Team P17

No. 03-240

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 2016

UNITED STATES OF AMERICA,

Petitioners,

v.

WILLIAM LARSON,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

BRIEF FOR THE PETITIONER

Counsel for Petitioner

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STATEMENT OF THE ISSUES

1. Whether the warrantless searches performed by police officers pursuant to Local Ordinance 1923 were valid under the special needs doctrine.

2. Whether W.M. possessed authority to consent to Officer Nelson's search of the apartment and the cell phone found therein.

STATEMENT OF THE FACTS

In March of 2013, the Professional Baseball Association (PBA) selected Victoria City, Victoria, to host the 2015 All-Star Game. R. at 1. Shortly thereafter, the Victoria Board of Supervisors (Board) and the PBA agreed to hold the game on July 14, 2015, at Cadbury Park, in the Starwood Park neighborhood of downtown Victoria City. *Id.*

The Starwood Park area has long been known as an area afflicted by heavy gang activity. *Id.* The area is predominantly controlled by the "Starwood Homeboyz," but is also known as the home of the "707 Hermanos." *Id.* Human trafficking is the most profitable venture of gangs in the Starwood Park area; they are believed to control upwards of 1,500 conscripted sex workers, many of whom are known to be children. *Id.* The gangs are known to advertise their victims on the "deep web" through sites such as backpage.com, which are difficult for the police to monitor. *Id.*

Several groups of concerned citizens raised fears that the All-Star Game would create an influx of child sex trafficking in the Starwood Park neighborhood. *Id.* Upon finding a wealth of scholarship confirming that large sports events create an increase in sex services, the Board passed Local Ordinance 1923 (L.O. 1923). *Id.* L.O. 1923 reads:

1. Any individual obtaining a room in a hotel, motel, or other public lodging facility shall be subject to search by an authorized law enforcement officer if that officer has reasonable suspicion to believe that the individual is:
    a. A minor engaging in a commercial sex act as defined by federal law.
    b. An adult or minor who is facilitating or attempting to facilitate the use of a minor for a commercial sex act as defined by federal law.
2. The ordinance shall be valid from only Monday, July 11, 2015, through Sunday, July 17, 2015.
3. A search conducted under the authority of this provision shall be limited in scope and duration to that which is reasonably necessary to ascertain whether the individual searched is engaging in the conduct

described in subsection (1).

4. This ordinance shall be valid only in the Starwood Park neighborhood.
    a. Starwood Park is defined to encompass the area within a three-mile radius of Cadbury Park Stadium.

Id.

On May 6, 2015, the Board issued a press release discussing the provisions of L.O. 1923. *Id.* The statement supplied statistical evidence supporting that Starwood Park would likely experience an increase in child sex trafficking during the All-Star Game. R. at 41. Finally, it announced that L.O. 1923 provided law enforcement with the authority to remove children "from dangerous situations before they escalate." *Id.*

On the evening of July 12, 2015, Officers Joseph Richols and Zachary Nelson (Richols and Nelson) were on duty in the Starwood Park area, inspecting patrons at the Stripes Motel. R. at 3. At approximately 11:22 p.m., William Larson (Defendant) and a young female entered the motel. *Id.* The officers observed that the girl was wearing a low-cut top and tight fitting shorts that exposed much of her legs. *Id.* The officers also noticed that the couple was not carrying luggage and that Defendant had two tattoos identifying him as a member of the Starwood Homeboyz. *Id.* The first tattoo, located on Defendant's left forearm, contained the letters "S" and "W" emblazoned on a wizard's hat. *Id.* The second tattoo was on the back of Defendant's neck and read "4-11-5-11." *Id.* Based on Nelson's training and experience, he knew that the numbers referenced the letter's "d," "k," and "e," according to their respective positions as the fourth, eleventh, and fifth letters of the alphabet. *Id.* Nelson also knew that the letters stood for, "dinosaur killer, everybody killer." *Id.* Dinosaur is a pejorative term used by the Starwood Homeboyz to refer to members of their rival gang, 707 Hermanos. *Id.*

Based upon their observations, Richols and Nelson believed they had reasonable

suspicion to search Defendant and his companion pursuant to L.O. 1923. *Id.* Upon searching Defendant, the officers recovered a number of items from his jacket: nine condoms, a butterfly knife, two oxycodone pills, lube, $600 in cash, and a list of names with corresponding allotments of time. R. at 4. When the girl was searched, the officers found a valid State of Victoria driver's license, identifying her as W.M., a 16-year old female. *Id.* Following the searches, Richols handcuffed and arrested Defendant for sex trafficking of a minor in violation of 18 U.S.C. § 1591(a)(1). *Id.* Nelson believed that W.M. was the victim, and therefore declined to also place her under arrest. *Id.*

Upon arresting Defendant, Nelson began questioning W.M. *Id.* She informed Nelson that she was willing to speak to him about her relationship with Defendant. *Id.* W.M. also said that she lived in an apartment with Defendant, and was willing to let Nelson search its premises. *Id.* At the apartment, located at 621 Sasha Lane, Nelson discovered a black semi-auto handgun with the serial number scratched off. *Id.* Nelson impounded the gun, which Defendant later admitted belonged to him.

