In The

Supreme Court of the United States

United States of America,
Petitioner

v.

William Larson,
Respondent

On Writ of Certiorari to the United States Court of Appeals for the Thirteenth Circuit

---

October Term 2016

Brief for Petitioners

Team P18

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutional Provisions

QUESTIONS PRESENTED

I. Are searches conducted pursuant to L.O. 1923 permitted under the special needs exception to the Fourth Amendment?

II. Did W.M. possess authority to consent to Officer Nelson's search of the apartment at 621 Sasha Lane or the cell phone found therein?

STATEMENT OF THE FACTS

Sex trafficking had already been a serious problem in Victoria City, Victoria when the city was selected to host the Professional Baseball Association's 2015 All-Star Game. R. at 40. With the game, however, the Victoria City Board of Supervisors ("the Board") was concerned that Victoria City would see a significant increase in sex trafficking. R. at 41. Studies show that demand for sex services increases substantially in the days surrounding national championship games. R. at 41. To combat this increased demand for sex services, the Board passed Local Ordinance 1923 ("L.O. 1923"), to allow law enforcement to search any individual obtaining a room in a hotel, motel, or other public lodging facility if an authorized law enforcement officer had reasonable suspicion to believe the individual was a minor engaging in a commercial sex act or an adult or a minor facilitating or attempting to facilitate the use of a minor for commercial sex acts. R. at 2. L.O. 1923 would only be valid for nine days, between Monday, July 11, 2015 and Sunday, July 17, 2015. R. at 2. During that time, L.O. 1923 would only apply to the Starwood Park neighborhood, a three-mile radius of Cadbury Park Stadium. R. at 2. Over two months before L.O. 1923 would apply, the Board released a press statement announcing L.O. 1923 to the residents of Victoria City. R. at 3, 40-41.

During L.O. 1923's period of applicability, Officer Joseph Richols and Officer Zachary Nelson were stationed at the Stripes Motel in Starwood Park. R. at 26. While on duty, they saw a man and a woman walk into the lobby, and became suspicious that the two were attempting to engage in commercial sex acts. R. at 27.

The man had tattoos that, based on Officer Nelson's training and experience, indicated he was a gang member. R. at 28. Two rival gangs have long terrorized Victoria City: the Starwood Homeboyz and the 707 Hermanos. R. at 2. These gangs engage in a variety of crimes, but their

most profitable venture is human trafficking. R. at 2. Victoria City had struggled in the past to control the human trafficking these gangs engaged in because they use the "deep web" to post advertisements on sites that are difficult to monitor. R. at 2. The man had two tattoos that led the officers to believe he was in the Starwood Homeboyz gang. R. at 28. One tattoo depicted an "S" and a "W" wrapped around a wizard's hat, and the other depicted the numbers "4-11-5-11." R. at 28. Based on Officer Nelson's training and experience, he knew that the "S" and "W" stood for Starwood and the numbers corresponded with the letters "d," "k," and "e," standing for "dinosaur killer, everybody killer." R. at 28. The Starwood Homeboyz called their rivals, the 707 Hermanos, dinosaurs. R. at 28.

Per L.O. 1923, the officers' reasonable suspicion that the man and girl were attempting to engage in commercial sex acts granted them authority to search the individuals. Officer Nelson and Officer Richols then searched the man, William Larson, who later became the Defendant in this case, and found a pair of house keys, nine condoms, lube, a butterfly knife, 600 dollars in cash, two pills of oxycodone, and a list of names and how long they paid for. R. at 28. These findings prompted Officer Richols to arrest the Defendant. R. at 28. Officer Nelson then searched the woman, referred to in this case as W.M., and found a State of Victoria Driver's license indicating that she was sixteen years old. R. at 29. Officer Nelson did not arrest W.M. because he thought she was likely the victim of sex trafficking in this crime. R. at 29.

Officner Nelson told W.M. that she was not in any trouble. R. at 36. Then, he asked W.M. if she would be willing to talk a little, and she gave him permission to talk with her. R. at 29. During their conversation, W.M. informed Officer Nelson that she was dating the Defendant, and that they were in the area to do business with the all-star game fans. R. at 29. Concerned for W.M.'s safety, Officer Nelson asked W.M. whether she had a safe place to spend the night. R. at

29. W.M. informed Officer Nelson that she lived with the Defendant in an apartment about three blocks away at 621 Sasha Lane. R. at 29. She further informed Officer Nelson that they shared the apartment, even though the lease was in the Defendant's name. R. at 29. Officer Nelson then asked W.M. to clarify what she meant when she said they shared the apartment, and W.M. informed Officer Nelson that she and the Defendant shared everything there. R. at 29.

