# 08-1269-cr

*To Be Argued By*:
JAMES R. SMART

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# United States Court of Appeals

## FOR THE SECOND CIRCUIT

**Docket No. 08-1269-cr**

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UNITED STATES OF AMERICA,
*Appellee,*

-vs-

ALBERT LOPEZ,
*Defendant-Appellant.*

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

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**BRIEF FOR THE UNITED STATES OF AMERICA**

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NORA R. DANNEHY
*Acting United States Attorney*
*District of Connecticut*

JAMES R. SMART
*Assistant United States Attorney*
SANDRA S. GLOVER
*Assistant United States Attorney (of counsel)*

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PURSUANT TO "BLUE BOOK" RULE 10.7, THE GOVERNMENT'S CITATION OF CASES DOES NOT INCLUDE "CERTIORARI DENIED" DISPOSITIONS THAT ARE MORE THAN TWO YEARS OLD.

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## STATEMENT OF JURISDICTION

The district court (Stefan R. Underhill, J.) had subject matter jurisdiction over this federal criminal prosecution under 18 U.S.C. § 3231. Judgment entered on March 10, 2008. A8.[1] Defendant filed a timely notice of appeal on March 10, 2008, pursuant to Fed. R. App. P. 4(b). This Court has appellate jurisdiction pursuant to 28 U.S.C. § 1291.

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[1] The Appendix filed with defendant's opening brief will be cited here as "A_." The Appendix filed by the Government with its brief will be cited here as "GA_."

## STATEMENT OF ISSUE PRESENTED FOR REVIEW

Did the district court properly conclude that the search of the bedroom of Angelica Repollet and defendant was constitutional where the district court found that Repollet had consented to the search outside of defendant's presence, defendant never objected to the search, and the officers did not intentionally remove defendant for the purpose of avoiding a possible objection?

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## BRIEF FOR THE UNITED STATES OF AMERICA

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### Preliminary Statement

This appeal concerns the reasonableness of a consent search of the bedroom of defendant-appellant Albert Lopez and his girlfriend, Angelica Repollet. On October 2, 2006, deputies of the United States Marshals Service entered a home in Ansonia, Connecticut, to arrest defendant pursuant to a warrant for violation of supervised release. The deputies arrested defendant downstairs. Because defendant was wearing only shorts, one of the deputies accompanied Repollet upstairs to gather clothing

from their bedroom. Upon seeing narcotics and paraphernalia in plain view on a night-stand, the deputy asked Repollet for permission to search the bedroom. She consented. Defendant, in custody downstairs and uninvited to participate in the colloquy, voiced no objection. The deputies searched the bedroom and found a loaded .357 handgun under a pillow on the bed. A federal grand jury subsequently returned an indictment charging defendant with crimes related to the firearm.

On appeal, defendant challenges the district court's denial of his motion to suppress the firearm. For the reasons that follow, this Court should reject defendant's claims and affirm the ruling of the district court.

**Statement of the Case**

On March 22, 2007, a federal grand jury sitting in Bridgeport, Connecticut returned an indictment charging defendant with two firearms offenses. A2. Count One charged defendant with Possession of a Firearm by a Convicted Felon, in violation of Title 18, United States Code, Sections 922(g)(1) and 924(a)(2). Count Two charged defendant with Possession of a Firearm by an Unlawful User of a Controlled Substance, in violation of Title 18, United States Code, Section 922(g)(3) and 924(a)(2). A9-10.

On May 29, 2007, defendant filed a motion to suppress evidence. A4. On July 26, 2007, the district court held a hearing on the motion to suppress. The hearing was continued on August 31, 2007. A5-6. On September 12,

2007, the district court (Stefan R. Underhill, J.) issued a ruling denying the motion to suppress. A6, A62-73.

Defendant pleaded guilty to Count One of the Indictment on November 19, 2007. A7. On March 3, 2008, the district court imposed a sentence principally of 47 months' incarceration. A7, A74. Judgment entered on March 10, 2008, and defendant filed a notice of appeal that same day. A8, A77. Defendant is currently serving his sentence.

## Statement of Facts and Proceedings Relevant to this Appeal

### A. Facts relevant to this appeal

The following facts were established by the evidence presented at the suppression hearing and found as fact by the district court.

#### 1. The issuance of the warrant for defendant's arrest

In 1991, defendant was convicted of Conspiracy to Distribute Cocaine in violation of Title 21, United States Code, Sections 846 and 841(a)(1). Defendant's sentence included 140 months' imprisonment and five years' supervised release. A63; GA3. During his term of imprisonment, Lopez was convicted of a second federal offense, Possession of Contraband (Heroin) by an Inmate, in violation of Title 18, United States Code, Sections

1791(a)(1) and (2). A63; GA3. He was released from custody on December 11, 2003. A63; GA3.

While on supervised release, on July 5, 2006, Lopez failed a drug test administered by the United States Probation Office ("USPO"). A63; GA3. The USPO made numerous efforts to contact Lopez, but without success, and defendant did not report as required. A63; GA3. The USPO initiated violation proceedings against Lopez on September 23, 2006, charging him with violation of the supervised release conditions requiring abstention from illegal controlled substances and reporting to the Probation Office. A63; GA3, GA12-13. On that same day, a warrant issued for defendant's arrest. A63; GA3, GA17.

**2. The arrest of defendant and the search and seizure on October 2, 2006**

The USPO referred the arrest of the defendant to the Bridgeport office of the United States Marshals Service ("USMS"). A63; GA11-13. Deputy United States Marshal ("DUSM") Lawrence Bobnick was assigned responsibility for apprehending defendant. A63; GA13-14. Upon investigating the matter, Deputy Bobnick concluded that defendant was likely staying with his girlfriend, Angelica Repollet, at her residence on Wakelee Avenue in Ansonia, Connecticut. A63; GA14, GA16-17.

