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Cotenants Trumping Cotenants: The Eighth Circuit Takes a Diverse Stance on Cotenants' Authority under the Fourth Amendment

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Cotenants Trumping Cotenants: The Eighth Circuit Takes a Diverse Stance on Cotenants' Authority Under the Fourth Amendment

United States v. Hudspeth[1]

I. INTRODUCTION

Reluctantly, John Adams mailed the envelope addressed to his wife, Abigail, knowing the contents could bring about his death. This letter, mailed to his "dear friend," contained a description of his pleas for independence to the Continental Congress, a description that if located by the British, would most certainly subject him to charges of treason. Immediately after Mr. Adams dispatched his letter, he was approached by a British intelligence officer requesting to review the letter. Mr. Adams denied the officer's request and sent him on his way. Later, when the letter arrived to the unsuspecting Abigail, it was accompanied by a British officer who asked if he could examine the letter. Ignorant as to the letter's contents, Abigail consented to the request and the officer discovered the treasonous materials, resulting in the seizure of the letter and the subsequent arrest of Mr. Adams. Would our founding fathers have considered this particular exercise of police power beyond reproach?

While this fictional illustration is distinguishable from the more disturbing factual scenario presented in *United States v. Hudspeth,* it nevertheless embodies the same question: If two individuals have common authority over a piece of property, can government officials purposely ignore one party's express refusal to search and instead accept the consent of the other party? *Hudspeth* asks this question in the unforgiving light of the despicable acts of a pedophile; where a computer containing child pornography takes the place of John Adams' rebellious letter. In light of its deplorable factual setting, *Hudspeth* is a case which must be viewed with an objective eye. In doing so, it is helpful to keep the analogy of John Adams's letter in mind, as one may be, albeit unconsciously, predisposed to the persecution of pedophiles. Because *Hudspeth* is a case which not only implicates the rights of a pedophile, but the rights of all citizens who wish to object to governmental searches and seizures of their property, objectivity is essential to arriving at the correct conclusion.

1. United States v. Hudspeth (*Hudspeth II*), 518 F.3d 954 (8th Cir. 2008).

II. FACTS AND HOLDING

On July 25, 2002, the Missouri State Highway Patrol, in cooperation with the Combined Ozarks Multi Jurisdictional Enforcement Team, executed a valid search warrant on Handi-Rak Service, Inc. ("Handi-Rak").[2] During the process of executing the search warrant, law enforcement officers were confronted by Handi-Rak's CEO, Roy J. Hudspeth ("Hudspeth").[3] Hudspeth was promptly briefed on the situation and informed of his Miranda rights by Corporal Daniel Nash ("Cpl. Nash").[4] Initially, Hudspeth was more than cooperative - answering all the officers' questions and waiving his right to an attorney.[5] Further, when one of the officers, operating outside of the scope of the warrant, identified pornographic images on a compact disc next to Hudspeth's office computer, Hudspeth gave Cpl. Nash verbal and written consent to have the computer searched.[6] When the sanctioned search produced child pornography, Hudspeth explained that he had obtained the images over the internet and copied them onto the compact discs next to the computer.[7] He then pleaded ignorance to the officers, claiming he was unaware his actions constituted an illegal act.[8] The officers then inquired as to whether Hudspeth accessed child pornography on his home computer but Hudspeth refused to answer the officers' questions and explicitly denied Cpl. Nash's request to search his home computer.[9] Upon Hudspeth's refusal, Cpl. Nash placed him under arrest based solely on the evidence already obtained.[10]

Pursuant to his belief that Hudspeth's home computer also contained child pornography, Cpl. Nash and three additional officers proceeded to Hudspeth's residence.[11] Upon arrival, Cpl. Nash was greeted by Georgia Hudspeth ("Mrs. Hudspeth"), Hudspeth's wife, and the couple's two children.[12] After proper introductions were made and the children were ushered away, Cpl. Nash explained to Mrs. Hudspeth that her husband had

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2. United States v. Hudspeth (*Hudspeth I*), 459 F.3d 922, 924 (8th Cir. 2006), *reh'g en banc granted, opinion vacated*, No. 05-3316, 2007 U.S. App. LEXIS 16854, at *1 (8th Cir. Jan. 4, 2007), *panel opinion reinstated in part*, 518 F.3d 954 (8th Cir. 2008). The search warrant was issued in connection with an investigation into the sale of high volumes of pseudoephedrine-based cold tablets and listed on the face of the warrant property to be seized such as "[a]ny and all papers and/or documents" related to such sale. *Id.*

3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.* at 925.

7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.*

12. United States v. Hudspeth (*Hudspeth II*), 518 F.3d 954, 955 (8th Cir. 2008).

been arrested for possession of contraband, but neglected to tell her that Hudspeth refused to give Cpl. Nash consent to search the family's home computer.[13] Cpl. Nash then asked for permission to search the home, which Mrs. Hudspeth promptly denied.[14] Immediately following her denial, Cpl. Nash confined his request to permission to confiscate the couple's home computer.[15] Mrs. Hudspeth seemed unsure as to what to do and Cpl. Nash responded to her tentativeness by informing her that if she denied his request he would leave an armed uniformed officer at the house to ensure evidence was not destroyed while he obtained a search warrant for the computer.[16] Still unsure as to the proper course of action, Mrs. Hudspeth unsuccessfully attempted to contact her lawyer.[17] After a period of approximately thirty minutes, Mrs. Hudspeth consented to Cpl. Nash's request to seize the computer.[18] Upon returning to the station with the computer, but prior to obtaining a valid search warrant, officers searched the computer disks and discovered prolific amounts of child pornography.[19] In addition to the images of unidentified children, police also uncovered a video file which Hudspeth had surreptitiously recorded of his stepdaughter undressing.[20]

Stemming from the evidence obtained from the search of Hudspeth's home computer, Hudspeth was charged with possession of child pornography and later indicted for producing and attempting to produce child pornography.[21] After the United States District Court for the Western District of Missouri denied Hudspeth's motion to suppress the evidence obtained from his home computer, he entered a conditional guilty plea to possession of child pornography but reserved the right to appeal the court's denial of his suppression motion.[22]

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13. *Hudspeth I*, 459 F.3d at 925.
14. *Id.*
15. *Id.*
16. *Id.*
17. *Id.*
18. *Id.*
19. *Id.* at 926.
20. *Id.*
21. *Id.* Hudspeth was indicted for possession of child pornography under 18 U.S.C. § 2252A(a)(5) and (b)(2). *Id.* Additionally, he was indicted for the charge of "producing and attempting to produce child pornography" under 18 U.S.C. § 2251(a) and (b). *Id.*
22. *Id.* Hudspeth's motion to suppress attacked not only the evidence obtained via the consent given by his wife but also that the evidence obtained from the search of the business computer was outside the scope of the search warrant issued for the search of Handi-Rak and exceeded the scope of the consent Hudspeth gave Cpl. Nash. *Id.* It should also be noted that Hudspeth's case before the United States District Court for the Western District of Missouri-Springfield Division, is unpublished and could not be obtained. Therefore, any references to the district court are obtained from the United States Court of Appeals's opinion of Hudspeth's case.