Nelson also found a smart phone with the initials "S" and "W" inscribed on the phone cover. *Id.* The design was identical to that which is tattooed on Defendant's left forearm. *Id.* Nelson asked W.M. who owned the phone, and she replied that she shared it with Defendant. *Id.* Nelson then asked if he needed a password to access the device. *Id.* W.M. responded by informing Nelson that the password was 4-11-5-11. *Id.* W.M. thereafter consented to Nelson's request to search the phone. *Id.* Upon entering the password, Nelson found several pictures of Defendant holding the impounded gun, suggestive pictures of W.M., and a video of Defendant rapping about pimping. *Id.*

On August 1, 2015, Defendant was indicted by a federal grand jury on one count

of child sex trafficking in violation of 18 U.S.C. § 1591(a)(1) and one count of being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g)(1). R. at 5. Defendant filed a Motion to Suppress Evidence, arguing that the searches violated his Fourth Amendment rights. *Id.* On October 22, 2015, the United States District Court for the Western District of Victoria denied Defendant's motion.

On February 3, 2016, the United States Court of Appeals for the Thirteenth Circuit reversed the district court's ruling, finding that (1) the searches conducted pursuant to L.O. 1923 violated Defendant's Fourth Amendment rights, and (2) W.M lacked both actual and apparent authority to consent to the search of the apartment and the cellphone. R. at 15. Thereafter, the Supreme Court of the United States of America granted certiorari for the October 2016 term. R. at 24.

SUMMARY OF THE ARGUMENT

This Court should reverse the ruling of the United States Court of Appeals for the Thirteenth Circuit because L.O. 1923 is constitutional under the special needs doctrine. The search of Defendant served a special need that is separate from ordinary law enforcement. While L.O. 1923 authorized law enforcement to search Defendant, the ultimate goal of the legislation was child safety. Defendant's expectation of privacy was diminished when the Board published a press release prior to the All-Star Game, outlining the provisions of L.O. 1923.

The Court of Appeals erred in ruling that the intrusion of Defendant's privacy interests were extensive. The search of Defendant was within the dates of the All-Star Game, in a hotel within the three-mile radius of Starwood Park, and only after the officers established reasonable suspicion. The intrusion of Defendant's privacy interests

were minimal when weighed against the government's substantial interest in protecting children from sexual abuse.

Alternatively, if this Court determines that L.O. 1923 is unconstitutional, it should still uphold the search. The Board did not abandon its responsibility to enact a constitutional ordinance, and the provisions are not such that a reasonable law enforcement officer would have known that it was unconstitutional.

Moreover, W.M. possessed apparent authority to consent to Nelson's search of the apartment and the cell phone found therein. W.M. stored all of her belongings in the apartment and received medical bills at the address. Further, she performed most of the household chores, had access to a key, and was able to stay in the residence without Defendant. Even if Nelson erroneously believed that W.M. possessed authority, the facts available at the time demonstrate that he was reasonable and the Fourth Amendment was not violated.

Similarly, W.M. possessed authority to consent to the search of the cell phone. Defendant gave express permission to W.M. to use the phone. W.M. had complete access to it, and knew the password. Further, she regularly sent and received personal text messages, phone calls, and used it to access her social media accounts. Although the phone was found on Defendant's nightstand, the couple shared the bedroom. All of these facts show that Defendant did not have a reasonable expectation of privacy in the phone. Nelson's belief in W.M.'s authority was reasonable, and as such, the apparent authority exception should be applied.

STANDARD OF REVIEW

"Challenges to the constitutionality of a local ordinance are subject to *de novo* review." *Ramos v. Town of Vernon*, 353 F.3d 171, 174 (2d Cir. 2003). "Legal conclusions pertinent to the ultimate question as to whether the Fourth Amendment has been violated are [also] subject to de novo review." *United States v. Allen*, 297 F.3d 790, 794 (8th Cir. 2002).

ARGUMENT

I. LOCAL ORDINANCE 1923 IS CONSTITUTIONAL UNDER THE FOURTH AMENDMENT.

A. The Warrantless Search was Valid Despite the Absence of Probable Cause.

"The fundamental command of the Fourth Amendment is that searches and seizures be reasonable . . ." *New Jersey v. T.L.O.*, 469 U.S. 325, 340 (1985). The Fourth Amendment "does not denounce all searches and seizures, but only those that are unreasonable." *Carroll v. United States*, 267 U.S. 132, 147 (1925). The test of reasonableness "is not capable of precise definition or mechanical application." *Bell v. Wolfish*, 441 U.S. 520, 559 (1979). In determining the standard of reasonableness governing any specific class of case, this Court balances "the need to search against the invasion which the search entails." *Camara v. Mun. Court of City & Cty. of San Francisco*, 387 U.S. 523, 537 (1967).

