No. 09-287

In the Supreme Court of the United States

DARREL A. WESTON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

BRIEF FOR THE UNITED STATES IN OPPOSITION

ELENA KAGAN
Solicitor General
Counsel of Record
LANNY A. BREUER
Assistant Attorney General
WILLIAM C. BROWN
Attorney
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTIONS PRESENTED

1. Whether the search of the house that petitioner shared with his wife was unreasonable, where petitioner's wife voluntarily consented to the search after petitioner, who was not present at the house, had earlier refused to do so.

2. Whether law enforcement officers removed petitioner from his home for the sake of avoiding his objection to the search.

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 1
Statement 1
Argument 6
Conclusion 12

TABLE OF AUTHORITIES

Cases:

Georgia v. *Randolph*, 547 U.S. 103 (2006) . . 4, 6, 7, 8, 11, 12
Illinois v. *Rodriguez*, 497 U.S. 177 (1990) 7
Nix v. *Williams*, 467 U.S. 431 (1984) 4, 10
Schneckloth v. *Bustamonte*, 412 U.S. 218 (1973) 6
United States v. *Henderson*, 536 F.3d 776 (7th Cir. 2008), cert. denied, 130 S. Ct. 59 (2009) 8, 9
United States v. *Hudspeth*, 518 F.3d 954 (8th Cir. 2008) 9
United States v. *Matlock*, 415 U.S. 164 (1974) 4, 6
United States v. *Murphy*, 516 F.3d 1117 (9th Cir. 2008) 8, 9

Constitution and statute:

U.S. Const. Amend. IV 4, 5
Uniform Code of Military Justice, 10 U.S.C. 901 *et seq.*:
10 U.S.C. 930 (Art. 130) 2
10 U.S.C. 934 (Art. 134) 2

In the Supreme Court of the United States

No. 09-287

DARREL A. WESTON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The decision of the United States Court of Appeals for the Armed Forces (Pet. App. 1a-26a) is reported at 67 M.J. 390. The opinions of the Navy-Marine Corps Court of Criminal Appeals are reported at 66 M.J. 544 and 65 M.J. 774.

JURISDICTION

The judgment of the court of appeals was entered on June 11, 2009. The petition for a writ of certiorari was filed on September 4, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. 1259(3).

STATEMENT

Petitioner, a staff sergeant in the United States Marine Corps, was convicted by general court-martial of

housebreaking and two specifications of invasion of privacy, in violation of Articles 130 and 134 of the Uniform Code of Military Justice (UCMJ), 10 U.S.C. 930 and 934. Pet. App. 4a. He was sentenced to seven months of confinement, total forfeitures, reduction to pay grade E-1, and a dishonorable discharge. 65 M.J. 774 (N-M. Ct. Crim. App. 2007). The convening authority approved the sentence as adjudged. *Ibid.*

A panel of the Navy-Marine Corps Court of Criminal Appeals (N-MCCA) set aside petitioner's convictions, 65 M.J. at 774, but, on rehearing en banc, the N-MCCA set aside the panel opinion and affirmed petitioner's convictions, 66 M.J. 544, 544-545 (N-M. Ct. Crim. App. 2008). The United States Court of Appeals for the Armed Forces (CAAF) affirmed. Pet. App. 1a-26a.

1. Petitioner was the head court reporter at a law center at the Marine Corps Base in Kaneohe Bay, Hawaii. In May 2004, one of petitioner's female colleagues became suspicious of an electric razor that had been placed in a bathroom at the law center that she shared with petitioner. She opened the razor and found that it contained a surveillance camera. She suspected petitioner, whom she knew to be familiar with surveillance equipment, and reported the matter to the Criminal Investigations Division (CID). 66 M.J. at 547; Pet. App. 2a.

CID investigators sent a military policeman to petitioner's on-base residence, and the policeman escorted petitioner and his wife to the CID offices. There, petitioner's wife produced an ordinary electric razor and stated that petitioner had "mistakenly taken the wrong razor to work that day." 66 M.J. at 547-548; Pet. App. 3a. His wife also produced an adapter used to download

images from a micro-surveillance camera. 66 M.J. at 547.

The CID agents then placed petitioner and his wife in separate interview rooms. At one point during the interviews, a CID agent asked petitioner if he would consent to a search of his residence. Petitioner refused. Shortly thereafter, the agent went to petitioner's wife and obtained her consent to search the residence. Petitioner's wife then accompanied security personnel to her home and provided assistance to the searching agents. Approximately 20 minutes after the search had begun, an attorney who had spoken with petitioner telephoned petitioner's wife and advised her to withdraw her consent for search, which she did.[1] CID agents, however, had already seized two computers and multiple storage devices before consent was withdrawn. 66 M.J. at 548 & n.11; Pet. App. 4a.

