NO. 19-5522

# IN THE
# SUPREME COURT OF THE UNITED STATES

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CRAIG HOWARD,

PETITIONER,

VS.

UNITED STATES OF AMERICA,

RESPONDENT.

## ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

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## PETITION FOR WRIT OF CERTIORARI

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# QUESTIONS PRESENTED FOR REVIEW

(1) Does the lawful detention of an objecting co-tenant in a squad car on the premises to be searched make him absent such that another co-tenant may consent to the search while the objecting co-tenant remains in the squad car, or will said objecting co-tenant's presence near the premises to be search, despite in a squad car, satisfy the physical presence requirement under *Randolph* and *Fernandez*?

(2) Is it reasonable for an investigating officer to rely on a single co-tenant's consent to search a shared residence in order to search each separate bedroom of the residence and its contents without first possessing knowledge of the consenting co-tenant's authority and mutual use of each bedroom?

# LIST OF PARTIES

All parties appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

Craig Howard, Petitioner

United States of America, Respondent

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PEITION FOR WRIT OF CERTIORARI

Petitioner, Craig Howard, respectfully prays that a Writ of Certiorari issue to review the judgment below.

## OPINION BELOW

The opinion of the District Court denying Petitioner's Motion to Suppress appears at Appendix A and is unreported. The opinion of the United States Court of Appeals for the Sixth Circuit appears at Appendix B and can be found at *United States v. Howard*, 806 Fed. App'x 383 (6th Cir. 2020).

The United States Court of Appeals for the Sixth Circuit issued an unreported order denying Petitioner's Petition for Rehearing En Banc on May 13, 2020 and appears at Appendix C to this petition.

## JURISDICTION

On March 16, 2020, the United States Court of Appeals for the Sixth Circuit entered its ruling affirming the conviction of Petitioner. *United States v. Howard*, 806 Fed. App'x 383 (6th Cir. 2020). Pursuant to Federal Rules of Appellate Procedure 35(b), Petitioner filed a Petition for Rehearing En Banc with the United States Court of Appeals for the Sixth Circuit on March 31, 2020. On May 13, 2020 the Court of Appeals for the Sixth Circuit denied Petitioner's Petition for Rehearing En Banc, which was mandated on May 22, 2020. The jurisdiction of this Court is invoked under 28 USCS § 1254(a).

## STATUTES, RULES, ORDINANCES, AND REGULATIONS INVOLVED

(1) USCS Const. Amend. 4:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

## INTRODUCTION

This Honorable Court has held that "[a] physically present inhabitant's express refusal of consent to a police search is dispositive as to him, regardless of the consent of a fellow occupant . . . Disputed permission is thus no match for this central value of the Fourth Amendment" *Georgia v. Randolph*, 547 U.S. 103, 115, 122-23 (2006). However, this Court subsequently recognized that if "*Randolph* requires presence on the premises to be searched, there may be cases in which the outer boundary of the premises is disputed." *Fernandez v. California*, 571 U.S. 292, 306 (2014). While individuals have disputed the definition and Fourth Amendment implications behind "physical presence" since the holding in *Randolph*, this case presents the ideal vehicle for resolving a question that has fractured the lower courts and created a lack of uniformity in answering an important question that this Court should settle: does lawful detention in a squad car near the premises to be searched invalidate the objection by the detained individual such that officers may conduct a warrantless search under the authority of a contemporaneously consenting co-tenant?

In various cases cited herein, lower courts have held that lawful detention on the premises or in a squad car near the place to be searched renders an individual absent for purposes of objecting to a warrantless search of their residence. Other courts, however, have found that lawful detention nearby, including in a squad car, will not remove this important Fourth Amendment right. Because Petitioner, Craig Howard, objected to the search of his residence, was detained near his residence in a

squad car while officers sought another co-tenant's consent to search, and officers subsequently conducted a warrantless search based on the third party's consent, this case affords the Court an opportunity to clarify *Randolph* and its progenies such that uniformity among the lower courts may be reached when confronting this narrow, yet often-occurring situation.

This case also presents an excellent vehicle for resolving a second important question that has resulted in a circuit split between the Sixth and Ninth Circuits, inquiring into the reasonableness of a search of each separate bedroom of a shared residence based on the apparent authority of a single co-tenant without possessing or obtaining information that would indicate mutual use of such areas. The Ninth Circuit, following this Court's well-established instruction in *Illinois v. Rodriguez*, 497 U.S. 177 (1990), has determined that it is unreasonable, without further inquiry, for officers to presume that a single party has control over a specific bedroom within a shared residence. *United States v. Arreguin*, 735 F.3d 1168 (9th Cir. 2013). Conversely, the Sixth Circuit in the present case determined that officers were reasonable when they searched a bedroom within a shared residence based on a single co-tenant's consent without indication or confirmation of her mutual use of the bedroom. Because it is undisputable that officers knew nothing about the consenting party's mutual use or joint access of the bedroom in question and took no steps to inquire further before conducting their search of such an area, this case presents the Court with an opportunity to resolve this circuit split.

