No. 03-240

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

BRIEF OF PETITIONER

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES PAGE

STATUTES AND CONSTITUTIONAL PROVISIONS PAGE

STATEMENT OF THE ISSUES

1. Whether searches conducted pursuant to L.O. 1923 are permitted under the special needs exception to the Fourth Amendment.
2. Whether W.M. possessed the authority to consent to Officer Nelson's search of the apartment at 621 Sasha Lane or the cell phone found within the premises.

STATEMENT OF FACTS

In 2013 the Professional Baseball Association chose Victoria City, Victoria to host the 2015 All-Star Game. R. at 2. Cadbury Park, nestled within Starwood Park in downtown Victoria City, was selected as the site of the game, which was to take place on July 14, 2015. R. at 2. The neighborhood of Starwood Park is home to two rival gangs, the Starwood Homeboyz and the 707 Hermanos. R. at 2. Both gangs are known to engage in violent crimes such as robbery, drug distribution, murder, and their most lucrative enterprise, human trafficking. R. at 8-10. The Internet has provided an optimal arena for human trafficking known as the "deep web," which allows gangs to easily reach a wide audience and evade law enforcement detection. R. at 2. Authorities estimate that the human trafficking operations managed by the Starwood Homeboyz and the 707 Hermanos have ensnared at least 1,500 vulnerable individuals, many of them children. R. at 2.

The All Star-Game was estimated to draw over tens of thousands of people to the area. R. at 2: 5-6. With such large numbers expected to attend the game, authorities predicted that the human trafficking operations activity in the Starwood Park area would increase significantly. R. at 2-3. In fact, multiple studies have shown a correlation between large sporting events and the rise of human trafficking. R. at 2-3. Given this concern, approximately two months prior to the All-Star Game the Victoria City Board of Supervisors passed Local Ordinance 1923 ("L.O. 1923") as a preventative measure to protect victims of human trafficking, particularly those who are minors. R. at 2-3. L.O. 1923 states as follows:

" 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 a minor who is facilitating or attempting to facilitate the use of a minor for a commercial sex act as defined by federal law.

2. This ordinance shall be valid only from 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 section (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." R. at 2-3.

Two days before the All-Star Game, on July 12, 2015, Officers Joseph Richols and Zachary Nelson of the Victoria City Police Department were on duty at the Stripes Motel on I Street in Starwood Park. R. at 3, 26. The Officers were on specialty detail working under the purview of L.O. 1923, and were observing the motel for signs of human trafficking. R. at 26. As Officer Nelson testified, this was not a normal assignment for him; however, the special circumstances of the game and increased risk of human trafficking warranted such observation. R. at 27.

At around 11:22pm the officers observed the Respondent, William Larson, and a female, later identified as 16-year old W.M., enter the motel. R. at 3-4. The officers were immediately on alert that something was amiss. Neither W.M. nor the defendant had any luggage, the defendant appeared much older than W.M., and W.M. was "wearing a low-cut top and tight fitting shorts" exposing most of her legs. R. at 3, 28. Furthermore, based upon their observations and experience the officers were able to identify the defendant as a member of the Starwood Homeboyz gang from the tattoos on his left forearm and neck. R. at 3, 28. Specifically, the Respondent's left forearm featured a tattoo of a wizard's hat with the letters "S" and "W"; the officers recognized these letters as an abbreviation for "Starwood" regularly used by the Starwood Homeboyz. R. at 3, 28. W.M. had also had a tattoo of the letters "SW" tattooed on her ankle, showcasing her affiliation with the Starwood Homeboyz gang. R. at 37. Moreover, the numbers 4-11-5-11 were tattooed on the back of the Respondent's neck. R. at 3, 28. The officers

recognized these numbers as numerical representations of the letters "D, K, E, K," code for "dinosaur killer, everybody killer". *Id.* The Officers knew from their experience that "dinosaurs" was a derogatory term used for their rivals, the 707 Hermanos. R. at 3, 28.

Though the facts did not amount to probable cause, the officers believed they were entitled to search the Respondent and W.M based upon the language in L.O. 1923. R. at 3. A search of the Respondent revealed nine condoms, lubricant, a list of names with corresponding time allotments, two oxycodone pills, a butterfly knife, a pair of house keys, as well as $600. R. at 3-4, 28. W.M. was also searched and a valid driver's license was produced, confirming that she was indeed a minor. R. at 4, 29. The defendant was promptly arrested for sex trafficking of a minor, and a search of his criminal record revealed that he had two prior felony convictions for drug trafficking. R. at 4, 28.

Recognizing that W.M. was likely the victim in this situation, Officer Nelson inquired about how she knew the defendant. R. at 4, 29. W.M. responded that she and the defendant were dating and that they had come to the area specifically to "do business" with the fans that would be in town for the All-Star Game. R. at 29. Concerned for her well being, he asked whether she had a "safe place to spend the night". R. at 4. She further stated she and the defendant shared an apartment together at 621 Sasha Lane, only three blocks away from the Stripes Motel. R. at 4, 29. Officer Nelson proceeded to ask a follow up question to clarify their living situation. R. at 4, 29. W.M. explained that she and the defendant had an equitable relationship whereby "they shared everything" including the money from the business and the apartment. R. at 29. Though W.M. did not pay rent, she contributed to the household in other ways, such as by doing all of the household chores. R. at 33. Furthermore, W.M. kept her belongings in the apartment and had her mail, including medical bills, sent to their apartment. R. at 30, 31.

