R. 13

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

October Term 2016

BRIEF FOR THE RESPONDENT, WLLIAM LARSON

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STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether Officer Nelson's searches, conducted pursuant to L.O. 1923, are permitted under the special needs exception to the Fourth Amendment.

2. Whether W.M. possessed authority to consent to Officer Nelson's search of the apartment at 621 Sasha Lane or the cell phone found therein.

STATEMENT OF FACTS

In March 2013, Victoria City, Victoria was chosen to host the 2015 All-Star Game by the Professional Baseball Association. R.2. The game was going to be held on July 14, 2015, at Cadbury Park in, Starwood Park of downtown Victoria City. R.2. The neighborhood is know to be afflicted by gang activity, specifically the Starwood Homeboyz but also the 707 Hermanos. R. 2. Human trafficking is their most profitable activity. R.2 Concerned for the heightened human trafficking accompanied with sporting events, the Victoria City Board of Supervisors, passed the Local Ordinance 1923 on May 5, 2015. R.2. It provided:

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 subsection (1).

4. This ordinance shall be valid only in the Starwood Park neighborhood.

a. Starwood Park is defined to encompass the area within a three-mile radius of Cadbury Park Stadium. R.2-3.

On May 6, 2015, the Board released a statement announcing the ordinance. R.3. On the night of July 12, 2015, Officer Joseph Richols and Officer Nelson were inspecting patrons as they checked in at the Stripes Motel. R.3. The motel is located in the middle of Starwood Park. R.3. Approximately, 11:22 p.m., Larson and W.M. entered the Motel. R.3. The officers noticed

the female was younger than the male. R.3. Further, the officers noticed that neither Larson nor W.M. had luggage. R.3.

Officers noticed Larson with two tattoos that identified him as a member of the Starwood Homeboyz gang. R.3. Based on these observations, the officers searched Larson and recovered from his jacket: nine condoms, a butterfly knife, lube, two oxycodone pills, a list of names and corresponding allotments of time, and $600 in cash. R.4. The officers searched W.M. and found a valid State of Victoria driver's license, identifying her as a 16-year-old female. R.4. Officer Richols immediately handcuffed and arrested Larson for sex trafficking a minor in violation of 18 U.S.C. § 1591(a)(1). R.4. Officer Nelson believed W.M. was a victim and declined to place her under arrest, rather, he asked if she had a safe place to stay. R.4. W.M. responded that she lived in an apartment with Larson a couple blocks away. R.4. Officer Nelson asked W.M. more questions regarding her relationship with Larson. R.4.

W.M. stated that she ran away from home about a year and a half ago, but lived with Larson for about a year. R.30. W.M. also stated an incident when Larson slapped her after he found her texting another boy from school. R.30. After that, Larson had W.M. only use the cell phone found by Officer Nelson. R.30. The phone was payed for by Larson as was the rent of the apartment. R.30. She had medical bills and other mail sent to the apartment. R.31. She allowed Officer Nelson to search by using a spare key that was underneath a fake rock. R.31.

Officer Nelson found a black semi-automatic gun underneath the bed. R.4. W.M. did not have her own room because she slept with Larson. R.31. She complained about doing chores and she said she had her own food which was separate from Larson's. R.31. She said she usually kept her backpack and some spare clothes at the apartment; only a duffle bag worth of stuff. R.30.

Also, on a nightstand, Officer Nelson found a smart phone with a custom cover emblazoned with an “S” and a “W” around a wizard’s hat. R.4. The nightstand had a men’s glasses, a gold fake Rolex men’s watch, and some condoms. R.35. On the other nightstand, was an issue of “Seventeen” magazine and W.M.’s eye cover. It was later revealed that Larson had been convicted for state level drug trafficking offenses. Officer Nelson asked W.M. whose phone it was and she responded that it was hers and Larson’s. R.4. W.M. knew the password and allowed Officer Nelson to search the phone. R.4. On the phone, he found photographs of Larson and W.M., and a video of Larson. R.4. The lock screen of the phone was a picture of Larson and W.M. R.34.