## STATEMENT OF THE CASE

On March 29, 2017, the Memphis Police Department received a report that a vehicle was stolen from an individual by two unknown assailants armed with firearms. On or about April 3, 2017, during the early morning hours, the stolen vehicle was located outside a house at 5607 Apple Blossom Drive, Memphis, Shelby County, Tennessee ("the Residence"). After removing a female, Evelyn Harris, from the vehicle, officers completed a protective sweep of the home and removed multiple individuals, four of whom were detained in squad cars near the residence. A single co-tenant of the Residence, LaQuinta McAbee, was allowed to remain in the home along with several young children, and she provided consent to search the Residence. Officers subsequently located a firearm in an upstairs bedroom, underneath a mattress, and the firearm was later determined to belong to Petitioner, Craig Howard (hereinafter "Howard") based on statements he subsequently made while in custody after the search and seizure was conducted.

On December 12, 2017, a grand jury sitting in the Western District of Tennessee returned a one-count indictment against Howard for knowing possession of a Glock 9mm firearm in and affecting interstate commerce in violation of 18 U.S.C. § 922(g)(1). On February 16, 2018, Howard filed a Motion to Suppress seeking suppression of any and all evidence obtained as a result of the warrantless search of Howard's Residence on or about April 3, 2017.

## I. THE OBJECTING CO-TENANT PLACED IN A NEARBY SQUAD CAR

Accomplishing a protective sweep of the Residence on April 3, 2017, officers removed four adult men from the Residence, some of whom were in the common area of the home, while others were found in separate upstairs bedrooms. Additionally, one female was located in the Residence in an upstairs bedroom, at which time she was taken downstairs to the living room, along with four young children who had been gathered from two separate bedrooms. The four adult men, one of whom was Howard, were each detained in separate squad cars near the Residence. As Howard was being removed from the Residence, and then continuing from the squad car where he was within earshot of the Residence, Howard objected to the search and questioned the officer's authority to be in the home, stating the following as captured by body camera and police cruiser audio recordings:

> y'all must got a search warrant or something. . . . Hey Robocop . . . must got a warrant or something. . . . We got kids in there. . . . Y'all ain't even got no warrant. . . . Can any of y'all talk to me . . . who I need to be talking to . . . [observing officers coming and going from the residence] why the fuck they [undecipherable] goin' into the house, bro? . . . He can close that house, the car is right here.

Despite Howard's objections and his physical presence and proximity to the Residence, officers approached McAbee, the female co-tenant who had been allowed to remain inside the Residence with the children. While Howard was detained outside in the nearby squad car, officers requested consent to search from McAbee, explaining that she could either sign the consent to search and her home would not be torn up, or they could go get a search warrant and tear up the home. McAbee gave verbal and written consent to search.

Howard, through a Motion to Suppress, challenged the subsequent warrantless search of his shared Residence, including the bedroom he shared with his girlfriend Evelyn Harris, based on the fact that he had been a physically present co-tenant who was objecting to the search such that it would have invalidated McAbee's contemporaneous consent. The District Court considered this issue and determined that Howard's questions and statements from the back of the police car located several yards from the premises were not an express objection to the search. Additionally, the District Court determined that Howard was not placed in the squad car to avoid any potential objection, but that he was detained during the search due to him matching a description of the individual involved in the car theft. However, the Court did find it curious that the officers never asked Defendant for consent or simply obtained a search warrant, though they had every opportunity to do so. Thus, the Motion to Suppress related to Howard's objection argument was denied.

This issue was properly preserved and presented to the Sixth Circuit for consideration on appeal. Without determining whether or not Howard expressly objected to the search of the Residence, the Sixth Circuit summarily determined that, if Howard did object, he did so before he was lawfully arrested. He was then placed in the back of a squad car, whereupon officers entered the house and asked McAbee for consent. The Sixth Circuit deemed Howard as absent when McAbee gave consent, in addition to the conclusion that Howard's earlier objection did not remain effective. Accordingly, the Sixth Circuit upheld the District Court's denial of Howard's Motion to Suppress related to the physically present and objecting co-tenant issue.

## II. SEARCH OF THE ENTIRE SHARED RESIDENCE, INCLUDING EACH SEPARATE BEDROOM AND ITS CONTENTS, BASED ON THE CONSENT OF A SINGLE CO-TENANT.

Multiple officers accomplished a protective sweep of the Residence during the early morning hours of April 3, 2017, at which time five adult co-tenants were removed from various locations of the dwelling, including several separate bedrooms. Howard and three other adult male co-tenants of the Residence were detained by officers in nearby squad cars, and a female co-tenant, McAbee, was detained in the living room of the Residence along with four children who had been placed in the living room by officers. Immediately after officers had secured the premises, one officer, Officer Westrich, approached each adult co-tenant and asked if they lived at the Residence. All five co-tenants answered in the affirmative and confirmed that they lived at the Residence. Each co-tenant, including McAbee, additionally told Officer Westrich that they were not leaseholders of the property. Officer Westrich did not ask any of the detained male co-tenants for consent to search the premises.

