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Alex Chan

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NO, YOU MAY NOT SEARCH MY CAR! EXTENDING *GEORGIA V. RANDOLPH* TO VEHICLE SEARCHES

Alex Chan

Abstract: In *Georgia v. Randolph*, the United States Supreme Court announced that third-party consent does not always suffice to immunize the search of a residence from Fourth Amendment attack. Specifically, the Court held that a police search of a residence conducted pursuant to the consent of one occupant, but over the express refusal of a physically present co-occupant with common authority, is unreasonable as to the nonconsenting occupant under the Fourth Amendment. The Court did not indicate whether its holding also extended to searches of personal effects, such as vehicles, conducted pursuant to third-party consent. As a general principle, the Fourth Amendment does not protect an individual's expectation of privacy in his vehicle to the same extent that it does in his residence. Where a search proceeds on the basis of consent, however, the Court analyzes vehicle searches in the same manner as residence searches. Furthermore, Court precedent suggests that a physically present, nonconsenting party with common authority over the property to be searched does not assume the risk that a third party with common authority will permit a search of that property. In light of these considerations, and especially in the absence of evidence of widely shared social expectations to the contrary, this Comment argues that courts should apply the *Randolph* rule to searches of vehicles conducted pursuant to third-party consent.

One afternoon, Officer Calloway observes a man and a woman sitting together on the hood of a car.¹ Although Calloway does not witness the couple violating any laws, he nevertheless has a hunch that the car contains illegal drugs.² He approaches the two, a married couple named Cyrus and Sarah, and asks who owns the vehicle. Cyrus tells the officer that he and his wife jointly own the car. Calloway then asks Cyrus for permission to search the vehicle; Cyrus refuses. Undeterred, Calloway then asks Sarah for permission to conduct the search. Sarah, angry with Cyrus for his recent extramarital affair, consents to the vehicle's search. Calloway finds drug paraphernalia in the glove compartment.

A grand jury indicts Cyrus for possession of drug paraphernalia. At trial, Cyrus moves to suppress this evidence as the direct product of an

1. Hypothetical scenario created by the author for illustrative purposes.

2. A police officer's hunch cannot serve as the basis for a lawful search under the Fourth Amendment. See *Alabama v. White*, 496 U.S. 325, 329–30 (1990) (citing *United States v. Sokolow*, 490 U.S. 1, 7 (1989)). It satisfies neither the probable cause required for a warrantless search under the automobile exception, see *Carroll v. United States*, 267 U.S. 132, 155–56 (1925), nor the lesser standard of reasonable suspicion required for a protective search of the passenger compartment of a vehicle, see *Michigan v. Long*, 463 U.S. 1032, 1049 (1983).

unreasonable search under the Fourth Amendment.³ Specifically, Cyrus argues that the search was unreasonable because the consent Calloway received from Sarah could not properly serve as the basis for the search. While conceding that Sarah gave her consent voluntarily, Cyrus claims it was nonetheless unreasonable for Calloway to search the vehicle when Cyrus was physically present and expressly refused to consent to the search.

This Comment argues that the question raised by this hypothetical—whether, in the face of Cyrus’s explicit refusal to consent to the search of the car, Sarah’s consent is sufficient to transform what would otherwise be an unreasonable warrantless search under the Fourth Amendment of the couple’s vehicle into a reasonable search—should be answered by the limitation on the third-party consent rule announced in the U.S. Supreme Court’s recent decision, *Georgia v. Randolph*.⁴ The *Randolph* rule provides that where police search a house without a warrant but with the consent of an occupant, that search is nevertheless unreasonable under the Fourth Amendment as to a co-occupant of the residence, provided that the co-occupant is physically present at the time of the search and expressly refuses to consent.⁵ As a result, any search conducted solely pursuant to such third-party consent violates the Fourth Amendment and, with limited exceptions not here relevant, all evidence discovered as a result of the search must be suppressed in a criminal prosecution of the physically present, nonconsenting co-occupant.⁶

Although the Court did not address in *Randolph* whether this rule extends to searches of personal effects such as vehicles, the decision’s underlying rationale militates in favor of such an extension. The *Randolph* Court primarily justified its rule by concluding that it is not a

3. 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.”); see also *Weeks v. United States*, 232 U.S. 383, 393–94 (1914) (“To sanction [the use of illegally obtained evidence in a prosecution of the accused] would be to affirm by judicial decision a manifest neglect if not an open defiance of the prohibitions of the Constitution, intended for the protection of the people against such unauthorized action.”).

4. 547 U.S. ___, 126 S. Ct. 1515 (2006).

5. *Id.* at ___, 126 S. Ct. at 1526.

6. See *id.* at ___, 126 S. Ct. at 1528. The Court first held in *Weeks v. United States* that the Fourth Amendment bars the use in federal criminal prosecutions of evidence secured through a violation thereof. 232 U.S. at 393–94, 398. The Court applied this prohibition to state criminal prosecutions via the Fourteenth Amendment in *Mapp v. Ohio*. 367 U.S. 643, 655 (1961).

“widely shared social expectation” for an occupant of a residence to admit a visitor when a co-occupant is physically present and expresses her desire that the visitor not enter.⁷ The Court reached this conclusion by examining social practice.⁸ The reasoning adopted by the Court to justify the *Randolph* rule largely applies to vehicle searches as well.⁹ Specifically, it is not a widely shared social expectation that one with common authority over a vehicle would admit a party therein when another person with common authority over the vehicle is physically present and expressly states a wish that the party not enter.¹⁰

Part I of this Comment discusses exceptions to the warrant requirement of the Fourth Amendment. Part II compares the Court’s treatment of residential and vehicle searches under the Fourth Amendment. Part III outlines pre-*Randolph* case law governing searches conducted pursuant to consent. Part IV explores the reasoning underlying the *Randolph* rule. Finally, using the hypothetical introduced above, Part V argues that the *Randolph* rule should also apply to vehicle searches conducted pursuant to third-party consent.

I. SOME WARRANTLESS SEARCHES ARE REASONABLE UNDER THE FOURTH AMENDMENT

Even if warrantless, a search may still be reasonable under the Fourth Amendment.¹¹ The requirements of the Fourth Amendment only apply to governmental action,¹² and only prohibit unreasonable searches and seizures.¹³ Furthermore, governmental action that does not intrude upon

7. *Randolph*, 547 U.S. at ____, 126 S. Ct. at 1521–23.

8. *See id.*

9. *See infra* Part V.A.

10. *See infra* Part V.A.

11. *See, e.g.,* *United States v. Ross*, 456 U.S. 798, 799 (1982) (explaining that the Court had previously held that a warrantless search of a vehicle conducted with probable cause to believe that the vehicle contained contraband was not unreasonable under the Fourth Amendment (citing *Carroll v. United States*, 267 U.S. 132 (1925))). *See also generally* 2 WAYNE R. LAFAVE, SEARCH AND SEIZURE § 4.1(b) (4th ed. 2004).

12. *United States v. Jacobsen*, 466 U.S. 109, 113–114 (1984).