To ensure he completely understood W.M.'s use of the apartment, Officer Nelson asked for even further clarification. R. at 29. W.M. told Officer Nelson that she and the Defendant had lived together for about a year and shared all the money from the business they had together. R. at 29-30. W.M. explained that prior to living with the Defendant, W.M. was homeless. R. at 30. At this point, Officer Nelson inquired even further to ascertain exactly how and to what extent W.M. used the apartment. R. at 30. W.M. informed Officer Nelson that she kept all of her personal belongings there, did almost all of the household chores, received medical bills and other personal mail there, and hosted friends at the residence. R. at 30-31, 33, 38. It was not until all of this information had been gathered regarding W.M.'s use of the apartment that Officer Nelson determined that she had mutual use of the apartment and asked for her permission to search the apartment. R. at 31. W.M. consented to the search and led Officer Nelson to the apartment. R. at 31.

W.M. opened the door with a spare key, and Officer Nelson went inside to search. R. at 31. Underneath the bed W.M. and the Defendant shared, Officer Nelson found a loaded black semi-automatic handgun with the serial number scratched off. R. at 31. On one of the nightstands in W.M. and the Defendant's bedroom, Officer Nelson found an Apple IPhone 5s. R. at 31. Before doing anything with the phone, Officer Nelson asked W.M. if the phone belonged to her. R. at 31. She told Officer Nelson that the Defendant paid for the phone, but had insisted that she

share that phone with him and use the phone for all of her personal correspondence. R. at 31-32. The Defendant insisted she use only this phone after he saw her using a phone she previously owned to text a classmate about a class project. R. at 30. Officer Nelson further inquired about W.M.'s use of the phone and she informed him that she knew the phone's passcode, accessed her social media accounts on the phone, and she could unlock the phone without the Defendant's permission. R. at 32. After gathering all of this information, Officer Nelson asked W.M. if he could search the phone, and she consented to the search of the phone. R. at 32. During that search, Officer Nelson found inappropriate photos of W.M. and a video of the Defendant rapping about pimping. R. at 32.

The District Court denied Defendant's motion to suppress the evidence gathered from the search of his person at the hotel lobby and from W.M.'s consented searches. R. at 1. The jury convicted the Defendant one count of human trafficking and one count possession of a firearm by a felon. R. at 1. Defendant appealed, and the Thirteenth Circuit Court of Appeals reversed the guilty verdicts and remanded for a new trial. R. at 23.

SUMMARY OF THE ARGUMENT

This case is about conducting valid searches to protect children. The evidence gathered from both the search of the Defendant and the consented searches of the apartment and cell phone should not be suppressed because the officers conducted reasonable searches. First, the search of the Defendant was permitted under the special needs doctrine. Law enforcement could not control sex trafficking in Victoria City prior to the All-Star Game. The All-Star Game threatened to exacerbate the existing crisis and put children at risk of organized crime. This extraordinary situation constituted a special need allowing the municipality to permit limited, suspicion-based searches.

Second, W.M.'s consent to search the apartment and the cell phone rendered those searches reasonable because W.M. had apparent authority to consent to a search. According to the information W.M. provided to Officer Nelson, Officer Nelson was correct to believe she had mutual use of the apartment and the cell phone with the Defendant and that use gave her common authority over those pieces of property. Any reasonable in Officer Nelson's position would have found that W.M. had apparent authority over the apartment and the cell phone, allowing any officer to rely on her consent to search.

All evidence gathered against the Defendant came from reasonable searches. Excluding the evidence in this case would have little, if any, deterrent effect on any alleged police misconduct. The searches are justified by established exceptions to the Fourth Amendment warrant requirement. U.S. Const. amend. IV. This Court should not punish the officers in this case for conducting valid searches in order to protect children. This Court should reverse the ruling from the Thirteenth Circuit Court of Appeals and allow the evidence gathered against the Defendant from the searches in question to stand in finding him guilty of sex trafficking and possession of a firearm by a felon.

STANDARD OF REVIEW

Motions to suppress evidence are typically reviewed *de novo*. *United States v. Thomas*, 863 F.2d 622, 625 (9th Cir. 1988). Mixed questions of law and fact require *de novo* review. *United States v. McConney*, 728 F.2d 1195, 1202-1203 (9th Cir.), *cert. denied*, 469 U.S. 824 (1984). Whether the searches in this case are justified under the Special Needs and Third-Party Consent doctrines involve questions of law and fact, so *de novo* review is required.

ARGUMENT

A. Are searches conducted pursuant to L.O. 1923 permitted under the special needs exception to the Fourth Amendment?

I. The significant exacerbation of an already existing and uncontrollable sex trafficking crisis posed a special need.

a. The Court should return to the original interpretation of the special needs doctrine, under which the Government's search is permissible.