Instead, Officer Westrich retrieved a consent to search form from his vehicle and reentered the Residence where McAbee stood with the children to request consent to search the Residence. McAbee provided both verbal and written consent to search. Officer Westrich testified at the subsequent Suppression Hearing that he did not ask which room McAbee resided in or which rooms the other residents resided in because he considered McAbee's consent to search, as a resident of the house, to be valid as to the entire house. He further testified that he did not believe any further action was necessary after he obtained consent to search from McAbee because she

lived at the Residence, she took care of the children, no other individuals on the scene stated that they were leaseholders, and she gave consent for the Residence to be searched. Accordingly, the entire residence was searched based on McAbee's consent, including Howard's bedroom and underneath the mattress of the bed that he shared with his girlfriend. In light of the early morning hours and the unexpected nature of the officer's arrival and removal of all the residents from their bedrooms, all of the bedroom doors were unlocked and open. A firearm was discovered in what was later determined to be Howard's bedroom, under the mattress he shared with his girlfriend.

Howard challenged the discovery of the firearm through a Motion to Suppress based on the unreasonable and warrantless search of his bedroom and mattress. At the suppression hearing, Howard's girlfriend, Evelyn Harris, testified that she and McAbee were sisters and had lived at the residence for about a year and a half and split the rent payments equally. Harris additionally stated that Howard had lived at the Residence for a few months and is her boyfriend of three years and her children's father. In addition to their shared room, Harris testified that McAbee had her own separate bedroom at the Residence, as did her other male relatives who were also co-tenants of the Residence. Harris testified that she would not go into McAbee's personal belongings without her permission and that although McAbee helped care for her children, McAbee did not have permission to go through the bedroom she shared with Howard, including under their mattress or in their bags.

The District Court considered this issue and determined that McAbee had both

actual and apparent authority to consent to a search of Howard's bedroom. In finding actual authority, the District Court found that the record suggested that the residence was a family residence, which under Sixth Circuit law provides actual authority for McAbee to consent to search. In finding apparent authority, the District Court determined that officer could have reasonably relied on McAbee's authority to consent to a search of the bedroom shared by Harris and Howard because (1) McAbee had all four children by her side when Officer Westrich sought consent; (2) McAbee signed a consent-to-search form that authorized a "complete search" of the residence; and (3) the bedroom where officers found Defendant's gun was unlocked. Accordingly, the District Court denied Howard's Motion to Suppress.

This issue was presented upon appeal to the Sixth Circuit. Following the District Court, the Sixth Circuit found both actual and apparent authority existed to validate McAbee's consent to search the bedroom. Despite never resolving whether officers knew the Residence to be a family residence at the time of the search, the Sixth Circuit found the fact that all of the co-tenants besides Howard were family members gave McAbee actual authority to consent.

The Sixth Circuit additionally parroted the factors found by the District Court above to provide a reasonable basis for apparent authority. Determining that especially in light of McAbee having the children with her and the bedroom door being unlocked at the time of the search, McAbee's apparent authority extended to every bedroom in the residence, including the largest item in the room—the mattress. Reasoning further that the searching officers *could have* believed Howard's bedroom

belonged to McAbee, and finding no evidence that the bedroom was searched solely because officers definitively knew that it *was not* McAbee's, the Sixth Circuit held that no ambiguity was presented as to mutual use such that officers needed to inquire further into McAbee's authority to consent. Thus, the Sixth Circuit affirmed the District Court's denial of Howard's Motion to Suppress.

Howard's Petition for Rehearing En Banc was denied by the Sixth Circuit Court of Appeals on May 13, 2020.

## REASONS FOR GRANTING THE WRIT

This Honorable Court should grant the writ to decide the two important questions this case presents. The first presents an important question of federal law that has not been, but should be, settled by this Court regarding whether the lawful detention of an objecting co-tenant in a nearby squad car renders him absent such that officers may reasonably search the premises based on the contemporaneous consent of another co-tenant. The second question has produced a circuit split and asks whether officers, with the consent of a single co-tenant, may reasonably search the entirety of a shared residence, including separate bedrooms, without first possessing knowledge that would objectively and reasonably indicate mutual use of such areas by the consenting co-tenant.

### I. Will the lawful detention of an objecting co-tenant in a squad car on the premises to be searched make him absent such that another co-tenant may consent to the search while the objecting co-tenant remains in the squad car, or will said objecting co-tenant's presence near the premises to be search, despite in a squad car, satisfy the physical presence requirement under *Randolph* and *Fernandez*?