On February 15, 2006, Hudspeth filed an appeal with the United States Court of Appeals for the Eighth Circuit.[23] He contended that the district court should have granted his motion to suppress because, pursuant to the Fourth Amendment, his express denial of consent to search his home computer could not be overruled by his wife's later consent.[24] In ruling on August 25, 2006, the Eighth Circuit reviewed the case *de novo*, applying the holdings of *United States v. Matlock*[25] and *Georgia v. Randolph*,[26] both of which stand for the proposition that "police must get a warrant when one co-occupant denies consent to search."[27] Reversing the lower court, the Eighth Circuit held that Mrs. Hudspeth's later consent could not effectively waive Hudspeth's Fourth Amendment rights after Hudspeth had previously refused to consent.[28] However, on January 4, 2007, in response to the U.S. Attorney's petition, the Eighth Circuit vacated its August 25 decision and granted a rehearing en banc.[29]

On rehearing, the Eighth Circuit emphatically recognized that the case before the court was one of first impression.[30] This being the case, the court reexamined the cases of *Randolph* and *Matlock* as they related to the present case, reinstated the district court's denial of Hudspeth's motion to suppress, and reversed its own previous decision.[31] The court held that the consent of one who possesses common authority over shared property trumps the previous denial of consent by an absent cotenant.[32] Thus, "the Fourth Amendment was not violated when the officers sought Mrs. Hudspeth's consent despite having received Hudspeth's previous refusal."[33]

III. LEGAL BACKGROUND

A "search," as referred to in the United States Constitution, is commonly understood to occur when a citizen's reasonable expectation of privacy is

23. *Id.* at 922.

24. *Id.* at 928.

25. 415 U.S. 164 (1974).

26. 547 U.S. 103 (2006).

27. *Hudspeth I*, 459 F.3d at 930-31.

28. *Id.* at 931, 932. The Court of Appeals upheld the district court's denial of Hudspeth's motion to suppress evidence obtained from his office computer. *Id.* at 932.

29. United States v. Hudspeth, No. 05-3316, 2007 U.S. App. LEXIS 16854, at *1 (8th Cir. Jan. 4, 2007). A rehearing en banc may be ordered when "[a] majority of the circuit judges who are in regular active service and who are not disqualified . . . [deem that either] (1) en banc consideration is necessary to secure or maintain uniformity of the court's decisions; or (2) the proceeding involves a question of exceptional importance." FED. R. APP. P. 35(a).

30. United States v. Hudspeth (*Hudspeth II*), 518 F.3d 954, 960 (8th Cir. 2008).

31. *Id.* at 955-61.

32. *Id.* at 961.

33. *Id.*

infringed upon by the police.[34] In order for a search or a seizure to be lawful it must not impinge upon the rights guaranteed by the Fourth Amendment, namely the right of citizens "to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures."[35] Reasonableness, therefore, is the "touchstone" of the Fourth Amendment.[36] Thus, not only should any search or seizure made by police officers be reasonable within the intent of the constitution, adjudicators should construe the aforementioned Fourth Amendment guarantees liberally in favor of the citizens in order to protect their guaranteed right to privacy.[37] In keeping with this maxim and in order to protect the "'security of one's privacy against arbitrary intrusion by the police,'"[38] a search or seizure devoid of a warrant, absent "a few well-established exceptions," has been deemed per se unreasonable.[39]

These Fourth Amendment foundational principles have produced the Fourth Amendment exclusionary rule.[40] This rule dictates that any evidence obtained in an unreasonable manner, and therefore in contravention of the Fourth Amendment, is inadmissible at a trial against the accused if a motion to suppress such evidence is filed.[41] Despite this rule, however, the Fourth Amendment and its accompanying exclusionary rule are not devoid of loopholes. To the contrary, many exceptions and exigent circumstances permit warrantless searches or seizures under the Fourth Amendment, making the exclusionary rule inapplicable.[42]

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34. George L. Blum, Annotation, *Admissibility of Evidence Discovered in Search of Defendant's Property or Residence Authorized by Defendant's Spouse (Resident or Nonresident)-State Cases,* 65 A.L.R. 5TH 407 § 2(a) (1999).

35. 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, 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.").

36. Samson v. California, 547 U.S. 843, 855 n.4 (2006).

37. *See* Blum, *supra* note 34.

38. Schneckloth v. Bustamonte, 412 U.S. 218, 242 (1973) (quoting Wolf v. Colorado, 338 U.S. 25, 27 (1949), *overruled on other grounds by* Mapp v. Ohio, 367 U.S. 643 (1961)); *see also* Joshua Brannon, Comment, Georgia v. Randolph*: An Exception to Co-Occupant Consent Under the Fourth Amendment*, 31 OKLA. CITY U. L. REV. 531, 533 (2006).

39. United States v. Hudspeth (*Hudspeth I*), 459 F.3d 922, 928-29 (8th Cir. 2006), *reh'g en banc granted, opinion vacated*, No. 05-3316, 2007 U.S. App. LEXIS 16854, at *1 (8th Cir. Jan. 4, 2007), *panel opinion reinstated in part*, 518 F.3d 954 (8th Cir. 2008).

40. *See* WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE § 3.1(a), at 106 (4th ed. 2004).