Petitioner's computer was taken from the home and subsequently searched. The search revealed 31 deleted videos and still images of the female court reporter in various stages of undress in the shared law center bathroom, including images of the female court reporter changing her clothes and using the bathroom. Also retrieved were three deleted photographs of the interior of the female court reporter's residence. 66 M.J. at 548; Pet. App. 4a.

2. Before trial, petitioner moved to suppress the evidence seized from his residence. A military judge denied that motion, and petitioner was subsequently convicted. Pet. App. 5a.

---

[1] Petitioner had called a friend, a former military judge, from the interview room when he had been left alone. That conversation was interrupted when agents returned. The agents took petitioner's cell phone "and placed him incommunicado in a holding cell." Pet. App. 3a.

On appeal, a panel of the N-MCCA held that the search of petitioner's residence violated his Fourth Amendment rights and that the seized evidence should be suppressed. On rehearing en banc, the N-MCCA set aside the panel opinion and affirmed petitioner's convictions. The en banc N-MCAA concluded that petitioner's wife voluntarily consented to the search and that her consent made the search reasonable under the Fourth Amendment even though petitioner, who was not present at the residence, had refused to consent to a search. 66 M.J. at 548-552. The en banc court further held that, even if the search had violated petitioner's Fourth Amendment rights, the computer evidence seized pursuant to the search would in any case be admissible under the inevitable discovery doctrine. *Id*. at 552-554 & n.35 (citing *Nix* v. *Williams*, 467 U.S. 431 (1984)).

3. The CAAF affirmed, rejecting petitioner's claim that the warrantless search of his residence violated the Fourth Amendment because he had refused his consent for the search. Pet. App. 1a-26a. The CAAF concluded that the search was reasonable based on petitioner's wife's voluntary consent. *Id.* at 5a-7a. In support of its ruling, the CAAF noted this Court's holding in *United States* v. *Matlock*, 415 U.S. 164 (1974), that a search was reasonable under the Fourth Amendment where a co-occupant granted consent while the defendant was detained in a nearby police car. Pet. App. 7a. The CAAF observed that *Georgia* v. *Randolph*, 547 U.S. 103 (2006), where this Court had found a search unreasonable where a co-occupant physically present at the residence objected to a law enforcement search, was distinguishable because petitioner was not present at the residence. Pet. App. 7a-9a.

The CAAF also rejected on factual grounds petitioner's argument that his absence from the residence did not matter because government agents removed him from his home to prevent him from voicing an effective objection to the search. The CAAF found that, in this case, there was "no evidence that the agents removed [him] from his home so that he could not effectively object to its search." Pet. App. 11a.

Having found that the search was reasonable under the Fourth Amendment, the CAAF declined to address whether the inevitable discovery exception to the exclusionary rule would have allowed the admission of the seized evidence. Pet. App. 2a.

Chief Judge Effron concurred in the result. Pet. App. 12a-17a. Chief Judge Effron would have found the seized evidence admissible under the inevitable discovery doctrine because there was probable cause for a search warrant for the residence and "the evidence presented by the Government at trial established that the military police possessed knowledge that would have led to a lawful search of [petitioner's] home in compliance with routine police practices." *Id.* at 16a.

Judge Erdmann also concurred in the result. Pet. App. 17a-26a. Judge Erdmann did not address "whether an objection registered away from the home is vitiated by a subsequent consent by a cotenant," but he believed that petitioner's absence was not determinative here because, in Judge Erdmann's view, the police had removed petitioner from the scene to avoid a possible objection. *Id.* at 22a. Judge Erdmann concurred in the judgment, however, because he agreed with Judge Effron's view that the evidence was in any event admissible under the inevitable discovery doctrine. *Id.* at 17a, 26a.

