May the Fourth Be With You: Fernandez’s Arbitrary Application of the Right to Exclude

I. INTRODUCTION

The following may or may not be an accurate snippet of the Justices’ conference to decide *Fernandez v. California.*

Justice Sotomayor: Why can’t the police just get a warrant instead of a cotenant’s consent to search?
Justice Alito: Don’t be so naïve, Sonia. Issuing warrants is burdensome for judges.
Justice Scalia: Forget warrants. Homeowners have a right under property law to exclude the police.
Chief Justice Roberts: Again with the property law, Tony? Didn’t you get that out of your system when you assigned *Jardines* to yourself?
Justice Kagan: Doesn’t the Fourth Amendment protect the objecting cotenant?
Justice Thomas: Assumption of the risk, Elena. No ifs, ands, or buts about it.
Justice Ginsburg: You’re going to drive me to an early retirement, Clarence.

The question at issue in *Fernandez* was simple: Can a person’s objection to a warrantless search of his home be disregarded if the police obtain his cotenant’s consent and return when he has been removed from the premises? Answering in the affirmative, *Fernandez* trammeled the progressive approach the Court took in its previous cotenant consent case, *Georgia v. Randolph.*

The Court introduced the cotenant consent doctrine in *United States v. Matlock.* In this case, a cotenant’s consent to a warrantless search was deemed legal so long as the search was limited to areas over which both cotenants enjoyed common authority. However, because the scenario in *Matlock* did not account for objecting cotenants, the Court granted certiorari in *Randolph* to determine which of the sparring cotenants had the upper hand should the objector be present. Although *Randolph* made it clear that a present, objecting cotenant could not be denied
his Fourth Amendment rights, it was much less clear what rights, if any, an objecting cotenant had if he was absent during the search.

It would not have been farfetched for Walter Fernandez to believe that his objection to the police’s warrantless search of his home would have prevented the admission of evidence obtained during the search. Indeed, Fernandez seemed to be well aware of his Fourth Amendment rights. What Fernandez did not account for was the fact that the police would return to his home to obtain consent from his cotenant after his arrest and that his physical absence at that moment would nullify his prior objection.

This Note will argue that the Court’s application of the presence requirement in Fernandez is a manipulation of the way it was understood in Randolph and violative of the Fourth Amendment. Part II will highlight the Court’s paramount consent search cases over the last forty years while distinguishing their controlling factors. Part III will summarize the events that led to the Court’s Fernandez decision, as well as contrast the majority and dissenting opinions. Part IV will resolve the underlying concerns that inhibited the Court from expanding Randolph. Part V will advise that Fernandez is a stark departure from the Fourth Amendment’s tenet and a warrantless step in the wrong direction.

II. A HISTORY OF VIOLATIONS

The Fourth Amendment guarantees that people will have “[t]he right . . . to be secure in their . . . houses . . . against unreasonable searches and seizures.” The Fourteenth Amendment binds states to this same principle. It follows that “whenever practicable, [the police must] obtain advance judicial approval of searches and seizures through the warrant procedure.”
Despite the Amendment’s unyielding protection from warrantless searches, its trajectory since its inception can best be described as an ebb and flow.\textsuperscript{17}

A. Thank You for Consenting

“[M]ore than ninety percent of warrantless police searches are accomplished through the use of the consent exception to the Fourth Amendment.”\textsuperscript{18} In \textit{Schneckloth v. Bustamonte}, the Court further encouraged consent searches by noting that police need not alert a person to their right to object to a search.\textsuperscript{19} In so holding, the Court stressed the importance of considering the surrounding circumstances.\textsuperscript{20} Thus, there was no single determinative factor to gauge whether a person consented voluntarily.\textsuperscript{21}

Here, the Court held that Joe Alcala’s consent to search the car he was riding in with Robert Bustamonte was voluntary.\textsuperscript{22} Bustamonte’s conviction was affirmed by the state appellate court,\textsuperscript{23} but reversed by the Ninth Circuit.\textsuperscript{24} After weighing the “competing concerns . . . [of] the legitimate need for such searches and the equally important requirement of assuring the absence of coercion,” the Court decided that the absence of coercion was not as equally important after all.\textsuperscript{25}