41. Blum, *supra* note 34; *see also* Stone v. Powell, 428 U.S. 465, 485 (1976).

42. Exigent circumstances outside the scope of this article include the need to preserve evidence, when the police are in hot pursuit, the need to protect the safety of police officers, a need to prevent the imminent destruction of a building or if there is a likelihood that the suspect will imminently flee. *See, e.g.*, Georgia v. Randolph, 547

One such exception to the warrant requirement exists where the lawful owner, possessor, or custodian of property consents to a search or seizure made by police officers.[43] So long as this consent is given knowingly and voluntarily, no warrant is required because the citizen is, in effect, waiving his or her Fourth Amendment rights.[44] This exception raises questions as to whether a search or seizure of property held or occupied by more than one person may be lawfully consented to by only one of the holders without tainting the search as unreasonable and thus inadmissible via the exclusionary rule. Upon a careful reading of relevant case law, it becomes apparent that each time courts attempt to define what is reasonable under the Fourth Amendment and create a bright line rule for "cotenant consent cases," additional questions present themselves. These questions have only multiplied in the years since the United States Supreme Court first addressed the issue in *United States v. Matlock*.[45]

Matlock involved the arrest of a lessee, Mr. Marshall, in front of the home that he and several other people occupied as cotenants.[46] After Mr. Marshall was arrested, officers immediately placed him in a nearby police car without requesting permission to search his home.[47] Instead, officers asked and received permission to search the house from one of Marshall's cotenants.[48] In all, the cotenants consented to three searches of the house, all of which produced incriminating evidence.[49] The case quickly made its way through the lower courts and eventually came before the United States Supreme Court. Upon review, the Supreme Court declared that the consent of Mr. Marshall's cotenant was valid, holding that "the consent of one who possesses common authority over premises or effects is valid as against the absent, nonconsenting person with whom that authority is shared."[50]

The implication of *Matlock's* holding was that police officers interested in searching or seizing property are not required to locate every person with authority over property. Rather, the police must only obtain the consent of

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U.S. 103, 117 n.6 (2006) ("[A] fairly perceived need to act on the spot to preserve evidence may justify entry and search under the exigent circumstances exception to the warrant requirement."); Warden, Md. Penitentiary v. Hayden, 387 U.S. 294, 298-99 (1967) (hot pursuit exigent circumstance); Chimel v. California, 395 U.S. 752, 762-63 (1969) (police officer safety exigent circumstance); Michigan v. Tyler, 436 U.S. 499, 509 (1978) (building destruction exigent circumstance); *cf.* Johnson v. United States, 333 U.S. 10, 14-15 (1948) (suggesting that flight may constitute an exigent circumstance).

43. *Schneckloth*, 412 U.S. at 219; United States v. Sanders, 424 F.3d 768, 773 (8th Cir. 2005).

44. *Schneckloth*, 412 U.S. at 248-49.

45. 415 U.S. 164 (1974).

46. *Id.* at 166.

47. *Id.*

48. *Id.*

49. *Id.* at 179 (Douglas, J., dissenting).

50. *Id.* at 170 (majority opinion).

one person with common authority over the property.[51] Common authority, as the *Matlock* Court noted, stems from "mutual use of the property by persons generally having joint access or control"[52] and the burden to establish such mutual use rests with the state.[53] The *Matlock* standard, however, necessarily gives rise to yet another question: How are police in the field to gauge whether or not a third party actually has authority over property, and if he or she is incorrect, does that error make the search unreasonable under the Fourth Amendment?

In the years following *Matlock*, numerous courts attempted to answer this question. The Eighth Circuit has answered this question by developing presumptions in an effort to aid police with their determination as to whether common authority was held by a third party. For example, the Eighth Circuit held that it is presumed that one spouse holds common authority over the property of the other.[54] In response to the circuit courts' struggle, the U.S. Supreme Court enunciated an answer to the question presented by *Matlock* embodied in *Illinois v. Rodriquez*.[55]

The *Rodriquez* Court held that consent of a third party is constitutionally valid so long as the facts known by the police officer at the moment a third party consents warrant a "reasonable" belief that the consenting party had authority over the premises, even if the belief is later proven erroneous.[56] In reaching this conclusion, the *Rodriquez* Court discussed the difference between constitutional rights that guarantee a fair trial, which demand a somewhat heightened level of scrutiny when examining the waiver of such rights, and those rights guaranteed under the Fourth Amendment.[57] This finding is embodied in the *Rodriquez* Court's assertion that:

> What [citizens are] assured by the trial right of the exclusionary rule . . . is that no evidence seized in violation of the Fourth Amendment will be introduced at [their] trial unless [they] consent[]. What [they are] assured by the Fourth Amendment itself, however, is not that no government search of [their] house[s] will occur unless [they] consent[]; but that no such search will occur that is "unreasonable."[58]

The Supreme Court, thus, clearly established that police merely need a reasonable belief that a third party has authority over property in order to obtain a constitutionally valid waiver of another's Fourth Amendment rights.

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51. *Id.*
52. *Id.* at 171 n.7.
53. *See id.* at 178 n.14.
54. *See* Roberts v. United States, 332 F.2d 892, 896 (8th Cir. 1964).
55. 497 U.S. 177 (1990).
56. *Id.* at 188-89 (citing Terry v. Ohio, 392 U.S. 1, 21-22 (1968)).
57. *Id.* at 183.
58. *Id.*

But, even this disposition did not quell the debate over cotenant consent. The circuit courts next addressed the issue of whether a third party with such "reasonable" authority could override the express non-consent of another with common authority over the property.

The U.S. Supreme Court recently addressed the issue of conflicting expressions of consent by cotenants in *Georgia v. Randolph*.[59] The incident at issue in *Randolph* was initiated by a domestic dispute at a married couple's home.[60] During the course of the argument, the couple hurled accusations of drug use at each other in the presence of police and the wife eventually informed the police that "drug evidence" belonging to her husband was located inside their home.[61] The police responded to the allegation by requesting permission to search the house for the alleged evidence.[62] The defendant husband explicitly denied the officers request.[63] The officer then turned to the defendant's wife and asked if she would give the police permission to search her home.[64] The wife, undoubtedly caught up in the heat of the moment, consented and the ensuing search produced the defendant's cocaine.[65]

In his initial appearance before the trial court, the husband moved to suppress the evidence produced by the search.[66] Mixed opinions by the lower courts ensued and the case eventually made its way to the Supreme Court.[67] The Supreme Court began its analysis of the *Randolph* case by noting that a cotenant, whom police reasonably believe has authority over the property, may consent to a warrantless search of the defendant's property when the defendant is absent, pursuant to *Matlock* and *Rodriquez*.[68] However, there was no precedent for the current situation where the cotenant refusing to consent was physically present while another cotenant with authority gave her consent.[69] In deciding the reasonableness of the instant search, the Court saw

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59. 547 U.S. 103 (2006).

60. *Id.* at 106-07 (The wife had been in and out over the course of a month. She called the police after she discovered that the husband had taken their child without her knowledge.).

61. *Id.* at 107.