13. U.S. CONST. amend. IV; *see Illinois v. Rodriguez*, 497 U.S. 177, 183 (1990) (“What [the defendant] is assured by the Fourth Amendment itself, however, is not that no government search of his house will occur unless he consents; but that no such search will occur that is ‘unreasonable.’”). The Fourth Amendment’s prohibition against unreasonable searches and seizures also applies to state governments through the Due Process Clause of the Fourteenth Amendment. *Mapp v. Ohio*, 367 U.S. 643, 655 (1961) (“We hold that all evidence obtained by searches and seizures in violation of the Constitution is, by that same authority, inadmissible in a state court.”).

a person's "reasonable expectation of privacy" does not even constitute a search under the Fourth Amendment.¹⁴ In order for a search to be reasonable under the Fourth Amendment, the government must first obtain a search warrant unless an exception applies.¹⁵ The Court has created exceptions to the warrant requirement for searches wherein the governmental interest in conducting the search outweighs the intrusiveness of the search on the individual's reasonable expectation of privacy.¹⁶ The exclusionary rule usually bars the government from introducing in a criminal prosecution any evidence obtained in violation of the Fourth Amendment's prohibition of unreasonable searches.¹⁷

A. The Fourth Amendment Only Applies to Governmental Conduct that Constitutes a Search or Seizure

The Fourth Amendment protects "the people . . . against unreasonable searches and seizures."¹⁸ However, the Fourth Amendment only applies to a search or seizure effected by the government.¹⁹ Furthermore, not all such governmental action constitutes a "search" for purposes of the Fourth Amendment.²⁰

Governmental conduct does not constitute a search under the Fourth Amendment if it does not intrude on a person's "reasonable expectation of privacy."²¹ In the seminal case of *Katz v. United States*,²² Justice

14. See *Katz v. United States*, 389 U.S. 347, 360–61 (1967) (Harlan, J., concurring).

15. U.S. CONST. amend. IV; see also *Katz*, 389 U.S. at 357 (emphasizing that warrantless searches are per se unreasonable under the Fourth Amendment, but for a few well-delineated exceptions).

16. See, e.g., *Maryland v. Buie*, 494 U.S. 325, 331–34 (1990) (concluding that a warrantless protective sweep of a house incident to the arrest of someone therein is reasonable because the governmental interest in the safety of officers at the arrest scene outweighs the intrusion on the arrestee's reasonable expectation of privacy).

17. See *Segura v. United States*, 468 U.S. 796, 804 (1984); *Wong Sun v. United States*, 371 U.S. 471, 484 (1963); *Weeks v. United States*, 232 U.S. 383, 393–94 (1914).

18. U.S. CONST. amend. IV.

19. *Id.*; see *United States v. Jacobsen*, 466 U.S. 109, 113–114 (1984) ("This Court has also consistently construed this protection as proscribing only governmental action; it is wholly inapplicable 'to a search or seizure, even an unreasonable one, effected by a private individual not acting as an agent of the Government or with the participation or knowledge of any governmental official.'" (quoting *Walter v. United States*, 447 U.S. 649, 662 (1980) (Blackmun, J., dissenting))).

20. See, e.g., *California v. Greenwood*, 486 U.S. 35, 40–41 (1988) (holding that police do not engage in a search under the Fourth Amendment when they look through garbage bags left for collection on the curb outside of a home).

21. *Oliver v. United States*, 466 U.S. 170, 177 (1984) (citing *Katz v. United States*, 389 U.S. 347, 360, 361 (1967) (Harlan, J., concurring)).

Harlan indicated that the Court had used a two-part test to determine whether governmental action constitutes a search under the Fourth Amendment: first, whether the individual possesses an actual, subjective expectation of privacy, and second, whether society is prepared to recognize that expectation as reasonable.²³ Governmental action that intrudes into a home, for example, constitutes a search under this test because homeowners actually expect privacy in their homes and society recognizes that this expectation of privacy is reasonable.²⁴

By contrast, governmental action that intrudes upon an expectation of privacy that society does not recognize as reasonable is not a search under the Fourth Amendment, even if the individual possesses an actual expectation of privacy in the area or thing searched.²⁵ For example, in *Oliver v. United States*,²⁶ the Court held that individuals possess no reasonable expectation of privacy in activities conducted in “open fields” despite the presence of fences and “No Trespassing” signs that presumably indicated a subjective expectation of privacy.²⁷ The Court reasoned that society does not recognize an expectation of privacy in open fields as reasonable because: open fields do not serve as settings for “intimate activities”; barriers and signs are not usually effective in excluding the public; and such property may be surveyed aerially.²⁸ Thus, the police can intrude upon a person’s open fields without having to satisfy the requirements of the Fourth Amendment.²⁹

22. 389 U.S. 347 (1967).

23. *Id.* at 361 (Harlan, J., concurring) (explaining that a person’s expectation of privacy in a telephone conversation conducted in a closed public booth is one that society is prepared to recognize as reasonable and is therefore protected by the Fourth Amendment). Although Justice Harlan articulated his test in a concurrence, the Court has since adopted the two-part test he articulated and has further recognized the objective element as the key inquiry into whether a search even occurred for purposes of the Fourth Amendment. *See Minnesota v. Carter*, 525 U.S. 83, 101 (1998) (Kennedy, J., concurring); *see also California v. Ciraolo*, 476 U.S. 207, 211 (1986) (using Harlan’s test as the *Katz* two-party inquiry).

24. *Cf. Minnesota v. Olson*, 495 U.S. 91, 98 (1990) (finding that even an overnight houseguest has a legitimate expectation of privacy in the host’s home).

25. *See, e.g., United States v. Jacobsen*, 466 U.S. 109, 122–24 (1984) (holding that a chemical test that only discloses whether a particular substance is cocaine does not constitute a search because it does not intrude upon any reasonable expectation of privacy); *see generally United States v. Place*, 462 U.S. 696, 706–07 (1983) (stating that a search is only unreasonable under the Fourth Amendment if it intrudes upon a reasonable expectation of privacy (citing *United States v. Chadwick*, 433 U.S. 1, 7 (1997))).

26. 466 U.S. 170 (1984).

27. *Id.* at 178–81.

28. *Id.* at 179.

29. *Id.* at 182–83. Police may nonetheless be criminally or civilly liable under state trespass laws

B. *Warrantless Searches Are Generally Unreasonable Under the Fourth Amendment*

The Fourth Amendment provides that “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.”³⁰ The Court has often referred to this provision as the “warrant requirement”³¹ and generally interprets it to prohibit the police from conducting a search without first acquiring a search warrant.³² Furthermore, a judge may issue a search warrant only when satisfied that probable cause exists to believe that the search will uncover evidence of a crime.³³ Some warrantless searches are reasonable, however, because the Court has created specific and well-delineated exceptions to the warrant requirement.³⁴

C. *The Court Establishes Exceptions to the Warrant Requirement by Balancing Competing Interests*

In determining whether to create an exception to the warrant requirement of the Fourth Amendment, the Court balances the legitimate governmental interests in conducting the search against the degree to which the search intrudes upon an individual’s reasonable expectation of privacy.³⁵ One example of an exception to the warrant requirement is an

for intruding on an individual’s property. *See id.* at 183 & n.15.

30. U.S. CONST. amend. IV.

31. *See, e.g.,* *Thompson v. Louisiana*, 469 U.S. 17, 20 (1984).

32. *Flippo v. West Virginia*, 528 U.S. 11, 13 (1999); *Katz v. United States*, 389 U.S. 347, 357 (1967).

33. U.S. CONST. amend. IV (“no Warrants shall issue, but upon probable cause”); *see also Katz*, 389 U.S. at 357 (explaining that except for a few well-delineated exceptions, the Court has held searches conducted without the prior approval of a judge or magistrate to be per se unreasonable).

34. *Katz*, 389 U.S. at 357; *see, e.g., Mincey v. Arizona*, 437 U.S. 385, 393–94 (1978) (describing exigent circumstances exception to the warrant requirement as applicable to situations where police are in “hot pursuit” of a suspect who runs into a residence or where the suspect would destroy evidence if he is not searched immediately (citing *Warden v. Hayden*, 387 U.S. 294, 298–300 (1967); *Schmerber v. California*, 384 U.S. 757, 770–771 (1966))); *United States v. Robinson*, 414 U.S. 218, 224 (1973) (recognizing an exception to the warrant requirement for a search incident to a lawful arrest); *Terry v. Ohio*, 392 U.S. 1, 30–31 (1968) (creating an exception to the warrant requirement for the frisk of a suspect conducted pursuant to an officer’s reasonable and articulable suspicion that the suspect was armed and presently dangerous).