After discussing their living situation for approximately 10 minutes, Officer Nelson felt that the apartment was a shared space and asked W.M. for her permission to search the residence. R. at 4, 31, 37. W.M. agreed and even led Officer Nelson to the address and opened the apartment using a spare key. R. at 4, 31. While searching the apartment, Officer Nelson uncovered "a loaded black semi-automatic handgun with the serial number scratched off." R. at 4, 31. The Respondent later identified the handgun as his. R. at 4.

As Officer Nelson examined the rest of the bedroom, he located an Apple IPhone 5s on a nightstand. R. at 4, 31, 37. Officer Nelson asked W.M. whether the cell phone belonged to her - she responded that she and the Respondent shared the phone. R. at 4, 31. Though the Respondent paid the bill and had chosen the sticker on the outside of the phone, the various social media accounts on the phone were the personal accounts of W.M. and she used the phone for personal calls and texts. R. at 32. W.M. proceeded to share the password with Officer Nelson, and gave her affirmative permission for him to search the phone. R. at 4, 32. The search subsequently revealed photographs of the defendant holding the black semi-automatic handgun found in the apartment, provocative photos of W.M., and a video of the defendant "rapping about pimping." R. at 16-17, 24-27.

On August 1, 2015, the Respondent was charged with one count of Sex Trafficking of Children, in violation of 18 U.S.C. § 1591(a)(1), specifically alleging that he recruited, enticed, harbored, transported, provided, obtained, advertised, maintained, patronized, or solicited four minor females knowing that each of them would be caused to engage in commercial sex acts as defined in 18 U.S.C. § 1591(e)(3), and one count of being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g)(1). R. at 1.

This case specifically arose from the two lawful searches conducted on July 12, 2015. The first search of the Respondent was conducted pursuant to L.O. 1923, a local ordinance permitting a search under the special needs exception. The second search, conducted in the Respondent's apartment, was conducted pursuant to lawful consent of the Respondent's girlfriend. The Respondent contends that these searches were in violation of his Fourth Amendment right and filed a Motion to Suppress the evidence seized as a result of these searches. R. at 1, 5. On October 22, 2015 the United States District Court for the Western District of Victoria denied the defendant's Motion to Suppress the evidence recovered from 621 Sasha Lane and the Apple iPhone 5S. R. at 1. The Court held that L.O. 1923 was constitutional under the Fourth Amendment based upon the special needs doctrine and that Officer Nelson conducted his search pursuant to valid consent based upon the apparent authority of W.M. R. at 5.

The Respondent appealed his convictions for human trafficking and possession of a firearm by a felon to the United States Court of Appeals for the Thirteenth Circuit. R. at 14. On February 3, 2016 the Court decided to reverse the lower court's holding and remanded the case for a new trial. *Id.* The Government filed a writ of certiorari, which was granted, and the case is now before this Court. R. at 24.

SUMMARY OF THE ARGUMENT

This case focuses on two exceptions to the general rule that searches and seizures are unreasonable unless the government obtains a warrant based on probable cause. The exceptions at issue in this case are searches based on a special need of the government and searches based on consent to a search. R. at 24. In this case, the initial search of the Respondent was permitted under the special needs exception. Furthermore, the searches of the Respondent's apartment and

cell phone were properly authorized by the consent of W.M. pursuant to the doctrine of apparent authority.

The search of the Respondent's person was reasonable under the 4th Amendment because the search authorized by L.O. 1923 falls under the special needs exception to the 4th Amendment's warrant requirement. The primary purpose of L.O. 1923 is to protect victims of child sex trafficking by interrupting the trafficking before it takes place. This purpose goes beyond an ordinary law enforcement need, as required by *City of Indianapolis v. Edmond*, 531 U.S. 32 (2000). Additionally, the searches authorized in this case are reasonable under the balancing test required for special needs searches. The special need here, the protection of children from sex trafficking, is incredibly important to the public good. The searches are designed to advance the public need in question by authorizing police to make stops and conduct searches to determine whether or not trafficking is taking place. R. at 41. The privacy interest implicated, freedom from search and seizure, is very important, but is minimized by the narrowly tailored searches permitted under L.O. 1923.

Furthermore, the search of the Respondent's apartment and the cell phone found within the premises were reasonable under the 4th Amendment because W.M. had the authority to consent to a search of the apartment. Apparent authority rests upon the doctrine that a search is constitutionally permissible as long as the Officer possesses a reasonable belief that an individual has the requisite authority to authorize the search, even if that belief was mistaken. *Illinois v. Rodriguez*, 497 U.S. 177, 186, 188 (1990); *see United States v. Weeks*, 666 F. Supp. 2d 1354, 1378 (N.D. Ga. 2009). In this case, given the totality of the circumstances, Officer Nelson was reasonable in his belief that W.M. had authority over the apartment and the cell phone.