While the Government and the defendant may not agree on the permissibility of the search, they can certainly agree on the obscurity of the Court's special needs jurisprudence. At the time the Court created the special needs doctrine, determining whether a fact pattern constituted a special need occurred on a case-by-case basis, but any determination had to be grounded in the requirement that the need be "beyond the normal need for law enforcement." *N.J. v. T.L.O.*, 469 U.S. 325, 351 (1985) (Blackmun, J., concurring). A special need stems from "a special law enforcement need for greater flexibility." *Id.* (quoting *Florida v. Royer*, 460 U.S. 491, 514 (1983)). In these cases, a law enforcement purpose backing the search did not preclude the finding of a special need.

However, the Court deviated from the foundational understanding of the doctrine and inexplicably interpreted that the phrase "beyond the normal need for law enforcement" meant that evidence seized from special needs searches "may not be used in a criminal prosecution," or to serve an ordinary crime control purpose. *Nat'l Treasury Employees Union v. Von Raab*, 489 U.S. 656, 666 (1989). *City of Indianapolis v. Edmond*, 531 U.S. 32, 38 (2000). This interpretation is in error for two reasons. First, when creating the doctrine, the Court did not mean to preclude the use of law enforcement. Second, municipalities should be given the tools to respond to crises using personnel with backgrounds in constitutional boundaries.

First, the Court's original special needs doctrine did not prevent the use of law enforcement in special needs searches. Justice Blackmun, whose concurrence in *T.L.O.* coined the term "special needs," made this clear as the Court began shifting away from the original meaning of the doctrine. "The presence of special *law enforcement* needs justifies resort to the balancing test . . . ." *Griffin v. Wis.*, 483 U.S. 868, 881 (1987) (Blackmun, J., dissenting) (emphasis added). A "government search" is permissible when "the practical realities of a particular situation" necessitate an easing of the warrant requirement and the use of the balancing test. *O'Connor v. Ortega*, 480 U.S. 709, 741 (1987) (Blackmun, J., dissenting). In neither opinion did Justice Blackmun require law enforcement to stay on the sidelines. Thus, the involvement of law enforcement should not preclude a special needs search in this case.

Second, public policy dictates that the Court should return to the original meaning of the special needs doctrine. Law enforcement officers are the best government agents to conduct searches. Law enforcement officers receive significant training on constitutional criminal procedure and permissible search techniques. To protect the constitutional rights of the person being searched, as well as to control unnecessary intrusions into their privacy, law enforcement officers are best suited to conduct searches.

The Court has found special needs in cases where public safety is at risk, and when the Government faces the peril of "great human loss." *Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602, 628 (1989). A special need is most clear when the government is forced to take extraordinary action to protect an extraordinary interest. For example, in *Skinner*, the government's concern about the inability of law enforcement to prevent drug use among train conductors, and accidents occurring due to such drug use, resonated with the Court. *Id.* at 628. Another example can be found in a case involving rebellious students. *Vernonia Sch. Dist. 47J v.*

Acton, 515 U.S. 646 (1995). In that case, the students of the high school were "in a state of rebellion," and officials were at their "wits end" trying to stem the crisis. *Id.* at 649. The Court created the special needs doctrine for these extraordinary circumstances.

This case presents extraordinary circumstances justifying the finding of a special need. The sophistication of the sex trafficking operation among the Victoria City gangs allowed them to elude law enforcement, and systemically endanger women and children. R at 2. The gangs in Starwood Park used the "deep web," an area of the Internet constructed to be hidden from law enforcement. *Id.* Data paint a clear picture of the failure of ordinary law enforcement tactics to control the crisis in Starwood Park. The number of victims in Starwood Park is triple the number in any other region of the city. R at 40. Empirical evidence has shown the event would further exacerbate the out-of-control situation. R at 41. The inability of law enforcement to combat the sex trafficking crisis in Starwood Park, and the escalation posed by the event, created a special need that merited a measured legislative response by the municipality. Because a special need existed, the Court can balance a compelling government interest against the privacy expectation of the searched individual to determine the reasonability of the search. *T.L.O.*, 469 U.S. at 351 (Blackmun, J., concurring).

b. Even if the Court adopts the more stringent *Edmond* and *Ferguson* interpretation of the special needs doctrine, the Court should rule for the Government because the search did not have an ordinary law enforcement purpose.

The Court deviated from the foundational understanding of the special needs doctrine in two recent cases. In the first, the Court stated that special needs searches may not have the primary purpose to "detect evidence of ordinary criminal wrongdoing." *Edmond*, 531 U.S. at 38. In the second, the Court argued that a special need search is not permissible where the "immediate objective" of the search is to "generate evidence for law enforcement purposes."

Ferguson v. City of Charleston, 532 U.S. 67, 82 (2001). In *Ferguson*, the Government crossed the line by searching under the special needs doctrine "for the specific purpose of incriminating those patients." *Id.* at 85.