"Where a careful balancing of governmental and private interests suggests that the public interest is best served by a Fourth Amendment standard of reasonableness that stops short of probable cause, [this Court has] not hesitated to adopt such a standard." *T.L.O*, 469 U.S. at 341. In *T.L.O.*, this Court found that an exception to the warrant and probable cause requirement exists when "special needs, beyond the normal need for law

enforcement, make the warrant and probable-cause requirement impracticable . . ." *Id.* at 340 (Powell, J., concurring). In *National Treasury Employees Union v. Von Raab*, this Court identified two factors as necessary in determining the constitutionality of a warrantless search under the special needs doctrine: (1) the search serves a purpose related to a special need that is separate from ordinary law enforcement, and (2) that this special need makes the ordinary requirement of a warrant impracticable under the circumstances. 489 U.S. 656, 665 (1989).

1. The search served a special need that is separate from ordinary law enforcement.

The Court of Appeals conclusion that L.O. 1923 is unconstitutional because it creates opportunities for law enforcement is inconsistent with this Court's special needs jurisprudence. R. at 17. Indeed, the question that this Court has long concerned itself with in these cases is not whether law enforcement is involved, but rather if law enforcement is the ultimate goal of the legislation.[1] Here, the ultimate goal of L.O. 1923 was child safety. R. at 41.

The incontrovertible truth is that large sports events like the All-Star Game attract a swell of human traffickers and sexual predators who seek to exploit children.[2] In recognizing this danger, the Board enacted L.O. 1923 to protect children from this

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[1] *See Nat'l Treasury Employees Union v. Von Raab,* 489 656, 666 (1989) *Ferguson v.City of Charleston*, 532 U.S. 67, 82–83, (2001).

[2] Meghan Casserly, Forbes Magazine, *Sex And The Super Bowl: Indianapolis Puts Spotlight On Teen Sex Trafficking*, FORBES MAGAZINE, http:forbes.com/sites/meghancasserly/2012/02/02/sex-and-the-super-bowl-indianapolis-spotlight-teen-sex-trafficking/#df398ec48a70 (last visited Oct. 15, 2016).

increased risk of child sexual abuse during the six-days of the event. R. at 41. While the ordinance provided law enforcement with the ability to conduct searches and collect evidence, these allowances were merely collateral to the ultimate goal of protecting children. R. at 2.

The facts here apply equally to *Griffin v. Wisconsin,* 483 U.S. 868 (1987). In *Griffin*, this Court upheld a state law permitting a probation officer's warrantless search of a probationer's home under the special needs doctrine. *Id.* Akin to the present case, the defendant in *Griffin* argued that the probation officer's warrantless search and seizure were tantamount to the ordinary duties of law enforcement. However, this Court rejected the argument, finding persuasive that the law was "meant to assure that the probation serves as a period of genuine rehabilitation and that the *community* is not harmed by the probationer's being at large." *Id.* at 868 (emphasis added).

Contrary to the Court of Appeals assertion, *Ferguson v. City of Charleston*, 532 U.S. 67 (2001) and *City of Indianapolis v. Edmund*, 531 U.S. 32 (2000) are not instructive here. In *City of Charleston*, this Court struck down a state hospital policy of notifying police when blood or urine of pregnant mothers tested positive for cocaine. 532 U.S. 67 (2001). This Court found that the special needs doctrine was inapplicable because the ultimate goal of the policy was law enforcement. *Id.* While *City of Charleston* and the present case both include the use of law enforcement, the facts of the cases do not lend themselves to any reasonable comparison. Charleston did not create their policy out of any necessity driven circumstance, as with the increased risk of sexual assaults on children present here. Charleston simply wanted to identify and prosecute mothers who were using drugs. *Id* at 67. Moreover, unlike the present case, law

enforcement was the central feature of Charleston's hospital policy. In fact, the policy was the result of a cooperative agreement between the city representatives and the Charleston police department. *Id.*

In *Edmund*, this Court invalidated an Indianapolis checkpoint program "whose primary purpose was to detect evidence of ordinary criminal wrongdoing." 531 U.S. 32, 41 (2000). While this Court had previously upheld suspicionless searches with objectives of securing borders and apprehending drunk drivers, it would not "credit the general interest in crime control as justification for a regime of suspicionless stops." *Id.* at 41. The similarities between the present case and *Edmund* are likewise negligible. The policy in *Edmund* was focused on uncovering all potential criminal offenses, while the present case is narrowly tailored to address the special need of protecting children from sexual abuse. Further distinguishing these cases is the fact that the policy in *Edmund* was conceived by the police department. *Id.* at 36. Here, the record does not indicate that the police were involved in the construction of L.O. 1923.

The facts here support the conclusion that L.O. 1923 was divorced from ordinary law enforcement. While law enforcement executed a search and collected evidence, these actions were neither part nor paramount to the ultimate goal of protecting children from sexual abuse.

2. The special need makes the ordinary requirement of a warrant impracticable under the circumstances.

This Court considers three factors when determining the constitutionality of a special needs search: (1) the nature of the privacy interest that is intruded upon; (2) the character of the intrusion upon that interest; and (3) the nature and immediacy of the

government concern at issue. *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 654-61 (1995).

i. The nature of the privacy interest that is intruded upon.