Thus, the Petitioner respectfully request that the Court reverse the lower court's decision and find that the searches conducted pursuant to L.O. 1923 and the consent of W.M. were constitutionally permissible.

STANDARD OF REVIEW

1. Whether or not a search is reasonable under the special needs doctrine is a mixed question of law and fact. Factual findings should be reviewed for clear error; the legal question of reasonability and judgments of mixed questions of law and fact should be reviewed *de novo*. *See Macwade v. Kelley*, 460 F.3d 260 (2d Cir. 2006).
2. Whether or not W.M. possessed authority to consent to the search of the apartment and the cell phone is a mixed question of fact and law. Accordingly, the evidence surrounding the search is viewed in favor of the Government, *see, e.g., United States v. Kimoana*, 383 F.3d 1215, 1220 (10th Cir. 2004); *United States v. Andrus*, 483 F.3d 711, 716 (10th Cir. 2007), and such findings are only examined for clear error. *United States v. Buckner*, 473 F.3d 551, 553 (4th Cir. 2007) (citations omitted). The issue of reasonableness will be reviewed *de novo*. *See, e.g., United States v. Andrus*, 483 F.3d 711, 716 (10th Cir. 2007) (citations omitted).

ARGUMENT

The 4th Amendment protects all citizens against unreasonable searches and seizures. U.S. Const. amend. IV. Generally, searches and seizures are unreasonable whenever they are conducted without a warrant issued on probable cause. *See, e.g., Katz v. United States*, 389 U.S. 347, 357-58 (1967). However, under certain exceptional circumstances a search may be deemed reasonable without a warrant. *See, e.g., Illinois v. Lidster*, 540 U.S. 419, 426 (2004) (special needs exception); *Terry v. Ohio*, 392 U.S. 1, (1968) (exception allowing officers to stop and frisk for weapons). Of the several exceptions to the warrant requirement, two are at issue in this case: the special needs exception, and consent to a search. The initial search of the Respondent was permitted under the special needs exception. Furthermore, the searches of the Respondent's apartment and cell phone were properly authorized by the consent of W.M. pursuant to the doctrine of apparent authority.

I. SEARCHES CONDUCTED PURSUANT TO L.O. 1923 ARE REASONABLE UNDER THE 4TH AMENDMENT BECAUSE THEY FALL UNDER THE SPECIAL NEEDS EXCEPTION TO THE WARRANT REQURIEMENT.

The special needs exception to the warrant requirement recognizes that warrantless searches may be reasonable where there exists a substantial government interest in conducting the search or seizure that goes beyond a normal law enforcement purpose, and the circumstances of this need make obtaining a warrant impracticable. *See, e.g., Skinner v. Ry. Labor Executives Ass'n*, 489 U.S. 602, 613 (1989) (statute requiring drug and alcohol tests of railroad operators was reasonable because of the important government interest in maintaining railway safety and the impracticability of requiring a warrant). In order to determine whether or not such a search is reasonable, the Court must first determine whether there is a governmental interest beyond the

needs of ordinary law enforcement. *See City of Indianapolis v. Edmond*, 531 U.S. 32, 44 (2000). If the search or seizure does serve a need beyond an ordinary law enforcement need, it is then examined for reasonableness. *Illinois v. Lidster*, 540 U.S. 419, 426 (2004). Courts apply a balancing test for reasonableness, considering "the gravity of the public concerns served by the seizure, the degree to which the seizure advances the public interest, and the severity of the interference with individual liberty." *Id.* The search of the Respondent conducted pursuant to L.O. 1923 is constitutionally permissible because A) the primary purpose of the ordinance was not for ordinary law enforcement, and B) the searchers authorized by the statute are reasonable under the balancing test.

A. The searches authorized by L.O. 1923 are permitted by the special needs doctrine because the primary purpose of the searches is not an ordinary law enforcement purpose.

When determining whether or not there is a legitimate government interest beyond an ordinary law enforcement need, the court looks to the primary purpose of the seizure. *See City of Indianapolis v. Edmond*, 531 U.S. 32, 44 (2000) (checkpoint program was unreasonable when the primary purpose of the seizure was to "detect evidence of ordinary criminal wrongdoing," specifically to detect narcotics); *Michigan Dept. of State Police v. Sidtz*, 496 U.S. 444, 455 (1990) (law enforcement drunk driving checkpoints were reasonable when the primary purpose of the seizure was to protect highway safety by removing drunk drivers). If the primary purpose of the seizure is to serve an ordinary law enforcement need, then the seizure is presumed to be unreasonable under the special needs analysis. *See Edmond*, 531 U.S. at 42; *Illinois v. Lidster,* 540 U.S. 419, 426-27 (2004) (declining to apply the *Edmond* presumption of unconstitutionality when the primary purpose of the search was to collect information about a crime from the

community, not to investigate specific individuals for crimes). It is not enough that the government can claim a consequential benefit that serves a governmental need beyond general law enforcement; the court must conduct a close examination of all of the available evidence to determine what the *primary* purpose was, not what ultimate goals the search or seizure might serve. *See Ferguson v. City of Charleston,* 532 U.S. 67, 81-82 (2001) (drug testing of pregnant mothers was unreasonable when the primary purpose was to arrest and prosecute drug-abusing mothers, even if the ultimate goal was to convince mothers to seek treatment and protect the health of infants).