ARGUMENT

1. Petitioner argues (Pet. 3-26) that the search of his home was unreasonable notwithstanding his wife's consent, because he objected to the search earlier in the day and from a remote location. The CAAF correctly rejected that argument, and its decision is consistent with *Georgia* v. *Randolph*, 547 U.S. 103 (2006). Any tension between the decision below and an isolated ruling of the Ninth Circuit does not warrant review at this time. Accordingly, further review is not warranted.

a. A search based on consent is reasonable. *Schneckloth* v. *Bustamonte*, 412 U.S. 218 (1973). The police may obtain consent from a third party "who possesse[s] common authority over or other sufficient relationship to the premises * * * sought to be inspected." *United States* v. *Matlock*, 415 U.S. 164, 171 (1974); see *Randolph*, 547 U.S. at 109. In this case, it is undisputed that petitioner's wife had actual authority to consent to a search of the house and that her consent was voluntarily given. Petitioner contends (Pet. 20-25) that his wife's voluntary consent to a search of her home was invalid because, while he was at the CID interrogation room, he had refused such consent. That claim lacks merit.

In *Randolph*, this Court held that "a warrantless search of a shared dwelling for evidence over the express refusal of consent by a *physically present* resident cannot be justified as reasonable as to him on the basis of consent given to the police by another resident." 547 U.S. at 120 (emphasis added). Invoking "widely shared social expectations," the Court explained that it is generally understood "that a solitary co-inhabitant" typically has an absolute entitlement to "admit visitors, with the consequence that a guest obnoxious to one may nev-

ertheless be admitted in his absence by another." *Id.* at 111. The Court concluded that the situation is different, however, where one inhabitant's consent is "subject to immediate challenge by another." *Id.* at 113. The Court determined that "a caller standing at the door of shared premises would have no confidence that one occupant's invitation was a sufficiently good reason to enter when a fellow tenant stood there saying, 'stay out,'" *ibid.*, and it held that such a "disputed invitation, without more, gives a police officer no better claim to reasonableness in entering than the officer would have in the absence of any consent at all," *id.* at 114.

Randolph acknowledged drawing "a fine line" between its holding and the Court's previous decisions in *Matlock* and *Illinois* v. *Rodriguez*, 497 U.S. 177 (1990), both of which upheld consent searches despite the fact that "a potential defendant with self-interest in objecting [was] * * * nearby but not invited to take part in the threshold colloquy." *Randolph*, 547 U.S. at 121. But the Court concluded that its "formalism [was] justified" in the interests of "clarity," and it stated that "[s]o long as there is no evidence that the police have removed the potentially objecting tenant from the entrance for the sake of avoiding a possible objection," a co-tenant's permission is sufficient to make a search constitutionally reasonable "when there is no fellow occupant on hand." *Ibid.*

The decision below is consistent with *Randolph*. The Court's holding in *Randolph* was expressly limited to situations involving "a physically present resident." 547 U.S. at 120; see *id.* at 122; *id.* at 126 (Breyer, J., concurring) (stating that "[t]he Court's opinion does not apply where the objector is not present"). Petitioner was not

physically present when his wife voluntarily consented, in her own right, to a search of their shared home.

Petitioner argues (Pet. 15) that his refusal to consent should be effective even in his absence. That contention, however, is inconsistent with this Court's recognition in *Randolph* of the "widely shared social expectation[]" that "a guest obnoxious to one [co-tenant] may nevertheless be admitted *in his absence* by another." 547 U.S. at 111 (emphasis added). It is also inconsistent with *Randolph*'s stated goal of articulating a clear rule. See *id.* at 121-122. As the Seventh Circuit has observed, a reading of *Randolph* that gives force to a co-tenant's objection made after his departure "giv[es] rise to many questions with no readily identifiable principles to turn to for answers" concerning the "limits to the superiority or duration of [the co-tenant's] objection." *United States* v. *Henderson*, 536 F.3d 776, 784 (2008), cert. denied, 130 S. Ct. 59 (2009).

Petitioner argues (Pet. 15) that the court of appeals' focus on the physical presence of the objecting co-tenant is inconsistent with social expectations. But *Randolph*'s analysis of social expectations in this context emphasized the affront to the co-tenant's authority and dignity if a social guest violates, in the co-tenant's presence, a demand to keep out. See 547 U.S. at 113. A co-tenant's objection, however, loses its force when the co-tenant is gone and the invited guest's entry does not result in a direct personal confrontation. See *Henderson*, 536 F.3d at 784.

b. Petitioner contends (Pet. 15-18) that this Court's review is necessary to resolve a conflict between this case and *United States* v. *Murphy*, 516 F.3d 1117 (9th Cir. 2008). Although *Murphy* did adopt a different read-

ing of *Randolph*, this Court's review would be premature at this time.

In *Murphy*, police officers went to a storage facility where they knew that the defendant lived. When Murphy opened the door, the officers saw an operating methamphetamine lab behind him. The officers arrested Murphy and asked him to consent to a search of the unit; he refused and was removed from the scene. Two hours later, another man with authority to do so arrived on the scene and consented to a search of the storage unit. 516 F.3d at 1119-1120, 1121 n.2.