B. The Presence of a Woman: The Cotenant Consent Doctrine

Police looking to search a home without a warrant, absent exigent circumstances, were out of luck if an owner was not present to consent—until \textit{Matlock}. In this case, the police seized money from Matlock’s closet after Gayle Graff, his significant other, voluntarily consented to a search of the room they shared.\textsuperscript{26} Significantly, Matlock did not object to the search as he had already been arrested and restrained in a police car at the time Graff consented.\textsuperscript{27} Although the government used the evidence obtained to indict Matlock for robbery, the trial and appellate
courts held that the government had not proven that Graff had the authority to consent. The Court disagreed, relying on third-party consent cases, which “show that permission to search [can be] obtained from a third party who possess[es] common authority over . . . the premises or effects sought to be inspected.”

C. The Big Sleep: You Snooze, You Lose (Your Fourth Amendment Rights)

In Illinois v. Rodriguez, the Court cemented the cotenant consent doctrine by answering a critical issue reserved in Matlock. Must the consenting “cotenant” actually be a cotenant? As a matter of fact, no. Unfortunately for Edward Rodriguez, who believed he was a roommate short when his live-in girlfriend moved out with her children, the police only needed to reasonably believe that she lived there when she allowed them into Rodriguez’s apartment to arrest him for battery. Although the Court agreed that Rodriguez’s girlfriend did not possess common authority over the apartment, it reversed the trial and appellate courts because it was conceivable that she lived there.

Unlike a hotel clerk who lacks the authority to consent to searches of guests’ rooms, ostensibly consenting cotenants can invite police into the common areas of what appear to be their homes—and anything found thereafter is fair game. Had Rodriguez not been sleeping, he could have objected to the police entering his home. But at that point, which cotenant’s request would the police honor: the imploring invitation, or the vehement veto?

Furthermore, because the cotenant consent doctrine “[i]s not synonymous with a technical property interest,” it follows that analyzing the reasonableness of a person’s invitation over their cotenant’s objection is determined by social expectations, not property law. Today, however, the social expectations rubric is less clear after Florida v. Jardines. In this case, the
Court held that the warrantless search of a home using a narcotics dog to alert police to marijuana violated the Fourth Amendment, making it clear that police looking to conduct a search are not visitors to a home in the traditional sense. Although property rights may inform Fourth Amendment analyses, they are not understood as “the sole measure of Fourth Amendment violations.”

D. *Face/Off: The Case of Objecting Cotenants*

The Court rescinded cotenants’ seemingly carte blanche authorization in *Randolph*. Unlike the somnolent Rodriguez, Scott Randolph was wide-awake and—conveniently for him—at home when his wife called the police after a domestic dispute. The police’s arrival proved an opportune time for Randolph’s wife to alert the police to evidence of her husband’s cocaine use, which they seized over Randolph’s “unequivocal[] refus[al].”

The trial court denied Randolph’s motion to suppress the evidence, holding that his wife’s consent sufficed to conduct the search. However, the appellate court held that Randolph’s objection should not have been discarded because he was physically present to object. The Court granted certiorari to determine how, if at all, a present objector affected the validity of the cotenant consent doctrine. Notwithstanding the Court’s admittedly subtle distinction between a present objector and a potential objector, it held that an objector’s presence vitiated a consenter’s invitation. Consequently, the fact Randolph was physically present to “express refusal of consent to a police search [wa]s dispositive as to him, regardless of the consent of a fellow occupant.”
III. NO COUNTRY FOR ARRESTED MEN: ABSENCE AS CONSENT IN FERNANDEZ

Three years after the Court’s Randolph decision, police in Los Angeles figured it would be worth their while to return to Walter Fernandez’s home after his arrest in an effort to seize evidence connecting him to an assault on Abel Lopez. When the police first reached Fernandez’s apartment, his girlfriend, Roxanne Rojas, opened the door in an injured state. Despite Fernandez’s objection to their search while he was still inside his home, the police obtained Rojas’s consent to search the home after Fernandez had been arrested. Their search was not in vain. Fernandez was charged with robbery, infliction of corporal injury, and a slew of possession offenses after the police uncovered gang paraphernalia, as well as the weapon used to assault Lopez.