In *City of Indianapolis v. Edmond,* 531 U.S. 32 (2000), this Court first applied the presumption that if the primary purpose of the search or seizure is a general law enforcement need, then the search or seizure will not fall under the special needs test. *See Edmond*, 531 U.S. at 44. In *Edmond*, the city of Indianapolis conducted highway checkpoints solely to attempt to intercept illegal drugs - counsel for the city stated as much in briefs submitted to the Court, and city publications called the stops "drug checkpoints." *Id.* at 40-41. The *Edmond* court limited its holding to "stops justified only by the generalized and ever-present possibility that interrogation and inspection may reveal that any given motorist has committed some crime." *See Edmond,* 531 U.S. at 48. The *Edmond* court additionally recognized that under emergency circumstances, a purpose normally considered part of ordinary law enforcement could meet the requirements of the special needs test.[1] *See id.* at 44. Furthermore, the court in *Edmond* noted that police officers

[1] "Of course, there are circumstances that may justify a law enforcement checkpoint where the primary purpose would otherwise, but for emergency, relate to ordinary crime control. For example, as the Court of Appeals noted, the Fourth Amendment would almost certainly permit an appropriately tailored roadblock set up to thwart an imminent terrorist attack or to catch a dangerous criminal who is likely to flee by way of a particular route." *City of Indianapolis v. Edmond,* 531 U.S. 32, 44 (2000).

can still act on evidence of criminal activity discovered during a seizure that was conducted with a primary purpose beyond ordinary law enforcement. *See id.*

The Court addressed the rules regarding the primary purpose of special needs searches again in *Ferguson v. City of Charleston,* 532 U.S. 67 (2001). In *Ferguson*, hospital staff noticed a significant increase in the number of pregnant women abusing illegal drugs and contacted the local prosecutor's office. *See Ferguson*, 532 U.S. at 71-72. The prosecutor's office implemented a program whereby hospital staff would conduct blood tests of pregnant women, and if the women tested positive, the hospital would pass on the information to the police, who would then arrest the women and begin prosecutions. *See id.* The *Ferguson* court found that, based on all of the available information, the primary purpose of this program was to obtain evidence and prosecute the women for their drug offenses, even if the eventual aim of the program was to convince them to enter drug treatment programs. *See id.* at 81-83. Because the court considered the evidence collection and prosecution to be ordinary law enforcement purposes, it held that the program did not meet the special needs requirements. *See id* at 83-84.

The analysis in *Illinois v. Lidster*, 540 U.S. 419 (2004) is particularly relevant here. *Lidster* determined that *Edmond's* analysis did not automatically bar a suspicionless seizure conducted pursuant to *any* law enforcement need. *See Lidster,* 540 U.S. at 424. In *Lidster,* police officers set up a highway checkpoint in order to stop passengers and ask if they had any information regarding a recent murder. *Id.* at 422. During this checkpoint, Lidster was stopped by an officer who saw him driving erratically, and was arrested when the officer determined that he was intoxicated. *Id.* The *Lidster* court found the primary purpose of the search was to collect information from motorists who might have knowledge about a murder, not to investigate the individuals who were stopped. *Id*. at 424. Despite the clear connections between the murder

investigation and general law enforcement, the *Lidster* court determined that the primary purpose of collecting information was not the type of general investigatory need that was at issue in *Edmond*. *See id.* at 424-25.

Upon examination of all of the available information, the primary purpose of the searches authorized by L.O. 1923 goes beyond an ordinary law enforcement need. As stated by the Victoria City Board of Supervisors, the primary purpose of the ordinance is "to protect children by removing them from dangerous situations before they can escalate." R. at 41. Importantly, the statute itself specifies that only individuals suspected of trafficking in children will be subject to searches. R. at 2. The city recognized that human trafficking is a significant problem no matter the age of the victim, however, the specific concern of Victoria City was to protect *child* victims from the effects of human trafficking. Thus the statute was specifically tailored to target minors and those facilitating the special problem of child sex trafficking. R. at 40 (discussing the impacts of child sex trafficking and the development of the local ordinance to identify and protect these victims). This distinguishes L.O. 1923 from *Edmond*, where the city clearly identified that the primary purpose of the stop was general investigation of drug crimes, and from *Ferguson*, where the primary purpose of the search was general evidence collection and to prosecute drug users. This case falls under the analysis in *Lidster*, which recognized that some purposes related to law enforcement may still qualify as special needs after *Edmond*. This case is also similar to *Sidtz*, which recognized that a government's special need to prevent drunk driving and promote highway safety is beyond an ordinary law enforcement need. The interest of promoting safety of vulnerable youth by preventing child sex trafficking is similarly beyond an ordinary need.