Early in the morning on October 2, 2006, DUSMs Lawrence Bobnick, Michael Moore, and James Masterson, accompanied by three Ansonia Police Officers, went to 227 Wakelee Avenue to attempt to arrest defendant. A64;

GA19-20. Each member of the arrest team was armed and wearing a bullet-proof vest. A64; GA19.[2]

At 227 Wakelee Avenue, DUSMs Bobnick and Moore and two Ansonia police officers approached the front of the building while the other officers took up positions in a perimeter around the building. A64; GA21. The deputies were able to communicate with each other while at the residence by raising their voices and through the "push-to-talk" feature of their cell phones. A66; GA60. As DUSMs Bobnick and Moore and two Ansonia officers approached the front of the building, an officer observed defendant standing in an upstairs window. A64; GA21-22. The officer motioned for defendant to come downstairs. A64; GA22.

A pit bull was barking loudly as DUSMs Bobnick and Moore, accompanied by the two Ansonia police officers, approached the front door. A64; GA21-22. The door was opened for the officers, as one of the residents held the dog by its collar. A64; GA22. There were several women in the front room. A64; GA22. These included defendant's girlfriend, Angelica Repollet, as well as two of his daughters, Laris Lopez and Elizabeth Lopez. A64; GA113. The officers immediately asked where Lopez was. A64;

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[2] Deputy Bobnick testified that he was aware that the USPO had determined that defendant had failed a drug test and was considered to be an absconder. GA17-18. He was also aware that defendant had been convicted of narcotics violations and had a history of involvement with firearms. *Id.* He shared that information with the arrest team. GA19-20.

GA22. They entered with their guns drawn and called up the stairs, instructing defendant to come down. A64; GA22-24. Lopez did not immediately respond, and for a few moments it appeared that the deputies would have to ascend the stairs to arrest Lopez. A64; GA23.[3] As DUSMs Bobnick and Moore started up the stairs with their guns drawn, defendant started to come down with his hands in the air. A64; GA23-24, GA79-81. Defendant was directed to continue down the stairs, as Bobnick and Moore backed down the stairs to the bottom. A64; GA23-24. Defendant complied, and was handcuffed by DUSM Moore at the base of the stairs. A64-65, GA24-25, GA79-81. The officers holstered their weapons. A65; GA24, GA80.

At the time he was handcuffed, defendant was wearing only a pair of mesh shorts. A65; GA25, GA80. Accordingly, pursuant to USMS practice, DUSM Bobnick sought additional clothing for defendant. A65; GA25-26. He asked the women if they could get clothing for defendant. A65; GA26. As Angelica Repollet went upstairs to retrieve the clothing, DUSM Bobnick escorted her upstairs. A65; GA26. He accompanied her for officer

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[3] DUSM Bobnick testified that the deputies and officers did not simply go upstairs to arrest Lopez out of concern for officer safety. GA25. In light of their knowledge of defendant's prior history, including prior involvement with firearms, GA18, and considering that defendant had seen them from the window when they entered the house, Bobnick was concerned that they could be walking into a possible ambush at the top of the stairs, GA25.

safety, because the deputies had not yet cleared the upstairs of people or weapons. A65; GA26.[4]

As they entered a bedroom, DUSM Bobnick immediately saw on the night-stand a note of United States currency rolled into the form of a straw. A65; GA31-32, GA37-38. The rolled bill was lying on a plate, with a white powdery residue around it. A65; GA32. DUSM Bobnick also saw a dollar bill that was folded and appeared to be holding a small amount of narcotics in its fold. A65; GA32, GA37.

Upon seeing the suspected narcotics in plain view in the bedroom, DUSM Bobnick asked Repollet whose bedroom they had entered. A65; GA37-38. Repollet responded that defendant and she slept in that room. A65; GA37-38. Bobnick asked if there were other drugs in the room, and Repollet answered that she did not know. A65; GA38-39. Bobnick then asked Repollet if she would permit a search of the bedroom for additional narcotics and weapons. A65; GA39. Repollet answered in the affirmative. A65; GA39-40.

DUSM Bobnick asked Repollet to sit at the end of the bed, while he went outside the bedroom into the hallway to call DUSM Masterson to witness the consent and to assist with the search. A65; GA39-40. Bobnick asked

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[4] DUSM Bobnick testified that he was not going upstairs with any intention of conducting a search, and at no point in his preparation for the arrest had he formed an intention to conduct a search. GA26-27.

Repollet to stay seated in this position for his own protection and to keep her from destroying evidence because he planned to turn away from her. A65; GA40. The deputies did not handcuff Repollet or use any force to restrain her. A66; GA41-42. Bobnick confirmed Repollet's consent to the search upon DUSM Masterson's arrival in the bedroom. A66; GA43-44, GA101-104.[5]

Defendant, who had not been moved anywhere from the time he came downstairs and who remained in the house at the time Repollet gave consent, was not invited to participate in the colloquy regarding the search of the upstairs bedroom. A72; GA45, GA64-65; GA79-80, GA83-84, GA87-88, GA98-99, GA108-09. He was not asked to consent to the search, and he never articulated an objection to it. A71; GA68-70, GA88, GA109.

While searching the bed on which Angelica Repollet was sitting, DUSM Masterson discovered a loaded Taurus .357 Magnum revolver under a pillow on the right side of the bed. A66; GA47-48. Just moments after Masterson discovered the firearm, DUSM Moore left defendant in the custody of the Ansonia officers downstairs and came up to the bedroom to report his discovery of a large wad of cash in defendant's shorts during the frisk incident to his arrest.

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[5] The district court made certain findings of fact concerning the voluntariness of Repollet's consent, which are not recounted here because defendant does not challenge the district court's finding regarding Repollet's consent. Defendant's Br. at 24 n.7.

A66; GA48, GA83-84. The deputies subsequently took Lopez from the residence. A66; GA64-65, GA86-88.