"The Fourth Amendment does not protect all subjective expectations of privacy, but only those that society recognizes as 'legitimate.'" *Vernonia Sch. Dist.,* 515 U.S. at 654 (citing *T.L.O.,* 469 U.S. at 741). "What expectations are legitimate varies, of course, with context, depending, for example, upon whether the individual asserting the privacy interest is at home, at work, in a car, or in a public park." *Vernonia Sch. Dist.*, 515 U.S. at 654 (citation omitted). This Court has generally found that where a defendant was provided advance notice of a search, that notification greatly reduces "to a minimum any 'unsettling show of authority,'" *Delaware v. Prouse,* 440 U.S. 648, 657 (1979), "that may be associated with unexpected intrusions on privacy." *Von Raab*, 489 U.S. 656, 672 (1989).

Here, Defendant's expectation of privacy was diminished by advanced notice. On May 6, 2015, more than two months before the All-Star Game, the Board circulated a press release notifying the public of the provisions of L.O. 1923. R. at 40. The press release specifically announced that the ordinance: (1) was created to protect children from sex trafficking; (2) would be in effect during the week of the All-Star Game; and (3) enabled police officers to "protect children by removing them from dangerous situations." *Id.*

ii. The character of the intrusion upon that interest.

Here, on balance, the intrusion of Defendant's privacy interests was relatively minor. In accordance with the provisions of L.O. 1923, the search of Defendant occurred

(1) within the dates of the All-Star Game celebration; (2) in a hotel within the three-mile radius where children were determined to be at the greatest risk for child sex trafficking; and (3) only after Richols and Nelson established reasonable suspicion for the search. R. at 3. In sum, as the trial court properly found, the "broad and potentially unreasonable searches complained of by [Defendant] were not permitted under L.O. 1923, because the ordinance did not sanction such intrusions." R. at 9.

iii. The nature and immediacy of the government concern at issue.

Where, as here, the special need of a policy is to protect children or the general community, this Court has not hesitated to find a compelling governmental interest to uphold the enactment. *See T.L.O.,* 469 U.S. 325 (1985). In *T.L.O*, this Court upheld a principal's search of a student's purse, which uncovered the presence of drugs. *Id.* This Court found that the search was constitutional, given that the measures adopted by the school were reasonably related to the goal of the search and the age of the student. *Id.* In his concurring opinion, Justice Blackmun noted that "[t]he special need for an *immediate response* to behavior that threatens either the safety of schoolchildren and teachers . . . justifies the Court in excepting school searches from the warrant and probable-cause requirement, and in applying a standard determined by balancing the relevant interests." *Id*. at 353 (emphasis added).

This Court adopted Justice Blackmun's special needs test in *Veronia School Dist.*, where it upheld a policy of drug testing high school student athletes. 515 U.S. 646 (1995). The expressed purposes of the policy were to prevent student athletes from using drugs, to protect their health and safety, and to provide drug users with assistance programs. *Id.* at 650. Pertinent to this Court's decision to uphold the law was the

immediate risk of physical harm "to the drug user or those with whom he is playing his sport . . ." *Id.* at 662.

The Board's interest in protecting children from the increased risk of sex trafficking during the week of the All-Star Game cannot be understated. According to the National Center for Missing and Exploited Children, during the 2011 Super Bowl in Dallas, 133 people were arrested for soliciting sex acts with minors. Casserly, *supra* note 2, at 7. Moreover, a recent study by Arizona State University suggests that the demand for prostitution during sports events has not diminished.[3] The study reported that in the days leading up to the 2015 Super Bowl in Santa Clara, California, postings that advertised sex services increased 30.3% in just the ten days leading to the event. *Id.*

In sum, the intrusion of Defendant's privacy rights here were minimal, particularly so when weighed against the government's substantial interest in protecting children from sexual abuse. As this Court observed in *Wyman v. James,* 400 U.S. 309, 318 (1971) "[t]here is no more worthy object of the public's concern [than a child's safety and wellbeing]."

B. Alternatively, If The Search And Seizure Of The Defendant Violated The Fourth Amendment, The Evidence Should Still Be Admitted Under The Good-Faith Exception to the Exclusionary Rule.

This Court first discussed the good-faith exception to the exclusionary rule in *United States v. Leon* 468 U.S. 897, 104 (1984). It explained that the exclusionary rule did not preclude the use of evidence obtained by law enforcement when officers

[3] *See* Lane Anderson, *The Super Bowl is the Largest Human Trafficking Event in the* Country, Desert News National, http://national.deseretnews.com/article/3412/the-super-bowl-is-the-largest-human-trafficking-event-in-the-country.html (last visited Oct. 15, 2016).

reasonably relied on a search warrant issued by a detached and neutral magistrate that was later found to lack probable cause. *Id.* at 913. This Court observed that where the officer's conduct is objectively reasonable, "excluding the evidence will not further the ends of the exclusionary rule in any appreciable way; for it is painfully apparent that . . . the officer is acting as a reasonable officer would and should act in similar circumstances." *Id.* at 919–20 (citing *U.S v. Janis* 428 U.S. 454, 496 (1984)).