Even if the primary purpose of the statute was to meet a need that would generally be considered an ordinary law enforcement need, the *Edmond* court recognized that emergency circumstances could cause these needs to go beyond ordinary needs. *See Edmond,* 531 U.S. at 44. The council of Victoria City identified that a "rush of human trafficking victims" would likely occur as a result of hosting the Professional Baseball Association All-Star Game in the city. R. at 41. The city believed that the problem of human trafficking would thus be "particularly dire" during this week, and designed L.O. 1923 to deal with this emergency and protect the city's most vulnerable citizens. R. at 40-41. Due to these circumstances, the special need identified by Victoria City qualifies as a need beyond an ordinary law enforcement need.

B. The searches authorized by L.O. 1923 are reasonable under the balancing test applied to searches and seizures conducted pursuant to a special government need.

Once the Court has determined that there is a special governmental need beyond general law enforcement goals, the Court must then determine whether or not the search or seizure at hand was reasonable. *See Lidster,* 540 U.S. at 427. When judging the reasonableness of the search or seizure, courts apply a three-factor balancing test. *See Nat'l Treasury Employees v. Union v. Von Raab*, 489 U.S. 656, 678 (1989) (remanding to lower courts with instructions to apply the balancing test); *Skinner v. Ry. Labor Executives Ass'n*, 489 U.S. 602, 613 (1989). The first factor examines "the gravity of the public concerns served by the seizure," or how important the special need is to the public. *Illinois v. Lidster*, 540 U.S. 419, 426 (2004) (quoting *Brown v. Texas*, 443 U.S. 47, 51 (1979)). The second factor examines the "degree to which the seizure advances the public interest," that is, the degree to which this particular seizure address the public concern at issue. *Id.* The third prong of the test evaluates "the severity of the interference

with individual liberty." *Id.* Each of these three factors weighs in favor of finding that the searches authorized by L.O. 1923 are reasonable.

The public concerns served by the seizure are quite grave. A study determined that there are more than 8,000 victims of child sex trafficking in Victoria City every year, and that nearly 1,500 of these victims lived specifically in the Starwood Park neighborhood. R. at 40. The city's interest in protecting its most vulnerable citizens is very strong, particularly because these victims are minors. The city noted that the impacts of child sex trafficking are felt by victims for years, and can include drug addiction and post-traumatic stress disorder. R. at 40-41. Prevention of child sex trafficking is a significant and compelling government interest, and should weigh in favor of reasonableness.

The search authorized by L.O. 1923 significantly advances the public interest in question: stopping child sex trafficking in its tracks. The statute provides an opportunity for law enforcement officers to identify individuals who might be victims, but does so by requiring that officers develop reasonable suspicion before stopping or searching. R. at 2. As occurred in this case, the search of the victim and the trafficker may reveal enough evidence that police can determine with greater certainty whether or not the individuals are engaged in human trafficking. R. at 2. Once an officer is able to gather information about the situation, he or she may then take action to prevent the trafficking by separating the victim and her trafficker. The search authorized here provides tools not normally available to law enforcement officials when they seek to combat human trafficking. This should weigh in favor of a finding of reasonableness.

The search authorized by L.O. 1923 does implicate a significant privacy interest, but the authorized conduct is properly limited and weighs in favor of a finding of reasonableness. There is no doubt that searches and seizures involve significant privacy concerns. *See* U.S. Const.

amend. IV. However, L.O. 1923 specifically limits the searches in order to minimize privacy implications. First and foremost, the statute does require some modicum of individual suspicion in order to proceed with the search. *See* R. at 2, 40. This individual suspicion requirement ensures that the search does not apply to every single individual who might be standing in the hotel lobby – officers must be able to articulate some particular suspicion. Furthermore, the search is limited in scope and in duration to only what is necessary to determine whether or not the individual is trafficking in minors. R. at 2. The search is also limited in location – searches are only authorized in hotels, motels, or other public lodging facilities located within a three mile radius of the Starwood Park neighborhood. R. at 2. Finally, the ordinance is only in effect for the time period between July 11, 2015, and July 17, 2015. R. at 2, R. at 42. The ordinance is so limited that it will only affect a small class of individuals, and only when an officer has reasonable suspicion that the individuals are part of a child sex trafficking operation. This limited invasion of privacy interests is far outweighed by the strong governmental interest and the ability of the searches to further this important interest. Based on these three factors, the searches authorized in L.O. 1923 are reasonable, and thus do not violate the 4th Amendment.

II. W.M. HAD LAWFUL AUTHORITY OVER BOTH THE APARTMENT AT 621 SASHA LANE AND THE CELL PHONE FOUND THEREIN WHICH ALLOWED HER TO GIVE OFFICER NELSON CONSENT TO SEARCH THE PREMISES.