First, restrictions on "ordinary" crime control does not mean that law enforcement cannot be involved. "The Chief Justice's dissent erroneously characterizes our opinion as resting on the application of a 'non-law-enforcement primary purpose test' . . . our judgment turns on the fact that the primary purpose . . . is to advance the general interest in crime control." *Edmond*, 531 U.S. at 44 n.1. Additionally, the Court stated that emergencies could justify a special needs search even when such a search, absent the emergency, would be disallowed. *Edmond*, 531 U.S. at 44.

Second, the ordinance in this case, and the searches underwritten by the ordinance, do not have the ordinary law enforcement purpose that the Court finds objectionable. The ordinance responded to an emergent crisis that law enforcement could not contain. Logically, the ordinance could not be "ordinary" law enforcement, because "ordinary" law enforcement had already failed. R at 2. Unable to control the sex trafficking crisis before the game, with thousands of women and children's lives in jeopardy, the event posed further lawlessness. R at 40. The facts of this case are exactly the special need this Court intended to allow, and this Court should proceed to the balancing test prescribed by the special needs jurisprudence.

II. The necessity of preventing sex trafficking is a compelling government need.

The search furthered the Government's compelling interest in protecting the women and children of Victoria City. The Court has already accepted public safety as a compelling government interest, as well as invoking the prevention of "great human loss" as a special need. *Skinner*, 489 U.S. at 615. *Id.* at 629. The ordinance, and the searches that resulted, occurred

precisely out of concern for public safety. R at 41. The press release used to announce the ordinance told the story of Samantha, a victim of sex trafficking, and a resident of Victoria City. R at 40. As a child sex slave, Samantha endured multiple non-consensual sexual encounters, was dropped out of school, and even tried to dupe a customer into killing her. R at 40. This type of anguish is more severe than the "great human loss" the Court envisioned in *Skinner*. Instead of the release of death, Samantha suffered a far worse reality. The "great human loss" here is not death, but dehumanization. The municipality should have felt just as compelled to act to prevent such horrific victimization as preventing mortality among residents.

Studies have shown that sports events cause a significant increase in demand for sexual services among trafficking individuals. R at 41. Considering the municipality's inability to control sex trafficking prior to the event, the municipality had a legitimate desire to take extraordinary action to protect victims like Samantha. The municipality made clear in their press release that protecting children from these individuals was the driving purpose behind creating the ordinance. R at 41. Therefore, the Government had a compelling and extraordinary need that necessitated searches.

III. The defendant had a diminished expectation of privacy because the search occurred in a public place and the municipality gave notice to citizens that searches to protect the public in the Starwood Park area could occur, subject to geographic and temporal limits.

The public nature of the search, as well as the notice that the Defendant received about potential, limited searches, diminished his expectation of privacy. Evaluating whether someone has a reasonable expectation of privacy requires first a demonstration of a subjective expectation of privacy, followed by an objective determination of whether that expectation is reasonable in society. *Minnesota v. Carter*, 525 U.S. 83, 88 (1998). The defendant had neither a subjective expectation of privacy, nor an objectively reasonable one.

First, the initial tip that led to the search was in plain view. Physical identifying characteristics do not implicate the Fourth Amendment, and are not subject to an expectation of privacy. *United States v. Dionisio*, 410 U.S. 1, 14 (1973). The defendant's tattoo, visible to the public and the searching officers, identified him as a member of a gang involved in sex trafficking activity. Those suspected of criminal activity have a diminished expectation of privacy. *United States v. Knights*, 534 U.S. 112, 119-120 (2001) (holding that the potential for criminal activity among probationers diminished their expectation of privacy).

Along a similar vein, the defendant did not have a subjective expectation of privacy because the search did not take place in a traditionally protected location. The Court has accorded private places, such as homes or automobiles, a higher degree of protection from searches. *Payton v. New York*, 445 U.S. 709, 715 (1980). Here, the search took place in a hotel lobby. R at 26. Hotel lobbies are areas accessible to the public. Any member of the public could have observed the defendant and his girlfriend, and with the specialized knowledge that law enforcement had in this case, surmised that the defendant was involved in gang activity and potentially sex trafficking. The tattoo identifying the defendant as a gang member historically involved in sex trafficking, the age difference between the defendant and W.M., and the use of a hotel, a location often used in sex trafficking, created a likelihood of criminal activity that reduced the defendant's expectation of privacy.

Even if the Court recognized a subjective expectation of privacy, the defendant did not have an objectively reasonable expectation of privacy for two reasons. First, members of the public received notice from the municipality that they were subject to a reduced expectation of privacy because of the ordinance. The municipality created a press release that disseminated information about the ordinance and the necessity of searches to keep the public safe. R at 40-41.

Thus, the public, including the defendant, had reason and opportunity to know that suspicious activity could result in a search. This knowledge contributed to a diminished expectation of privacy.