In *United States v. Krull,* this Court articulated principles that further constrain the application of the exclusionary rule. 480 U.S. 340, (1987). *Krull* extended the good-faith exception to encompass circumstances where an officer is objectively reasonable in relying on a statute authorizing a warrantless search that is ultimately determined to violate the Fourth Amendment. *Id.* This Court observed that "excluding evidence obtained pursuant to [a statute] prior to such a judicial declaration will not deter future Fourth Amendment violations by an officer who has simply fulfilled his responsibility to enforce the statute as written." *Id.* at 350. This Court identified two situations where the good-faith exception would not support objectively reasonable reliance on the officer: (1) if in passing the statute the legislature wholly abandoned its responsibility to enact constitutional laws, or (2) if the statutory provisions are such that a reasonable officer should have known that the statute was unconstitutional. *Id.* at 355.

1. The Board did not abandon its responsibility to enact constitutional laws.

The facts here demonstrate that the Board acted responsibly in enacting L.O. 1923. First, there was a pressing need for the ordinance. Statistics confirmed that children would be at an increased risk of becoming victims of human sex trafficking during the All-Star Game. Casserly, *supra* note 2, at 7. Second, the ordinance was

narrowly tailored to accomplish its stated purpose. The searches only targeted child sex trafficking from Monday, July 11, 2015, through Sunday, July 17, 2015, inside hotels located in the three-mile radius of Cadbury Park Stadium. R. at 2. Third, the Board restricted the type of search permitted by the ordinance. *Id.* Law enforcement was only permitted to search the adults and minors whom the police had reasonable suspicion to believe were involved in sex trafficking. *Id.* Lastly, the searches were limited in scope and duration to that which was reasonably necessary to ascertain whether the adults and children were engaged in human trafficking. *Id.* Therefore, the Board's tailored approach to L.O. 1923 demonstrates that it was cognizant of its legal responsibilities and took the necessary steps to stay within its constitutional limits.

2. An objectively reasonable officer would have concluded that L.O. 1923 was constitutional.

Assuming, arguendo, that L.O. 1923 is unconstitutional, the defect in the ordinance is not so obvious as to render a police officer's reliance on it objectively unreasonable. *Krull*, 480 U.S. at 359. The statute was directed at a pervasively regulated criminal industry where the public interest is clearly at stake. Given the known prevalence of human trafficking during the All-Star Game, Richols and Nelson were objectively reasonable in concluding that an ordinance that protected children from sexual abuse was constitutional. *See Krull*, 480 U.S. at 351 (recognizing that there is no evidence that Congress or state legislatures enact statutes permitting searches in violation of the Fourth Amendment.) Moreover, as noted above, the focus of L.O. 1923 was narrowly tailored. This narrow tailoring would lead any objectively reasonable officer to believe that he was enforcing a constitutional ordinance.

Lastly, at the time that Richols and Nelson conducted the search, there had been

no court decision rendering the code invalid or even suggesting that it was unconstitutional. As mentioned above, this Court has validated a number of special needs statutes similar to the ordinance enacted here. Given these holdings, Richols and Nelson could not have been reasonably expected to have doubts about the ordinance and decline to conduct the searches in compliance with its provisions. *See Krull,* 480 U.S. at 349 (stating that unless a statute is facially unconstitutional, an officer cannot be expected to question the legislature.)

In sum, the facts of this case overwhelmingly counsel against suppression. The Board did not deliberately or recklessly enact L.O. 1923 and Richols and Nelson were objectively reasonable in believing the ordinance was consistent with the Fourth Amendment. Therefore, suppressing the evidence here does not outweigh the enormous societal costs imposed by exclusion.

II. W.M. POSSESSED AUTHORITY TO CONSENT TO THE SEARCH OF THE APARTMENT AND THE CELL PHONE FOUND THEREIN.

The Fourth Amendment requires a warrant for searches and seizures conducted by government officials, subject to a few established exceptions. *Katz v. United States,* 389 U.S. 347, 357 (1969). One of the recognized exceptions to the warrant requirement is a search conducted pursuant to an individual's voluntary consent. *Schneckloth v. Bustamonte*, 412 U.S. 218, 219 (1973). Furthermore, when the prosecution seeks to justify a warrantless search by proof of voluntary consent, it is not limited to proof that consent was given by the defendant, but may show that "permission to search was obtained from a third party who possessed common authority over the premises or effects sought to be inspected." *United States v. Matlock,* 415 U.S. 164, 171 (1974).

A third party has common authority to consent to a search of property if that third party has either (1) mutual use of the property by virtue of joint access, or (2) control for most purposes over it. *United States v. Andrus,* 483 F.3d 711, 716 (10th Cir. 2007). Alternatively, even if a third party does not possess actual authority over the premises, consent may still be upheld under the "apparent authority" exception. *Illinois v. Rodriguez*, 497 U.S. 177, 186-88 (1990).