The trial court denied Fernandez’s motion to suppress the evidence and he was later found guilty of robbery and infliction of corporal injury, which resulted in a fourteen-year sentence. The California Court of Appeal affirmed his sentence noting that Randolph was inapposite to Fernandez’s case because he was not physically present at the time of the search. The California Supreme Court denied Fernandez’s petition for review, but the Court granted certiorari to determine whether Randolph applied in this situation.

A. Back to the Future: The Court’s Return to Its Pre-Randolph Ways

Justice Alito’s majority opinion emphasized Randolph was a narrow exception to the cotenant consent doctrine and that its holding would extend to few situations other than the one Scott Randolph found himself in. The majority reiterated the redeeming factor in Randolph was his physical presence in the home—a slight setback in Fernandez’s case. Moreover, the
majority recognized the implication of denying the police access into a home when an abused person was at the other end of the door.\textsuperscript{62}

Furthermore, the Court held that Fernandez’s two arguments: 1) that his absence was a result of his arrest, and 2) that his objection should have remained in effect despite his absence were unpersuasive.\textsuperscript{63} Because the police’s motives are to be viewed through an objective lens and because it is impractical to adopt a reasonable timeframe with which to sustain objections, the Court affirmed the California Court of Appeal’s decision.\textsuperscript{64} Simply put, \textit{Randolph} was to be accepted “on its own terms.”\textsuperscript{65}

\textbf{B. \textit{The Others: Fernandez’s Concurring and Dissenting Opinions}}

Justices Scalia and Thomas’s concurring opinions were continuing assertions of their dissents in \textit{Randolph}. According to Justice Scalia, Fernandez’s right to exclude the police under property law was much less cut-and-dried than the majority made it out to be\textsuperscript{66} while Justice Thomas advocated for a return to the assumption of risk theory that influenced the Court’s decision in \textit{Matlock}.\textsuperscript{67}

Writing for the dissent, Justice Ginsburg was less willing to forgo the formality of a warrant, arguing that obtaining a warrant would make “the Court’s practical problems disappear."\textsuperscript{68} A warrant would, for example, obviate the need to determine how long a person’s objection should remain in effect.\textsuperscript{69} The dissent went on to note that “the specter of domestic abuse hardly necessitates the diminution of . . . Fourth Amendment rights . . .”\textsuperscript{70}

\textbf{IV. GONE BABY GONE: THE COURT’S MISSED OPPORTUNITY TO GET IT RIGHT}

“Undoubtedly an unpleasant champion for the privacy and property rights of us all,”\textsuperscript{71} Walter Fernandez’s Fourth Amendment rights were indeed violated when the police conducted a
warrantless search of his home. As it turns out, obtaining a warrant may not be the most efficient way to ferret out crime, but it is not the police’s only resource. In fact, officers looking to gain entrance into a home have other options should they feel that fetching a warrant is just not on their day’s to-do list.

A. **Knocked Up: Why Police Only Need to Knock and Get a Warrant**

Apart from consent searches, which pose their own perplexities as this Note has indicated, officers may enter a home if there is an exigent circumstance, precluding the need for a warrant. Domestic violence, in particular, is a pervasive and dire situation that merits warrantless entry into homes to prevent and end such abuse. However, this was not the case before the *Fernandez* Court. Because Fernandez had already been removed from the premises, there was no availing concern for Rojas’s safety or that of her children, eliminating any exigent circumstance. It follows that the police’s sole reason for seeking to gain admission into Fernandez’s home was to secure incriminating evidence. Admittedly, “successful prosecutions require evidence,” but evidence obtained in violation of a person’s Fourth Amendment rights will be of no use to prosecutors who must try to admit evidence gathered in the course of officers’ unbridled searches and seizures.

