

Georgia v. Randolph:  
Current Co-Habitant Consent Cases Could Cause  
Confusion  
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Before we get into our topic for today, I think it appropriate to have a moment of silence for the fish that gave their lives in the line of duty this week. Reports are sketchy, but apparently as a search warrant was being executed, a flashbang was thrown into a house of known gang members causing them temporary blindness and disorientation while also contemporaneously destroying the “family” fish tank. I have heard, although it hasn’t been confirmed, that one detective attempted to save the fish by performing mouth-to-mouth but soon decided instead to apply tartar sauce and eat them.<sup>1</sup> P.E.T.A. and the S.P.C.A. continue to leave messages on my phone.<sup>2</sup>

Today we look at a United States Supreme Court case from 2006 called Georgia v. Randolph, 547 U.S. 103 (2006). In this case, Janet Randolph complained to the police that after a domestic dispute, her husband, Scott, had taken their son away. Janet further helpfully volunteered that Scott was a cocaine user. (Hell hath no fury like a woman scorned, “The Mourning Bride” (1697) by William Congreve.) While the officers were present at the house, Scott returned and explained that he had taken the child to a neighbor’s house out of concern that his wife was planning to take the child out of the country.

When asked about the drug use, Scott denied it and instead told police that it was Janet who abused both drugs and alcohol. (These two obviously loved each other deeply.) One of the officers went with Janet to retrieve the child and on the way back to the house, Janet renewed her complaints about Scott’s drug use and volunteered that there was drug evidence in the house. The officer asked Scott for permission to search the house, but he refused. The officer then asked Janet for consent, which she enthusiastically gave. She led the officers to an upstairs bedroom where a straw with cocaine residue was found.

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<sup>1</sup> As a free nutritional note, I understand that fish are high in Omega-3 fatty acids which sound bad for you but are in fact healthy. I am not sure whether that applies to tropical fish.

<sup>2</sup> Notice that I didn’t take the easy way out here and use the standard jokes about the story being “fishy” or mention the “one that got away.” You deserve better than that, I say.

After calling the DA's office, the officers stopped the search to go and get a search warrant. When they returned to the house, Janet withdrew her consent. (After all, she loved him and this was all just a big misunderstanding.) The officers seized the straw, arrested the Randolphs, and executed the search warrant seizing more drug evidence. The record is silent as to whether any pets, including fish, were harmed.

The U.S. Supreme Court held that the drugs should be suppressed as a result of an unconstitutional search. Restating the general rule that officers can search upon the voluntary consent of an occupant who shares, or is reasonably believed to share, common authority over the property, the Court held that there is an additional requirement that no present co-tenant objects.

This, of course, raises several questions. I have attempted to set out many of these questions below and answer the ones that I can.

Q: May a co-occupant who possesses common authority over premises or effects give valid consent to search those premises or effects against an absent party?

A: YES. Randolph did not change this rule and in fact affirmed it in the decision.

Q: May a co-occupant who possesses common authority over premises or effects give valid consent to search those premises or effects when another occupant with shared authority is present and objects to the search?

A: NO. This is the main point of the Randolph case.

Q: Why can't the Cubs win the World Series?

A: THE CURSE OF THE BILLY GOAT. The Billy Goat curse was supposedly placed on the Cubs in 1945 when Billy Goat Tavern owner Billy Sianis was asked to leave a World Series game at Wrigley Field because his pet goat's odor was bothering other fans. He was outraged and placed a curse on the team saying there would never again be a World Series game played at Wrigley Field. His exact words: "Them Cubs, they aren't gonna win no more."

Q: May police rely on the consent of a co-tenant to search shared premises when another co-tenant is not present, but nearby such that his or her permission could have been easily requested?

A. YES. There is no need to actively seek the consent of all people with a shared property interest.

Q: So can I simply remove the objecting person from the scene so that he is no longer a "present" objector?