On August 1, 2015, a federal grand jury returned an indictment against Larson charging him with one count of sex trafficking of children in violation of 18 U.S.C. § 1591(a)(1) and one count of being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g)(1). R.5. Larson seeks to suppress every piece of evidence. R.5.

SUMMARY OF THE ARGUMENT

Mr. Larson argues that his Fourth Amendment right to privacy and to be free from unreasonable and unwarranted searches and seizures was violated by an invalidly enacted statute the Government contends held a 'special needs' purpose. The Government's state actor, Officer Nelson, violated Mr. Larson's Fourth Amendment right when; he searched his person and his apartment. Officer Nelson had no probable cause to extend and exceed the scope of the search under L.O. 1923 by searching Mr. Larson and his apartment; the subjective intent of Officer Nelson is irrelevant because there is no probable cause nor a valid search warrant to search Mr. Larson and his apartment; L.O. 1923 is not a 'special needs doctrine' purpose nor did the statute comport with the 'special needs doctrine' requirements; and, there were no exigent circumstances for Officer Nelson to conduct an extended search of Mr. Larson's apartment.

Mr. Larson further argues that the gun found under his bed and his cellphone were improperly seized and should be suppressed as evidence of fruits of the poisonous tree, because; W.M. is not a proper person to give consent to search Mr. Larson's apartment; W.M. had neither apparent nor actual authority to consent to the search; and, Officer Nelson violated Mr. Larson's Fourth Amendment right under *Riley* by searching Mr. Larson's cellphone.

Ultimately, the Court must drop all charges against Mr. Larson and suppress all evidence as fruits of the poisonous tree due to the invalid statute L.O. 1923, being constitutionally unsound and thus violating Mr. Larson's constitutional rights.

STANDARD OF REVIEW

Determination as to a search under the Fourth Amendment is one of law, reviewable de novo. *U.S. v. Kimoana*, 383 F.3d 1215 (2004). Determination of authority to consent to a search presents mixed questions of fact and law and is reviewed de novo. *U.S. v. Reid*, 226 F.3d 1020(2000).

ARGUMENT

OFFICER NELSON'S SEARCH OF MR. LARSON'S PERSON AND HIS APARTMENT VIOLATED THE FOURTH AMENDMENT.

Mr. Larson argues that the search and seizure of his person pursuant to L.O. 1923 was unlawful because Officer Nelson had no search warrant and there were no exceptions for not retaining one. Petitioners argue that a 'special need' rose out of the confrontation and arrest of Mr. Larson, is inaccurate and invalid. In order for Mr. Larson to have been lawfully searched, Officer Nelson needed a search warrant based on probable cause. Searches conducted without warrants have been held unreasonable 'notwithstanding facts unquestionably showing probable cause,' *Agnello v. United* States, 269 U.S. 20, 33 (1925). The Constitution requires 'that the deliberate, impartial judgement of a judicial officer be interposed between the citizens and the police. *Wong Sung v. United States,* 371 U.S. 471 (1963). Over and again the Supreme Court has emphasized that the mandate of the Fourth Amendment requires adherence to judicial processes, *United States v. Jeffers*, 342 U.S. 48, 51 (1951) and that searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment-subject only to a few specifically established and well-delineated exceptions. *Katz v. United States***,** 389 U.S. 347 (1967).

OFFICER NELSON HAD NO PROBABLE CAUSE TO EXTEND AND EXCEEDED THE SCOPE OF THE SEARCH UNDER L.O. 1923 BY SEARCHING MR. LARSON AND HIS APARTMENT.

The freedom of Mr. Larson restricts adherence to the principle that no search may be conducted where the official is not in possession of probable cause—that is, where the official does not know of "facts and circumstances [that] warrant a prudent man in believing that the offense has been committed." *Henry v. United States*, 361 U.S. 98 (1959). The Fourth

Amendment was designed not merely to protect against official intrusions whose social utility was less as measured by some "balancing test" than its intrusion on individual privacy; it was designed in addition to grant the individual a zone of privacy whose protections could be breached only where the "reasonable" requirements of the probable-cause standard were met.