35. *Samson v. California*, 126 S. Ct. 2193, 2197 (2006); *see also Maryland v. Buie*, 494 U.S. 325, 331 (1990) (“Our cases show that in determining reasonableness, we have balanced the intrusion on the individual’s Fourth Amendment interests against its promotion of legitimate governmental

inventory search of an impounded vehicle conducted pursuant to standardized procedures.³⁶ The government has legitimate interests in conducting such a search—both in securing the property that it has taken into custody against unauthorized interference and in protecting police officers and others from any danger that the property may pose.³⁷ Although people do have a reasonable expectation of privacy in their vehicles, the intrusion imposed by a routine inventory search on that interest is deemed insufficient to outweigh the legitimate governmental interests in conducting inventory searches.³⁸

D. The Exclusionary Rule Generally Prohibits Introduction of Evidence Obtained as a Result of an Unreasonable Search

The exclusionary rule is a judicially created remedy designed to deter violations of the Fourth Amendment.³⁹ It applies to both direct and derivative evidence obtained from an illegal search.⁴⁰ When a court concludes that evidence has a direct or derivative relationship to an illegal search, it will usually prohibit the government from using that evidence against the person whose reasonable expectation of privacy was intruded upon by the search.⁴¹ For example, if a court analyzing the

interests.”); *Pennsylvania v. Mimms*, 434 U.S. 106, 109 (1977) (“[The] [r]easonableness [of a particular governmental invasion of a citizen’s personal security], of course, depends ‘on a balance between the public interest and the individual’s right to personal security free from arbitrary interference by law officers.’” (quoting *United States v. Brignoni-Ponce*, 422 U.S. 873, 878 (1975))).

36. *See Colorado v. Bertine*, 479 U.S. 367, 370 (1987). Police generally do not need a warrant to search a vehicle if they have probable cause to believe that a search of the vehicle will uncover evidence of a crime. *See infra* Part II.B.

37. *Bertine*, 479 U.S. at 372–73 (reviewing inventory search decisions holding that governmental interests outweigh the intrusion on the individual’s reasonable expectation of privacy); *South Dakota v. Opperman*, 428 U.S. 364, 369 (1976).

38. *Bertine*, 479 U.S. at 372.

39. *United States v. Leon*, 468 U.S. 897, 906 (1984) (citing *United States v. Calandra*, 414 U.S. 338, 348 (1974)).

40. *Segura v. United States*, 468 U.S. 796, 804 (1984). The Court refers to the derivative evidence of an illegal search as “fruit of the poisonous tree.” *See, e.g., id.* (citing *Nardone v. United States*, 308 U.S. 338, 341 (1939)). An example of derivative evidence is testimony from a witness identified as the result of an illegal search. *See* 6 WAYNE R. LAFAVE, *SEARCH AND SEIZURE* § 11.4, at 256 (4th ed. 2004).

41. *See Segura*, 468 U.S. at 804. However, the prosecution can use illegally obtained evidence to impeach the defendant. *United States v. Havens*, 446 U.S. 620, 627–28 (1980) (holding that the government can use illegally obtained evidence to impeach statements made by the defendant during cross-examination); *Walder v. United States*, 347 U.S. 62, 65 (1954) (holding that the government can use illegally obtained evidence to impeach the defendant’s direct testimony).

hypothetical fact pattern involving Cyrus and Sarah found Calloway's search of their vehicle unreasonable, the drug paraphernalia found during the search would constitute direct evidence of the illegal search and could not be used in the prosecution's case against Cyrus.⁴²

In sum, the Fourth Amendment only applies to unreasonable governmental action that constitutes a "search" or "seizure," as those terms have been interpreted by the Court. Governmental action constitutes a search under the Fourth Amendment only if it intrudes upon a person's reasonable expectation of privacy. Furthermore, unless an exception applies, warrantless searches are unreasonable under the Fourth Amendment. The Court has created exceptions for certain warrantless searches where the governmental interest in conducting the search outweighs the intrusion upon the individual's reasonable expectation of privacy. The government generally may not in a criminal prosecution introduce evidence uncovered directly or derivatively from an illegal search against the person whose reasonable expectation of privacy was intruded upon.

II. THE COURT TREATS SEARCHES OF HOUSES DIFFERENTLY FROM SEARCHES OF VEHICLES

The Court recognizes that people possess a reasonable expectation of privacy in their vehicles.⁴³ Vehicles are personal effects,⁴⁴ which are protected against unreasonable searches and seizures under the Fourth Amendment.⁴⁵ However, as evidenced by the number of exceptions to the warrant requirement pertaining to vehicles, the Court considers warrantless vehicle searches less intrusive than warrantless residence searches.⁴⁶ Despite this lesser protection afforded vehicle searches, the Court has unequivocally stated that the Fourth Amendment protects a person's reasonable expectation of privacy in his vehicle—even if that expectation is markedly lower than it is in the home.⁴⁷

42. *Cf. Silverthorne Lumber Co. v. United States*, 251 U.S. 385, 392 (1920) ("The essence of [the Fourth Amendment in] forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the Court but that it shall not be used at all.").

43. *California v. Carney*, 471 U.S. 386, 390 (1985).

44. *Cady v. Dombrowski*, 413 U.S. 433, 439 (1973).

45. U.S. CONST. amend. IV ("The right of the people to be secure in their . . . effects, against unreasonable searches and seizures, shall not be violated . . .").

46. *See infra* Part II.B.

47. *Cf. United States v. Ortiz*, 422 U.S. 891, 896 (1975) ("A search, even of an automobile, is a substantial invasion of privacy.").

A. *The Court Considers Residential Searches Extremely Intrusive Given the Home's Special Place in Fourth Amendment Jurisprudence*

Fourth Amendment protection is at its strongest when the place searched is a house. The Fourth Amendment explicitly protects “houses.”⁴⁸ For centuries, people have placed stock in the “ancient adage that a man’s house is his castle,”⁴⁹ and Fourth Amendment jurisprudence recognizes a special place for the home.⁵⁰ The Court has stated that “the Fourth Amendment has drawn a firm line at the entrance to the house.”⁵¹

B. *The Court Recognizes an Automobile Exception to the Warrant Requirement*

The Court consistently recognizes that searches of residences are more intrusive than searches of vehicles,⁵² and has created an “automobile exception” to the warrant requirement.⁵³ This exception applies to warrantless vehicle searches conducted with probable cause to believe that the search will uncover evidence of a crime.⁵⁴ Warrantless

48. U.S. CONST. amend. IV.

49. *Miller v. United States*, 357 U.S. 301, 307 (1958).

50. *See* *Kyllo v. United States*, 533 U.S. 27, 31 (2001) (“At the very core’ of the Fourth Amendment ‘stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion.’” (quoting *Silverman v. United States*, 365 U.S. 505, 511 (1961))); *Wilson v. Layne*, 526 U.S. 603, 610 (1999) (“[P]hysical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed.” (quoting *United States v. U.S. Dist. Court*, 407 U.S. 297, 313 (1972) (alteration in original))).

51. *Payton v. New York*, 445 U.S. 573, 590 (1980).

52. *See, e.g.,* *South Dakota v. Opperman*, 428 U.S. 364, 367 (1976) (explaining that “the expectation of privacy with respect to one’s automobile is significantly less than that relating to one’s home or office”).