A. NO. Not if the person was removed for the purpose of avoiding a possible objection to the search. There have been conflicting cases in other federal circuit courts as to whether an objector's arrest on charges render him "not present" in order to allow consent by a co-occupant. U.S. v. Henderson, 536 F.3d 776 (7<sup>th</sup> Circuit, 2008) said the search was okay, U.S. v. Murphy, 516 F.3d 1117 (9<sup>th</sup> Circuit, 2008) said it wasn't.

Here's the trick. If you have warrants on an occupant that you think might object to a search, arrest him prior to asking the co-occupants for consent to search. That way he will be removed prior to having an opportunity to object and Randolph won't apply.

Q: Is Tina Fey actually related to Sarah Palin?

A. YOU BETCHA.

Q: What if police begin to search based on the consent of one co-tenant and during the course of that search a co-tenant either arrives on the premises or becomes aware of police presence and objects to the search?

A. UNCLEAR. This issue hasn't been clarified by our courts. Until it is, the recommended course of action is to stop the search and obtain a search warrant, if possible. If I had to guess, I would say that's how the court is going to rule sometime in the future.

Q: If police respond to a complaint of domestic violence and one tenant consents to entry of the premises, but the other refuses, may police enter the premises?

A. YES. The Court noted that this case has no bearing on the capacity of police to enter a dwelling over another tenant's objections in order to protect a resident from domestic violence. The emergency nature of the situation would validate the entry to determine whether violence has occurred or is about to occur, and since the police would then be lawfully on the premises, there is no question that they could seize any evidence in plain view or take further action supported by any subsequent probable cause.

Q: May a parent consent to a search of shared premises over a child's objections?

A. YES. The Court noted that a hierarchy exists between a parent and child (persons under 18) of superior versus inferior privacy interests that generally doesn't exist between co-tenants.

Q: Why are TBS and Major League Baseball scheduling playoff games between the Tampa Bay ~~Devil~~ Rays and the Boston Red Sox, two East Coast teams, so that they end well after midnight on the East Coast?

A. VERY UNCLEAR. The logic seems to be that scheduling them later puts them in the prime-time slot in more time zones which causes less people who might watch due to geographic closeness to actually watch, thus making baseball less popular as a sport and causing future ratings to decline. Brought to you by the same people who brought us New Coke, trickle-down economics, and a \$700 billion ~~reseue~~ bailout plan.

Q: How does this court decision apply to vehicles?

A. N.C.G.S. 15A-222 gives the owner or driver of a vehicle the authority to consent to a search of the vehicle. If both the owner and the driver were physically present, I believe the courts would find that the driver could not

overcome the owner's consent by objecting since the owner's interest in the vehicle would be superior. On the other hand, if the driver consented and the owner present on the scene objected, the owner's objection would prevent the search. If both the driver and a present passenger own the vehicle, the rule in Randolph would apply.

Q: Does "present" mean precisely what it says – that if the person objects but is not physically present at the place of the search, his objection is not binding?

A. APPARENTLY SO. In U.S. v. Hudspeth, 518 F.3d 954 (8<sup>th</sup> Circuit, 2008), the defendant was at his office and officers asked him for consent to search his home computer. He refused. The officers then went to the home and asked the wife for consent, which she gave. The court held that this search was fine because the husband was not present.

Q: What is the other case you'd like to share with us?

A. I'M GLAD YOU ASKED. In U.S. v. Groves, 530 F.3d 506 (7<sup>th</sup> Circuit, 2008), a boyfriend and girlfriend were living together. The boyfriend refused consent to search. Officers determined that the boyfriend and girlfriend had different work schedules and a few weeks after boyfriend's refusal, they returned to the house when they knew the boyfriend would be at work and obtained the girlfriend's consent. This search was upheld by the court who pointed out that the officers played no active role in securing the boyfriend's absence.

Q: Why did your legal adviser go to the beach earlier this week?

A. TO ATTEND THE NORTH CAROLINA ASSOCIATION OF POLICE ATTORNEY'S FALL CONFERENCE at Wrightsville Beach. This is just one more example of my willingness to make personal sacrifices to better serve you and the department. I'm just that kind of guy. Fear not, I stand ready to make more sacrifices like this at any time.

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