**B. Proceedings relevant to this appeal**

On March 28, 2007, a federal grand jury returned an indictment charging defendant with crimes related to the firearm seized on October 2, 2006. Count One charged defendant with Possession of a Firearm by a Convicted Felon, in violation of Title 18, United States Code, Sections 922(g)(1) and 924(a)(2). Count Two charged defendant with Possession of a Firearm by an Unlawful User of a Controlled Substance, in violation of Title 18, United States Code, Section 922(g)(3) and 924(a)(2). A9-10.

On May 29, 2007, defendant filed a motion to suppress evidence. A4, A11-23. Defendant argued, among other things, that Repollet had not consented to the search of her and defendant's bedroom, A17, that any consent she gave was not voluntary, A18-19, and that, notwithstanding any consent to the search by Repollet, the search was unreasonable under *Georgia v. Randolph*, 547 U.S. 103 (2006), A20-23. Defendant claimed that *Randolph*'s holding – that a defendant's denial of consent is dispositive as to him, regardless of the consent of a co-tenant – should be extended to this case because the deputies supposedly removed defendant with the intent of avoiding a possible denial of consent on his part. A22-23. He also claimed that the search was unreasonable under *Randolph* because the deputies failed to ask him for consent, despite his ready availability. A60.

The district court held an evidentiary hearing on the motion to suppress on July 26 and August 31, 2007. A5-6. The witnesses included DUSMs Bobnick, Moore and Masterson, as well as Angelica Repollet and Lopez's daughters, Elizabeth and Laris Lopez. A63.

On September 12, 2007, the district court issued a ruling denying defendant's motion to suppress. A6, A62-73. Crediting the testimony of the deputies over that of Repollet, the district court found that Repollet had given consent and that her consent was voluntary. A69-70.

The district court also rejected defendant's argument that the search was unreasonable under *Randolph*. A70-73. The district court noted that *Randolph* carved out only "a very simple, clear, and narrow exception to [the doctrine that] a co-occupant [may validly give] consent to the search of an area over which the co-occupant has common authority." A70-71 (citing *Randolph*, 547 U.S. at 122-23; *Illinois v. Rodriguez*, 497 U.S. 177, 181 (1990); and *United States v. Matlock*, 415 U.S. 164, 170 (1974)). Because this exception applies only when a physically present inhabitant expressly refuses consent, and because Lopez did not object to the search, the district court concluded that "he does not fall into the narrow exception to the consent doctrine that the Supreme Court carved out in *Georgia v. Randolph*." A71. The court rejected defendant's assertion that the deputy marshals intentionally removed him from the colloquy regarding the search to avoid a possible objection, finding that there was no evidence of such conduct. A72. It found that, "[t]o the contrary, the DUSMs did not move him anywhere from the

time he came downstairs until after they searched the bedroom, and [that] Lopez was still in the house when Bobnick obtained Repollet's consent. Lopez was simply not invited to take part in the colloquy." A72.

Defendant pleaded guilty to Count One of the Indictment on November 19, 2007. A7. On March 3, 2008, the district court imposed a sentence principally of 47 months' incarceration. A7, A74-76. Judgment entered on March 10, 2008. A8. Defendant filed a timely notice of appeal on March 10, 2008. A8, A77.

## SUMMARY OF ARGUMENT

The district court properly concluded that the deputy marshals acted reasonably in searching Repollet and defendant's bedroom pursuant to Repollet's consent. In *Randolph*, while reiterating the general rule that co-tenant consent typically justifies a search, the Supreme Court created one narrow exception: "[A] physically present inhabitant's express refusal of consent to a police search is dispositive as to him, regardless of the consent of a fellow occupant." *Randolph*, 547 U.S. at 122-23. The Court made clear that a "potential objector, nearby but not invited to take part in the threshold colloquy, loses out" on the exception, *id.* at 121, without regard to questions concerning "the adequacy of the police's efforts to consult with [the] potential objector," *id.* at 122. It is undisputed here that Repollet consented to the search, while defendant remained silent, in custody downstairs and uninvited to voice his position. Accordingly, the search was constitutional.

Although the *Randolph* Court indicated that a different analysis might be required where "the police have removed the potentially objecting tenant from the entrance for the sake of avoiding a possible objection," *id.* at 121, the district court found that no such conduct occurred here. That finding is amply supported by credible evidence, and defendant falls well short of establishing that it was clearly erroneous.

## ARGUMENT

### I. The search of the bedroom of Angelica Repollet and defendant was constitutional.

#### A. Governing law and standard of review

Although the Fourth Amendment ordinarily prohibits warrantless searches as unreasonable *per se*, that rule is subject to a few "well-delineated exceptions." *Katz v. United States*, 389 U.S. 347, 357 (1967). One such exception "recognizes the validity of searches with the voluntary consent of an individual possessing authority." *Randolph*, 547 U.S. at 109 (citing *Rodriguez*, 497 U.S. at 181). Consent to search can be given validly by anyone who possesses "common authority" over the area or item to be searched. *Rodriguez*, 497 U.S. at 181. "'Common authority' rests 'on mutual use of the property by persons generally having joint access or control for most purposes . . . .'" *Id.* (quoting *Matlock*, 415 U.S. at 171 n.7). When a person with common authority over the premises consents to the search, his or her consent "is valid as against the

absent, nonconsenting person with whom that authority is shared." *Matlock*, 415 U.S. at 170.