53. *California v. Carney*, 471 U.S. 386, 390 (1985); *see also* *Chambers v. Maroney*, 399 U.S. 42, 52 (1970) (“For constitutional purposes, we see no difference between on the one hand seizing and holding a car before presenting the probable cause issue to a magistrate and on the other hand carrying out an immediate search without a warrant. Given probable cause to search, either course is reasonable under the Fourth Amendment.”). *But see* *Coolidge v. New Hampshire*, 403 U.S. 443, 458–64 (1971) (plurality opinion) (rejecting the argument that police can conduct a search of a vehicle whenever they have probable cause to do so if exigent circumstances are lacking). By contrast, “[w]ith few exceptions, the question whether a warrantless search of a home is reasonable and hence constitutional must be answered no.” *Kyllo*, 533 U.S. at 31.

54. *Carroll v. United States*, 267 U.S. 132, 155–56 (1925). Historically, a vehicle has been subject to this exception only if it is readily mobile and present in a setting that objectively indicates its use for transportation. *Carney*, 471 U.S. at 393–94 (holding that defendant’s motor home constituted a vehicle for purposes of the automobile exception). Furthermore, this exception only allows police to

searches of vehicles conducted with the requisite probable cause are permissible because, under the balancing test discussed above, the governmental interest in conducting the search outweighs the resulting intrusion on the vehicle owner's reasonable expectation of privacy.⁵⁵ Initially, the Court focused on the strength of the governmental interest as the primary justification for the exception, emphasizing that police may not be able to procure a search warrant before a suspect drives away.⁵⁶ The Court has subsequently shifted its focus to the limited intrusiveness of a warrantless vehicle search, observing that people know that their vehicles are subject to pervasive governmental regulation.⁵⁷ Furthermore, much of the passenger compartment of a standard vehicle is open to plain view.⁵⁸ In contrast, no such exception exists for the search of a home because the intrusiveness of a warrantless residential search on an individual's reasonable expectation of privacy therein usually outweighs the governmental interest in conducting the search.⁵⁹

Moreover, the Court has created several exceptions to the warrant requirement for vehicle searches even where police do not possess probable cause to believe that a search will uncover evidence of crime. First, police can, in the absence of probable cause, search the passenger compartment of a vehicle incident to the lawful arrest of an occupant or recent occupant.⁶⁰ Second, the police can search the passenger

search those areas of the vehicle where the evidence sought might plausibly be found. *Cf.* *California v. Acevedo*, 500 U.S. 565, 580 (1991) (explaining that the search of an entire vehicle for marijuana would have been unreasonable because the searching officers only had probable cause to believe that the marijuana was in a paper bag in the vehicle's trunk).

55. *Cf. Carroll*, 267 U.S. at 149 ("The Fourth Amendment is to be construed . . . in a manner which will conserve public interests as well as the interests and rights of individual citizens.").

56. *Carney*, 471 U.S. at 390–91 (noting that the ready mobility of the vehicle served as the original justification for the exception's establishment in *Carroll*).

57. *Id.* at 393 (noting that "there is a reduced expectation of privacy stemming from [a vehicle's] use as a licensed motor vehicle subject to a range of police regulation").

58. *See Cardwell v. Lewis*, 417 U.S. 583, 590 (1974). *But cf. Carney*, 471 U.S. at 392 (stating that a person's reduced expectation of privacy in a vehicle does not derive from the plain view nature of a vehicle, but rather "from the pervasive regulation of vehicles capable of traveling on the public highways").

59. *See Maryland v. Buie*, 494 U.S. 325, 331 (1990) ("[A] search of the house or office is generally not reasonable without a warrant issued on probable cause."); *cf. Payton v. New York*, 445 U.S. 573, 589–90 (1980) (observing that "the Fourth Amendment has drawn a firm line at the entrance to the house" in dismissing the argument that an entry into a residence to search for a person is less intrusive than an entry to search for property).

60. *Thornton v. United States*, 541 U.S. 615, 623–24 (2004); *New York v. Belton*, 453 U.S. 454, 460 (1981).

compartment of a vehicle without probable cause if they have a reasonable and articulable belief that a dangerous suspect may immediately gain control of weapons from his vehicle.⁶¹ Third, as described above, police can conduct routine inventory searches of impounded vehicles without any probable cause to believe that the search will uncover evidence of criminal activity.⁶² Finally, police can search a vehicle without probable cause if they receive valid consent to such action.⁶³

C. Despite the Lessened Expectation of Privacy in Vehicles, the Fourth Amendment Protects an Individual's Reasonable Expectation of Privacy Therein

Despite creating many exceptions to the warrant requirement for vehicle searches, the Court continues to maintain that the Fourth Amendment protects the reasonable expectation of privacy that people have in their vehicles.⁶⁴ In *Coolidge v. New Hampshire*,⁶⁵ a four-justice plurality emphasized: “The word ‘automobile’ is not a talisman in whose presence the Fourth Amendment fades away and disappears.”⁶⁶ Even though police had probable cause, the *Coolidge* plurality refused to apply the “automobile exception” to a search of a vehicle parked in the defendant’s driveway because none of the exigencies used to justify the exception were present.⁶⁷ Furthermore, the automobile exception does

61. *Michigan v. Long*, 463 U.S. 1032, 1049 (1983).

62. *Colorado v. Bertine*, 479 U.S. 367, 374 (1987); *South Dakota v. Opperman*, 428 U.S. 364, 372 (1976).

63. *Schneckloth v. Bustamonte*, 412 U.S. 218, 219 (1973).

64. *See United States v. Ortiz*, 422 U.S. 891, 896 (1975) (“A search, even of an automobile, is a substantial invasion of privacy.”).

65. 403 U.S. 443 (1971).

66. *Id.* at 461–62 (plurality opinion).

67. *Id.* at 460–64 (plurality opinion) (“[T]here was probable cause [to search the defendant’s vehicle], but no exigent circumstances justified the police in proceeding without a warrant.”). In *Cardwell v. Lewis*, the Court held a warrantless search of the exterior of an automobile, conducted with probable cause, to be constitutional. 417 U.S. 583, 591–92 (1974). The police had conducted the search after seizing the automobile from a public parking lot and moving it to the police impoundment lot. *Id.* at 587–88. One way in which the Court distinguished the vehicle seizure in *Cardwell* from the vehicle seizure in *Coolidge* was that the vehicle in *Cardwell* was “seized from a public place where access was not meaningfully restricted.” *See id.* at 593. *But see Maryland v. Dyson*, 527 U.S. 465, 467 (1999) (per curiam) (observing that “the automobile exception does not have a separate exigency requirement” (citing *Pennsylvania v. Labron*, 518 U.S. 938, 940 (1996) (per curiam))).

not allow police to search an entire vehicle if they have probable cause to believe that they will find contraband only in a certain part of the vehicle.⁶⁸

In sum, the Court considers the search of a house to be more invasive than the search of a vehicle. The Court has created an exception for warrantless searches of vehicles supported by probable cause because the governmental interest in conducting the search outweighs the individual's reasonable expectation of privacy. Nevertheless, despite the numerous exceptions that it has created to the warrant requirement for vehicle searches, the Court maintains that a vehicle search constitutes a significant intrusion on an individual's reasonable expectation of privacy, and as such is still a "search" within the meaning of the Fourth Amendment.

III. THE COURT HAS CREATED AN EXCEPTION TO THE WARRANT REQUIREMENT FOR SEARCHES CONDUCTED PURSUANT TO THIRD-PARTY CONSENT

Valid consent exempts a search from the warrant requirement.⁶⁹ The consent doctrine applies to vehicle searches in the same manner that it applies to searches of residences and other personal effects.⁷⁰ The Court has also extended the consent doctrine to searches conducted pursuant to third-party consent under the rationale that one assumes the risk that another person with common authority over the property or effect will permit the police to search it.⁷¹ Furthermore, dicta in one of the Court's leading third-party consent cases suggests that this assumption-of-risk principle justifies application of the third-party consent exception regardless of the level of Fourth Amendment protection for the reasonable expectation of privacy at stake.⁷² However, language in that same case hints that the exception for searches conducted pursuant to third-party consent does not apply to physically present, nonconsenting parties.⁷³

68. *California v. Acevedo*, 500 U.S. 565, 580 (1991).