While the Supreme Court has discussed the Fourth Amendment at length in terms of warrantless searches based upon the consent of a single resident of a shared dwelling, here, a unique question is presented when a physically present co-tenant objects to a search, but is then removed from the immediate dwelling while officers seek consent to search from another co-tenant, who acquiesces. This question is especially unique and significant when the objecting co-tenant is removed from the physical dwelling place by law enforcement, only to be detained in a squad car still on the premises and near the residence to be searched while consent to search from

another co-tenant is sought. Not only does this circumstance present a Fourth Amendment issue, but it also presents an important question of federal law that has not been settled by this Honorable Court because there is an outstanding question as to what will qualify as presence on the premises to be searched such that a co-tenant's objection will prevail over another co-tenant's consent.

In *Georgia v. Randolph*, 547 U.S. 103 (2006), this Court held that "a warrantless search of a shared dwelling . . . 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. However, in *Fernandez v. California*, 571 U.S. 292 (2014), this Court clarified that an objection by a co-tenant—who has afterwards been far-removed from the premises—would not invalidate a physically present co-tenant's subsequent consent to search. *See id.* Consequently, the Court recognized that if "*Randolph* requires presence on the premises to be searched, there may be cases in which the outer boundary of the premises is disputed." *Id.* at 306.

Accordingly, the Court "adopted a rule that applies only when the affected individual is **near the premises being searched**."[1] *Id.* (citing *Bailey v. United States*, 568 U.S. 186 (2013)) (defining the geographic parameters of officers' authority to detain individuals while executing a search warrant and limiting such area to "the

[1] In adopting the premises rule, the Supreme Court was careful not to overturn prior precedent holding that when an individual is present, *but does not object before the search begins*, the search will be valid if based on the consent of a third-party with common or apparent authority over the premises to be searched. *See United States v. Matlock*, 415 U.S. 164 (1974) (defendant was detained nearby in a squad car but did not object to the search) (emphasis added); *see also Illinois v. Rodriguez*, 497 U.S. 177 (1990).

immediate vicinity of the premises") (emphasis added).

### A. This case is an ideal vehicle to clarify the Court's premises rule as developed in *Fernandez*.

This case does not require the Court to imagine and define the outer boundary of physical presence in every conceivable circumstance. It does, however, present the Court with an ideal vehicle to resolve the specific question of whether detention of an objecting co-tenant in a squad car on or near the premises will disqualify the co-tenant's objections and render him absent such that another physically present co-tenant's consent to search will prevail.

It is indisputable that officers routinely remove individuals from the doorways and interiors of their residences when investigating potential crimes, only to detain these individuals outside the dwelling or in nearby squad cars to purportedly ensure officer safety. It is oftentimes the individuals removed from the residence and detained nearby that have the strongest objection to a warrantless search of their residence. While such detention is often lawful, it does not follow that typical protocol used to enhance officer safety must result in the removal of the detained individual's Fourth Amendment rights.

The recurrent nature of these circumstances, without directly applicable precedent, has led to a lack of uniformity among lower courts' rulings such that this important question should be resolved by this Court. For example, various lower courts have determined that an individual's detention in a nearby squad car, or even in the front yard of the premises to be searched, will render that individual "absent" such that officers may approach another co-tenant in the residence and request

consent to search over the objections of the nearby and detained co-tenant. *See e.g. United States v. Jones*, 861 F.3d 638, 642-43 (7th Cir. 2017) (although the government contended that Jones was not removed because he was only twenty feet away from the entrance of the residence and could see and hear what the searching officers were doing, the Seventh Circuit found he was no longer "standing at the door and expressly refusing consent" when the officers received consent to search the residence. Rather, Jones was removed due to lawful detention and his objection "lost its force"); *see also Joseph v. Donahue*, 392 F. Supp. 3d 973 (D. Minn. 2019) (defendant objecting from the front yard and later from a squad car "loses out" because he was not "in fact at the door and object[ing]," but was instead "nearby but not invited to take part in the threshold colloquy"); *Prophet v. State of Florida*, 970 So.2d 942 (Fla. App. 4 Dist. 2008) (arrestee handcuffed and placed in back of patrol car was not "physically present" for purposes of determining whether his consent to search was required).

Alternatively, other lower courts have determined that detention in a nearby squad car will satisfy physical presence such that the individual's objection will defeat another's consent. *See United States v. Blackaby*, 2018 U.S. Dist. LEXIS 22204, *23 (E.D. Ky. Feb. 12, 2018) (co-tenant's consent was invalid when sought immediately after defendant objected to the search, was arrested and detained in a police cruiser near the premises being searched); *see also United States v. Morales*, 893 F.3d 1360, 1370 (11th Cir. 2018) (indicating that, similar to the defendant in *Matlock*, defendant had been detained near the place to be searched; however, had he objected to the

search, his case may have yielded a different outcome than the holding in *Matlock*);

Notably, at least one state court has held that a tenant who has been arrested and placed in a nearby police car is not "physically present" such that his refusal to consent to a search would bar a warrantless search despite consent given by a co-tenant. *See State of Wisconsin v. St. Martin*, 800 N.W.2d 858, 861 (Wisc. 2011). In *St. Martin, supra*, the Wisconsin Supreme Court answered the following question:

> Whether the rule regarding consent to search a shared dwelling in [*Randolph*], which states that a warrantless search cannot be justified when a physically present resident expressly refuses consent, applies where the physically present resident is taken forcibly from his residence by law enforcement officers but remains in close physical proximity to the residence such that the refusal is made directly to law enforcement on the scene?