The Ninth Circuit held that the consent was invalid as to Murphy. The panel acknowledged that the case before it was different from *Randolph* because Murphy "was not physically present" when Roper consented to the search. *Murphy*, 516 F.3d at 1124. The court of appeals stated, however, that it saw "no reason * * * why Murphy's arrest should vitiate the objection he had already registered to the search." *Ibid*. The court reasoned that "[i]f the police cannot prevent a co-tenant from objecting to a search through arrest, surely they cannot arrest a co-tenant and then seek to ignore an objection he has already made." *Id*. at 1124-1125.

Murphy was the first court of appeals decision to address the issue presented here. Since then, the Seventh Circuit in *Henderson* and the en banc Eighth Circuit in *United States* v. *Hudspeth*, 518 F.3d 954 (2008), along with the CAAF in this case, have reached a contrary conclusion. See *Henderson*, 536 F.3d at 784 (noting that "[t]he Ninth Circuit's decision in *Murphy* essentially reads the presence requirement out of *Randolph*"); *Hudspeth*, 518 F.3d at 960 (holding that the defendant's wife had validly consented to a search of the defendant's home computer notwithstanding the previ-

ous refusal of the defendant himself, who had been arrested and was not present at the time, to provide consent). The Ninth Circuit has not had an opportunity to revisit its analysis in light of the contrary views of other courts. And relatively few courts have addressed the issue. This Court's intervention would therefore be premature at this time.

This case would be a particularly poor vehicle for resolving any conflict because even if petitioner's wife did not validly consent, petitioner's suppression motion would have been properly denied under the inevitable discovery doctrine. See *Nix* v. *Williams*, 467 U.S. 431, 444 (1984); 67 M.J. at 394-396 (Effron, C.J., concurring) (recounting the evidence available to officers at the time of the search); 66 M.J. at 552-554. Before searching petitioner's home, law enforcement officials knew that his victim had reported the existence of a surveillance camera hidden inside an electric razor; and at the CID office, petitioner's wife gave the officers two items—a working electric razor and a device used to download images taken by the micro-camera—that strongly implicated petitioner in the wrongdoing. As the N-MCCA explained, the lead agent's trainee was familiar with the established process for obtaining a warrant and the lead agent herself (Agent Stevenson) was supervising the process of collecting evidence. On these facts, "had Mrs. Weston not consented to the initial search, * * * [i]t would be wholly unreasonable to conclude that Agent Stevenson would have simply abandoned her efforts to find and secure the computer." *Id.* at 553. Rather, "routine procedures" of the relevant law enforcement agency would have inevitably led to the discovery of the same evidence. *Id.* at 552; see *id.* at 554 (N-MCCA finding that the government established such procedures by

a preponderance of the evidence). Accordingly, the outcome of this case would be the same regardless of the disposition of the consent issue.

2. Petitioner also contends (Pet. 9-10, 27-32) that the rule of *Randolph* does not apply in his case, because law enforcement officers intentionally removed him from his home for the sake of avoiding a possible objection. That fact-bound claim does not warrant review by this Court.

In *Randolph*, the Court suggested that the rule of that case might not apply where "the police have removed the potentially objecting tenant from the entrance for the sake of avoiding a possible objection." 547 U.S. at 121. The CAAF concluded in this case, however, that there was "no evidence that the agents removed [petitioner] from his home so that he could not effectively object to its search." Pet. App. 10a-11a. That finding is supported by the record, see *ibid.* (noting that "there were no circumstances that should have led the police to anticipate" petitioner's objection), and, in any event, the lower court's evaluation of that factual issue does not warrant this Court's review.

Petitioner makes the related argument that the agents' taking his cell phone from him while he was detained at the CID station kept him from communicating with his wife about her consent to search. But petitioner's wife did not need his permission to consent to a search of her home, and petitioner has identified no decision that requires communication among co-tenants before one of them may consent in her own right. *Randolph* itself did not suggest that the validity of a search of a shared residence turns on the ability of the co-occupants to communicate with each other beforehand. Such a requirement would undercut the decision in *Matlock*, where a potential objector was not present

with the opportunity to object because he was detained in a squad car not far away from the residence. See *Randolph*, 547 U.S. at 121-122.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ELENA KAGAN
Solicitor General
LANNY A. BREUER
Assistant Attorney General
WILLIAM C. BROWN
Attorney

DECEMBER 2009