The validity of a co-tenant's consent to a search is subject to only a narrow exception: "[A] physically present inhabitant's express refusal of consent to a police search is dispositive as to him, regardless of the consent of a fellow occupant." *Randolph*, 547 U.S. at 122-23. However, once the police have received the consent of a co-tenant, they have no obligation to consult with a suspect who might potentially object before they undertake the search – even where the person could easily be asked for permission. *Id.* at 122 (expressly declining to adopt "a test about the adequacy of the police's efforts to consult with a potential objector" or to require "police to take affirmative steps to find a potentially objecting co-tenant before acting on the permission they had already received"); *see also Matlock*, 415 U.S. at 166, 170 (officers not required to check "whether [defendant] would consent to the search" of his residence, where defendant was arrested in the front yard of the house and placed in a nearby squad car, despite his proximity to the area being searched and the officers' knowledge that he resided in the house); *Rodriguez*, 497 U.S. at 179-80, 186 (where defendant's girlfriend had consented to search conducted while the defendant was asleep in the apartment, search was reasonable); *United States v. Lewis*, 386 F.3d 475, 481 (2d Cir. 2004) (rejecting defendant's "claim that the officers should have asked his permission to search since he was outside of the apartment in

handcuffs in a police car at the time of the search");[6]

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[6] *Lewis* stated further that:

> Supreme Court and Second Circuit law establishes that in situations where the defendant is present – and even in situations where the defendant has already refused consent – the officers may nevertheless rely on consent from a third party who has the requisite authority to give it. *See, e.g.*, *Matlock*, 415 U.S. at 166, 171 [] (warrantless search may be justified based on the consent of a third party with proper authority even when the arrested defendant was on the scene and available to give consent); *United States v. Davis*, 967 F.2d 84, 86-88 (2d Cir. 1992) (third-party consent justified a search and seizure despite fact that defendant was in the custody of police in squad car outside and was never asked to consent); . . . ."

386 F.3d at 481. The *dictum* suggesting that a search based on a co-tenant's consent would be valid "even in situations where the defendant has already refused consent," *id.*, may arguably warrant re-examination in light of *Randolph*'s adoption of "the rule that a physically present inhabitant's express refusal of consent to a police search is dispositive as to him, regardless of the consent of a fellow occupant." *Randolph*, 547 U.S. at 122-23; *see, e.g.*, *United States v. Murphy*, 516 F.3d 1117, 1124 (9th Cir. 2008) (consent search invalid under *Randolph* where consent had been obtained from co-tenant after arrest and removal of defendant, who had earlier denied the police's request for consent); *but see United States v. Hudspeth*, 518 F.3d 954, 959-961 (8th Cir. 2008) (*en banc*) (search upheld as reasonable where the police arrested the defendant, placed him in custody, and then went to his home, where his wife

(continued...)

*United States v. Ayoub*, 498 F.3d 532, 540 (6th Cir. 2007) (noting that "the Supreme Court recently made clear [in *Randolph*] that a consensual search will stand where a potential objector, such as [defendant], never refused consent – even if he was available" but not consulted), *petition for cert. filed* (March 5, 2008) (No. 07-10039).

As the Supreme Court has explained, application of the exception to the co-tenant consent rule turns on a bright-line distinction based on whether or not a present defendant actually objected to the search:

> [W]e are drawing a fine line; if a potential defendant with self-interest in objecting is in fact at the door and objects, the co-tenant's permission does not suffice for a reasonable search, whereas the potential objector, nearby but not invited to take part in the threshold colloquy, loses out.
>
> This is the line we draw, and we think the formalism is justified. So long as there is no evidence that the police have removed the

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[6] (...continued)
consented to a search of the family computer; although defendant had expressly refused to consent to computer search before his arrest, officers had no obligation to inform wife of earlier refusal, and *Randolph* did not apply because the defendant, having been detained, was not physically present). In any event, *Lewis*'s actual holding – that defendant's availability for consultation about consent is immaterial in connection with the validity of co-tenant's consent – was confirmed by *Randolph*, as discussed *supra*.

> potentially objecting tenant from the entrance for the sake of avoiding a possible objection, there is practical value in the simple clarity of complementary rules, one recognizing the co-tenant's permission when there is no fellow occupant on hand, the other according dispositive weight to the fellow occupant's contrary indication when he expresses it.

*Randolph*, 547 U.S. at 121-22.

Factual findings related to a motion to suppress are reviewed by this Court for clear error. *Ornelas v. United States*, 517 U.S. 690, 699 (1996); *United States v. Singh*, 415 F.3d 288, 293 (2d Cir. 2005). When a suppression motion has been denied, all facts are to be construed in the Government's favor. *Singh*, 415 F.3d at 293; *United States v. Casado*, 303 F.3d 440, 443 (2d Cir. 2002). "[T]he reasonableness of police action [is] a 'mixed question of law and fact' that is reviewed *de novo*." *Singh*, 415 F.3d at 293 (quoting *United States v. Reyes*, 353 F.3d 148, 151 (2d Cir. 2003)).

**B. Discussion**

**1. The search of the bedroom based on Repollet's consent was reasonable, given the absence of any objection by defendant.**

The district court properly concluded that the search of Repollet and defendant's bedroom was reasonable, given Repollet's consent and the absence of any objection by

defendant. As noted, the consent of a co-tenant to a search of their common area "is valid as against the absent, nonconsenting" co-tenant, *Matlock*, 415 U.S. at 170, subject only to the narrow exception, under *Randolph*, that the express objection of a present co-occupant is dispositive as to him, *Randolph*, 547 U.S. at 121-23. Here, it is essentially undisputed that Repollet had sufficient authority over the bedroom to validly consent to its search, that she, in fact, did voluntarily consent to the search, that Lopez was held downstairs during the search and the discussion about it, and that he never objected to it.[7] This

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[7] Repollet stated at the time of the search that the bedroom was occupied by both her and defendant, GA37-38, and she repeated that statement in her testimony on the motion to suppress, GA117. Indeed, as the district court noted, defendant has never alleged that Repollet lacked sufficient common authority over the bedroom to consent to the search validly. A70 n.3.

Moreover, the district court's factual finding that Repollet voluntarily consented to that search, A65-66, 69-70 & n.2, is not only amply supported by the record, *see, e.g.*, GA37-44, GA101-104; but also unchallenged on appeal, *see* Defendant's Br. at 24 n.7. The district court expressly found credible the testimony of DUSMs Bobnick and Masterson on Repollet's multiple verbal avowals of her consent and the absence of coercion and other circumstances supporting the voluntariness of her consent, A65-66, 69-70 & n.2; the court found that Repollet's contrary testimony on these points was not credible, A67, A69-70 & n.2. In light of these findings, defendant expressly states that he "does not pursue that issue [Repollet's consent] because the determination of credibility is given such

(continued...)

combination of facts renders the search reasonable under the co-tenant consent rule, and disqualifies defendant from *Randolph*'s narrow exception to that rule.