*Id.* at 860. The Court held that the rule in *Randolph* does not apply in such a case. *Id.* at 861. In doing so, the Court reasoned that "*Randolph* is to be construed narrowly," and that the rule stated in *Randolph* did not apply under the circumstances presented there because the defendant, who was in police custody and seated in a nearby police vehicle when he refused consent, "was not physically present at what the United States Supreme Court called the 'threshold colloquy.'" *Id.* at 859, 861 (citing *Randolph*, 547 U.S. at 121). Of most importance, however, the *St. Martin* Court made these findings *before* the Supreme Court in *Fernandez* determined that a "premises rule" is workable when determining physical presence, applying *Randolph* and finding physical presence when the affected individual is "near the premises to be searched." *Fernandez*, 571 U.S. at 306.

Here, Howard made the following objections directly to officers and while he was detained in a squad car observing officers entering his Residence:

> y'all must got a search warrant or something. . . . Hey Robocop . . . must got a warrant or something. . . . We got kids in there. . . . Y'all ain't even got no warrant. . . . Can any of y'all talk to me . . . who I need to be talking to . . . [observing officers coming and going from the residence] why the fuck they [undecipherable] goin' into the house, bro?" Supp. Exhibit List, RE 126, Supp. Ex. 5. Additionally, Howard said to nearby officers: "He can close that house, the car is right here.

These statements, taken together, exhibited a clear objection to the entry and warrantless search of the Residence Howard shared with multiple other adult co-tenants. Further, although Howard was handcuffed in a squad car outside the Residence, he remained "on the scene" and "near the premises" during his continuing protests. Yet, within minutes of detaining Howard, and while he remained near the residence in a squad car, officers approached a single co-tenant who was allowed to remain inside the residence to request consent to search.

### B. The United States Court of Appeals for the Sixth Circuit erred in holding that the warrantless search of the shared premises was reasonable as to Howard.

Despite the foregoing circumstances, the Sixth Circuit held that the warrantless search of Howard's residence based on his co-tenant's consent was reasonable. In so doing, the Court cited *Fernandez* and *Matlock* and determined that Howard was "absent" at the time of his co-tenant's consent. The Court therefore reasoned that any objections Howard may have made did not remain in effect based on his subsequent detention in a nearby squad car.

Contrary to the Sixth Circuit's findings, however, this Court has not previously

determined that an objecting individual's detention in a squad car near the premises to be searched would render said individual "absent" for purposes of a warrantless search and his objections ineffective. In fact, the *Fernandez* Court expressly stated that it did not resolve the outer boundaries of the premises requirement. *Fernandez*, 571 U.S. at 306. The Sixth Circuit therefore erred when it determined summarily that detention in a nearby squad car renders an objecting co-tenant absent. Moreover, the Sixth Circuit incorrectly construed prior Supreme Court rulings, which has unacceptably eroded the protections provided by the Fourth Amendment, such that this unsettled area of law requires review and resolution by this Honorable Court.

While the Sixth Circuit properly noted that the *Fernandez* Court has held that "an occupant who is absent due to a lawful detention or arrest stands in the same shoes as an occupant who is absent for any other reason," the Sixth Circuit failed to acknowledge that this holding was in the context of an occupant who had been detained or arrested *and* long removed from the premises, typically due to being transported to a police station for questioning or to jail. *See e.g. Fernandez*, 571 U.S. at 296 (after arresting defendant and transporting him to the station for booking, officers returned to the residence an hour later to request consent to search from the present co-tenant). Extrapolating a lawful detention under any circumstances and in any proximity to the premises being searched to mean that an occupant is automatically then absent for purposes of objecting to a warrantless search undermines the premises rule established by the *Fernandez* Court, as well as the

rationale explained initially in *Randolph* and reiterated in *Fernandez*[2]. In fact, it would be difficult to reconcile a holding that would determine the distance of a driveway is all that is needed to invalidate a co-occupant's objections over the consent of the occupant in the home and effectively remove the objecting occupant's Fourth Amendment right to be secure from unreasonable searches and seizures.