Second, the ordinance established limits to the searches. Searches could only take place within a three-mile radius of the stadium, and within three days of the event. R at 2. The municipality did not grant law enforcement wide-ranging and potentially invasive discretion to conduct searches. The geographic and temporal limits of the search, along with the requirement that law enforcement possess reasonable suspicion that the subject of the search be engaged in specifically a commercial sex act, ensure that searches were laser-focused on those actually committing a crime.

B. Did W.M. possess authority to consent to Officer Nelson's search of the apartment at 621 Sasha Lane or the cell phone found therein?

After conducting a valid search of the Defendant, law enforcement continued to protect children by conducting valid searches of the Sasha Lane apartment and the cell phone. The Defendant was trafficking W.M. for sex, and to ensure he would not victimize her again, Officer Nelson sought to conduct a search of their shared apartment. When Officer Nelson obtained consent from W.M. to search the apartment and subsequently, the cell phone, he did so completely within the bounds of the Constitution. W.M. informed Officer Nelson that she shared the apartment and the cell phone with the Defendant, and in sharing those pieces of property, she exerted control over each one. That control gave W.M. apparent authority over those pieces of property. So, W.M. could consent to a search.

I. A reasonable officer in Officer Nelson's position would have determined that W.M. had apparent authority over the apartment and the cell phone.

Voluntary consent to search property renders a search reasonable under the Fourth Amendment. *Schneckloth v. Bustamonte*, 412 U.S. 218, 248 (1973). Voluntary consent does not have to come from the original property owner, however. If a third-party demonstrates to law enforcement that she has common authority over the searched property, that third-party may consent to a search. *United States v. Matlock*, 415 U.S. 164, 170-71 (1974). A third-party has common authority when she has joint access to or control of the property. *Id.* at 171. Authority to consent must be actual or apparent. Actual authority requires that the third-party possess common authority over the property. *Id.* Apparent authority, on the other hand, requires only that the third-party *appears* to possess common authority at the time. Common authority is not about property rights. Common authority rests "on mutual use of the property by persons generally having joint access or control for most purposes . . . ." *Id.* at 171 n. 7. To determine whether a third-party possessed apparent authority, this Court must conduct an objective test: Would a reasonable officer in the searching officer's position have found the third-party possessed apparent authority, given the facts available to the searching officer at the time? *Illinois v. Rodriquez*, 487 U.S. 177, 188 (1990).

The common authority doctrine is based on an assumption of risk. When an individual grants another permission to exercise control over his property, he assumes the risk that the third-party will allow someone else to search that property. *Frazier v. Cupp*, 394 U.S. 731, 740 (1969). The Defendant assumed the risk that one day W.M. would consent to a search of the Sasha Lane apartment and the cell phone when he allowed her to share both of those pieces of property with him and use them as her own. To determine whether W.M. had apparent authority when she consented to the search, this Court must analyze whether a reasonable officer in Officer Nelson's

position would have determined W.M. possessed apparent authority based on the information W.M. provided to him.

a. W.M. had apparent authority to consent to the search of the apartment.

This Court must examine what Officer Nelson learned from W.M. to determine whether W.M. possessed apparent authority to consent to a search of the residence she shared with the Defendant. Factors courts have weighed in favor of finding apparent authority include, but are not limited to:

> (1) Possession of a key to the premises; (2) a person's admission that she lives at the residence; (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 the 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.

United States v. Groves, 530 F.3d 506, 509-10 (7th Cir. 2008).

W.M.'s statements of her use of the Sasha Lane apartment meet several of these factors. Officer Nelson learned that W.M. had been living at the residence for over a year. R. at 29. She received medical bills and other personal mail at the apartment. R. at 30. W.M. kept the extent of her personal belongings at the Sasha Lane apartment. R. at 30. She performed a significant amount of the household chores at the apartment. R. at 33. And finally, she hosted friends at the apartment. R. at 38.

It is true that Officer Nelson learned that W.M.'s name was not on the lease and that she did not contribute to rent payments. It is also true that W.M. used what appeared to be a spare key to open the apartment, so it is unclear whether she possessed her own key at the time she consented to the search. None of this information defeats W.M.'s apparent authority, however.

There is no exhaustive checklist of factors a third-party must meet to possess apparent authority over premises.