The Fourth Amendment safeguards citizen's rights and protects against unreasonable searches and seizures. U.S. Const. amend. IV. The Court has established that a warrantless search of an individual's home is presumed to be unreasonable. *Coolidge v. New Hampshire*, 403 U.S. 443, 474 (1971); *Payton v. New York*, 445 U.S. 573, 586 (1980). However, a few delineated exceptions to this rule are recognized, one being that a warrantless search is permissible if conducted pursuant to valid consent. *Coolidge v. New Hampshire*, 403 U.S. 443, 474-75;

Schneckloth v. Bustamonte, 412 U.S. 218, 219 (1973). For consent to be deemed valid the Government must show that consent was "freely and voluntarily given." *Bumper v. North Carolina*, 391 U.S. 543, 548 (1968). The voluntariness of an individual's consent does not rest on the presence or absence of one factor, but rather is weighed amongst the totality of the circumstances. *Schneckloth v. Bustamonte*, 412 U.S. 218, 227 (1973) (finding that voluntariness balances the competing needs of safeguarding citizens against coercive tactics and allowing law enforcement officers to effectuate necessary searches). Thus, "while the Fourth and Fourteenth Amendments limit the circumstances under which the police can conduct a search, there is nothing constitutionally suspect in a person's voluntarily allowing a search." *Id.* at 243 (recognizing that "the community has a real interest in encouraging consent" for the swift and proper enforcement of justice).

Furthermore, the Court has established that the accused is not the only party who may give valid consent to a search. *United States v. Matlock*, 415 U.S. 164, 171 (1974). The right to consent also extends to third party individuals.[2] *Id.* Specifically, third party consent is deemed constitutionally valid under the Fourth Amendment in two circumstances: 1) when an individual possesses "actual authority" or 2) when an individual possesses "apparent authority" over the premises. *United States v. Kimoana*, 383 F.3d 1215, 1221 (10th Cir. 2004); *see United States v. Gutierrez-Hermosillo*, 142 F.3d 1225, 1230 (10th Cir. 1998). Actual authority derives from the Courts holding in *United States v. Matlock*, 415 U.S. 164, 171 (1974) whereby a third party may give constitutionally valid consent if they possess "common authority over or other sufficient relationship to the premises or effects sought to be inspected." In determining the existence of

[2] As noted by the decision of the United States Court of Appeals for the Thirteenth Circuit there is no dispute in this case that W.M. both freely and voluntarily consented to the search. R. at 19.

actual authority the Courts have looked to whether the third party has: 1) "mutual use of the property", 2) "joint access or control for most purposes", and 3) if "others have assumed the risk that one of their number might permit the common area to be searched." *United States v. Matlock*, 415 U.S. 164, 171 (1974); *see, e.g., United States v. Gutierrez-Hermosillo*, 142 F.3d 1225, 1230 (10th Cir. 1998), *United States v. Kimoana*, 383 F.3d 1215, 1221 (10th Cir. 2004), *United States v. Rith*, 164 F.3d 1323, 1329 (10th Cir. 1999).

On the other hand, apparent authority exists when officers have a reasonable belief that the individual giving consent has the requisite authority do so. *United States v. Gutierrez-Hermosillo*, 142 F.3d 1225, 1229-30 (10th Cir. 1998). Accordingly, an officer may be mistaken in his belief that a third party has the authority to consent, but the search will be upheld so long as the officer's mistaken belief was reasonable. *Id.* at 1230; *Illinois v. Rodriguez*, 497 U.S. 177, 186 (1990). This standard is akin to the objective reasonableness standard set forth in *Terry v. Ohio*, 392 U.S. 1 (1968) whereby an officer must ascertain whether, under the circumstances and facts available "a man of reasonable caution" would believe that the third party had authority over the premises. *Illinois v. Rodriguez*, 497 U.S. 177, 188 (1990) (citing *Terry*, 392 U.S. at 21-22); *see United States v. Weeks*, 666 F. Supp. 2d 1354, 1378 (N.D. Ga. 2009) (finding that "it is the reasonableness of the officers conduct and 'not what the consenting party knows' that is the Fourth Amendment inquiry under the apparent authority doctrine." (quoting *United States v. James*, 353 F.3d 606, 615 (8th Cir. 2003)). Finally, the apparent authority doctrine places upon officers a duty to conduct further inquiry before advancing upon third party consent in the face of ambiguity. *United States v. Kimoana*, 383 F.3d 1215, 1222 (10th Cir. 2004).

In this case, the Court of Appeals erred in finding that W.M. lacked apparent authority over the premises because Officer Nelson possessed a reasonable belief that W.M. had the

requisite authority to give valid consent to search both 621 Sasha Lane and the cell phone found therein.[3] Accordingly, the Court should reverse the lower court's decision because W.M. voluntarily provided the officers with consent to search.

A. Officer Nelson's warrantless search of 621 Sasha Lane was constitutionally permissible based upon the consent of W.M. because he possessed a reasonable belief that W.M. lived and shared control over the apartment.