To further illustrate, the Eleventh Circuit, without precedent to instruct them on such circumstances, has indicated that placement in a squad car or detention near a squad car at the premises being searched *in addition to* objections by the individual may yield a different result than that which was reached in *Matlock*, wherein the defendant was in a squad car and *did not* object to the search:

> Although the *Matlock* defendant was not present with the opportunity to object, he was in a squad car not far away." [*Randolph*, 547 U.S. at 121]. Same here. Morales was not involved in the conversation between the officers and Lang but was outside the house "not far away." *Id.*

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[2] Articulating a rational explanation for the physical presence requirement, *Fernandez* stated the following:

> Explaining why consent by one occupant could not override an objection by a physically present occupant, the *Randolph* Court stated: "[I]t is fair to say that a caller standing at the door of shared premises would have no confidence that one occupant's invitation was a sufficiently good reason to enter when a fellow tenant stood there saying, 'stay out.' Without some very good reason, no sensible person would go inside under those conditions." [*Georgia v. Randolph*, 547 U.S. 103, 113 (2006)].
>
> It seems obvious that the calculus of this hypothetical caller would likely be quite different if the objecting tenant was not standing at the door. When the objecting occupant is standing at the threshold saying "stay out," a friend or visitor invited to enter by another occupant can expect at best an uncomfortable scene and at worst violence if he or she tries to brush past the objector. But when the objector is not on the scene (and especially when it is known that the objector will not return during the course of the visit), the friend or visitor is much more likely to accept the invitation to enter.

*Fernandez*, 571 U.S. at 303-304.

> …**Had Morales objected to the search, it might be different**. *Cf. Randolph*, 547 U.S. at 121. But he didn't.

*United States v. Morales*, 893 F.3d 1360, 1370 (11th Cir. 2018).

Further, lower courts within the Sixth Circuit have determined that detention in a squad car near the premises to be searched would not render a defendant absent, nor would it remove the effect of the defendant's objection to a search of the premises:

> Unlike the arrested cotenant in *Fernandez*, who was taken to the police station, Ruark was arrested and detained in Officer Tackett's police cruiser near the premises being searched. Although it is unclear from the record where Officer Tackett's cruiser was parked—two of the three cruisers were parked on the street directly in front of the Defendants' home and the third cruiser was parked in a neighbor's driveway—it is clear that Ruark was near the premises being searched. *See also United States v. Allen*, No. 16-cr-20239, 2018 U.S. Dist. LEXIS 14325, 2018 WL 624110, at *4 (W.D. Tenn. Jan. 30, 2018) ("Although Allen was lawfully detained in a squad car while [cotenant] consented to the search, he was near the searched premises."). After putting Ruark in his cruiser, Officer Tackett immediately reentered the residence and requested consent to search from Blackaby. Accordingly, Blackaby's consent to search was invalid.

*United States v. Blackaby*, 2018 U.S. Dist. LEXIS 22204, *23 (E.D. Ky. February 12, 2018).

Unlike the defendants in *Matlock*, *Rodriquez*, and *Fernandez*, a defendant who registers his objection to the search and remains near the premises to be searched while consent is sought from another co-tenant, despite detention in a squad car, is physically present on the premises such that another's consent to search will be invalid. As the *Randolph* Court has previously emphasized,

> . . . in the balancing of competing individual and governmental interests entailed by the bar to unreasonable searches, the cooperative occupant's invitation adds nothing to the government's side to counter the force of an objecting individual's claim to security against the government's

> intrusion into his dwelling place . . . Disputed permission is thus no match for this central value of the Fourth Amendment . . . .

*Georgia v. Randolph*, 547 U.S. 103, 115 (2006). Given the unsettled nature of this important question of federal law, this Court should grant certiorari to resolve this important question, thereby ensuring that *Randolph*, *Fernandez*, and their progeny are correctly applied across federal and state courts.

## II. Is it reasonable for an investigating officer to rely on a single co-tenant's consent to search a shared residence in order to search each separate bedroom of the residence and its contents without first possessing knowledge of the consenting co-tenant's authority and mutual use of each bedroom?

In *Illinois v. Rodriguez*, 497 U.S. 177 (1990), the Court reiterated that the Fourth Amendment does not demand that an officer be correct when executing a search or seizure; it requires only that he or she act reasonably. *Id.* at 184. In assessing whether an officer's belief was objectively reasonable, the court considers "the facts available to the officer *at the moment*." *Id.* at 188 (emphasis added). However, where the circumstances presented would cause a person of reasonable caution to question whether the third party has *mutual use* of the property, "warrantless entry *without further inquiry* is unlawful[.]" *Id.* at 188-89 (noting that "the surrounding circumstances could conceivably be such that a reasonable person would doubt [the apparent consent] and not act upon it without further inquiry") (emphasis added).

### A. A circuit split exists regarding whether officers may search every bedroom of a shared residence to which consent to search has been given by a single adult co-tenant, without first inquiring further or possessing information that indicates mutual use of such areas.

This case asks the question whether it is reasonable for an officer to rely upon

the consent of a single co-tenant in order to search each and every separate bedroom within the residence and its contents without first inquiring into the co-tenant's authority or mutual use of such areas.