Here, Nelson's entry into Defendant's apartment and the subsequent seizure of property constituted a valid search and seizure under the Fourth Amendment. This Court has long recognized that third party consent based on apparent authority is a valid exception to the warrant requirement. Based on the facts available to Nelson at the time, it was reasonable to conclude that W.M. had authority to consent to the search. Therefore, the Court of Appeals erred in holding that the search of Defendant's apartment was unlawful.

A. W.M. Possessed Authority to Consent to the Search of the Apartment.

Common authority to consent to a search rests on joint use of the property by persons generally having mutual access or control for most purposes. *United States v. Matlock*, 415 U.S. 164, 171 n.7 (1974). In *Matlock*, this Court recognized common authority because, *inter alia*, the consenting party shared the same bedroom as the defendant where the incriminating evidence was seized. *Id*. at 177. Like *Matlock*, W.M. stated to Nelson that she was the live-in girlfriend of Defendant. R. at 29. The subsequent search revealed incriminating evidence in the bedroom where Defendant and W.M. slept together. R. at 4.; *see also United States v. Weeks*, 666 F.Supp.2d 1354, 1378 (2006). (A live-in girlfriend may have apparent authority even where she "was not on the

lease, did not have her own set of keys to apartment, and was not contributing to rental payment or utilities.")

The test for determining whether an officer reasonably believes that a third party has the authority to consent is an objective one. *United States v. Kimoana*, 383 F.3d 1215, 122 (10th Cir. 2004). A search consented to by a third party without actual authority over the premises is nonetheless valid "if the facts available to the officer at the moment [of the search would] warrant a man of reasonable caution in the belief that the consenting party had authority over the premises." *Rodriguez*, 497 U.S. at 188. In *Rodriguez*, this Court held that the Fourth Amendment is not violated when officers enter without a warrant when they "reasonably, although erroneously, believe that the person who consents to their entry has the authority to consent . . ." *Id*. at 188; *see also United States v. Gillis*, 358 F.3d 386, 390 (6th Cir. 2004) ("search valid if the officers reasonably could conclude from the facts available that the third party had authority to consent.")

Moreover, established jurisprudence has held that the burden of proof to establish the existence of effective consent rests on the government. *United States v. Whitfied*, 939 F.2d 1071, 1075 (D.C. Cir. 1991). Warrantless entry is unlawful without further inquiry if "circumstances make it unclear whether the property about to be searched is subject to mutual use by the person giving consent." *Id.* For example, in *Groves*, the Seventh Circuit listed ten factors that may be relevant in establishing third party consent. *United States v. Groves*, 530 F.3d 506, 509-10 (7th Cir. 2008). These factors include:

> (1) Possession of a key to the premises; (2) a person's admission that she lives at the residence in question; (3) possession of a driver's license listing the residence as the driver's legal address; (4) receiving mail and bills at that residence; (5) keeping clothing at the residence; (6) having one's children reside at that address; (7) keeping personal belongings such as a diary or a pet at that residence; (8) performing household chores at the

> home; (9) being on the lease for the premises and/or paying rent; and (10) being allowed into the home when the owner is not present.

Id.[4]

Here, Nelson was not presented with facts that solely amount to "simple access," as the Court of Appeals suggested. R. at 20. Rather, he was presented with facts that have exceeded the reasonableness requirements in federal circuit courts throughout the country, *supra*. Upon initial contact, Nelson was not worried about obtaining consent right away. Instead, he wanted to make sure that W.M. had a "safe place" to stay. R. at 4. W.M. stated that "she was living with [her] boyfriend and that [she] could stay there even though he was arrested." R. at 36. She also mentioned that she had resided in the apartment for one year. R. at 30. The Court of Appeals stated that Nelson should have noticed that "something much more sinister was actually occurring." R. at 21. However, Nelson recognized the need to obtain further information. He said he was "having a little trouble understanding," so he continued the conversation for over ten minutes prior to asking for consent to search the apartment. R. at 29.

Consistent with *Groves*, Nelson sought further information leading him to believe that he had effective third-party consent. First, he asked whether W.M. stored any belongings in the apartment. R. at 30. Although the contents of her belongings could be stored in a "duffel bag," this was the extent of everything she owned. *Id*. W.M. also indicated that she received very personal medical bills at the address. R. at 31. W.M. further indicated that although she did not pay rent, she performed most of the household

[4] *See also United States v. Morning*, 64 F.3d 531, 534 (9th Cir. 1995) ("defendant and consenting party, who lived together in house, had an at least equal interest in the use and possession of the house.")

chores. R. at 33. Next, she clearly indicated that she had control of the apartment for most purposes. This was apparent to Nelson when W.M. said that she could stay at the apartment, even though her boyfriend was arrested. R. at 36. W.M. also stated that she hosted a party the night before. R. at 38.

These circumstances, like in *Groves*, indicate that Nelson had a reasonable belief that W.M. and Defendant were sharing the apartment and nothing "more sinister was actually occurring." Only then did he ask for her consent to search. Based on the information provided at the time, Nelson had a reasonable determination that W.M. had joint use and control over the property, thus satisfying the apparent authority exception in *Rodriguez*.