Should the situation arise where there is no exigent circumstance, but an officer has reason to believe there is a threat of abuse, he may remain on the premises until the abused has left safely. Moreover, if there is concern over the preservation of evidence, the police may similarly remain on the premises and secure the area until a warrant has been issued. And because a concerned cotenant can always bring evidence to the police on their own volition, one would be hard pressed to conjure a scenario that requires the police to charge into a home...
without a warrant. Despite the fallacy that obtaining warrants “needlessly inconvenience[s] everyone involved,” procuring them has become a relatively expeditious process and one that should be adhered to in almost all situations. After an officer has obtained a warrant, a person must then allow a search of what the warrant has authorized. In Florida, for example, a person who then refuses to allow the police to search is guilty of a second degree-misdemeanor.

B. Taken: Why Fernandez Should Have Been Considered Present

The linchpin of Fernandez was not whether Rojas’s property rights were impinged, but whether Fernandez’s privacy rights were violated. While it is not contested that Rojas possessed the authority to consent to the search, the argument that she would have been a hostage to Fernandez’s objection does not withstand scrutiny.

Since the cotenant wishing to open the door to a third party has no recognized authority in law or social practice to prevail over a present and objecting cotenant, 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.

The word present cannot be ignored. The Court’s impeccable diction bars a gloss over any words in its opinions—particularly words that are this contentious. Indeed, Randolph emphasized the physically present factor, making the Court’s Fourth Amendment analysis twofold: only an objection by a person present at the precise moment the police undertook the search is entitled to the Fourth Amendment’s protections.

Most disconcerting about this case is the Court’s egregious disregard for the fact Fernandez did object. Simply put, Fernandez should have been treated as a present, objecting cotenant because his objection was made in the presence of the same officers who returned to
search his home an hour later. This is not to say that the Matlocks and Rodriguezes of the world should enjoy the same right to exclude—it would indeed be impractical to require the police to take “affirmative steps” to ensure there are no nearby objectors. But the evidence expedition should come to an abrupt halt once officers have been stopped in their tracks.

What constitutes presence in this context has even vexed legal scholars. But the Court need not undertake such a burdensome task when a cotenant objected prior to their absence, especially if the absence is the result of an arrest, albeit a lawful one. To be sure, the police did not remove Fernandez from his home for the express purpose of conducting a search. However, even if the police harbored more furtive motives, the Court would not undertake such a subjective analysis. Nevertheless, “if the police cannot prevent a cotenant from objecting to a search through arrest, surely they cannot arrest a cotenant and then seek to ignore an objection he has already made.” Moreover, there was no reason to believe that Fernandez’s objection had dissipated. “Where the police are responsible for the objecting tenant’s removal from the premises, his objection ought to be treated as a continuing one.”

Furthermore, there is no need to draw bright-line rules to determine whether a person’s geographic coordinates fulfill Randolph’s presence prong. Because presence may mean presence at the door or presence somewhere else on the property, a workable standard is admittedly difficult. However, in a case where there is 1) no exigent circumstance, and 2) an objector is physically present at the time police request to search the home, there is no excuse for the police to forgo a warrant. The same is true even if the objector decides to step out of the home in the interim.
The only gripe that judges may have with this novel idea is: what happens if the police uncover contraband before the objector can assert their Fourth Amendment rights? If, for example, a homeowner in Florida decides to grow decorative marijuana plants outside their home then their green thumb has triggered the plain view doctrine and removed them from the Fourth Amendment’s ambit. However, more probable scenarios, such as an officer observing contraband in plain view as an objecting cotenant is coming out of a room would likely not apply to the extension of *Randolph* posited by this Note. Regardless, “Hypothesized practical considerations, in short, provide no cause for [the] drastic reduction of *Randolph*’s holding and attendant disregard for the warrant requirement.”\(^\text{100}\)

V. conclusion

Looking to the future, it is difficult to imagine a situation in which the police are not barred entry into a home if there is a consenting cotenant. Any scintilla of promise that the Roberts Court was faithfully interpreting the Fourth Amendment was dispelled by its *Fernandez* decision,\(^\text{101}\) marking the end of the Court’s adherence to the Amendment’s tenet. Even the very specific instance in which an objector is at the ready, firmly positioning himself at his doorway will not suffice to protect the sanctity of his home come hell, high water—or his arrest.\(^\text{102}\)

2 See id. at 1.

3 See id. at 1.


6 Id. at 176.

7 Randolph, 547 U.S. at 108.

8 See id.

9 See id. at 120.

10 See id.

11 Fernandez, slip op. at 3 (noting that Fernandez told police: “You don’t have a right to come in here. I know my rights.”).