The search of the Respondent's home was constitutional as W.M. had apparent authority over the apartment to grant consent to search. The Respondent contends that this search violated his Fourth Amendment right and the officers infringed upon his privacy by searching his home based upon the consent of W.M. R. at 10. However as the Court has stated, "what he [the Respondent] is assured by the Fourth Amendment…is not that no government search of his house will occur unless he consents; but that no such search will occur that is 'unreasonable.'" *Illinois v. Rodriguez*, 497 U.S. 177, 183 (1990). To assist in making a determination for apparent authority the Courts have taken into consideration factors such as:

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

Moreover, whether it is reasonable to rely on third party consent to search is a fact intensive study of the totality of the circumstances. *Compare United States v. Cos*, 498 F.3d 1115, 1130-31 (10th Cir. 2007) (finding search premised on third party consent unconstitutional when officer's

[3] The question of whether W.M. possessed "actual authority" over 621 Sasha Lane and the cell phone found within the apartment was not discussed by the District Court of the Western District of Victoria nor the United States Court of Appeals for the Thirteenth Circuit. *United States v. Matlock*, 415 U.S. 164, 171 (1974). Accordingly, the issue will not be addressed in this brief.

failed to gain information about individual's relationship with defendant) *and United States v. Reid*, 226 F.3d 1020, 1025-26 (9th Cir. 2000) (holding search unconstitutional based upon consent of individual who opened door and was alone when other circumstances presented doubt as to his authority over premise), *with United States v. Goins*, 437 F.3d 644, 649 (7th Cir. 2006) (finding apparent authority when an individual had a key to the premise, lived there occasionally, completed household duties, and kept possessions in the apartment) *and United States v. McGee*, 564 F.3d 136, 139-141 (2d Cir. 2009) (finding third party consent valid even when individual had no key to the residence and was locked out during police questioning).

Here, based upon the circumstances presented to Officer Nelson, he was reasonable in believing that W.M. had the authority to give consent to search the apartment at 621 Sasha Lane. Unlike in *United States v. Cos*, 498 F.3d 1115, 1127-28 (10th Cir. 2007), where the third party giving consent had only known the defendant for a month, had no personal belongings at the residence, and when asked admitted that she lived elsewhere, W.M. had described her significant ties to both the residence and the Respondent to establish apparent authority. When Officer Nelson approached W.M. to inquire about whether she had somewhere safe to stay for the night she discussed with the Officer that she and the Respondent were dating and that they resided together for approximately a year at 621 Sasha Lane. R. at 29-30.

Moreover, this case is distinguishable from *United States v. Reid*, 226 F.3d 1020, 1025-26 (9th Cir. 2000) where third party consent was found to be unconstitutional when the Officer's proceeded to search based upon the consent of an individual who opened the door and failed to investigate further in light of clear signs that the individual did not reside at the apartment. In this case, Officer Nelson fulfilled his obligations to inquire about any possible ambiguities before proceeding with the search. Even after receiving an affirmative response that the apartment was

shared between W.M. and the Respondent, Officer Nelson followed up with her about what she meant by "they shared it [the apartment]." R. at 29. Again, he received a clear affirmative response when W.M. stated, "they shared everything." R. at 29. Diligent in his desire to better understand the situation, Officer Nelson inquired even further about their living situation. R. at 29-31. At this time W.M. disclosed that she kept most, if not all, of her belongings in the apartment and that her personal mail, including very sensitive mail such as medical bills, was delivered to the apartment. R. at 30-31.

Additionally, W.M. was not restricted in her use of the apartment and the fact that the Respondent lived on the premise before W.M. moved in is far from dispositive on the issue of authority. R. at 36. Here, W.M. shared a bedroom with the Respondent because they were romantically involved. R. at 29:10, 33. The contents of the room are evidence of her permanent residence as there are two nightstands on each side of the bed, and her belongings are kept in the apartment. R. at 30, 33, 37. Furthermore, W.M. testified that she could stay at the apartment without the Respondent, indicating she was not limited in access, and in fact had recently invited friends over to the premise. R. at 36, 38. Moreover, many individuals choose to move in with their significant other for a variety of reasons such as location and cost effectiveness. As a general policy to find that because an individual moved into a space at a later time than another it diminishes their authority of the space would place a large majority of the population's privacy in a precarious position.

Furthermore, to place considerable weight on W.M.'s assertion that she did not pay rent or that she did not have a key fails to take into consideration W.M. and the Respondent's unique relationship. R. at 31, 33. This case is thus similar to *United States v. McGee*, 564 F.3d 136, 140-41 (2d Cir. 2009), where the Court upheld third party consent even when the individual had "no

formal property interest", was at the time locked out of the house, and possessed no key, because the Court recognized the defendant actually sought to keep her confined to the premise. Likewise, the Respondent is controlling and jealous in his relationship with W.M. as evidenced by the fact that he controls all of her finances, and slapped her for texting a boy in her class that she was working on a class project with for school. R. at 29-30. Accordingly, though W.M. may not have paid a monthly sum or carried her own set of keys, she did contribute equally to the apartment they shared. R. at 31, 33. As all earnings from the business were mutual income and shared between them, it follows that this money could have gone towards living and food expenses incurred while they lived together at 621 Sasha Lane. R. at 29-30.