Many courts have found apparent authority even when the third-party does not possess a key, has no name on the lease, and does not contribute to rent payments. *See United States v. Weeks*, 666 F. Supp. 2d 1354 (N.D. Ga. 2009) (finding the defendant's live-in girlfriend's children residing at the premises, familiarity with the layout of the residence, and responsibility over the household chores demonstrated her apparent authority even though she did not have her own set of keys, did not have her name on the lease, and did not contribute to rent or utility payments); *United States v. Gillis*, 358 F.3d 386 (6th Cir. 2004) (finding defendant's girlfriend had apparent authority even though she removed her children from the shared residence, she was locked out of the shared residence, she maintained a second residence, and she had no personal property remaining there); *United States v. Ryerson*, 545 F.3d 483 (7th Cir. 2008) (finding defendant's live-in girlfriend had apparent authority, even though she did not have a key to get into the residence at the time of the search, because she received mail there, kept personal items there, and demonstrated knowledge of the layout and contents of the residence). The apparent authority analysis requires only that a reasonable officer would have found apparent authority based on the facts given, and based on what Officer Nelson learned, any reasonable officer in Officer Nelson's position would have determined W.M. had apparent authority to consent to a search of the Sasha Lane apartment.

b. W.M. had apparent authority to consent to the search of the cell phone.

Similar to authority over a residence, an individual may also have authority over a container inside a residence. The analysis required to determine whether a third-party shares common authority over a container inside a residence is the same as that for a residence—the

focus is on mutual use of the container. In this modern age of technology, courts have likened password-protected computers and devices to containers, finding that since both lock up personal information, the owner possesses an expectation of privacy in the device. *See United States v. Andrus*, 483 F.3d 711, 718 (10th Cir. 2007). This Court has acknowledged that smart phones today are "minicomputers that also happen to have the capacity to be used as a cellphone." *Riley v. California*, 134 S. Ct. 2473, 2489 (2014). As such, cell phone owners possess a reasonable expectation of privacy in their cell phone, and therefore cell phones are protected property under the Fourth Amendment. *Id.* at 2494-95.

Lower courts, then, have adopted the same analysis to determine apparent authority over a password-protected cell phone as they used to determine apparent authority over a password-protected computer. One of the most compelling factors in favor of finding apparent authority over a device is the third-party's ability to access the device using the passcode. *See United States v. Gardner*, No. 16-cr-20135, 2016 WL 5110190 (E.D. Mich. Sep. 21, 2016) (finding a minor arrested for engaging in sex trafficking had apparent authority over a cell phone found on her person since she demonstrated that she could unlock the phone using a passcode and had complete access to the phone); *United States v. Aaron*, 33 F. App'x 180 (6th Cir. 2002) (finding defendant's live-in girlfriend had apparent authority over a computer owned by the defendant because he never forbade her from accessing it and never restricted her use with any password protections). Similar to the women who possessed the cell phones in *Gardner* and *Aaron*, W.M. demonstrated to Officer Nelson that she could open the cell phone using the passcode without the Defendant's permission. R. at 13.

Other factors also weigh in favor of W.M's apparent authority over the cell phone. When the phone was locked, Officer Nelson noted that the lock screen contained a photograph of W.M.

and the Defendant together. R. at 13. W.M. explained to Officer Nelson that the Defendant not only gave W.M. permission to share the cell phone with him, but in fact, he *insisted* she use the phone for sending texts and making phone calls. R. at 30. Finally, she was able to access her social media accounts on the cell phone without the Defendant's permission. R. at 32. Taken together, any reasonable officer in Officer Nelson's position would have found that W.M. had apparent authority to consent to a search of the cell phone.

To find that the W.M. did not have apparent authority over the cell phone because certain facts might suggest the Defendant appeared to have "more" control over the phone would require this Court to engage in the metaphysical subtleties this Court refused to engage in under *Frazier v. Cupp*. 394 U.S. at 740. In *Frazier*, this Court rejected Frazier's argument that while he agreed that he allowed the third-party to share a duffel bag with him, he did not allow that third-party to share the compartment in the duffel bag where law enforcement uncovered evidence. *Id.* This Court found that Frazier's allowing this third-party to use the duffel bag demonstrated his assumption of risk that the third-party would allow someone else to look inside. *Id.*

Similarly, the Defendant in the instant case assumed the risk that W.M. would allow someone else to look at the cell phone when he insisted that she use no other phone except that cell phone for her personal correspondence. R. at 30. Therefore, even if the Defendant restricted W.M.'s use of the phone in any way, which the record does not indicate he did, Officer Nelson's knowledge of W.M.'s control over the phone was enough for any reasonable officer to determine that she had apparent authority to consent to search of the phone.

Officer Nelson conducted valid searches of the Sasha Lane apartment and the cell phone to protect W.M. and other potential child victims. Based on the facts known to Officer Nelson at the time of consent to search, any reasonable officer in his position would have found that W.M.

exerted control over both the Sasha Lane apartment and the cell phone. Therefore, any reasonable officer would have found W.M. had apparent authority over both pieces of property and would have relied on her consent to search.

II. Even if this Court finds the search of the Defendant unreasonable, the subsequent searches of the apartment and the cell phone are not fruit of the poisonous tree.