Instead, defendant qualifies as a "potential objector, nearby but not invited to take part in the threshold colloquy . . . ." *Randolph*, 547 U.S. at 121. Under the explicit instruction of *Randolph*, a defendant in this situation "loses out" on the exception. *Id.* As the Sixth Circuit (for example) has noted, "the Supreme Court recently made clear [in *Randolph*] that a consensual search will stand where a potential objector, such as [defendant], never refused consent – even if he was available" but not consulted. *Ayoub*, 498 F.3d at 540; *see also, e.g.*, *United States v. McKerrell*, 491 F.3d 1221, 1227 (10th Cir.) ("*Randolph* carefully delineated the narrow circumstances

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[7] (...continued)
deference on appeal." Defendant's Br. at 24 n.7.

The fact that Lopez never objected to the search is also undisputed. There was no evidence of such an objection, and numerous witnesses testified that Lopez made no such objection. GA68-70 (Deputy Bobnick), GA88 (Deputy Moore), GA109 (Deputy Masterson). Indeed, the evidence is uncontested that defendant was arrested at the bottom of the stairs and held there before, during and after the discussion about Repollet's consent and the search upstairs in the bedroom. A71-72; GA45, GA64-70, GA68-70, GA79-80, GA83-84, GA87-88, GA98-99, GA108. The district court made an express factual finding on this point, concluding that "Lopez never objected to the search." A71. That finding is unchallenged by defendant. *See, e.g.,* Defendant's Br. at 23.

in which its holding applied, and . . . employed a rule requiring an express objection by a present co-tenant."), *cert. denied*, 128 S. Ct. 553 (2007); *United States v. Wilburn*, 473 F.3d 742, 744-45 (7th Cir.) (under *Randolph*, consent of co-tenant was valid against non-objecting defendant despite fact that the potential objector was held in a police cruiser just 40 feet from the residence; "the police were not obligated to bring [defendant] to [the consenting party] so he could be a party to the discussion regarding consent"), *cert. denied*, 127 S. Ct. 2958 (2007).

Rather than *Randolph*, the case is governed by *Matlock*, *Rodriguez*, *Lewis*, and other cases in which co-tenant consent rendered a search reasonable despite the fact that police did not consult with an easily available defendant regarding his position about the search. *See Matlock*, 415 U.S. at 166; *Rodriguez*, 497 U.S. at 186; *Lewis*, 386 F.3d at 481. In *Matlock*, the defendant was arrested in the front yard of the house and placed in a nearby squad car. The Supreme Court held that the officers were not required to check "whether he would consent to [the] search," *Matlock*, 415 U.S. at 166, despite his proximity to the area being searched and the officers' knowledge that he resided in the house. In *Rodriguez*, the search based on the consent of an apparent co-tenant was valid, even though the police did not seek consent from the defendant, who was asleep in the residence at the time of the search. As the Supreme Court noted in *Randolph*:

> Although the *Matlock* defendant was not present with the opportunity to object, he was in a squad car not far away; the *Rodriguez* defendant was

> actually asleep in the apartment, and the police might have roused him with a knock on the door before they entered with only the consent of an apparent co-tenant.

547 U.S. at 121. Yet, in each instance the Court held that the co-tenant consent rule would justify the search. *Matlock*, 415 U.S. at 166, 170-71, 177-78; *Rodriguez*, 497 U.S. at 186. Similarly, in *Lewis* this Court found that the search of defendant's bedroom was justified by his mother's consent, where the police never asked for his permission even though "he was outside of the apartment in handcuffs in a police car at the time of the search." *Lewis*, 386 F.3d at 481.

*Randolph* carefully preserved the rulings in *Matlock* and *Rodriguez*, notwithstanding the ease with which the police could have asked the *Matlock* and *Rodriguez* defendants for their consent. *Randolph*, 547 U.S. at 121-22. *Randolph* distinguished the earlier decisions on the grounds of a bright-line distinction: Whereas Randolph was "in fact at the door and object[ing]," the potential objectors in *Matlock* and *Rodriguez* were "nearby but not invited to take part in the threshold colloquy." *Id.* The Court made clear that the exception carved out of the co-tenant consent rule applied only to the former category. *Id*. Because defendant here was not present when consent was sought and did not object, he falls into the latter category, and the case is governed by the co-tenant consent rule of

*Matlock*, *Rodriguez*, and *Lewis*.[8] On the basis of this precedent, the search of defendant's bedroom in this case pursuant to Repollet's consent was clearly reasonable.

**2. Defendant's arguments that the search was unreasonable lack merit.**

Defendant makes two main arguments in support of his assertion that the search was unreasonable, one factual and one legal. First, seeking to avail himself of *Randolph*'s suggestion that the reasonableness determination would be impacted by police removal of a "potentially objecting tenant from the entrance for the sake of avoiding a possible objection," *Randolph*, 547 U.S. at 121, defendant appears to claim as a factual matter that the deputy marshals deliberately removed him in order to exclude him from the discussion regarding consent to search. Defendant's Br. at 19-20, 25. Second, defendant argues as a legal matter that the deputies should have sought his consent because they had an easy opportunity to do so. *Id*. at 13, 27. He claims that their failure to do so renders the search unreasonable under *Randolph*. *Id.* Both arguments fail.[9]

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[8] Although *Randolph* does not specifically address *Lewis*, this Court's holding in that decision is reaffirmed by the Supreme Court's decision, as discussed in footnote 6, *supra.*

[9] Defendant also advances an argument concerning his assertedly reasonable expectation of privacy in the bedroom in which the search took place. *See* Defendant's Br. at 14-18. However, for purposes of this appeal, the Government does not (continued...)