62. *Id.*

63. *Id.*

64. *Id.*

65. *Id.* It should be noted that the comment in this sentence referring to the wife being caught up in the heat of the moment is deduced from the fact that the initial search was not allowed to be completed, because the wife, interestingly enough, elected to withdraw her consent to the initial search. *Id.* Police had already obtained some evidence, namely a straw with cocaine residue, so they obliged her withdrawal and returned with a search warrant. *Id.*

66. *Id.*

67. *Id.* at 108.

68. *Id.* at 109.

69. *Id.* at 113.

fit to expand upon the *Matlock* holding.[70] In so doing, it determined that *Matlock* stood not only for a cotenant's right to consent but also for "the proposition that the reasonableness of such a search is in significant part a function of commonly held understanding[s] about the authority that co-inhabitants may exercise in ways that affect each other's interests."[71] The Court observed that earlier consent cases granted great significance to these "commonly held understanding[s]" and "widely shared social expectations" when analyzing the reasonableness of various scenarios under the Fourth Amendment;[72] both of which are influenced, but not proscribed, by the law of property.[73]

Utilizing the law of property and prior courts' approaches, the *Randolph* Court established that "there is no common understanding that one cotenant generally has a right or authority to prevail over the express wishes of another, whether the issue is the color of the curtains or invitations to outsiders."[74] Applying this principle to the facts present in *Randolph*, the Court recognized that a search is no more reasonable under the Fourth Amendment when consent to search is given in the face of a present and objecting cotenant then when there is no consent at all.[75] The Court further noted that the privacy of a dwelling place, a core value of the Fourth Amendment, outweighs any asserted right to search and seize property based on disputed permission to enter one's home.[76] Accordingly, the Court held that it is unreasonable under the Fourth Amendment to perform a warrantless search of one's home based on consent given by one's cotenant where another cotenant is physically present and expressly refusing consent.[77]

Before concluding its opinion, the Court found it necessary to tie up "loose ends," namely the meaning of *Matlock* and *Rodriquez* in light of these new findings.[78] In order to integrate the significance of those cases, the Court distinguished *Matlock* and *Rodriquez* from *Randolph* by stating that when a cotenant is present and objects to a search of his home, another cotenant's permission will not overrule the objection; but where a potential objector is

70. *Id.* at 111.

71. *Id.*

72. *Id.*

73. *Id.* The Court also noted that "[t]he common authority that counts under the Fourth Amendment may thus be broader than the rights accorded by property law." *Id.* at 110.

74. *Id.* at 114.

75. *Id.*

76. *Id.* at 115 & n.4.

77. *Id.* at 120.

78. *Id.* at 120-21. The other loose end discussed was how, under *Matlock*, one tenant's objection can eliminate the consent of another tenant if the cotenant is giving permission in his own right. The court states that this is a question that *Matlock* did not answer, because it requires an analysis as performed in the present case, i.e., "whether customary social understanding[s] accord[] the consenting tenant authority powerful enough to prevail over the co-tenant's objection." *Id.* at 121.

merely in close proximity and "not invited to take part in the threshold colloquy," the potential objector loses out.[79] The Court further noted that this line of reasoning holds true so long as the police have not intentionally prevented the potential objector from taking part in this "threshold colloquy."[80] Thus, cotenants are permitted to give permission when a potential objector is absent, pursuant to *Matlock* and *Rodriquez*, while at the same time "according dispositive weight to the fellow occupant's contrary indication when he expresses it."[81] The Court concluded that under the new test, an officer could reasonably rely on a cotenants consent to search without requiring the police to locate every "potentially objecting cotenant."[82]

As the Court alluded to in its opinion, certiorari was granted in *Randolph* to resolve a split of authority among the state courts and the U.S. Courts of Appeals as to whether one occupant may constitutionally consent to search common property in the face of a present cotenant's express refusal.[83] While some state courts had previously deemed the consent ineffective, each Court of Appeals faced with the question held the consent to remain effective.[84] Given its extensive effort to harmonize the *Randolph* holding with earlier cases, the Court could not have anticipated all of the subsequent problems that arose. After *Randolph,* circuit courts have held a cotenant's consent to a search of shared premises to be valid where there is no presently objecting cotenant.[85] However, questions remain as to how to apply the *Randolph* holding where a cotenant grants police permission to search a shared premises but an absent cotenant either expressly refused to consent or was never given the opportunity to object at the "threshold colloquy" due to police detainment. The few circuit courts faced with the issue have reached incongruent results, producing contradictory authority.

For example, the Ninth Circuit dealt with this situation in *United States v. Murphy*.[86] In this case, the defendant objected to a search of his residence

79. *Id.* at 121.

80. *Id.* at 121-22.

81. *Id.*

82. *Id.* at 122.

83. *Id.* at 108.

84. *Id.* at 108 n.1 (citing United States v. Morning, 64 F.3d 531, 533-36 (9th Cir. 1995) (concluding consent is effective as long as there is no express objection); United States v. Donlin, 982 F.2d 31, 33 (1st Cir. 1992) (same); United States v. Hendrix, 595 F.2d 883, 885 (D.C. Cir. 1979) (per curiam) (same); United States v. Sumlin, 567 F.2d 684, 687-88 (6th Cir. 1977) (same); Love v. State, 138 S.W.3d 676, 680 (Ark. 2003) (same); Laramie v. Hysong, 808 P.2d 199, 203-05 (Wyo. 1991) (same); State v. Leach, 782 P.2d 1035, 1040 (Wash. 1989) (en banc) (requiring consent of all present co-occupants)).

85. *See* United States v. Hilliard, 490 F.3d 635, 640 n.5 (8th Cir. 2007); United States v. McKerrell, 491 F.3d 1221, 1224 (10th Cir. 2007); United States v. Ayoub, 498 F.3d 532, 540 (6th Cir. 2007); United States. v. Parker, 469 F.3d 1074, 1077 (7th Cir. 2006).