But the Fourth Amendment rests on the principle that a true balance between the individual and society depends on the recognition of "the right to be left alone—the most comprehensive of rights and the right most valued by civilized men." *Olmstead v. United States*, 277 U.S. 438, 478 (1928). That right protects the privacy and security of the individual unless the authorities can cross a specific threshold of need, designated by the term "probable cause." *New Jersey v. T.L.O.,* 469 U.S. 325 (1985).

Eluding to *Henry*, 'facts and circumstances' had to warrant Officer Nelson into believing sex trafficking was or had been occurring between Mr. Larson and W.M. *Id.* *Henry*, describes the offense as 'has been committed', which eludes to past and present tense. *Id.* Mr. Larson and W.M. were not engaged in any sexual act nor or pimping. They were not leaving the motel, but walking into the motel. Thus, no offense had been or was being committed at the time when Mr. Larson and W.M. entered Stripes Motel and were engaged by Officer Nelson.

THE SUBJECTIVE INTENT OF OFFICER NELSON IS IRRELEVANT BECAUSE THERE IS NO PROBABLE CAUSE NOR A VALID SEARCH WARRANT TO SEARCH MR LARSON AND HIS APARTMENT.

Officer Nelson testified that he thought he had reasonable suspicion to believe Mr. Larson was trafficking W.M., which he believed allowed him to search Mr. Larson's person pursuant to L.O. 1923. Here, Officer Nelsons based his reasonable suspicion on Mr. Larson being with a girl; she looked younger than him; the girl's outfit was inappropriate; they had no suitcases, and

Mr. Larson's tattoos. However, Officer Nelsons subjective intent to stop, search and arrest Mr. Larson was unjustified.

In *Whren*, we held that an individual officer's subjective intentions are irrelevant to the Fourth Amendment validity of a traffic stop that is justified objectively by probable cause to believe that a traffic violation has occurred. *Whren v. United States*, 517 U.S. 806, 810-813 (1996). *Whren* therefore reinforces the principle that, while "[s]ubjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis," programmatic purposes may be relevant to the validity of Fourth Amendment intrusions undertaken pursuant to a general scheme without individualized suspicion. *Id.* Accordingly, *Whren* does not preclude an inquiry into programmatic purpose in such contexts. See, *City of Indianapolis v. Edmond*, 531 U.S. 32 (2000).

Officer Nelson's seizure and search of Mr. Larson was based on a secondary purpose, not in associated with L.O. 1923 intended purpose. Officer Nelson was intimidated by Mr. Larson's tattoos which he believed to be associated with the gang Starwood Homeboyz - who are the primary subjects targeted for the enactment of the statute. Simply put, Mr. Larson was profiled. After noticing the tattoos, Officer Larson made a subjective determination based on the physical characteristics of W.M. that she is a victim of human trafficking. The purpose of L.O. 1923 was to conduct lawful searches of an individual **obtaining a room in a hotel, motel or other public lodging facility,** where its primary purpose of L.O. 1923 is preventing child sex trafficking. Officer Nelsons subjective opinion of Mr. Larson's appearance, initially allowed officer to believe that Mr. Larson might be a person of interest.

Therefore, because Officer Nelson established no probable cause, his subjective intentions are relevant and *Whren* cannot apply.

L.O. 1923 IS NOT A 'SPECIAL NEEDS DOCTRINE' PURPOSE AND VIOLATED MR. LARSON'S 4TH AMENDMENT RIGHTS.

There are certain limitations to where a search and seizure of items on Mr. Larson's person might not be suppressed. One limitation or exception to a search and seizure without a search warrant is the Special Needs Doctrine, which Petitioner argues is implicated through the enactment of L.O. 1923.

On the contrary, section (3) of L.O. 1923 states, "a search conducted under the authority of this provision shall be limited in scope and duration to that which is reasonably necessary to ascertain whether the individual searched is engaging in the conduct described in subsection (1) ["a minor engaging in a commercial sex act as defined by federal law"]. This subsection specifically describes the search to be limited in scope and in duration. Officer Nelson however went beyond the lawful scope of the search as indicated in subsection (1), when he searched Mr. Larson's person (not based on probable cause) and subsequently, his apartment. This search served a law enforcement need, and went beyond the control of the statute which allowed police officers an excuse to search anyone they felt might have associated with the intended purpose of the L.O. 1923.