69. *Schneckloth v. Bustamonte*, 412 U.S. 218, 219 (1973) ("[O]ne of the specifically established exceptions to the requirements of both a warrant and probable cause is a search that is conducted pursuant to consent.").

70. *See infra* Part III.B.

71. *See infra* Part III.C.

72. *See infra* Part III.C.

73. *See infra* Part III.D.

A. *A Warrantless Search Conducted Pursuant to Valid Consent Is Reasonable Under the Fourth Amendment*

A warrantless search is reasonable under the Fourth Amendment if a person validly consents to the search.⁷⁴ Such consent is valid only if the individual both consented voluntarily⁷⁵ and had either actual or apparent authority over the area searched.⁷⁶ In determining whether a person voluntarily consented, courts examine the totality of the circumstances.⁷⁷ If a person validly consents to a search, any evidence discovered in the course of that search is admissible against her at trial.⁷⁸

Given valid consent, not only may evidence discovered be admissible against the consenting individual, but it may also be admissible against other individuals with common authority over the area searched.⁷⁹ *Matlock v. United States*⁸⁰ provides an example of the Court's application of this "third-party consent" doctrine. After arresting the defendant in his yard, the police conducted a search of his house pursuant to the consent of one of his co-residents.⁸¹ The *Matlock* Court noted that the cash discovered by police in the warrantless search of the residence could be admitted against the defendant if the third party that consented had common authority over the searched residence.⁸²

74. See *United States v. Matlock*, 415 U.S. 164, 165–66 (1974); *Schneckloth*, 412 U.S. at 219.

75. See *Matlock*, 415 U.S. at 165–66 (explaining that *Schneckloth* had "reaffirmed the principle that the search of property, without warrant and without probable cause, but with proper consent voluntarily given, is valid under the Fourth Amendment" (emphasis added)).

76. 1 JOSHUA DRESSLER & ALAN C. MICHAELS, UNDERSTANDING CRIMINAL PROCEDURE § 16.02[A] (4th ed. 2006); cf. *Illinois v. Rodriguez*, 497 U.S. 177, 188–89 (1990) (finding that a search conducted pursuant to third-party consent would be unlawful if consentor lacked actual and apparent authority to consent). A third party has apparent authority over property if a law enforcement official could reasonably believe that individual to possess common authority over that property. *Id.*

77. *Schneckloth*, 412 U.S. at 226 (describing such circumstances to include the characteristics of the accused and the details of the interrogation); see also *infra* Part III.B.

78. See, e.g., *United States v. Watson*, 423 U.S. 411, 424–25 (1976) (reversing the appellate court's suppression of evidence found in a search of the defendant's vehicle on the basis that the defendant voluntarily consented to the search).

79. See *Rodriguez*, 497 U.S. at 179–81.

80. 415 U.S. 164 (1974).

81. *Id.* at 166.

82. See *id.* at 177–78 (remanding to the district court to determine whether the third party who consented to the search of the residence possessed sufficient authority to validly do so).

B. Determination of the Validity of Consent to a Search Is the Same for Residences, Vehicles, and Other Personal Effects

Supreme Court precedent affords individuals a lesser expectation of privacy in their vehicles than in their residences⁸³ and some other personal effects.⁸⁴ Nevertheless, the Court applies the consent exception to vehicles in the same manner that it applies the doctrine to residences and other personal effects.

The Court has applied the same consent analysis it used in *Schneckloth v. Bustamonte*,⁸⁵ its leading consent case in the context of a vehicle search, to subsequent cases involving residential searches. In *Schneckloth*, a passenger consented to a search of the vehicle.⁸⁶ The vehicle was owned by the consenting passenger's brother, who was not present at the scene.⁸⁷ At issue was the proof necessary for the state to satisfy the voluntariness requirement of the consent doctrine.⁸⁸ The Court in *Schneckloth* emphasized that the government did not need to establish that the consenting party possessed knowledge of his right to refuse consent in order to prove that his consent was voluntary.⁸⁹ Similarly, but in the context of a residential search, the consenting party in *Matlock* did not receive any warning that she could refuse to consent.⁹⁰ Referring explicitly to *Schneckloth*, the Court repeated that to establish voluntariness, the government need not show the consenter's knowledge of the right to refuse consent.⁹¹ Thus, the Court in *Matlock* did not require the government to establish a higher standard of consent just because the search was of a residence. Instead, the Court indicated its acceptance of a rule that it had established in the context of a vehicle

83. See *Kyllo v. United States*, 533 U.S. 27, 34 (2001) (distinguishing the search of a residence from other types of searches).

84. See, e.g., *United States v. Chadwick*, 433 U.S. 1, 13 (1977) (stating that a person's reasonable expectation of privacy in his personal luggage is substantially stronger than in his automobile).

85. 412 U.S. 218 (1973).

86. *Id.* at 220.

87. *Id.*

88. *Id.* at 223.

89. *Id.* at 227 ("While knowledge of the right to refuse consent is one factor to be taken into account, the government need not establish such knowledge as the *sine qua non* of an effective consent.").

90. *United States v. Matlock*, 415 U.S. 164, 167 n.2 (1974); see also *supra* text accompanying notes 80–82.

91. See *Matlock*, 415 U.S. at 167 n.2 (citing *Schneckloth*, 412 U.S. 218).

search, despite the reduced expectation of privacy in vehicles as compared to houses.

The *Schneckloth* analysis also applies to consent searches of other personal effects. *Schneckloth* held that the voluntariness of a person's consent is a question of fact to be determined by examining the totality of the circumstances.⁹² In *United States v. Drayton*,⁹³ the Court used the same totality of the circumstances approach to evaluate whether a defendant voluntarily consented to a search of his luggage bag,⁹⁴—even though individuals possess a substantially lesser expectation of privacy in vehicles than in personal luggage.⁹⁵ As in *Matlock*, the Court did not use a different standard for determining the validity of consent than the one it used for vehicle searches, even though a greater reasonable expectation of privacy was at issue in *Drayton* than in *Schneckloth*.

C. *Assumption of Risk Justifies the Exception for Searches Based on Third-Party Consent*

The Court justifies its creation of an exception for searches conducted pursuant to third-party consent on the basis that all individuals with common authority over a property have assumed the risk that one of them may permit a search thereof.⁹⁶ In *Frazier v. Cupp*,⁹⁷ for example, police searched the defendant's duffel bag after obtaining the consent of his cousin.⁹⁸ The defendant and his cousin used the bag jointly; at the time of the search, the duffel bag had been left at the cousin's residence.⁹⁹ The Court upheld the search as reasonable because the defendant had, under these circumstances, assumed the risk that his cousin would allow someone else to look into the bag.¹⁰⁰

The assumption-of-risk principle used to justify searches conducted pursuant to third-party consent applies regardless of the strength of the reasonable expectation of privacy at issue. Individuals have a greater

92. *Schneckloth*, 412 U.S. at 226.

93. 536 U.S. 194 (2002).

94. *See id.* at 207.

95. *United States v. Chadwick*, 433 U.S. 1, 13 (1977).

96. *Matlock*, 415 U.S. at 170–71; *see* Lesley McCall, Casenote, *Georgia v. Randolph: Whose Castle Is It, Anyway?*, 41 U. RICH. L. REV. 589, 592 (2007).

97. 394 U.S. 731 (1969).

98. *Id.* at 740.