86. 516 F.3d 1117 (9th Cir. 2008).

and was immediately arrested for methamphetamine production stemming from evidence obtained elsewhere.[87] Two hours after his arrest, police obtained consent to search from his cotenant.[88] The subsequent search produced incriminating evidence which was used against the defendant at trial.[89] The Ninth Circuit cited to *Randolph*, noting that if police are not permitted to prevent a potential objector from taking part in the threshold colloquy, "surely they cannot arrest a cotenant and then seek to ignore an objection he has already made."[90] Accordingly, the Ninth Circuit held "that when a cotenant objects to a search and another party with common authority subsequently gives consent to that search in the absence of the first cotenant the search is invalid as to the objecting cotenant."[91]

The Seventh Circuit also dealt with a factually similar situation in the case of *United States v. DiModica*.[92] The defendant husband in this case was arrested for spousal abuse and, while he neither consented to nor denied permission to search the home, his wife consented to a search of their home that produced illegal firearms.[93] The defendant argued, under *Randolph,* the search was invalid because police removed him from his home in order to avoid a possible objection to the search already consented to by his wife.[94] Thus, defendant argued that he was not permitted to take part in the "threshold colloquy" required by *Randolph*.[95] The Seventh Circuit held because the police "legally arrested" the defendant based on probable cause, police did not remove the defendant to avoid his objection in violation of *Randolph*.[96] Instead, the court likened the defendant to the absent non-consenting cotenant in *Matlock*, and declared the search constitutional.[97]

The progression of these cases offers some guidelines as to the reasonableness of a search based on cotenant consent. Despite the extensive case law history, questions regarding cotenant consent still arise. In fact, each attempt by the courts to offer a solution only creates additional conundrums. Particularly troublesome for courts are situations where one cotenant consents but the defendant cotenant either expressly denies or is physically absent from the "consent" conversation. Prior to the *Hudspeth* decision, circuit courts offered conflicting views on the question, but with the advent of *Hudspeth*, what were once contradictions have now matured into a schism between circuit courts' interpretations and applications of *Randolph*.

87. *Id.* at 1119-20.
88. *Id.* at 1124.
89. *Id.* at 1120.
90. *Id.* at 1124-25.
91. *Id.* at 1124.
92. 468 F.3d 495 (7th Cir. 2006).
93. *Id.* at 496-98.
94. *Id.* at 499-500.
95. *Id.* at 500.
96. *Id.*
97. *Id.*

IV. THE INSTANT DECISION

United States v. Hudspeth provided the Eighth Circuit its first opportunity to examine the *Randolph* decision and ultimately dictate its own interpretation of the case's applicability, in an effort to solve its own cotenant consent riddle. Rehearing *Hudspeth* en banc, Judge William Jay Riley delivered the opinion of the court and focused on only one issue: "Whether Hudspeth's objection to the warrantless search of the home computer overruled Mrs. Hudspeth's later consent."[98] Since this issue was a matter of first impression for the Eighth Circuit, it justified considerable reflection in the en banc proceedings.[99] All other factual findings and legal conclusions, the Eighth Circuit noted, had been properly adjudicated by the lower court.[100]

In addressing the issue at hand, the majority reasoned that not only must the Supreme Court's "narrow holding" in *Randolph* be considered but *Matlock* and *Rodriquez* also had considerable influence.[101] The court proceeded with a lengthy analysis of all three cases, attempting to pick out all relevant holdings and rhetoric, eventually arriving at the central issue of whether Hudspeth's refusal of consent was overruled.[102] This inquiry required the answering of three separate legal questions.[103]

First, the court addressed Mrs. Hudspeth's authority to consent.[104] The panel of judges determined that, under *Matlock*, Mrs. Hudspeth was a cotenant.[105] As such, she possessed common authority over the property and therefore possessed the capability to consent to any search of the property.[106]

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98. United States v. Hudspeth (*Hudspeth II*), 518 F.3d 954, 956-57 (8th Cir. 2008).

99. *Id.* at 960.

100. *Id.* at 956, 961.

101. *Id.* at 956-57, 959.

102. *Id.* at 957-59. Although not the central issue in the case, the court inexplicably felt the need to establish the reasonableness of Cpl. Nash's conduct throughout the events in question. First, the court noted that based on the independently discovered evidence at Handi-Rak and Hudspeth's own statements Cpl. Nash had probable cause "to believe the home computer contained additional contraband." *Id.* at 959. The court next pointed to phone calls made by Hudspeth during the search of Handi-Rak, which the court believed gave Cpl. Nash "a reasonable concern that any evidence on the home computer was at risk because it was possible Hudspeth made phone calls to arrange for the removal or destruction of the home computer." *Id.* at 960. Thus, the court reasoned that such exigent circumstances supported the reasonableness of Cpl. Nash's conduct. *Id.*

103. *Id.* Note that the following "legal questions" referred to by the court do not take the shape of questions at all, but merely legal points dictated in the opinion.

104. *Id.*

105. *Id.*

106. *Id.* This is another instance where the court felt obligated to justify Cpl. Nash's behavior. The court further noted that when Mrs. Hudspeth initially refused Cpl. Nash's request to search the home Cpl. Nash was within his right to inform Mrs.

Next, the majority held that "the narrow holding of *Randolph*" was inapplicable to the present situation.[107] In the Eighth Circuit's view, "unlike *Randolph*, the officers in the present case were not confronted with a 'social custom' dilemma, where two physically present cotenants have contemporaneous competing interests and one consents to a search, while the other objects."[108] Because Hudspeth had been "lawfully arrested and jailed based on evidence obtained wholly apart from the evidence sought on the home computer" and was not present when Cpl. Nash asked Mrs. Hudspeth for consent to search and seize the home computer, there were no contemporaneous competing interests.[109] If Hudspeth was not in the doorway and objecting, declared the majority, this case did not come within the "fine line" referred to in *Randolph*.[110]

Third, the court found that pursuant to *Matlock* and *Rodriquez*, "the Fourth Amendment's reasonableness requirement did not demand that the officers inform Mrs. Hudspeth of her husband's refusal."[111] In both of the cited cases, the Eighth Circuit noted, the defendants were present and able to be inquired upon but the officers intentionally sought out the consent of other cotenants.[112] Thus, the majority held that the present case did not fall under the rule enunciated in *Randolph* and that "Cpl. Nash's failure to advise Mrs. Hudspeth of her husband's earlier objection to a search of the home computer did not convert an otherwise reasonable search into an unreasonable one."[113]

Utilizing the three aforementioned legal questions, the court concluded that "the Fourth Amendment does not always prohibit warrantless searches and seizures when the defendant previously object[s]," but only requires that the warrantless search must be reasonable.[114] Quoting *Matlock,* the court stated that "the absent, expressly objecting co-inhabitant has 'assumed the risk' that another co-inhabitant 'might permit the common area to be

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Hudspeth that if she refused consent he would leave an armed officer at her home in order to secure the evidence sought. *Id.*

107. *Id.* A warning should be issued at this point, as to the somewhat confusing paragraphs to follow and the court's three points. The *Hudspeth* court seemed to focus on many issues that were incongruent with the other courts' analysis of cotenant consent cases, something the dissent devotes a considerable amount of time to pointing out. The following is the most accurate reproduction of their analysis that could be produced.