**a. The district court did not commit clear error in rejecting defendant's claim that the deputies removed him to avoid a possible objection**.

First, defendant's claim that the deputy marshals deliberately removed him to avoid a potential objection fails in light of the evidence and the factual findings of the district court. Defendant made the same factual claim before the district court, and the district court squarely rejected it. A72 (rejecting Lopez's claim "that the police intentionally removed him for the purpose of avoiding a possible objection to consent"). Indeed, the district court, having had the opportunity to review the evidence and observe the testimony of the witnesses during the two-day suppression hearing, concluded that:

> Lopez has failed to present any evidence to support that claim. To the contrary, the DUSMs did not move him anywhere from the time he came downstairs until after they searched the bedroom, and Lopez was still in the house when Bobnick obtained Repollet's consent. Lopez was simply not invited to take part in the colloquy.

A72.

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[9] (...continued)
contest that defendant enjoyed an expectation of privacy in the bedroom.

The district court did not commit "clear error" in making this finding. *Singh*, 415 F.3d at 293 (factual findings related to a motion to suppress are reviewed by this Court for clear error). To the contrary, the facts – all of which must "be construed in the [G]overnment's favor" – entirely support the determination. *Id.*

A review of the relevant findings of the district court and the evidence on which they are based makes this clear:

- Defendant was arrested at the bottom of the stairs shortly after the officers had entered the residence and before any officers had even gone upstairs where the bedroom was located. A64-65; GA22-26, GA79-81.

- At the time of the arrest, defendant was wearing only a pair of mesh shorts, prompting DUSM Bobnick to seek further clothing for him before transporting him away from the house. A65; GA25-26, GA80.

- Bobnick asked the women present at the arrest if they could retrieve clothing for defendant. A65; GA25-26. Repollet responded by going upstairs to retrieve the clothing from the bedroom. A65; GA25-26. This was the reason for Bobnick's trip up the stairs: Because the officers had not yet cleared the upstairs of

people or weapons, Bobnick went with her to ensure officer safety. A65; GA25-26.[10]

- Upon entering the bedroom in search of the clothing, DUSM Bobnick saw suspected narcotics and paraphernalia in plain view on the night-stand. A65; GA31-32, GA37-38. In light of the discovery of the suspected contraband, Bobnick asked Repollet for consent to search the rest of the bedroom. A65; GA31-32, 37-40.

- After Repollet's affirmative response, DUSM Bobnick called DUSM Masterson and asked him to witness the consent and to assist with the search. A65; GA39-40. Because Bobnick planned to turn his back on her while he stepped away to call Masterson, Bobnick asked

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[10] Defendant concedes the reasonableness of the officers' response to the circumstances. Defendant's Br. at 19. *See United States v. Di Stefano*, 555 F.2d 1094, 1101 (2d Cir. 1977) (officers have duty to find clothing for partially clad arrestee before transporting arrestee from residence; the officer "was clearly justified in accompanying her [to the bedroom] to maintain a 'watchful eye' on her and to assure that she did not destroy evidence or procure a weapon" (citing *United States v. Montiell*, 526 F.2d 1008, 1010 (2d Cir. 1975))); *United States v. Titus*, 445 F.2d 577 (2d Cir. 1971) (evidence found in plain view by officers looking for clothing for nude arrestee admissible); *accord United States v. Gwinn*, 219 F.3d 326, 333 (4th Cir. 2000) (even without arrestee's request, his partially clothed status constituted an exigency justifying officers' temporary reentry into arrestee's home to retrieve clothes).

Repollet to sit on the end of the bed, to keep her from destroying any evidence and for his own safety. A65; GA40.

- Upon Masterson's arrival in the room, the deputies confirmed Repollet's consent to the search. A66; GA43-44, GA101-104.

- The deputy marshals did not move defendant from the downstairs area where he was arrested from the time he came downstairs until after they had secured consent from Repollet and the search of the bedroom was complete. A71-72; GA64-65, GA79-80, GA83-84, GA87-88, GA98-99, GA108-09.

Moreover, Bobnick testified that the motivation for ordering defendant to come downstairs when they first entered the home, instead of going upstairs to arrest him, was concern that the officers could be walking into a possible ambush at the top of the stairs, GA25, and that Bobnick went up the stairs with only the intention of accompanying Repollet to get clothing and not with any intention of conducting a search, GA26-27. In short, as the district court found, there is no evidence that the police deliberately removed defendant for the purpose of avoiding a potential objection to a search upstairs. A72.

Although defendant appears to claim that an improper removal is established by the mere act of placing defendant in custody and holding him nearby without asking for permission to search, while the police secure the

consent of the co-tenant, *see, e.g.*, Defendant's Br. at 24 - 25, that claim fails. *Randolph* made clear that the relevant issue is whether the police intentionally "*removed* the potentially objecting tenant from the entrance *for the sake of avoiding a possible objection*," *Randolph*, 547 U.S. at 121 (emphasis added). As one court has stated:

> [T]he [*Randolph*] Court did not create a blanket rule covering every situation in which the suspect's absence was attributable to the actions of the police. Rather, the Court was specifically referring to situations where the police intentionally removed the suspect for the express purpose of preventing the suspect from having an opportunity to object.

