] *Hudspeth*, 459 F.3d at 930 (internal quotation marks omitted). The court further stated, "We believe that the Supreme Court has made it clear that the police must get a warrant when one co-occupant denies consent to search." *Id.* at 931. After considering and rejecting Hudspeth's sentencing claim, the court remanded the case to the district court to allow the government to present evidence on alternative theories for the admissibility of the home computer. *Id.* at 931–32.

[28] *Id.* at 932 (Riley, J., concurring in part and dissenting in part).

[29] *Id.* at 932–33.

[30] *Hudspeth*, 518 F.3d at 961.

[31] 415 U.S. 164 (1974).

[32] 497 U.S. 177 (1990).

[33] *Hudspeth*, 518 F.3d at 957. Judge Riley was joined by Chief Judge Loken and Judges Murphy, Smith, Colloton, Gruender, Benton, and Shepherd.

[34] *See Matlock*, 415 U.S. at 166.

[35] *See id.* at 171 ("[Proof of voluntary consent to search] is not limited to proof that consent was given by the defendant, but may show that permission to search was obtained from a third party who possessed common authority over . . . the premises . . . .").

[36] *Hudspeth*, 518 F.3d at 957–58 (citing *Rodriguez*, 497 U.S. at 186).

[37] *See id.* at 958–59. "If [*Matlock* and *Rodriguez*] are not to be undercut by today's holding, we have to admit that we are drawing a fine line . . . [as] the potential objector, nearby but not invited to take part in the threshold colloquy, loses out." *Id.* at 959 (quoting Georgia v. Randolph, 126 S. Ct. 1515, 1527 (2006)).

physically present when the officers requested his wife's consent, *Randolph* was not implicated and the consent was valid.[38]

Judge Melloy dissented.[39] He found it "inconceivable . . . that a core value of the Fourth Amendment, the expectation of privacy in one's own home, would be dependent upon a tape measure."[40] Also turning to *Matlock* and *Rodriguez*, he argued that the key distinction between those cases and *Randolph* was not that the objecting tenant was physically present, but that he voiced his objection.[41] Judge Melloy pointed out that, in both *Matlock* and *Rodriguez*, although the officers had not obtained the consent of the party who later moved to suppress the evidence, they had not obtained that party's express objection either.[42] Judge Melloy believed "that the Supreme Court ha[d] made it clear that the government must get a warrant when one cotenant expressly denies consent to search a shared residence," regardless of that tenant's physical proximity.[43]

The Eighth Circuit treated *Hudspeth* as an instance of strict adherence to precedent, when the court should have treated it as a matter of first impression where it had the freedom to craft a new rule to best fit the situation. Although both the majority and the dissenting opinions represented permissible approaches to this situation, an examination of the incentives created by the majority's rule reveals that the dissent's is the better approach.

The Eighth Circuit approached the issue of whether an occupant's consent to search was valid regarding an absent, expressly objecting co-occupant as a dichotomy: either the new rule in *Randolph* applied, or *Matlock* controlled.[44] That dichotomy was false. In fact, both precedents applied, but neither controlled. *Hudspeth* was factually distinguishable from *Randolph*. In *Randolph*, the Supreme Court decided only that a co-occupant's consent was invalid in the face of a physically present, objecting co-occupant;[45] it did not reach the issue of an absent, objecting co-occupant, or even speculate as to which condition — physical presence or express objection — if either, was more

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[38] *See id.* at 960–61.

[39] *Id.* at 961 (Melloy, J., dissenting). Judge Melloy was joined by Judges Wollman and Bye.

[40] *Id.* at 964.

[41] *Id.* at 962.

[42] *Id.*

[43] *Id.* at 964.

[44] *Compare id.* at 960 (majority opinion) (characterizing the issue as a matter of first impression), *with id.* at 960–61 (finding that, because the facts did not fall within *Randolph*'s "fine line," *Randolph* did not apply and the search was automatically reasonable (quoting Georgia v. Randolph, 126 S. Ct. 1515, 1527 (2006))). At no point did the court consider a holding anywhere between *Matlock* and *Randolph*.

[45] *Randolph*, 126 S. Ct. at 1526.

important to its holding.[46] Thus, the majority was correct in stating that *Randolph* did not control. However, this does not mean that *Matlock* controlled. Unlike Matlock, Hudspeth was "invited to take part in the threshold colloquy,"[47] and he expressly objected to the search.[48] Since the Supreme Court had not considered this issue, the Eighth Circuit should have used its discretion to craft a new rule that was appropriate to the situation, was consistent with *Matlock* and *Randolph*, and created the best incentives for law enforcement.[49]

Reasonableness is the underlying principle of the Fourth Amendment.[50] The majority rule in *Hudspeth* creates incentives for law enforcement to act unreasonably in two ways. First, it encourages officers to keep objecting tenants from their homes by any means legally possible. Second, it encourages officers to turn a deaf ear to residents' explicit objections and to search doggedly for anyone with actual or apparent authority who is so disconnected from the situation as to blindly grant consent.