108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.* at 960-61. This is a fascinating conclusion because it implies that somehow the "fine line" referenced in *Randolph* has some bearing on the lawfulness of Cpl. Nash's failure to inform Mrs. Hudspeth of her husband's previous objection.

114. *Id.* at 961.

searched.'"[115] Elaborating on this point, the majority stated that the location of the defendant when he objects to a search, and not the mere fact that he does object to it, is determinative of the constitutionality of a search.[116] Based upon these principles and the fact that Hudspeth was already in jail at the time his home was searched, the Eighth Circuit held that "the seizure of Hudspeth's home computer was reasonable and the Fourth Amendment was not violated when the officers sought Mrs. Hudspeth's consent despite having received Hudspeth's previous refusal."[117]

Judge Michael J. Melloy filed a separate dissenting opinion, joined by Judges Roger L. Wollman and Kermit E. Bye, arguing that the majority erroneously applied the relevant case law.[118] Further, the dissenters believed the majority was sidetracked by the reasonableness of Cpl. Nash's conduct, an issue which the dissenters thought to be wholly irrelevant.[119] Utilizing the same cases that the majority invoked to justify the search of Hudspeth's property, the dissent concluded that *Randolph* is applicable and, consequently, the search was unreasonable under the Fourth Amendment.[120]

The dissent first focused on the majority's misinterpretation of *Matlock*.[121] While the majority found that *Matlock* stood for the proposition that where an expressly objecting cotenant is absent, a warrantless search is justified by the consent of another cotenant, the dissent believed this to be an improper extension of *Matlock*'s ruling.[122] It argued that the majority improperly equated the term "nonconsenting," as utilized in the *Matlock* holding, with the term "objecting."[123] In support of the assertion, the dissent pointed to the fact that the defendants in both *Matlock* and *Rodriquez* never expressly objected to the search at issue, nor were they given an opportunity to do so, but when the Supreme Court was faced with a cotenant expressly objecting to a police request, as in *Randolph*, the explicit objection was "a[n]

115. *Id.* (quoting United States v. Matlock, 415 U.S. 164, 171 n.7 (1974)). It is very interesting how the court fashions this statement. It utilizes selected words from the *Matlock* holding and manipulates those words to fit its conclusion.

116. *Id.* at 960-61. The court also said consent would be justified where the cotenant is "unaware[] of contraband on the premises." *Id.* at 961. According to the court a cotenant is justified in overruling the prior objection of their co-occupant where, amongst other things, he or she has a desire to protect oneself or others, as the court noted was the case with Mrs. Hudspeth. *Id.*

117. *Id.*

118. *Id.* at 961-65 (Melloy, J., dissenting).

119. *Id.*

120. *Id.* at 963-64.

121. *Id.* at 962.

122. *Id.* As noted above, *Matlock's* holding was that "the consent of one who possesses common authority over premises or effects is valid as against the absent, nonconsenting person with whom that authority is shared." United States v. Matlock, 415 U.S. 164, 170 (1974).

123. *Hudspeth II*, 518 F.3d at 962 (Melloy, J., dissenting).

outcome determinative fact."[124] Therefore, in the dissent's view, *Matlock* and *Rodriquez* merely established that Mrs. Hudspeth had authority to consent to the warrantless search of Hudspeth's property, thus, the two cases had no bearing on the issue before the court.[125]

Because *Matlock* was inapplicable, the dissent found *Randolph* to be the determinative case despite the fact that the majority disagreed.[126] The dissenting judges argued that the "fine line" the Supreme Court wished to draw between *Randolph* and *Matlock/Rodriquez* was between where the defendant expressly objects to a particular search and where express objection is lacking.[127] Disputing the majority's focus on the *Randolph* Court's recurring references to "a physically present objecting cotenant,"[128] the dissent argued that the *Randolph* holding was an attempt to focus on the core value of the Fourth Amendment, legitimate expectations of privacy in one's home, instead of an attempt to establish some "geographic mandate" for expressly objecting cotenants.[129] As applied to the *Hudspeth* facts, the Eighth Circuit noted that this case did not involve merely a "potentially objecting cotenant," but it was a situation where police "were attempting to create an opportunity despite actual knowledge that the target of their investigation had already foreclosed the option of a consent search."[130] Thus, because under *Randolph* any warrantless search committed in the face of one cotenant's express denial of consent to search shared premises is unconstitutional under the Fourth Amendment, the dissent concluded that the search of Hudspeth's home computer was unreasonable.[131]

V. COMMENT

Since the Supreme Court's recognition in *Matlock* of cotenants' authority to consent to searches of shared property, the judiciary has been caught up in a seemingly perpetual journey to define which cotenant consent scenarios qualify as "reasonable" under the Fourth Amendment. In this journey, courts established bright line rules for each unique factual setting presented, resulting in inconsistent standards in the many jurisdictions faced with the task of defining "reasonable." *Randolph* was one such instance of

124. *Id.*

125. *Id.* "[T]he reasonableness of a search conducted despite explicit objection by a co-tenant of equal status." *Id.*

126. *Id.* at 963-64.

127. *Id.* at 963.

128. *Id.*

129. *Id.* at 963-64. In support of this interpretation, the dissenting judges pointed to the portion of the *Randolph* opinion devoted to tying up "loose ends." *Id.* at 963. For a discussion of the "loose ends" referenced in *Randolph*, see *supra* notes 78-82 and accompanying text.

130. *Hudspeth II*, 518 F.3d at 964 (Melloy, J., dissenting) (emphasis omitted).

131. *Id.* at 964-65.

the Supreme Court handing down such a fact-dependent guideline and *Hudspeth* confronted the unanswered question spawned by *Randolph*. *Hudspeth* asked whether a defendant's express invocation of his Fourth Amendment right to be free from unreasonable search and seizure of his property is overruled by the later consent of his cotenant who enjoys authority over the same property. This is a question that has puzzled the courts, as evidenced by the grant of en banc proceedings, and one which the Eighth Circuit has come to a decidedly different conclusion than other circuit courts.

One of *Hudspeth*'s primary impacts is that it grants third parties the power to waive the constitutional rights of another. The *Hudspeth* decision confirms what many libertarians feared could result from the *Randolph* holding – the only instance in which a defendant's objection to a search of shared premises or property will be effective against the consent of his or her cotenant is where he is physically present and objecting. Outside of this instance, it is feared that a cotenant's objections to police intrusions have no constitutional significance when police obtain consent from another occupant of the house. This standard imparts upon citizens who wish to keep their private belongings free from search and seizure, the onerous task of guarding their doorway in the event the police come to request permission from their cotenants. While this may not seem like a large burden, in 2006, 72.7% of Americans shared their home with co-occupants.[132] Given this statistic, the potential widespread impact of the *Hudspeth* decision becomes clear, even if it is currently only limited to the Eighth Circuit.