Finally, many of the factors set forth in *United States v. Groves*, 530 F.3d 506, 509-10 (7th Cir. 2008) for a finding of authority are present in this case. Specifically, W.M. admitted that she lived at 621 Sasha Lane, received mail at the apartment, kept all her clothing and the majority of her belongings there, performed household duties, knew where the spare key was kept, if this key was in fact not her own, and earned money which could have been put towards rent. R. at 29-31, 33. Thus, under the circumstances Officer Nelson was reasonable in his belief that W.M. had the authority to consent to a search of the apartment.

B. Officer Nelson's warrantless search of the cell phone found in 621 Sasha Lane was constitutionally permissible based upon the consent of W.M. because he possessed a reasonable belief that W.M. had mutual use and control over the device.

The search of the cell phone was constitutional as W.M. had apparent authority over the phone to grant consent to search because she mutually used the device and conducted personal business on it that would be subject to the same standards of privacy that the Respondent would have expected. R. at 32. The courts have found that searches of certain containers, suitcases, lockers, and more recently, computers demand a higher expectation of privacy. *United States v.*

Andrus, 483 F.3d 711, 718 (10th Cir. 2007). Specifically, for searches of computers often a separate inquiry is conducted and the courts have looked to factors including: "whether the consenting third party in fact used the computer, whether it was located in a common area accessible to other occupants of the premises, and – often most importantly – whether the defendant's files were password protected." *United States v. Clutter*, 674 F.3d 980, 984 (8th Cir. 2012). A cell phone, particularly an iPhone is in many ways analogous to a computer in terms of its capabilities, particularly in its ability to store private information.

Furthermore, when multiple users have access to a single device or computer each user both possesses the right to permit others to search the property and assumes the risk that others may take advantage of this right. *United States v. Buckner*, 473 F.3d 551, 553 (4th Cir. 2007) (citation omitted); *compare United States v. Andrus*, 483 F.3d 711, 720 (10th Cir. 2007) (finding a father's consent to search his son's computer valid because he owned the house, had access to the room, paid the internet bill, and the computer was in plain view) *with United States v. James*, 353 F.3d 606, 614 (8th Cir. 2003) (finding consent to require more than mere permission for a third party to store or safe keep items) *and United States v. Taylor*, 600 F.3d 678, 681-82 (6th Cir. 2010) (holding the officer's did not have a reasonable belief that the third party had authority to consent a search of the shoebox as it was in the spare bedroom tucked away beneath men's clothing).

This case is unlike *United States v. James*, 353 F.3d 606, 614 (8th Cir. 2003), where a search pursuant to third party consent was found unconstitutional, because here W.M. actually utilized the phone for her own personal business such as texting and calling friends, as well as keeping up to date with her social media pages. R. at 32. The item searched here was not as in

James, given for the purpose of safekeeping, but rather mutually used by both the Respondent and W.M. *United States v. James*, 353 F.3d 606, 614 (8th Cir. 2003); R. at 32.

Moreover, this case is distinguishable from *United States v. Taylor*, 600 F.3d 678, 680-84 (6th Cir. 2010), where officers proceeded to search a shoebox pursuant to third party consent knowing that it did not belong to the third party because the item was in a spare bedroom slightly covered by men's clothing. Here, while the cell phone was found on the nightstand with items such as men's glasses and a men's watch, R. at 35, it was also in plain view of anyone passing by, like the computer in *United States v. Andrus*, 483 F.3d 711, 720 (10th Cir. 2007). Officer Nelson also knew that the bedroom was a shared space used by W.M. and that there were no other cell phones in the room or found on her during the search. R. at 31, 33, 38. Additionally, the phone depicted a photo of W.M. and the Respondent, which is consistent with W.M.'s remarks that they both shared the device. R. at 31, 34.

Furthermore, it is presumptuous to believe that W.M. had no input on the design of the phone or is not also personally attached to it. Though the wizard may be the Respondent's gang nickname, the letters "S" and "W" are a clear sign of the Starwood Homeboyz, a group W.M. is affiliated with as she has those letters tattooed on her ankle. R. at 34, 37. Accordingly, it was not unreasonable for Officer Nelson to conclude that W.M. possessed authority over the phone given all the facts known to him at the time.

Finally, here, the phone was password protected, however little effort or creativity was utilized in its selection. R. at 34. Not only was 4-11-5-11 tattooed on the Respondent's neck, but it is also a common expression used by the Starwood Homeboyz. R. at 28, 34. The ease of which an individual could correctly guess the code showcases that contents of the phone were not so closely protected. However, even assuming that this was a genuine attempt at secrecy, as noted

in *United States v. Buckner*, 473 F.3d 551, 553 (4th Cir. 2007), co-users have an assumption of risk when utilizing the same device. In this case, the Respondent assumed the risk that W.M. would allow others to search the phone. Overall, W.M. had apparent authority to grant consent to search the cell phone found within the apartment at 621 Sasha Lane.

CONCLUSION

The search authorized by L.O. 1923 is reasonable under the special needs exception, and thus the initial search of the Respondent was reasonable under the 4th Amendment. Furthermore, the search of Respondent's apartment was reasonable under the 4th Amendment because the Respondent's girlfriend had authority to consent to the search. The Petitioner asks this Court to reverse the judgment of the 13th Circuit.