If this Court finds the search of the Defendant to be in violation of *Terry v. Ohio*, the firearm and the cell phone evidence gathered from the subsequent searches of the apartment and the phone should not be excluded. That evidence is not fruit of the poisonous tree. The connection between the evidence from the apartment and the cell phone was so attenuated from any illegal actions of the police as to dissipate the taint of the first search. "Where the connection between the lawless conduct of the police and the discovery of challenged evidence has 'become so attenuated as to dissipate the taint,'" the evidence need not be excluded. *Wong Sun v. United States*, 371 U.S. 471, 487 (1963) quoting *Nardone v. United States*, 308 U.S. 338, 341 (1939).

The attenuation doctrine is not a "but for" test. The doctrine does not require that any subsequent evidence that would not have been discovered but for police misconduct must be excluded. *Dunaway v. New York*, 442 U.S. 200, 217 (1979) ("Following *Wong Sun*, the Court eschewed any *per se* or "but for" rule, and identified the relevant inquiry . . . ."). The relevant inquiry is as follows: When determining whether challenged evidence is so attenuated from the illegal conduct as to dissipate the taint, the Court must analyze the following three factors:

(1) "the temporal proximity" of the official illegality and the discovery of the evidence;
(2) "the presence of intervening circumstances;" and
(3) "the purpose and flagrancy of the official misconduct."

Brown v. Illinois, 422 U.S. 590, 603-04 (1975).

Admittedly, the first *Brown* factor—the temporal proximity between the search of the Defendant and the searches of apartment and the cell phone—is short. However, the latter two

Brown factors in the attenuation analysis weigh in favor of finding the subsequent searches were attenuated from the search of the Defendant so as to dissipate the taint.

a. The second *Brown* factor weighs in favor of Petitioner because W.M.'s consent constituted an intervening circumstance.

W.M.'s consent to the searches of the apartment and the cell phone was an intervening circumstance. When an individual acts upon her own free will to provide information or evidence to law enforcement, that act constitutes an intervening circumstance that dissipates the taint of the initial illegality. *Wong Sun*, 371 U.S. at 486. To determine whether W.M.'s consent granted after the police misconduct indicated that the police exploited their illegal actions, this Court must ask whether W.M.'s consent was voluntary under the totality of the circumstances. *Schneckloth*, 412 U.S. at 248-49.

W.M. may have been a minor when she consented, but this does not bar her from voluntarily consenting to a search. The Eleventh Circuit lists the following points made in *Schneckloth* as reasons why minors may give third-party consent:

> [P]rivacy is an intuitive interest, and legal sophistication is not required even for adults to give valid consent. Hence, minors need not necessarily be presumed incapable of knowing consent . . . the list of factual considerations bearing upon the voluntariness of the consent is open-ended. . . The youth of the consenter, with its attendant vulnerability to coercion, is certainly among them . . . . consent searches serve a legitimate purpose that is properly balanced against the cost of limiting a minor's ability to consent . . . the rationale behind third-party consent involves no notion of agency. Rather, the third-party consent rule recognizes that sharing space with another lessens the expectation of privacy in that space.

Lenz v. Winburn, 51 F.3d 1540, 1548-49 (11th Cir. 1995) (citing *Schneckloth*, 412 U.S. at 228-29, 249)

W.M. was legally a minor, but in reality, she was two years from being a legal adult. She was the Defendant's live-in girlfriend, and while she did not pay rent or have her name on the lease, her co-habitance with the Defendant was like that of many cohabiting couples today.

Before W.M. moved in with the Defendant, she was homeless. R. at 30. The Defendant voluntarily took her in and granted her permission to exert control over his property. W.M. considered the Sasha Lane apartment her home—she performed all of the household chores there, received her important mail there, slept there, and kept all of her personal belongings there. R. at 30. These facts demonstrate a maturity far greater than that of the younger children courts have found had apparent authority to consent to property in the past. *See United States v. Clutter*, 914 F.2d 775 (6th Cir. 1990) (finding the defendant's twelve- and fourteen-year-old sons had apparent authority to consent to a search of the residence); *Winburn*, 51 F.3d 1540 (11th Cir. 1995) (finding nine-year-old daughter of defendant had apparent authority to consent to search of the residence); *United States v. Gutierrez-Hermosillo*, 142 F.3d 1225, 1231 (10th Cir. 1998) (ruling district court's finding that fourteen-year-old's consent to search hotel room shared with defendant was voluntary was not clearly erroneous).

At the time of the consented searches Officer Nelson believed W.M. was a victim of sex trafficking and the Defendant was her pimp. W.M.'s victim status does not invalidate the voluntariness of her consent. While the Defendant appeared to have a significant amount of control over W.M., that does not diminish the fact that he assumed the risk that W.M. would consent to a search of his property when he voluntarily allowed her to share his apartment and cell phone. W.M. being a victim does not bear on the apparent authority analysis, because the extent of her mutual use of the apartment and the cell phone demonstrate apparent authority regardless of whether she is a victim of sex trafficking. This Court cannot allow the Defendant to avoid his assumption of the risk merely because he was controlling W.M. and forcing her to be a sex slave.