Perhaps even more significant than the burden it places on cotenants, is the sharp distinction *Hudspeth*, however indirectly, fashions between the waiver of Fourth and Fifth Amendment Rights. While the distinction between waiver of Fourth and Fifth Amendment rights was first proposed by the *Rodriquez* Court, *Hudspeth* takes it to new heights. The *Rodriquez* Court made clear that a third party waiver of a defendant's Fourth Amendment rights may be accomplished by a lower standard (i.e. reasonable apparent authority) than those constitutional rights which guarantee a fair trial.[133] However, in *Rodriquez* the defendant failed to express his invocation of his Fourth Amendment rights to police prior to a search of his shared premises.[134] *Rodriquez* does not address the issue of whether Fourth Amendment rights, like those constitutional rights which guarantee a fair trial, once invoked, may be overruled or subrogated by a third party. *Hudspeth* answers this question by declaring that even after a defendant has called upon his Fourth Amendment right to be free from search and seizure, his constitutional rights may still be waived by a third party with reasonably apparent authority.

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132. UNITED STATES CENSUS BUREAU, 2006 OCCUPANCY CHARACTERISTICS, http://factfinder.census.gov/servlet/STTable?_bm=y&-geo_id=01000US&-qr_name=ACS_2006_EST_G00_S2501&-ds_name=ACS_2006_EST_G00_&-redoLog=false.

133. Illinois v. Rodriguez, 497 U.S. 177, 181 (1990).

134. *Id.* at 179-80.

Under *Miranda v. Arizona* and pursuant to the Fifth and Sixth Amendments, police are required to halt all interrogation once the defendant invokes his constitutional rights to remain silent or his right to an attorney.[135] Invocation of these rights makes any further attempt by police to elicit information, whether consented to by a third party or not, unconstitutional.[136] The proposition advanced by *Hudspeth,* however, is that one's Fourth Amendment right to be free from search and seizure may be circumvented merely by requesting a waiver from the citizen's cotenant when he is absent. Surely our constitutional rights are not so at odds. This is a peculiar contradiction between the Fourth and Fifth Amendments, particularly given that in *Boyd v. United States*, the Supreme Court was "unable to perceive that the seizure of a man's private books and papers to be used in evidence against him is substantially different from compelling him to be a witness against himself."[137] Further, the *Boyd* Court noted that "the 'unreasonable searches and seizures' condemned in the Fourth Amendment are almost always made for the purpose of compelling a man to give evidence against himself, which in criminal cases is condemned in the Fifth Amendment."[138] It is perplexing how two amendments' protections, which are so closely related, can be discarded by such different standards. Perhaps future decisions of the Eighth Circuit will elucidate the relevant distinctions. But, for now, whereas some constitutional rights may be invoked without fear of circumvention, others (i.e. rights under the Fourth Amendment) must be asserted not only more than once, but must be asserted at a specific time (i.e. the "threshold colloquy") and at a specific geographic location (i.e. the doorway of one's home) in order to give citizens the full protections afforded to them by the constitution.

Even if it is conceded that Fourth Amendment rights may be waived by a slighter standard than Fifth Amendment rights, such a concession may not have even been necessary. One might have been able to derive a standard for waiver of Fourth Amendment rights from the language enunciated in *Rodriquez*. To contrive such a standard, one must simply establish the converse holding of *Rodriguez* or its negative implications. If all that is required to waive a person's Fourth Amendment rights is a reasonable belief that another has authority over the property, isn't it necessarily true that an officer's reasonable belief that the person would not consent to such a search is also dispositive of the issue presented in *Hudspeth*? This converse analysis

135. Miranda v. Arizona, 384 U.S. 436, 444-45 (1966); *see also* U.S. CONST. amend. V ("[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law . . . ."); U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence.").

136. *Miranda*, 343 U.S. at 444-45.

137. Boyd v. United States, 116 U.S. 616, 633 (1886), *abrogated by* Fisher v. United States, 425 U.S. 391 (1976).

138. *Id.*

has never been done before, but it is a potential argument that the Supreme Court may look to if *Hudspeth* was heard on appeal.

Neither the *Hudspeth* majority nor the dissent direct any attention to the rather glaring distinction between the different types of property requested to be searched in *Randolph* and *Hudspeth*. Instead, the opinions focus nearly entirely, perhaps correctly, on whether the geographic location of the defendant is the deciding fact. At issue in *Randolph* was whether a present cotenant's express objection to a search of his home could be overruled by a consenting cotenant. However, in *Hudspeth* the police had already entered the home and were merely requesting permission, in the face of Hudspeth's prior objection, to search and seize a specific item of personal property. The *Randolph* Court devotes a substantial portion of its opinion noting the special protections afforded to one's home, quoting the age-old maxim that "'a man's house is his castle.'"[139] Indeed, the constitution gives "special consideration" to the privacy of one's home, granting the home any and all protections conceived under the auspices of the Fourth Amendment.[140] Further, "[p]hysical entry of the home is the chief evil against which the Fourth Amendment is directed."[141] The distinction between one's personal property and one's home is one of great importance in interpreting the *Randolph* decision and this focus on the common social expectation of privacy in the home could be interpreted as a limitation on *Randolph*'s holding.[142] If the social expectation of privacy in one's home is what makes the objection in *Randolph* dispositive, then it does not necessarily follow that the same social expectation exists where the police are already in the home and the only disputed permission concerns an item of personal property, as in *Hudspeth*. This distinction would have resolved the issue in *Hudspeth*, albeit still leaving some unanswered questions. Instead, the Eighth Circuit made a more sweeping distinction between the two cases by declaring that an absent cotenant's express objections will be ineffectual against a search and seizure of all property, whether a home or personal property.

The *Hudspeth* decision also enunciates a subtle rule regarding an imprisoned cotenant's express objection to a search or seizure. The majority in *Hudspeth* found that lawful imprisonment does not qualify, under the *Randolph* holding, as a situation in which the police removed a "potentially objecting tenant from the entrance for the sake of avoiding a possible objection."[143] Therefore, any objecting cotenant may be removed, lawfully jailed and prevented from taking part in the "threshold colloquy" between the police and his or her cotenants. This is an interesting conclusion by the Eighth Circuit because it implies that a jailed cotenant should not even be

139. Georgia v. Randolph, 547 U.S. 103, 115 (2006) (quoting Miller v. United States, 357 U.S. 301, 307 (1958)).

140. 68 AM. JUR. 2D *Searches and Seizures* § 64 (2000).