Relying on *Rodriguez*, the Ninth Circuit, in *United States v. Arreguin*, 735 F.3d 1168 (9th Cir. 2013), held that "a reasonable person would not presume, without further inquiry" that a third party had control of a bedroom within an apartment in which she was a resident. *Id.* at 1178. Therein, officers were confronted with several adult occupants of a residence, with only one resident providing consent to search the home. The Ninth Circuit ruled that it was not objectively reasonable for the officers to conclude that the consenting individual had authority to consent to a search of the master bedroom and bathroom, given that officers knew virtually nothing about: (1) the consenting individual; (2) the various separate rooms and areas inside the residence; or (3) the nature and extent of the individual's connection to those separate rooms. *Id.* at 1175-76 (also finding that "police are not allowed to proceed on the theory that **ignorance is bliss**," and officers were in a state of near-ignorance when they searched a master suite knowing "far too little to hold an objectively reasonable belief" that a single resident of a shared dwelling could consent to a search of those areas).

Departing from the "inquiry requirement" intimated by *Rodriguez* and clearly deemed necessary by the Ninth Circuit under strikingly similar circumstances, the Sixth Circuit here has seemingly given credence to an "ignorance is bliss" theory under which officers may apply the apparent authority concept to a single co-tenant's

consent to search a residence, such that every bedroom of a shared residence may be searched without ever determining whether or not a single adult co-tenant shares a mutual use of every single bedroom of a residence. Officers may reasonably continue with a search in the face of such ambiguity in terms of authority so long as they do not have definitive and reliable information that the area being searched belongs to someone *other than* the individual providing the consent to search. Thus, the Sixth Circuit apparently held that any bedroom of the residence reasonably *could have* belonged to McAbee, and thus, the warrantless search was reasonable.

This holding stands at odds with the Supreme Court's holding in *Rodriguez*, as well as creates a circuit split between Sixth and Ninth Circuit.

### B. The Sixth Circuit decision is in conflict with the Ninth Circuit, which necessitates an exercise of this Court's supervisory power.

As this Court has previously noted "[c]onsent searches are part of the standard investigatory techniques of law enforcement agencies" and are "a constitutionally permissible and wholly legitimate aspect of effective police activity." *Fernandez*, 571 U.S. 292, 298 (citing *Schneckloth v. Bustamonte*, 412 U.S. 218, 228, 231-32 (1973)). Indeed, this Court's cases "firmly establish that police officers may search jointly occupied premises if one of the occupants consents." *Id.* at 294. However, a co-tenant may not consent to a search of another co-tenant's space unless the co-tenant giving consent has some shared dominion over that space. *United States v. Matlock*, 415 U.S. 164, 171 n.7 (1974). When circumstances cause officers to reasonably question the shared dominion over a particular space, the determination of whether continued warrantless entry was reasonable turns on the facts and circumstances known to the

officers at the moment of the search. *Rodriguez*, 497 U.S. at 188.

Warrantless searches of a co-tenant's space based on the consent of another co-tenant have withstood scrutiny in other cases because the responding officers knew sufficient information to reasonably indicate mutual use of the place or item to be searched, either based on information freely shared by the consenting party or in response to inquiries made by officers prior to searching. *See e.g. United States v. Matlock*, 415 U.S. 164, 168 (1974) (consenting co-tenant told officers before search that she jointly occupied the bedroom with the defendant); *Pratt v. United States*, 214 Fed. App'x 532, 537 (6th Cir. 2007) (officers were aware prior to search that the consenting co-tenant was the mother of defendant and had authority to consent to search of her son's bedroom); *United States v. Kelley*, 953 F.2d 562, 566 (9th Cir. 1992) (consenting co-tenant told officers prior to search that they had separate bedrooms, but that she was allowed access to defendant's bedroom to use the telephone). Here, however, officers conducted a search without any knowledge that would have provided the basis for a reasonable belief of mutual use at the time of the search.

Illustrating clearly how the Sixth Circuit holding has diverged from *Rodriguez* and created a circuit split with the appropriate standard and ruling in the Ninth Circuit, it is important to note that the investigating officers in the present case only knew the following information "at the moment" they searched Howard's bedroom: (1) five adults, including McAbee, informed officers that they resided at the residence, however none of the five adults were leaseholders; (2) several adult co-tenants were

removed from multiple, separate bedrooms during a protective sweep of the residence; (3) four children were present at the residence and were gathered from at least two different bedrooms and placed in the living room; (4) a single adult female—McAbee—was allowed to remain with the children inside the residence; (5) one adult co-tenant had objected to a search of the residence and was still on the scene in a squad car; (6) McAbee consented to a search of the residence; and (7) the bedroom officers entered was unlocked.