When the Supreme Court created its rule in *Randolph*, it presumed that "police [would not remove] the potentially objecting tenant from the entrance for the sake of avoiding a possible objection."[51] *Hudspeth*'s holding directly undermines that presumption by creating an incentive for police to keep objecting tenants from their homes. In *United States v. Murphy*,[52] the Ninth Circuit recognized this possibility as its chief justification for the rule that one tenant's consent cannot overrule a cotenant's objection — whether the objecting tenant was present at the time consent was given or not.[53] "If the police can-

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[46] *See, e.g.*, *Hudspeth*, 518 F.3d at 963 (Melloy, J., dissenting) (acknowledging that the Supreme Court left this question unanswered in *Randolph*).

[47] *Randolph*, 126 S. Ct. at 1527.

[48] *Hudspeth*, 518 F.3d at 955.

[49] The Supreme Court has endorsed the proposition that a court should consider incentives in crafting a rule when the application of precedent is objectively unclear. *See* Mapp v. Ohio, 367 U.S. 643 (1961). There, the Supreme Court held that the exclusionary rule applied to the states by way of the Fourteenth Amendment, after considering the fact that a contrary rule would encourage federal officers to "step across the street to the State's attorney with their unconstitutionally seized evidence." *Id.* at 658; *see also id.* at 656 ("[T]he purpose of the exclusionary rule is to deter — to compel respect for the constitutional guaranty in the only effectively available way — by removing the incentive to disregard it." (quoting Elkins v. United States, 364 U.S. 206, 217 (1960) (internal quotation marks omitted))).

[50] *See Hudspeth*, 518 F.3d at 963 (Melloy, J., dissenting) ("The touchstone of the Fourth Amendment is reasonableness." (quoting Samson v. California, 126 S. Ct. 2193, 2201 n.4 (2006))); *see also* U.S. CONST. amend. IV ("The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . .").

[51] *See Randolph*, 126 S. Ct. at 1527; *see also* Maclin, *supra* note 2, at 75–76 (predicting that "[i]n a post-*Randolph* world, an absent suspect's refusal to give consent will not be the final word . . . [because] the police can always remove or arrest a suspect before seeking the co-occupant's consent").

[52] 516 F.3d 1117 (9th Cir. 2008).

[53] *Id.* at 1124–25.

not 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."[54]

The same logic should have guided the *Hudspeth* court. Hudspeth objected; he was subsequently arrested and removed to the county jail, and the same officers sought consent from his unsuspecting wife.[55] The court cannot rely on the justification that Hudspeth "los[t] out" because he was not present at the colloquy.[56] First, he had already participated in the discussion and said "no"; second, the only reason he was not present was because he had been arrested mere hours earlier.[57] Effectively, the majority rule reduced *Randolph*'s affirmation of a co-tenant's Fourth Amendment rights to a mere inconvenience, easily circumvented by any law enforcement officer who is manipulative enough to arrest the suspect — or even simply delay him — before she attempts to search his house.

Restricting *Randolph* to circumstances in which the objecting tenant is physically present also encourages law enforcement to continue searching for someone to say "yes," no matter how many times they hear the word "no" — as long as they can get the consenting person alone. Although the Supreme Court has previously justified third party consent searches on the basis that a co-occupant "has the right to permit the inspection in his own right,"[58] the underlying rationale for allowing a third party to consent to a search is actually administrability. The Supreme Court acknowledged this in *Randolph*:

> [W]e think it would needlessly limit the capacity of the police to respond to ostensibly legitimate opportunities in the field if we were to hold that reasonableness required the police to take affirmative steps to find a potentially objecting co-tenant before acting on the permission they had already received.[59]

The Court analogized to *Rodriguez*, which found that requiring the police to "confirm the actual authority of a consenting individual whose authority was apparent" would be "unjustifiably impractical."[60] Under the circumstances that the Court discussed in *Randolph*, it is reasonable for an officer to take the word of the cotenant as speaking for all tenants.[61]

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[54] *Id.*

[55] *Hudspeth*, 518 F.3d at 955.

[56] *See id.* at 959 ("[T]he potential objector, nearby but not invited to take part in the threshold colloquy, loses out." (quoting *Randolph*, 126 S. Ct. at 1527)).

[57] *See id.* at 960.

[58] United States v. Matlock, 415 U.S. 164, 171 n.7 (1974).

[59] *Randolph*, 126 S. Ct. at 1527.

[60] *Id.*

[61] *See id.* at 1527–28.