*People v. Lapworth*, 730 N.W.2d 258, 261 (Mich. App.) (after arresting defendant based on probable cause and placing him in squad car, police obtained consent to enter home from roommate, leading to eventual seizure of items in plain view; Court of Appeals reversed trial court's grant of suppression motion because there was no evidence that defendant had been removed with the intent to avoid a possible objection), *lv. to appeal denied*, 732 N.W.2d 543 (Mich. 2007); *and see, e.g.*, *McKerrell*, 491 F.3d at 1228-29 (Tenth Circuit holds that *Randolph* requires a specific showing that the arrest and removal of defendant was for the purpose of avoiding an objection, and stating: "*Randolph* did not upset the procedures that may be employed following an arrest; it merely suggested that the Fourth Amendment might prohibit a search when evidence shows that the police removed the defendant from the scene to avoid his or her potential objection to the

search."); *United States v. Snype*, 441 F.3d 119, 136 n.12 (2d Cir.) (anticipating the holding of the Supreme Court, this Court stated, "because [the co-occupant's] consent to the search was sought only after Snype was removed from the apartment pursuant to an arrest warrant, and because no evidence suggests that he was removed to avoid his opposition to a search, this case does not present the issue of conflicting responses presently pending before the Supreme Court in *Georgia v. Randolph*"), *cert. denied*, 127 S. Ct. 285 (2006).[11]

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[11] Defendant has cited no cases holding that a defendant was removed to avoid an objection, under *Randolph*, on facts analogous to those here. The Government is aware of one outlier case on this topic, by the Delaware Superior Court, in which the court suggested that the question of the purpose of the removal, under *Randolph*, should be addressed from the subjective perspective of the defendant. *State v. Jackson*, 931 A.2d 452, 455 (Del. Super. Ct. 2007) ("[t]hus, whatever [the officer] specifically had in mind, from the perspective of the home occupant/potential defendant, he was removed involuntarily from the 'natural' place for making an objection to the requested search"). However, that decision need not concern this Court. Not only is this aspect of the decision at odds with the language of *Randolph* and the holdings of other courts to have considered the issue, as indicated *supra*, it is also unnecessary to the ultimate conclusion in *Jackson* itself: The court ultimately found that the search based on the co-tenant's consent was invalid for a more straightforward reason, namely, because defendant clearly expressed his objection to the search, *id*., a fact that is not contended to be present in this case.

Here, as the district court found, A72, there is simply no evidence that defendant was removed with any such improper intent. Indeed, as the district court also found, A72, insofar as defendant was arrested and held downstairs while the consent colloquy and the search took place upstairs, the police did not move defendant at all. *Cf. United States v. Groves*, ___ F.3d ___, 2008 WL 2550745, *5 (7th Cir. 2008) (where defendant had denied consent to search and officers had returned later when they knew that defendant would be at work and obtained consent from co-occupant, consent search was valid: "The [district] court found that the officers did nothing to procure Groves' absence from the premises and so *Randolph* provides no relief"). Defendant falls well short of establishing clear error in the district court's factual findings, and the assertion that the search was unreasonable because of the supposed removal of him by the police to avoid a possible objection fails.

**b. The fact that the deputies did not seek defendant's consent is immaterial.**

Defendant's second argument is that the search was unreasonable under *Randolph* because the deputies did not avail themselves of the relatively easy opportunity to seek his consent. This argument fails because *Randolph* instructs that the availability of a nonconsenting defendant is immaterial.

The Supreme Court in *Randolph* made clear that it was putting in place a formalistic, bright-line rule triggered by one fact: an actual objection by a present co-tenant.

Provided that there is no evidence of a purposive removal of defendant to avoid a possible objection – which might require a different analysis, but which is not the case here, as explained above – the "potential objector, nearby but not invited to take part in the colloquy, loses out." *Randolph*, 547 U.S. at 121. The Court made this point explicit, repeatedly stressing the simple, formalistic nature of the test:

> *[W]e are drawing a fine line;* if a potential defendant with self-interest in objecting is in fact at the door and objects, the co-tenant's permission does not suffice for a reasonable search, whereas the potential objector, nearby but not invited to take part in the threshold colloquy, loses out.
>
> *This is the line we draw, and we think the formalism is justified*. So 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, *there is practical value in the simple clarity of complementary rules*, one recognizing the co-tenant's permission when there is no fellow occupant on hand, the other according dispositive weight to the fellow occupant's contrary indication when he expresses it.

*Id*. at 121-22 (emphasis added). Moreover, the Court set forth at length the policy considerations supporting its preference for the bright-line rule:

> [W]e think it would needlessly limit the capacity of the police to respond to ostensibly legitimate opportunities in the field if we were to hold that reasonableness required the police to take affirmative steps to find a potentially objecting co-tenant before acting on the permission they had already received. . . . The pragmatic decision to accept the simplicity of this line is, moreover, supported by the substantial number of instances in which suspects who are asked for permission to search actually consent, albeit imprudently, a fact that undercuts any argument that the police should try to locate a suspected inhabitant because his denial of consent would be a foregone conclusion.

*Id*. at 122 (footnote omitted). Interjecting into this framework an inquiry into the ability of the police to consult with defendant, as Lopez advocates here, would undercut the formalistic, bright-line system that the Court put into place and effect a disservice to the policy goals that the Court set forth in support of its preference for the bright-line rule. This, alone, dictates the immateriality of the ease with which the deputies might have consulted with defendant.

However, the Court did not leave this point to mere implication; to the contrary, it stated explicitly that it was not adopting "a test about the adequacy of the police's efforts to consult with the potential objector," made clear that it was not requiring police to make "efforts to invite a refusal" of consent, and emphasized that "affirmative steps to find a potentially objecting co-tenant" are not

necessary. *Id.* Moreover, it expressly preserved the holding of *Matlock* and *Rodriguez*, despite the explicit recognition that the *Matlock* defendant could have been given the opportunity to object because "he was in a squad car not far away; [while] the *Rodriguez* defendant was actually asleep in the apartment, and the police might have roused him with a knock on the door before they entered with only the consent of an apparent co-tenant." *Id.* In short, the Court gave every indication that the ease with which the police could have consulted a nonconsenting co-tenant is irrelevant to the constitutional inquiry. *Cf. Groves*, 2008 WL 2550745, at *5 ("At bottom, *Randolph* expressly disinvites anything other than the narrowest of readings . . . .").