99. *Id.*

100. *Id.*

reasonable expectation of privacy in their residences than they do in their personal effects.¹⁰¹ Nevertheless, the assumption-of-risk principle applies both to searches of residences¹⁰² and to searches of personal effects.¹⁰³ Therefore, the assumption-of-risk principle likely extends to any search conducted pursuant to third-party consent, regardless of the amount of protection that the Fourth Amendment provides the privacy interest at stake.

D. The Exception for Searches Conducted Pursuant to Third-Party Consent May Be Limited by Matlock and Frazier to Absent, Nonconsenting Parties

The Court in *Matlock* implied that the assumption-of-risk rationale may not extend to physically present, nonconsenting parties.¹⁰⁴ Its decision utilized the assumption-of-risk principle articulated in *Frazier* as one justification for holding that residential searches are reasonable when conducted pursuant to the consent of a third party with common authority over the premises.¹⁰⁵ However, in describing its third-party consent jurisprudence, the Court stated in *Matlock*: “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

101. See *United States v. Martinez-Fuerte*, 428 U.S. 543, 561 (1976) (noting that the sanctity of private dwellings is “ordinarily afforded the most stringent Fourth Amendment protection”); see also *Silverman v. United States*, 365 U.S. 505, 511 (1961) (“The Fourth Amendment, and the personal rights which it secures, have a long history. At the very core stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion.”); 1 WAYNE R. LAFAVE, *SEARCH AND SEIZURE* § 2.3, at 554 (4th ed. 2004) (“Indeed, one’s dwelling has generally been viewed as the area most resolutely protected by the Fourth Amendment.”). The authors of a prominent criminal procedure casebook question, in light of *Acevedo*, whether a warrant is still required to search a container having no connection with a vehicle. See YALE KAMISAR, WAYNE R. LAFAVE, JEROLD H. ISRAEL, & NANCY J. KING, *MODERN CRIMINAL PROCEDURE* 387 (11th ed. 2005).

102. *Matlock v. United States*, 415 U.S. 164, 171 n.7 (1974) (“The authority which justifies the third-party consent . . . rests . . . on mutual use of the property by persons generally having joint access or control for most purposes, so that it is reasonable to recognize that any of the co-inhabitants has the right to permit the inspection in his own right and that the others have assumed the risk that one of their number might permit the common area to be searched.”).

103. *Frazier*, 394 U.S. at 740 (“[Defendant], in allowing [his cousin] to use the bag and in leaving it in his house, must be taken to have assumed the risk that [his cousin] would allow someone else to look inside.”).

104. *Matlock*, 415 U.S. at 170.

105. *Id.* at 171; see also *McCall*, *supra* note 96, at 592.

shared.”¹⁰⁶ The emphasized limiting language strongly implies that only nonconsenting parties who are physically absent are subject to the assumption-of-risk principle used to justify searches conducted pursuant to third-party consent.¹⁰⁷

Neither the *Frazier* nor *Matlock* decisions explicitly stated that the respective defendants were absent at the time of the challenged search. However, the defendant’s absence can be inferred from *Frazier*; *Matlock* presents *Frazier* as a case relying upon the absence of the defendant.¹⁰⁸ In *Georgia v. Randolph*,¹⁰⁹ the Court characterized the *Matlock* defendant as absent¹¹⁰ and then used his absence to distinguish the two cases.¹¹¹ That the Court has emphasized the absence of the defendants in *Matlock* and *Frazier* at the time consent to search was sought from a third party lends further support to the argument that only absent, nonconsenting parties are subject to the assumption-of-risk principle. If the absence of these individuals constituted an irrelevant factor in determining whether they assumed the risk that a third party would permit a search of their property, then it seems odd that the Court has highlighted their absences as a pertinent fact.¹¹²

106. *Id.* (emphasis added).

107. *Cf. Georgia v. Randolph*, 547 U.S. ___, 126 S. Ct. 1515, 1527 (2006).

108. *See Matlock*, 415 U.S. at 169–71. The Court in *Matlock* observed that “more recent authority here clearly indicates 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. *Id.* at 170 (emphasis added). The Court then immediately proceeded to describe the facts of *Frazier*. *Id.* at 170–71.

109. 547 U.S. ___, 126 S. Ct. 1515 (2006).

110. *Id.* at ___, 126 S. Ct. at 1527 (noting that “the *Matlock* defendant was not present with the opportunity to object”). The defendant’s absence in *Matlock* was not of his own volition. *Matlock*, 415 U.S. at 166 (explaining that the defendant had been arrested in the front yard of his house). In his dissent, Justice Douglas noted that after the police arrested the defendant in the front yard, they “restrained [him] in a squad car a distance from the home” and then sought consent to search the house from a co-resident. *Id.* at 179 (Douglas, J., dissenting).

111. *Randolph*, 547 U.S. at ___, 126 S. Ct. at 1527.

112. Notably, the Court in *Illinois v. Rodriguez* used a similar analytic approach in holding that searches conducted pursuant to apparent consent were reasonable. *See* 497 U.S. 177, 188–89 (1990). The Court dismissed the argument that it had previously held such searches to be unreasonable. *Id.* at 187–88. To the contrary, the Court observed that some of the language in *Stoner v. California*, a third-party consent case dealing with the issue of whether a hotel clerk had common authority over a guest’s hotel room, provided support for its holding in *Rodriguez*. *Id.* at 187–88. In *Stoner*, the Court had stated that there was no evidence to indicate “that the police had any basis whatsoever to believe that” the guest had authorized the hotel clerk to permit a search of his room. 376 U.S. 483, 489 (1964). The *Rodriguez* Court noted that the quoted language from *Stoner* could reasonably be read as emphasizing the unreasonableness of a police officer’s belief that a hotel clerk had the authority to consent to such a search. 497 U.S. at 188 (“It is at least a

In sum, valid third-party consent constitutes an exception to the Fourth Amendment's warrant and probable cause requirements. The Court applies the third-party consent exception in the same manner to all forms of property, regardless of whether the property searched is a vehicle, other personal effect, or a residence. The rationale for establishing the third-party consent exception is that an individual with common authority over the searched property assumed the risk that others with common authority would permit police search thereof. This assumption-of-risk principle appears to justify any search conducted pursuant to third-party consent, regardless of the fact that the Fourth Amendment provides greater protection to some reasonable expectations of privacy than others. Finally, language in *Matlock* implies that this assumption-of-risk principle, and thus the third-party consent exception, extends only to absent—and not to present—nonconsenting parties.

IV. *GEORGIA V. RANDOLPH* IMPOSED A NEW LIMITATION ON THE THIRD-PARTY CONSENT DOCTRINE

In *Georgia v. Randolph*, the U.S. Supreme Court made explicit what it had merely implied in *Matlock*. The Court held that the warrantless search of a residence, conducted pursuant to the consent of one occupant, is unreasonable as to a physically present co-occupant who expressly objects to the search.¹¹³ The Court justified this rule on the basis that there is no “widely shared social expectation” that the wish of one occupant of a residence to admit a visitor will prevail over the express contrary wish of another, physically present co-occupant.¹¹⁴ The Court concluded that the intrusion of a warrantless search based on disputed consent on the objecting occupant's reasonable expectation of

reasonable reading of the case, and perhaps a preferable one, that the police could not rely upon the obtained consent because they knew it came from a hotel clerk, knew that the room was rented and exclusively occupied by the defendant, and could not reasonably have believed that the former had general access to or control over the latter.”). The *Rodriguez* Court thus concluded that *Stoner* would not have used this language had it intended to hold third-party searches conducted pursuant to apparent authority unreasonable. *Id.*

113. *Georgia v. Randolph*, 547 U.S. ___, 126 S. Ct. 1515, 1519, 1526 (2006). This rule may not apply when the people living together fall within a recognized hierarchy making it apparent that they do not share equal authority over the residence. *See id.* at ___, 126 S. Ct. at 1523. An example of such a hierarchy is that of a parent and child. *Id.* This issue is outside the scope of this Comment.