12 Id.

13 See id.

14 U.S. CONST. amend. IV.

15 U.S. CONST. amend. XIV.


17 See generally Daniel E. Pulliam, Post-Georgia v. Randolph, 43 IND. L. REV. 237, 239 (2009) (arguing that the U.S. court system has not guarded the protections afforded by the Fourth Amendment, especially with respect to its third-party consent doctrine).


20 *Id.* at 248–249.

21 *Id.*

22 *Id.* at 247.

23 *Id.* at 220–221.

24 *Id.* at 223.


27 *Id.*

28 *Id.* at 169.

29 *Id.* at 171.


31 *Id.* at 185–186.

32 *Id.* at 189.

33 *Id.* at 180.

34 *Id.* at 182.

35 *Id.* at 180.

36 See Illinois v. Rodriguez, 497 U.S. 179, 179 (1990) (explaining that Rodriguez’s girlfriend referred to the apartment as hers, kept belongings there, and had a key).

38 See Rodriguez, 497 U.S. at 179.

39 Id. at 180.

40 United States v. Matlock, 415 U.S. 164, 171 n.7 (1973) (citations omitted).

41 Florida v. Jardines, No. 11-564, slip op. at 7 (U.S. March 26, 2013).

42 Id. at 10.


45 Id.

46 Id. at 107–108.

47 Id. at 108.

48 Id.

49 Id. at 121.


51 Id. at 122–123.

52 See Fernandez v. California, No. 12-7822, slip op. at 3 (U.S. Feb. 25, 2014).

53 Id. at 2.

54 Id. at 3.

55 Id. at 3–4.

56 Id. at 3.

57 Id. at 4.

59 Id. at 5.

60 Id. at 8.

61 See id.

62 Id. at 15.

63 Id. at 9–11.


65 Id. at 10.

66 Id. at 1 (Scalia, J., concurring).

67 Id. at 1 (Thomas, J., concurring).

68 Id. at 5 (Ginsburg, J., dissenting).

69 Id.

70 Fernandez v. California, No. 12-7822, slip op. at 10 (U.S. Feb. 25, 2014).


72 Fernandez, slip op. at 3 (Ginsburg, J., dissenting).


75 See Brief for Petitioner at 22 (quoting Illinois v. McArthur, 531 U.S. 326, 331 (2001)).


77 Fernandez, slip op. at 6.

78 Oral Argument Transcript at 20 (noting it takes approximately fifteen minutes to get telephonic warrants in Los Angeles).

79 See Schneckloth v. Bustamonte, 412 U.S. 218, 219 (1973) (holding that “It is well settled under the Fourth and Fourteenth Amendments that a search conducted without a warrant issued upon probable cause is ‘per se unreasonable . . . subject to only to a few specifically established and well-delineated exceptions.’”) (quoting Katz v. United States, 389 U.S. 347, 357 (1967)).

80 Fla. Stat. § 933.27.

81 See Fernandez, slip op. at 15.

82 Id. at 1.

83 Oral Argument Transcript at 12.


85 Fernandez, slip op. at 8.

86 Id. at 3.

87 Id. at 13 (noting the complication that arises when the officers who conducted the search are not the ones who heard the cotenant’s objection).


See *Fernandez*, slip op. at 3.


*Id.*

*Id.*

Petition for Certiorari (quoting United States v. Murphy 516 F.3d 1117, 1124-1125 (9th Cir. 2008)).

United States v. Henderson 536 F.3d 776, 787 (7th Cir. 2008) (Rover, J., dissenting).


*Id.* at 3.

*Id.* at 5 (Ginsburg, J., dissenting).

*Id.* at 6.

*Id.* at 1.


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