This reasoning does not hold, however, when the officer has previously asked the same question of the absent tenant and been rejected. In such a situation, the officer already knows the absent tenant's answer and does not need to impute it from the answer of the present tenant. At that point, the officer has asked the same question of two people, and received conflicting answers. As the Supreme Court pointed out in *Randolph*, having been told unequivocally to stay out by one tenant and invited in by another tenant, "no sensible person would go inside."[62] An officer cannot reasonably believe that she has consent to search the premises when one tenant has denied consent.[63] Whether the objecting tenant is currently on the scene is irrelevant to the officer's belief.[64]

In *Hudspeth*, there was no question whether Corporal Nash had permission to seize the family computer — Hudspeth had already denied his request. The officer's actions in asking the wife, after the husband had already denied him, were akin to a child who asks her father's permission to go to the mall after her mother, who has gone to work, has already said no. Even if the father says yes, the answer is not unclear — it is no — and the child, despite her attempts to point to her father's "consent," will be in trouble when she gets home. As Judge Melloy stated in his dissent, the officers "were attempting to create an opportunity despite actual knowledge that the target of their investigation had already foreclosed the option of a consent search. . . . [H]is 'denial of consent' was 'a foregone conclusion.'"[65]

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[62] *Id.* at 1523. Although the Court's hypothetical in *Randolph* included the additional fact of a caller standing at the front door, with the consenting and objecting tenants standing side by side, the reasonableness of the caller's actions does not appear to depend on the objecting person's presence. Following the Court's logic, any person, invited inside by one tenant, but having been told a few hours earlier by that tenant's roommate to "stay out of my house," would not feel entirely justified in entering. He may enter, since that person is not around, but he would feel guilty and in the wrong, having expressly disregarded the wishes of a person whose home he has invaded. His internal rationalization of "it is okay because X is not here," does not make his actions objectively reasonable.

[63] *See id.* ("[A] 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.").

[64] *See supra* note 62. The next logical question is whether it matters that the same officer receive both the objection and the consent. A reasonable court could rule either way. However, an examination of Fifth and Sixth Amendment right to counsel jurisprudence speaks in favor of imputing the knowledge of one government agent to all government agents. *See, e.g.*, Michigan v. Jackson, 475 U.S. 625, 634 (1986) ("Sixth Amendment principles require that we impute the State's knowledge [that a defendant has requested to speak with counsel] from one state actor to another. . . . One set of state actors (the police) may not claim ignorance of defendants' unequivocal request for counsel to another state actor (the court).").

[65] *Hudspeth*, 518 F.3d at 964 (Melloy, J., dissenting) (quoting *Randolph*, 126 S. Ct. at 1528).

The dissent's rule, while not perfect, does not create the same perverse incentives as the majority's.[66] Interestingly enough, Judge Riley, in his initial dissent from the panel opinion, argued that it was the *dissent*'s rule that would create perverse incentives. He stressed that Judge Melloy's rule would raise "public policy concerns by encouraging law enforcement to adopt a 'don't ask' or an 'ignorance is bliss' policy."[67] He went on to explain that Judge Melloy's position "encourages law enforcement, in seeking consent, to bypass the suspect lest the suspect refuse consent, and instead seek only the consent of an authorized co-occupant, thereby avoiding the knowledge bar."[68] While this is true — under Judge Melloy's rule, officers would likely refrain from asking suspects for consent if at all possible — it is difficult to see that argument's significance. The majority's rule makes the suspect's opinion moot, regardless of whether he is asked for consent or not. The dissent's rule, in contrast, makes the suspect's opinion binding, once expressed. Even if the police do not ask the suspect for consent, the two rules are not equivalent in practice because a suspect can expressly withhold consent of his own volition.

In *Mapp v. Ohio*,[69] Justice Clark stressed that "the history of the criminal law proves that tolerance of shortcut methods in law enforcement impairs its enduring effectiveness."[70] The majority's rule in *Hudspeth* not only tolerates such shortcut methods, but encourages law enforcement to engage in them. Had the Eighth Circuit considered the incentives created by its rule, this detrimental result could have been avoided, and the rights to privacy recognized by the Supreme Court in *Randolph* could have been protected. Instead, these rights were reduced to no more than "an empty promise."[71]

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[66] Judge Melloy would have held that an objection by a cotenant always trumps the consent of a second cotenant. *Id.* This position, while a nice, bright-line rule, is somewhat impractical because it is unlimited in time and scope. If an officer is denied consent from a tenant, he should certainly not be able to go directly to that tenant's house and attempt to obtain consent from a cotenant. That creates the perverse incentives aforementioned. However, should this stop the officer from returning to the house three weeks later, when sufficient time has passed to allow the circumstances and motives of the first tenant to have changed? If the first tenant is not there to give his opinion, which the officer may have reason to believe has changed, must the officer track that tenant down, or can he take the consent of a cotenant at that time? What if the first tenant initially refused to consent to a search of his garage — should this prevent the officer from asking a cotenant about searching the attic? The dissent failed to answer these questions.

[67] United States v. Hudspeth, 459 F.3d 922, 933 (8th Cir. 2006) (Riley, J., concurring in part and dissenting in part).

[68] *Id.* at 933–34.

[69] 367 U.S. 643 (1961).

[70] *Id.* at 658 (quoting Miller v. United States, 357 U.S. 301, 313 (1958)) (internal quotation mark omitted).

[71] *Id.* at 660.