114. *See id.* at ___, 126 S. Ct. at 1521, 1523.

privacy outweighed the governmental interest in conducting that search.¹¹⁵

A. Police Searched Scott Randolph's Residence over his Express Objection, Relying Instead on his Wife's Consent

On July 6, 2001, Janet Randolph summoned the police to her residence, a home that she formerly shared with her husband, Scott.¹¹⁶ She informed one of the officers, Sergeant Murray, that Scott was a drug user and that "items of drug evidence" were present in their home.¹¹⁷ Sergeant Murray asked Scott, who was physically present at the door of the house, for his consent to search the residence.¹¹⁸ Scott unequivocally refused to provide the requested consent.¹¹⁹ Murray then asked Janet for her consent to search the residence.¹²⁰ She readily provided the requested consent¹²¹ and led Murray to an upstairs bedroom where he observed evidence of drug paraphernalia in plain view.¹²² The observed drug paraphernalia allowed police to obtain a warrant to search the residence, and the resulting evidence was used to indict Scott for possession of cocaine.¹²³

At trial, Scott moved to suppress the evidence of cocaine found in his residence as the product of an illegal warrantless search. Although the search was conducted pursuant to his wife's consent, Scott claimed that consent to be invalid in light of his express refusal.¹²⁴ The trial court rejected his motion, but the Court of Appeals of Georgia reversed and granted his motion to suppress.¹²⁵ The Georgia Supreme Court affirmed the appellate court's reversal.¹²⁶ In *Georgia v. Randolph*, the U.S. Supreme Court affirmed the Georgia Supreme Court's judgment.¹²⁷

115. *Id.* at ___, 126 S. Ct. at 1523–24.

116. *Id.* at ___, 126 S. Ct. at 1519.

117. *Id.*

118. *Id.*

119. *Id.*

120. *Id.*

121. *Id.*

122. *Id.*

123. *Id.*

124. *Id.*

125. *Id.*

126. *Id.*

127. *Id.* at ___, 126 S. Ct. at 1520.

B. *It Is Not a Widely Shared Social Expectation that the Wish of an Occupant to Admit a Visitor into a Shared Residence Will Prevail over a Present Co-Occupant's Express Wish to the Contrary*

In explaining its decision, the *Randolph* Court stated that “[t]he constant element in assessing Fourth Amendment reasonableness in the consent cases . . . is the great significance given to *widely shared social expectations*.”¹²⁸ Applying this methodology in *Randolph*, the Court found no widely shared social expectation that an occupant of a residence may admit a visitor against the express contrary wish of a co-occupant.¹²⁹ The Court looked to social practice,¹³⁰ paying particular attention to social expectations regarding overnight houseguests. In *Minnesota v. Olson*,¹³¹ the Court had already concluded that the host of an overnight houseguest would be “unlikely [to] admit someone who wants to see or meet with the guest over the objection of the guest.”¹³² Importing its *Olson* observations, the Court in *Randolph* reasoned that if it is customary for a host to so defer to an overnight guest, it would be logical to conclude that an occupant would accord the same deference—if not more—to the wishes of co-occupants.¹³³ The Court did not believe that a sensible person invited by one occupant would enter the residence if “a fellow tenant stood there saying, ‘stay out.’”¹³⁴

C. *A Residential Search Conducted Pursuant to an Occupant's Consent Is Unreasonable as to a Physically Present, Nonconsenting Co-Occupant*

The *Randolph* Court found that a present, nonconsenting occupant's reasonable expectation of privacy outweighs the government's interest in conducting a search based on a co-occupant's consent.¹³⁵ An

128. *Id.* at ___, 126 S. Ct. at 1521 (emphasis added).

129. *Id.* at ___, 126 S. Ct. at 1522–23.

130. *Id.* In addition to its exploration of social practice, the Court also turned to property law in its examination of widely shared social expectations. See *id.* at ___, 126 S. Ct. at 1521. The Court stated that property law's treatment of the nature of co-occupancy was influential, but not controlling, as to what constituted widely shared social expectations pertaining to shared authority over a residence. *Id.*

131. 495 U.S. 91 (1990).

132. *Id.* at 99.

133. *Randolph*, 547 U.S. at ___, 126 S. Ct. at 1522.

134. *Id.* at ___, 126 S. Ct. at 1522–23.

135. *Id.* at ___, 126 S. Ct. at 1523–24.

individual's reasonable expectation of privacy in his house is particularly strong due to the longstanding judicial respect accorded to the privacy of the home.¹³⁶ In addition, the Court reasoned that the disputed consent did not strengthen an already weak governmental interest in conducting a warrantless residential search.¹³⁷ Indeed, it observed that a search conducted pursuant to such consent was tantamount to conducting a search pursuant to no consent at all.¹³⁸ Because the balance of the competing interests weighs in favor of the physically present, nonconsenting occupant's reasonable expectation of privacy in his home,¹³⁹ a search conducted pursuant to a co-occupant's consent is unreasonable as to the nonconsenting occupant under the Fourth Amendment.¹⁴⁰

In sum, the Court in *Randolph* held that a warrantless search of a residence, conducted over a physically present occupant's express refusal to consent, is unreasonable under the Fourth Amendment as to the objector if the only basis for the search was a co-occupant's consent. The Court found no widely shared social expectation that an occupant's wish to admit a visitor into the residence will prevail over a present co-occupant's express wish to exclude that third party. Furthermore, an individual's reasonable expectation of privacy in his home outweighs the governmental interest in conducting a warrantless search pursuant to disputed consent.

V. THE *RANDOLPH* RULE SHOULD EXTEND TO VEHICLE SEARCHES BASED ON THIRD-PARTY CONSENT

Courts should apply the *Randolph* rule to vehicle searches conducted pursuant to third-party consent. A vehicle search justified solely by the consent of one with common authority over the vehicle is unreasonable as to another physically present, nonconsenting person who shares in that common authority. It is unlikely that society possesses a shared expectation that someone with common authority over a vehicle will admit a party therein if another person with common authority over the vehicle is physically present and objects.¹⁴¹ In addition, an individual's

136. *Id.*

137. *Id.* at ___, 126 S. Ct. at 1523.

138. *Id.*

139. *Id.* at ___, 126 S. Ct. at 1524.

140. *Id.* at ___, 126 S. Ct. at 1526.

141. *See infra* Part V.A.

reasonable expectation of privacy in a vehicle over which he possesses common authority outweighs the governmental interest in searching the vehicle pursuant to disputed consent. This is true notwithstanding the fact that an individual's reasonable expectation of privacy in a vehicle is weaker than in a residence.¹⁴² Therefore, in the hypothetical presented above, a court should hold that the search of the vehicle jointly owned by Cyrus and Sarah is unreasonable as to Cyrus under the Fourth Amendment.¹⁴³

A. The Assumption-of-Risk Principle Does Not Apply to a Vehicle Search when an Individual with Common Authority over the Vehicle Is Physically Present and Expressly Objects

The third-party consent exception is justified on the assumption-of-risk rationale.¹⁴⁴ This rationale applies to the search of any type of property, regardless of the reasonable expectation of privacy at issue.¹⁴⁵ However, the Court has explicitly restricted the applicability of the third-party consent exception to residential searches by limiting the situations in which one with common authority over a residence assumes the risk that a third party will consent to its search. The *Randolph* decision makes it clear that the physical presence or absence of the nonconsenting party is a vital aspect to evaluating the reasonableness of a residence search conducted pursuant to third-party consent.¹⁴⁶ The Court's earlier