Mirroring the circumstances in *Arreguin*, officers knew virtually nothing about McAbee, the various rooms within the residence, or McAbee's connection and mutual use to the multiple separate bedrooms within the residence. Although the Sixth Circuit attempted to grasp at the sparse factors available, it is clear that an objective inquiry into the reasonableness of the search in question fails.[3] In fact, upon review at the subsequent Suppression Hearing, the record does not reflect that officers knew that McAbee, the consenting co-tenant, resided in the shared residence with family members prior to conducting their search. Further, officers did not know, nor did they inquire into which bedroom belonged to McAbee, or whether or not she shared mutual use of any of the other bedrooms belonging to her adult co-tenants. Officers were additionally unaware whether the separate bedrooms were typically locked—they had surprised the occupants of the residence during the early morning hours

[3] The Sixth Circuit found that McAbee had the apparent authority to search every single bedroom in the shared residence based on the facts that "McAbee had four children by her side when asked for consent, McAbee signed a consent-to-search form that authorized a 'complete search,' the bedroom where the firearm was located was unlocked, and McAbee said she lived there and no other detained individual indicated leaseholder status." *United States v. Howard*, 806 Fed. App'x 383 (6th Cir. 2020).

and removed them such that the co-tenants would not have had the time nor ability to lock their doors behind them even if typically done—nor did officers determine ownership, or mutual use of the bed they searched within a specific bedroom that was later discovered to be Howard's. Moreover, although McAbee had four children at her side when asked for her consent to search, the children had been gathered from separate rooms of the residence and placed with McAbee by the officers on the scene for their supervision. Without inquiry, officers were unaware that three of the four were not even McAbee's children, adding nothing to McAbee's apparent authority to consent to a search of every separate bedroom belonging to her adult co-tenants. *See United States v. Cos*, 498 F.3d 1115, 1130-31 (10th Cir. 2007) (finding that neither *Randolph* nor *Matlock* suggested that a female in the defendant's apartment with children was sufficient to establish apparent authority).[4]

As concluded by the Ninth Circuit, the officers here were in a state of near-ignorance when they searched Howard's bedroom knowing "far too little to hold an objectively reasonable belief" that a single resident of a shared dwelling could consent to a search of this area. *Arreguin*, 735 F.3d at 1175-76; *See also United States v. Peyton*, 745 F.3d 546, 552 (D.C. Cir. March 21, 2014) (finding that "[t]he fact that a person has common authority over a house, an apartment, or a particular room, does

[4] "Here, the government contends that because Ms. Ricker answered the door of Mr. Cos's apartment at three o'clock in the afternoon and because the officers realized that children were there, the officers reasonably believed that Ms. Ricker had the authority to consent to the search . . . Even if accompanied by young children, a third party's mere presence on the premises to be searched is not sufficient to establish that a man of reasonable caution would believe that she had 'mutual use of the property by virtue of joint access, or . . . control for most purposes over it.'" *United States v. Cos*, 498 F.3d 1115, 1130-31 (10th Cir. 2007) (quoting *United States v. Rith*, 164 F.3d 1323, 1329 (10th Cir. 1999)).

not mean that she can authorize a search of anything and everything within that area"); *United States v. Davis*, 332 F.3d 1163, 1169 n.4 (9th Cir. 2003) ("By staying in a shared house, one does not assume the risk that a housemate will snoop under one's bed, much less permit others to do so"). Rather, considering the "facts available to the officer at the moment" of the search, the circumstances presented in this case are exactly those that would cause a person of reasonable caution to question whether the third party had mutual use of the property. Accordingly, "warrantless entry *without further inquiry* [was] unlawful[.]" *Rodriguez*, 497 U.S. at 188-89.

Given the importance of this issue, the significant Fourth Amendment implications, and the recurrent nature of these circumstances, this matter is ripe for review by the Supreme Court and its supervisory powers should be exercised to settle the circuit split between the Sixth and Ninth Circuits. Co-tenant living situations, both involving adult family members and unrelated adult individuals is an increasing phenomenon. *See* Richard Fry, *More adults now share their living space, driven in part by parents living with their adult children*, Pew Research Center (Jan. 31, 2018), https://www.pewresearch.org/fact-tank/2018/01/31/more-adults-now-share-their-living-space-driven-in-part-by-parents-living-with-their-adult-children/ ("In 2017, nearly 79 million adults (31.9% of the adult population) lived in a shared household – that is, a household with at least one 'extra adult' who is not the household head, the spouse or unmarried partner of the head, or an 18- to 24-year-old student. In 1995, the earliest year with comparable data, 55 million adults (28.8%) lived in a shared household"); *See also*, Harlan Thomas Mechling, *Third Party Consent and*

*Container Searches in the Home,* 92 Wash. L. Rev. 1029 (2017) (discussing the sharp rise of Americans living with roommates since the Supreme Court's decision in *Matlock* and the circuit court split regarding the duty of law enforcement to clarify authority over containers in shared space).

In light of the large number of co-tenant living situations across our country, courts can reasonably expect apparent authority issues to occur on an increasingly frequent basis. As exacerbated by the recent Sixth Circuit holding, there is a need for clarity regarding the reasonableness of searching every separate bedroom within a shared residence, and the respective contents, based on a single co-tenant's consent without first requesting or possessing information that would indicate mutual use of such areas. This Court should therefore grant certiorari on this issue.

## CONCLUSION

The Petition for Writ of Certiorari should be granted.

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Respectfully Submitted,

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