Finally, lower courts have uniformly declined to extend the *Randolph* exception to co-tenants who are physically absent but easily available for consultation as to their consent. *See, e.g.*, *McKerrell*, 491 F.3d at 1227 (holding that consent of the wife is valid for the search, even though the officers could have requested consent of defendant, with whom police had repeated telephone contact while he was barricaded in the garage and whom police ultimately arrested and placed in patrol car; "*Randolph* carefully delineated the narrow circumstances in which its holding applied, and . . . employed a rule requiring an express objection by a present co-tenant");[12]

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[12] *See also United States v. Parker*, 469 F.3d 1074, 1075-76, 1077-78 (10th Cir. 2006) (search pursuant to consent of co-tenant valid despite failure of officers to seek consent of (continued...)

*Wilburn*, 473 F.3d at 744-45 (holding that under *Randolph*, consent of co-tenant was valid against non-objecting defendant despite fact that the potential objector was held in a police cruiser just 40 feet from the residence; "the police were not obligated to bring [defendant] to [the consenting party] so he could be a party to the discussion regarding consent"); *United States v. Alama*, 486 F.3d 1062, 1066-67 (8th Cir. 2007) (search upheld where defendant was not present when third party gave consent, then appeared and was arrested before search, but was not asked for consent and did not volunteer his objection); *Ayoub*, 498 F.3d at 540 (holding that consent of defendant's sister justified search of their parents' home, even though police had opportunity to ask defendant for consent when they had stopped and searched his car immediately before going to parents' house; "the Supreme Court recently [in *Randolph*] made clear that a consensual search will stand where a potential objector, such as [defendant], never refused consent – even if he was available"); *United States v. Casteel*, 131 P.3d 1, 3-4 (Nev. 2006) (defendant sought suppression of fruits of search based on "the fact that his consent was not explicitly sought, even though he was present and available"; motion properly denied where officers had obtained consent of co-tenant while defendant was being questioned by police), *cert. denied*, 127 S.Ct. 932 (2007); *State v. Chilson*, 165 P.3d 304 (Kan. Ct. App. 2007) (after segregating father and son pursuant to domestic dispute protocol, officers

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[12] (...continued)
defendant, who had already been arrested and placed in police car).

searched residence pursuant to father's consent, without consulting defendant, who had reportedly been in possession of marihuana; search was valid under *Randolph*, even though defendant was available but had not been asked for his consent); *Prophet v. State*, 970 So. 2d 942 (Fla. Dist. Ct. App. 2008) (after arresting defendant and placing him in patrol car, officer obtained consent from co-occupant; search was valid even though before beginning search, the same officer returned to patrol car and asked defendant name, date of birth and address, without mentioning co-occupant's consent or asking defendant for permission).[13]

Significantly, the only cases cited by defendant for the proposition that the Fourth Amendment requires the consent of a defendant who is available are both from other jurisdictions and pre-date the Supreme Court's decision in *Randolph*. Specifically, defendant relies on the

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[13] *See also United States v. McCurdy*, 480 F.Supp.2d 380, 390 (D. Me. 2007) ("*Randolph's* holding is expressly limited to defendants who are physically present and expressly refuse consent. There is no indication *Randolph* would extend to absent, but potentially reachable defendants who, if reached, might refuse consent") *reopened on other grounds*, 2008 WL 270435 (D. Me. July 3, 2008); *Starks v. State*, 846 N.E.2d 673, 682 (Ind. Ct. App. 2006) (finding warrantless search valid where defendant had not been present in the room where co-tenant gave her consent to search and defendant was not asked for consent, even though defendant was present, and had just been arrested, in the room that was searched pursuant to co-tenant's permission; *Randolph* distinguished because defendant at no point expressed refusal of consent).

decision of the Georgia Supreme Court in *Georgia v. Randolph*, 604 S.E.2d 835, 837 (Ga. 2004), which is the decision subsequently reviewed by the United States Supreme Court in *Randolph*, and *State v. Walker*, 965 P.2d 1079 (Wash. 1998). Defendant's Br. at 26.

This reliance is misplaced. These decisions not only conflict with this Circuit's pre-*Randolph* ruling in *Lewis*, 386 F.3d at 481, which expressly rejected defendant's claim "that the officers should have asked his permission to search since he was outside of the apartment in handcuffs in a police car at the time of the search"; *id.* at 481; they also are in conflict with the United States Supreme Court's decision in *Randolph*. The Georgia Supreme Court, in the passage relied upon by defendant here, held broadly that "should the cohabitant be present and able to object, the police must also obtain the cohabitant's consent." *Randolph*, 604 S.E.2d at 837. Similarly, the Washington Supreme Court stated in broad *dicta* in *Walker* that "the police must obtain the consent of a cohabitant who is present and able to object in order to effect a valid warrantless search," 965 P.2d at 1082 (internal quotation marks and citation omitted). However, no such broad language appears in the United States Supreme Court's decision in *Randolph*. To the contrary, it decided the case on the much narrower grounds that the defendant actually was present and actually objected to the search, rejecting the broader approach of the Georgia Supreme Court – and, by implication, the broad *dicta* of the Washington Supreme Court in *Walker* – by instructing that "the potential objector, nearby but not invited to take part in the threshold colloquy, loses out." 547 U.S. at 121.

In short, defendant's claim that the search was unreasonable in light of the failure of the deputies to seek his consent lacks merit.

## CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

Dated: July 23, 2008

Respectfully submitted,

NORA R. DANNEHY
ACTING UNITED STATES ATTORNEY
DISTRICT OF CONNECTICUT

JAMES R. SMART
ASSISTANT U.S. ATTORNEY

SANDRA S. GLOVER
Assistant United States Attorney (of counsel)

**CERTIFICATION PER FED. R. APP. P. 32(A)(7)(C)**

This is to certify that the foregoing brief complies with the 14,000 word limitation requirement of Fed. R. App. P. 32(a)(7)(B), in that the brief is calculated by the word processing program to contain approximately 8,412 words, exclusive of the Table of Contents, Table of Authorities and Addendum of Statutes and Rules.

JAMES R. SMART
ASSISTANT U.S. ATTORNEY

# ADDENDUM

**Constitution of the United States, 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.