141. *Id.*

142. *Randolph*, 547 U.S. at 111.

143. *Id.* at 121.

given an opportunity to consent or object to a police search and seizure of his property. Indeed, under *Hudspeth*, the jailed cotenant has no constitutional right whatsoever to take part in the "threshold colloquy." While the notion that parolees and probationers have a "significantly diminished" reasonable expectation of privacy is not a revolutionary notion, similar reasoning has never been applied to those who have been lawfully arrested and have yet to have their day in court.[144] Consequently, this subtle decree puts the Eighth Circuit in line with the Seventh Circuit, but at even sharper odds with the Ninth Circuit, in light of the fact that the Ninth Circuit held that even where a defendant is lawfully arrested the police cannot ignore his previous objection to a search and seizure.[145]

A point to which the *Hudspeth* dissent point in support of its proposition that *Randolph* applies, is the portion of the *Randolph* opinion devoted to "tying up loose ends," noting that the distinctions between *Randolph* and *Matlock/Rodriguez* were made so as not to require police to locate every "potentially objecting cotenant."[146] The *Randolph* Court certainly appears to be more concerned with removing the onerous burden of requiring police to locate any "potentially objecting cotenants."[147] This implies that any objection previously expressed by one cotenant is valid and cannot be overruled because anyone who had previously objected could not be considered a "potential objector." It is a relatively nuanced argument, but it does offer some insight into the intentions of the Supreme Court.

Finally, in *Hudspeth* the Eighth Circuit seems to forego the fact that the Supreme Court in *Randolph* may have already declared whether the search of Hudspeth's computer was reasonable, or at least it may appear so. In the *Randolph* Court's analysis of what social expectations influence reasonableness, it states that "there is no common understanding that one cotenant generally has a right or authority to prevail over the express wishes of another, whether the issue is the color of the curtains or invitations to outsiders."[148] *Randolph* takes this general proposition and applies it to determine whether the search was unreasonable. The Court embarks on a journey through property law to establish the social customs and beliefs that contribute to the reasonableness of a search, such as the one at issue in *Hudspeth*, under the Fourth Amendment.[149] The Court finds that social

144. 3A CHARLES ALAN WRIGHT, NANCY J. KING, SUSAN R. KLEIN & SARAH N. WELLING, FEDERAL PRACTICE AND PROCEDURE § 663 (3d ed. Supp. 2008); *see also* United States v. Knights, 534 U.S. 112, 151 (2001) (diminished privacy expectation of probationers); Samson v. California, 547 U.S. 843, 852 (2006) (diminished privacy expectation of parolees).

145. United States v. Murphy, 516 F.3d 1117, 1124-25 (9th Cir. 2008).

146. United States v. Hudspeth, (*Hudpseth II*), 518 F.3d 954, 962-63 (8th Cir. 2008) (Melloy, J., dissenting).

147. *See Randolph*, 547 U.S. at 122.

148. *Id.* at 114.

149. *Id.* at 111-114.

customs dictate the very general principle quoted *supra* and applies that proposition to the facts before it.[150] Only then does the Court begin to use the language "present expressly objecting cotenant."[151] While this proposition arguably tends to negate the reasonableness of Cpl. Nash's conduct, the Eighth Circuit instead attempts to evade this issue by stating that the officers in the present case "were not confronted with a 'social custom' dilemma, where two physically present cotenants have contemporaneous competing interests and one consents to a search, while the other objects."[152] This, however, was not the social custom that the Supreme Court dictated in *Randolph*.

VI. CONCLUSION

The *Hudspeth* case is a fascinating one not only because the Eighth Circuit completely reversed its previous opinion but also because of the ruling's enormous implications on the many Americans who share their homes and property with others. In the aftermath of *Randolph*, the question arose as to whether, in the face of a consenting cotenant, prior express denial of consent by the defendant is dispositive or whether the physical location of an objecting defendant controls reasonableness under the Fourth Amendment. *Hudspeth* answered this question by declaring that the defendant's physical location at the time of denial is determinative. This decision, however, is not completely in line with other courts' decisions on similar issues and, more importantly, one can argue that the decision is out of alignment with the core cotenant consent Supreme Court cases.

All else aside, what *Hudspeth* ultimately comes down to is whether it was reasonable for Cpl. Nash to accept the consent of Mrs. Hudspeth over Hudspeth's express denial. Are we as a society prepared to say that "no" really doesn't mean "no" under the Fourth Amendment, but it does mean "no" under the Fifth Amendment? Is this a "commonly held understanding" our society has deemed reasonable? The Eighth Circuit has deemed *Hudspeth* a situation devoid of this inquiry and the Ninth Circuit has declared the opposite. Because reasonableness is the "touchstone" of the Fourth Amendment, it would appear that the Supreme Court was correct in *Randolph* when it declared that what is reasonable under the Fourth Amendment is in large part determined by widely held social customs. In the wake of *Randolph*, lower courts attempted to dictate reasonableness by declaring bright line rules, only adding to the confusion of what was or was not reasonable in cotenant consent cases. One might argue that the Supreme Court in *Randolph* was attempting to bring the Court's focus back to the true nature of the "touchstone" of the Fourth Amendment – what society thinks is reasonable, not what judges think is reasonable. Unlike the Supreme Court, it

150. *Id.*
151. *Id.*
152. *Hudspeth II*, 518 F.3d at 960.

seems as though the Eighth Circuit is reluctant to consider society's vision of reasonableness.

Based on the aforementioned issues that arise from *Hudspeth* and the decision's apparent incongruity with *Randolph,* Hudspeth's appeal for suppression of the evidence is likely to continue its tumultuous journey through the court system. *Hudspeth* undeniably creates a decision in conflict with the decision handed down by the Ninth Circuit in *Murphy* and, thus, is a case destined for review by the United States Supreme Court.[153] There, perhaps, the judiciary's quest to definitively define reasonableness under the Fourth Amendment will finally come to an end.

BENJAMIN M. JOHNSTON

153. SUP. CT. R. 10(a) (A petition for a writ of certiorari will be granted by at the discretion of the court upon a showing of "compelling reasons." Those reasons are, in part, evidenced where " a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter.").