Furthermore, there is no evidence in the record of any coercion on the part of the officers in obtaining W.M.'s consent. W.M.'s age can be an indicator that she is more likely to be coerced into giving consent, but without any evidence of coercion, her consent was voluntary.

Just because an encounter with law enforcement is intimidating does not mean that a juvenile cannot give voluntary consent. The Massachusetts Supreme Court upheld the appellate court's denial of suppression of evidence gathered from a consented search from a fourteen-year-old. *Com. v. Guthrie G.*, 848 N.W.2d 787, 791 (Mass. App. Ct. 2006). In that case, the officers received a tip that the juvenile possessed a gun, and went to the juvenile's home. *Id* at 789. The officers arrived at the juvenile's parents' home and were greeted by the juvenile at the door. *Id.* The officers asked the juvenile whether he had a gun, and the juvenile said yes. *Id.* at 791. The juvenile then led them in the house and showed the officers the gun. *Id.* The court found the juvenile's consent to search voluntary even when three officers were present, there was no adult at home at the time, and no verbal consent was given. *Id* at 791.

Unlike in *Guthrie G.* where the juvenile knew he was in trouble before consenting to the search, W.M. gave her consent after Officer Nelson informed her that she was not in any trouble. Officer Nelson began talking to W.M. out of concern over W.M.'s safety. He did not begin questioning W.M. until after asking if she would be willing to talk a little. R. at 29. Under these circumstances, it is clear that W.M.'s consent to the searches was entirely voluntary, and her age does not defeat any finding of voluntariness. Therefore, her voluntary consent represents an intervening circumstance that would attenuate the search of the Defendant from the consented searches so as to dissipate the taint.

b. The third *Brown* factor weighs in favor of Petitioner because excluding the evidence would not serve any deterrent value in preventing police misconduct.

The third *Brown* factor also weighs in favor of attenuation. The third factor requires analysis of the flagrancy and purpose of the police misconduct. This factor is directly tied to the purpose of the exclusionary rule: deterrence of police misconduct. Excluding the evidence gathered from the searches of the apartment and the cell phone would carry minimal, if not zero, deterrent value.

This case compares to *New York v. Harris*, a case where this Court upheld the District Court's denial to suppress evidence gathered in a legal interrogation that occurred after an illegal arrest. 495 U.S. 14 (1990). In *Harris*, officers entered the defendant's home without a warrant in order to arrest him, and then after he was in custody, obtained an admission of guilt in committing murder. *Id.* at 15. This Court found that the warrantless entry into the home was illegal, but that the subsequent confession was attenuated from the police misconduct so as to dissipate the taint. *Id.* at 19. This Court reasoned that while the police violated *Payton v. New York* when they entered the defendant's home without a warrant, suppressing the subsequent confession would not meet the purpose of the exclusionary rule. *Id.* at 20-21. By suppressing the evidence gathered from the warrantless entry, the purpose of the exclusionary rule had already been vindicated. *Id.* The police would be deterred from committing *Payton* violations. *Id.* Persuasive to this Court was that the police in *Harris* had probable cause to arrest the defendant prior to the illegal entry, so they would not have needed to violate *Payton* in order to later interrogate him. *Id.*

Similarly in the case at bar, the police had reasonable suspicion that the Defendant was trafficking W.M. for sex, so they would not have needed to violate *Terry v. Ohio* in order to request W.M.'s consent to questioning about whether she had a safe place to go. If this Court finds that the search of the Defendant violated *Terry*, then just as in *Harris*, excluding the

evidence from that search would vindicate the purpose behind the exclusionary rule. The evidence gathered from the apartment and the cell phone would not need to be suppressed. With the minimal deterrent value of suppressing the evidence from the apartment and cell phone, it is clear that the flagrancy and purpose behind the police misconduct was so attenuated from the consented searches as to dissipate the taint.

The third-party consent doctrine is a long-indoctrinated tool in law enforcement's toolbox used to conduct a reasonable search. Here, law enforcement applied the third-party consent doctrine because W.M. had control over the Sasha Lane apartment and the cell phone, so she could consent. Therefore, the evidence gathered from these consented searches should not be excluded. Even if the initial search of the Defendant is found to be unreasonable under the Fourth Amendment, the evidence gathered from the apartment and the cell phone should not be excluded as fruit of the poisonous tree because those searches are so attenuated from the search of the Defendant as to dissipate any taint arising from that initial search. The officers in this case should not be punished for conducting valid searches to protect W.M.

CONCLUSION

Therefore, Petitioner respectfully requests this Court reverse the Thirteenth Circuit Court of Appeals and find the evidence gathered from the search of the Defendant, and the searches of the apartment and the cell phone to stand in finding his conviction.