The Court of Appeals indicated that because W.M. had to use a spare key to gain access to the apartment, Nelson should have known that W.M. did not have joint control. R. at 21. However, given the facts presented at the time, Nelson's conclusion is still reasonable. First, leading up to the encounter at the hotel, the officers noticed that W.M. was wearing a "low cut top and tight fitting shorts that exposed much of her legs." R. at 28. Next, during the search of Defendant, the officers found "a pair of house keys." *Id.* When Nelson searched W.M., all that she had on her person was her wallet with her driver's license. R. at 29. Based on all of these facts, it was reasonable for Nelson to conclude that Defendant was holding on to her keys because of her choice of clothing. This belief was confirmed when the search of Defendant produced a "pair of house keys." Additionally, although she did not have her keys on her person, she knew exactly where to find the spare underneath a "fake rock." R. at 31. Like *Weeks*, the fact that

W.M. did not have keys on her person at the time is not dispositive of Nelson's reasonable belief that she had authority to consent.

After gaining access to the apartment, Nelson further inquired into the living arrangements. Prior to entering the bedroom, W.M. indicated that although she did not have her own room, it was not necessary because she shared the bed with Defendant. R. at 33. *But see United States v. Davis*, 332 F.3d 1163, 1169 (9th Cir. 2003) ("a suspect's roommate will not have common authority over a bedroom used *solely* by the suspect.") This led Nelson to further validate that they were not only co-habitants of the apartment, but were also domestic partners.

The Court of Appeals stated that W.M.'s use of the apartment was restricted to only those areas that benefited Defendant. R. at 20. The facts presented to Nelson at the time do not support this assertion. For example, in *United States v. Goins*, 437 F.3d 644 (7th Cir. 2006), the court held that the defendant's "informal domestic partner" had authority over the premises to authorize a police search where . . . a weapon was found in a container. *Id*. at 650. In leading to this conclusion, the court stated that the girlfriend had apparent authority after telling the police that she: (1) had possessions within the apartment; (2) lived there on-and-off for several months; (3) frequently cleaned; (4) was allowed into the residence when he was not home; and (5) had access to a key. *Id*. at 648; *see also United States v. Meada*, 408 F.3d 14, 21-22 (1st Cir. 2005) ("girlfriend had apparent authority to allow police to search for guns, including one in the bedroom that they shared."). As with the domestic partner's in *Goins* and *Meada*, W.M. told Nelson that she shared the bedroom with Defendant. This further validates that she had apparent authority to consent to both the apartment common areas and the bedroom. Additionally,

W.M. indicated that she lived in the residence full-time for the last year, unlike the girlfriend in *Goins*, who only lived there "on-and-off." Finally, the set-up of the bedroom validated W.M.'s claim that they occupied it together. It contained two nightstands, one had "what looked like men's glasses, a gold fake Rolex men's watch, and some condoms." R. at 35. The other nightstand had an issue of "Seventeen" magazine and a pink eye cover." R. at 37.

Nelson was reasonable in concluding that despite W.M.'s age, she could consent to the search. *United States v. Clutter*, 914 F.2d 775, 778 (6th Cir. 1990). In *Clutter*, the court held that a twelve and fourteen-year old could consent to police entry if they otherwise satisfy the requirements for third-party consent under the *Matlock* test. *Id*. The court further noted that even if the facts did not warrant a finding of capacity to consent, the police had "more than adequate [information] to support a reasonable belief" that the child could consent to the search. *Id*. at 778 n.1.

The Court of Appeals, citing to *United States v. Gutierrez-Hermosillo*, 142 F.3d 1225, 1231 (10th Cir. 1998), stated that Nelson should have known that it was rare for a sixteen-year old to have the sort of authority she claimed. R. at 21. However, like the 6th Circuit in *Clutter*, the 10th Circuit in *Gutierrez-Hermosillo* also held that the officer was reasonable to believe that a minor child had the authority to consent to a search. *Id*. Here, the cited authority from the proceedings below only further support the proposition that Nelson reasonably believed that W.M. had apparent authority to consent to the search, regardless of her age.

In sum, Nelson conducted a thorough investigation of the situation prior to requesting consent to search the apartment. Therefore, Nelson's belief that W.M. had authority to consent was reasonable.

B. W.M. Possessed Authority to Consent to Nelson's Search of the Cell Phone.

A defendant seeking to suppress evidence based upon a Fourth Amendment challenge must show that he or she had a "legitimate expectation of privacy" in the place or objects searched. *Rakas v. Illinois*, 439 U.S. 128, 143 (1978). This Court requires a challenger to show that they have an "actual subjective expectation of privacy, and that expectation must be one that society recognizes as reasonable." *Katz,* 389 U.S. at 361.

