

What Constitutes Valid Consent When One Co-Occupant Consents and the Other Co-Occupant Does Not?

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Generally, officers may obtain a valid consent to search only from a person whose reasonable expectation of privacy may be invaded by the proposed search. Sometimes two or more people—for example, spouses or roommates—share a reasonable expectation of privacy in the same place. Generally, either person may give valid consent to an officer. *United States v. Matlock*, 415 U.S. 164 (1974) (common authority over premises found). However, as discussed below, an exception to this general rule may exist when a physically-present occupant objects.

Georgia v. Randolph. The United States Supreme Court ruled in *Georgia v. Randolph*, 547 U.S. 103 (2006), that if a physically present occupant refuses to consent to a search of a place and a co-occupant consents, the Fourth Amendment prohibits a search based on the co-occupant's consent. The Court made clear that its ruling applies only to a physically present occupant who refuses to consent, as long as officers do not remove a potentially objecting occupant from the entrance to the residence in order to avoid a possible refusal to consent (however, see the discussion of *Fernandez v. California*, discussed below, concerning a legitimate reason to remove an objecting occupant). The Court stated that when officers have obtained consent from a co-occupant, they have no obligation to seek out any other occupants to determine if they want to refuse to allow consent.

The Court placed other limits on the scope of its ruling. The Court noted that the issue of consent is irrelevant when an occupant on his or her own initiative brings evidence from a residence to law enforcement, citing *Coolidge v. New Hampshire*, 403 U.S. 443 (1971). The Court also noted that an occupant can tell law enforcement what he or she knows, which in turn can lead to the issuance of a search warrant. In footnote 6, the Court stated that the exchange of this information in the presence of the nonconsenting occupant may render consent irrelevant by creating an exigency that justifies immediate action. If the occupant cannot be prevented from destroying easily disposable evidence during the time required to get a search warrant, see *Illinois v. McArthur*, 531 U.S. 326 (2001) (preventing suspect's access to residence while law enforcement sought search warrant), a perceived need to act then to preserve evidence may justify entry and search under the exigent circumstances exception to the warrant requirement. The Court also stated that other kinds of exigent circumstances might justify warrantless searches: hot pursuit, protecting officers' safety, imminent destruction to a residence, or likelihood that suspect will imminently flee.

The Court stated that *Randolph* had no bearing on the authority of law enforcement to protect domestic violence victims. The issue in this case concerned an entry to search for evidence. The Court stated that no question could reasonably be made about law enforcement authority to enter a residence without consent to protect an occupant from domestic violence, as long as officers have a good reason to believe such a threat exists. Officers could enter without consent to give an alleged victim the opportunity to collect belongings and get out safely or to determine whether violence or a threat of violence has just occurred or is about to (or soon will) occur. And because officers would be lawfully on the premises, they could seize any evidence in plain view or take further action supported by consequent probable cause. See *State v. Maness*, ___ N.C. App. ___, 782 S.E.2d 122 (2016) (unpublished) (noting *Georgia v. Randolph*, court upholds an officer's entry into a residence with a domestic violence victim, even though the physically present co-occupant was objecting, so the victim could collect her clothes and belongings for herself and her children, although the officer's seizure of the rifle in the residence was illegal because it was not in plain view and no other Fourth Amendment exception permitted its seizure without a search warrant).

Although the Court did not discuss this issue, when an occupant has a superior privacy interest over another occupant of a residence, as is the case in most living arrangements involving a parent and child, the parent's consent would generally override any expressed refusal to consent by a physically present child. See generally 4 Wayne R. LaFare, *Search and Seizure: A Treatise on the Fourth Amendment* 8.4(b) (4th ed. 2012).

Fernandez v. California. The United States Supreme Court in [Fernandez v. California](#) (2014), clarified an issue left open in *Georgia v. Randolph*: the validity of a consent search by a residential occupant after a co-occupant had previously objected to a search but is no longer physically present when the occupant consents. Officers in *Fernandez* saw a man apparently involved in a robbery run into a building. They heard screams and fighting coming from an apartment there. A woman responded to a knock on the door. She had fresh injuries and admitted that she had been in a fight. Fernandez, a co-occupant, then appeared at the door and objected to officers entering the apartment. Believing that Fernandez had assaulted the woman, the officers arrested him and took him to the police station. An officer returned to the apartment an hour later and obtained the woman's consent to search the apartment. The Court noted that *Randolph* had stressed that its ruling was limited to situations when an objecting occupant was physically present when the co-occupant consented to the search (in which case, officers cannot rely on that consent to enter). The Court ruled that as long as officers have an objectively reasonable basis to remove the defendant (that is, the officers' subjective motive for removal is irrelevant), the co-occupant's later consent is sufficient. In this case, the officers properly removed Fernandez so that they could speak with the alleged assault victim outside of Fernandez's intimidating presence. Also, there was probable cause to arrest Fernandez for assault.

With an objecting occupant's physical presence given prominence in *Fernandez*, it remains to be seen how physical presence will be defined in future cases. Does the objecting occupant need to be present exactly where the co-occupant is consenting, or is it sufficient if he or she is somewhere on or near the premises? The Court appeared to indicate that on or near the premises may be sufficient. [The Court cited *Bailey v. United States*, [113 S. Ct. 1031](#) (2013) (detaining occupants of premises during search warrant execution is limited to immediate vicinity of premises to be searched).] But the Court did not definitively decide the issue, and a future Court may decide differently.

North Carolina cases. There have not been any significant North Carolina appellate cases on *Randolph* or *Fernandez*.

Advice to officers. When officers are unsure of their authority to search based on one occupant's consent when another occupant is objecting, they may wish to consult with their agency's legal advisor or obtain a search warrant if probable cause exists to search the premises. Sometimes there will be other legal grounds to enter premises without consent or a search warrant, such as an immediate need to protect a victim from harm, seize weapons for self-protection, make a protective sweep of the premises, and so forth.