142. See *infra* Part V.B.

143. Chief Justice Roberts indicated in his dissent that the Court's rule would make it more difficult for innocent occupants to disassociate or protect themselves from the criminal activity occurring in the residence and might even prevent police from assisting in a domestic violence situation. See *Randolph*, 547 U.S. at ___, 126 S. Ct. at 1537–38 (Roberts, J., dissenting). These policy concerns would be even less applicable if the *Randolph* rule were extended to vehicles. Domestic abuse may be less likely to occur in vehicles because most vehicles are open to plain view. Cf. *Cardwell v. Lewis*, 417 U.S. 583, 590–91 (1974) (“A car has little capacity for escaping public scrutiny. It travels public thoroughfares where both its occupants and its contents are in plain view.”). It likewise may not be difficult for innocent parties with common authority over a vehicle to distance themselves from the criminal activity occurring therein. A phone call to the police about the criminal activities in which others with common authority over the vehicle are engaged may provide police with sufficient probable cause to search the vehicle, particularly given the lesser expectation of privacy in vehicles. Cf. *Massachusetts v. Upton*, 466 U.S. 727, 733–34 (1984) (finding that an informant's knowledge of incriminating evidence in the defendant's motor home provided police with sufficient probable cause to obtain a search warrant for the motor home).

144. See *United States v. Matlock*, 415 U.S. 164, 171 n.7 (1974).

145. See *supra* notes 101–03 and accompanying text.

146. See *Georgia v. Randolph*, 547 U.S. ___, 126 S. Ct. 1515, 1519, 1526 (2006) (holding that a search conducted of a residence pursuant to the consent of one occupant is unreasonable as to a

jurisprudence indicates that this same restriction should also be extended to the search of personal effects. Specifically, language in *Matlock*,¹⁴⁷ together with the *Matlock* Court's presentation of *Frazier*,¹⁴⁸ strongly implies that the presence or absence of the nonconsenting party at the time third-party consent is sought is pertinent to the reasonableness of a search, whether of a residence or of personal effects.¹⁴⁹

The assumption-of-risk principle should likewise not apply to vehicle searches when the defendant, an individual with common authority over the vehicle, is physically present and expressly refuses to consent. The Court acknowledges that a vehicle is a personal effect in which people retain a reasonable expectation of privacy.¹⁵⁰ While the reasonable expectation of privacy in a vehicle is lower than in a home,¹⁵¹ *Matlock*'s language and characterization of *Frazier* appear to limit the assumption-of-risk principle to absent individuals with common authority over a residence or personal effect.¹⁵² Thus, the Court's precedent suggests that application of the assumption-of-risk principle is not conditioned on the extent of protection afforded to the type of property searched. Courts therefore should not apply the assumption-of-risk principle when one with common authority over a vehicle is physically present and objects to a search of the vehicle, even though individuals have a lesser expectation of privacy in their vehicles than they do in their homes.

B. An Individual's Reasonable Expectation of Privacy in Her Vehicle Outweighs the Governmental Interest in Conducting a Warrantless Vehicle Search Pursuant to Disputed Consent

Because the Court analyzes the validity of consent to search vehicles in the same manner as for residences and other personal effects, disputed consent adds no weight to the governmental interest in conducting a

nonconsenting, physically present co-occupant).

147. *Matlock*, 415 U.S. at 170 (holding that the consent of one who possesses common authority over a residence is valid against the absent, nonconsenting person).

148. *Frazier v. Cupp*, 394 U.S. 731, 740 (1969) (holding that the defendant assumed the risk that his cousin would allow someone to look into his duffel bag when he let his cousin use the bag and left the bag at his cousin's house).

149. *See supra* notes 104–11 and accompanying text.

150. *See California v. Carney*, 471 U.S. 386, 390 (1985); *Cady v. Dombrowski*, 413 U.S. 433, 439 (1973).

151. *See Chambers v. Maroney*, 399 U.S. 42, 48–49 (1970) (citing *Carroll v. United States*, 267 U.S. 132, 153–54 (1925)).

152. *See Matlock*, 415 U.S. at 170.

warrantless vehicle search.¹⁵³ This conclusion is consistent with the Court's determination in *Randolph* that conducting a search pursuant to disputed consent is tantamount to conducting a search pursuant to no consent at all.¹⁵⁴ Despite the fact that the Court recognizes a lower expectation of privacy in a vehicle than in a residence,¹⁵⁵ the Court has unequivocally stated that a warrantless search of a vehicle constitutes a significant intrusion into its owner's reasonable expectation of privacy.¹⁵⁶ When consent functions as the only justification for a vehicle search—i.e., when police lack even the minimal level of suspicion needed to conduct any other reasonable search of the vehicle¹⁵⁷—then the governmental interest in conducting the warrantless search is weak. That interest is even weaker when the validity of the consent is doubtful because the defendant expressly objected to the search at the time consent was sought. As a result, courts should conclude that such searches, justified only by third-party consent, are unreasonable as to the nonconsenting defendant because the defendant's reasonable expectation of privacy in his vehicle outweighs the government's interest in the search.

C. The Warrantless Search of Cyrus's Vehicle Is Unreasonable as to Cyrus Under the Fourth Amendment

Under the proposed extension of the *Randolph* rule, a court analyzing the hypothetical fact pattern involving Cyrus and Sarah should hold that Officer Calloway's search of the couple's car was unreasonable as to Cyrus under the Fourth Amendment. Calloway did not have probable cause to believe that his search would uncover evidence of a crime; all he had was a hunch. Because no other vehicle exception applies, the only justification for Calloway's search of the car is the consent he received from Sarah. Although both Cyrus and Sarah possess actual

153. See *supra* Part III.B.

154. *Georgia v. Randolph*, 547 U.S. ___, 126 S. Ct. 1515, 1523 (2006).

155. See *South Dakota v. Opperman*, 428 U.S. 364, 367 (1976) (explaining that "the expectation of privacy with respect to one's automobile is significantly less than that relating to one's home or office").

156. See *United States v. Ortiz*, 422 U.S. 891, 896 (1975); see also *Coolidge v. New Hampshire*, 403 U.S. 443, 461–62 (1971) ("The word 'automobile' is not a talisman in whose presence the Fourth Amendment fades away and disappears.").

157. See generally WAYNE R. LAFAVE, JEROLD H. ISRAEL, & NANCY J. KING, *CRIMINAL PROCEDURE* § 3.10(a) (4th ed. 2004) (explaining that police often rely on consent searches to avoid both time-consuming paper work and the need to establish probable cause).

authority over the vehicle, Sarah's consent to the search is invalid as to Cyrus because he was physically present at the time of the search and expressly refused to consent. Therefore, under the proposed extension of the *Randolph* rule, a court should conclude that the Fourth Amendment condemns Calloway's search of the jointly owned vehicle as unreasonable as to Cyrus.

VI. CONCLUSION

Courts should extend the *Randolph* rule to searches of vehicles conducted pursuant to third-party consent. No widely shared social expectation exists whereby one with common authority over a vehicle would admit a third party against the objection and in the presence of another with common authority over the vehicle. Although the Fourth Amendment recognizes a lesser expectation of privacy in a vehicle than in a residence, the assumption-of-risk principle that normally justifies searches conducted pursuant to third-party consent is inapplicable when the nonconsenting party is physically present and objects to the intrusion. Furthermore, the nonconsenting party's reasonable expectation of privacy in the vehicle outweighs the government's interest in conducting a warrantless search pursuant to disputed consent. Therefore, courts should find that a warrantless search of a vehicle, conducted pursuant to the consent of one with common authority over the vehicle but over the express objection of a physically present party also possessing common authority in the vehicle, is unreasonable as to the nonconsenting party under the Fourth Amendment.