Modern cell phones implicate privacy concerns far beyond those implicated by a search of a traditional container. *Riley v. California*, 134 S.Ct. 2473, 2488-89 (2014). In *Riley*, this Court noted that "modern cell phones, with all they contain and all they may reveal . . . hold for many Americans 'the privacies of life.'" *Id*. at 2494-95. Modern cell phones have often been analogized to computers. *United States v. Gardner*, No. 16-CR-20135, 2016 WL 5110190 (E.D.Mich. Sep. 21, 2016). The inquiry into whether the owner of a highly personal object has indicated a subjective expectation of privacy traditionally focuses on whether the container is locked. *Andrus*, 473 F.3d at 20; *see also Trulock v. Freeh*, 275 F.3d 391, 403 (4th Cir. 2001) (finding a subjective expectation of privacy where the defendant kept files password-protected.)

When a third party accesses a computer or cell phone with a shared or unprotected password, a defendant's expectation of privacy is typically not violated. *United States v. Gardner*, No. 16-CR-20135, 2016 WL 5110190, at *16 (E.D.Mich. Sep. 21, 2016). In *Gardner*, the court held that a minor third-party had apparent authority to consent to a

search of the defendant's cell phone based on joint access and mutual use. *Id*. at 21. The court reasoned that the minor was clearly given permission to use the cell phone because the defendant provided her with the password and allowed her to use the phone to coordinate her commercial sex dates. *Id*. at 20. *See also United States v. Morgan*, 435 F.3d 660, 663-64 (6th Cir. 2006) ("may have access to an electronic device where it is located in a common area and he or she has installed applications onto it); *United States v. Buckner*, 473 F.3d 551, 555 (4th Cir. 2007) (a person who only uses the device for menial tasks such as playing games may still have authority to consent to a search of that device.)

In addition to password protection, courts also consider the location of the computer within the house and other "indicia of household member's access to the computer in assessing third party consent." *Andrus*, 473 F.3d at 23. In *Andrus*, the court held that there was valid consent where the cohabitant-homeowner consented to the search of his fifty-one-year-old son's computer, which was located in the son's bedroom. *See also Buckner*, 473 F.3d at 555-56. (determining wife's consent was valid where wife occasionally used computer and computer was found in living room.)

Here, W.M. had complete access to the cell phone, including the password to open it. R. at 4. Prior to even arriving at the apartment and seeing the cell phone, Nelson began to develop information concerning W.M.'s authority to consent to its search. During questioning, Nelson inquired as to whether Defendant had ever "gotten mad at her for doing something he didn't like." R. at 30. W.M. told Nelson "one time he found her texting a guy she was doing a class project with at school and he got mad." *Id*. Defendant told her "from then on, she could only use the cell phone he had given her,

which he paid for, so that he could check it." *Id*. This important piece of information later became vital in determining that W.M. had express permission to use the phone.

Upon arriving at the bedroom and locating the cell phone, Nelson further inquired into whether it was the mutual cell phone that W.M. previously discussed at the hotel. Like the wife in *Morgan*, W.M. stated that she used the cell phone to access her social media accounts, including Instagram, Facebook, and Snapchat. R. at 32. W.M. stated that Defendant gave her the password, and that they both used the phone for personal calls and text messages. *Id*. No other phone was found during the course of the entire investigation. Nelson requested consent to search only after reasonably determining that this was indeed the cell phone that W.M. shared with Defendant. Additionally, the picture on the lock screen was a "picture of [W.M and Defendant] together, smiling and making a gesture at the camera," thus further corroborating W.M.'s contention that the phone was a shared piece of property where both had mutual access. R. at 34. Akin to *Gardner*, W.M. presented apparent authority to search the phone and Nelson reasonably relied upon the information presented to him.

The Court of Appeals erred in finding that Defendant had an expectation of privacy in the cell phone. The jurisprudence involving third-party consent of computers and cell phones clearly indicates that because Defendant shared the phone with W.M., he did not have an expectation of privacy in the item. Unlike the defendant *Trulock,* Defendant here did not protect information on the phone from being visible to W.M. In fact, he shared his password with her so that she could fully access the phone. Furthermore, sharing the cell phone was the decision of Defendant, not W.M.

The Court of Appeals erred in determining that Nelson was not "skeptical" when

he found the phone on the nightstand in a specialized phone case. R. at 22. Upon seeing the phone, Nelson further inquired into whether W.M. possessed mutual authority over the item. As noted above, this inquiry began at the hotel, prior to even finding the phone. The district court correctly noted that the court should not engage in "metaphysical subtleties" in order to determine the boundaries of common authority. R. at 13 (quoting *Frazier v. Cupp*, 394 U.S. 731, 740 (1969). The facts known to Nelson at the time reasonably allowed him to conclude that W.M. had joint access and control over the phone.

In sum, it was reasonable for Nelson to conclude that W.M. had authority to consent to the search of the phone. First, W.M. demonstrated that she knew the password by providing it to Nelson. Second, she had full use of it for making personal calls, sending text messages, and accessing her various social media sites. Last, the lock-screen picture was of her and Defendant. All of this corroborated her assertion that she had express permission to fully access the phone that she shared with Defendant. Accordingly, this Court should find that the apparent authority exception applies here.

CONCLUSION

For the reasons stated above, Petitioner respectfully requests that the ruling of the Thirteenth Circuit Court of Appeals be reversed.

Respectfully submitted,

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