L.O. 1923 DOES NOT COMPORT WITH THE SPECIAL NEEDS DOCTRINE REQUIREMENTS.

Petitioner argues that L.O.1923 serves a 'special need' to curb the crime of human trafficking in the city of Victoria, during the 2015 All-Star Baseball Game, which allows police officers to search persons whom they believe are engaging in human trafficking. The “special

needs" doctrine, which has been used to uphold certain suspicion-less searches performed for reasons unrelated to law enforcement, is an exception to the general rule that a search must be based on individualized suspicion of wrongdoing. See, *e.g., Skinner v. Railway Labor Executives' Ass'n*489 U.S. 602 (1989); and, *Camara v. Municipal Court of City and County of San Francisco,* 387 U.S. 523 (1967); quoting *Edmond, supra.* (2000).

However, Mr. Larson argues that L.O. 1923 does not serve a special need purpose and does not serve a purpose that is separate from the general interest in law enforcement, as found in the Court of Appeals. The threshold inquiry in determining whether L.O.1923 is a"special needs" case permitting suspension of Fourth Amendment's warrant or probable cause requirements in connection with search or seizure is; whether the government has identified some need, beyond the normal need for law enforcement, to justify a departure from traditional Fourth Amendment standards. *Greene v. Camreta*, 588 F.3d 1011 (9th Cir. 2009).

L.O. 1923 instead, serves to curb gang activity that might be connected to human trafficking, which the city of Victoria believes will be heightened during the All-Star Baseball Game. The Starwood Park neighborhood in the city of Victoria has been long affiliated by gang activity by both the Starwood Homeboyz and 707 Hermanos. These gangs engage in many crimes, including human trafficking. Law enforcement believes that the gangs prefer pimping and often advertise such services on the internet, making them hard to track. Mr. Larson argues that the L.O. 1923 serves a law enforcement need. By enacting this statute gives law enforcement more discretion to stop, search and seize any person whom they believe is engaging in human trafficking, based on them possibly being a gang member. In actuality, the statute was enacted because of the fear of these gangs; which are targeted as the man subjects of L.O. 1923. Mr.

Larson, also has tattoos that Officer Nelson believed were Starwood Homeboyz related, that made him a perfect target to extend the option to question and search Mr. Larson and invade his privacy.

The special needs test requires the court to ask, first, whether the search is justified by a special need beyond the ordinary need for normal law enforcement, and, second, if the search does serve a special need, whether the search is reasonable when the government's special need is weighed against the intrusion on the individual's privacy interest. *Nicholas v. Goord,* 430 F.3d 652 (2d Cir. 2005).

In *Chandler v Miller,* 520 U.S. 305 (1997); see also *Skinner supra. (1989),, Treasury Employees v. Von Raab, 489 U.S. 656* (1989)*,* and *Veronica School Dist. 47J v. Acton,* 515 U.S. 646 (1995), those cases employed a balancing test weighing the intrusion on the individual's privacy interest against the "special needs" that supported the program. *Ferguson v. City of Charleston,* 532 U.S. 67, 68 (U.S.S.C. 2001). The invasion of privacy in these cases, is far more substantial. In previous cases, there was no misunderstanding about the purpose of the test or the potential use of the test results, and there were protections against the dissemination of the results to third parties. Moreover, those cases involved disqualification from eligibility for particular benefits, not the unauthorized dissemination of test results. The critical difference, however, lies in the nature of the "special need" asserted. In each of the prior cases, the "special need," was one divorced from the State's general law enforcement interest. *Ferguson, supra.* (2001).

In balancing a general law enforcement need and non-law enforcement need, the City of Victoria's purpose is too deeply associated with wanting to curb gang activity that **revolved** around human trafficking and allowed them to stop any person whom they believed to be a gang

member initially, and who might be engaging in human trafficking, subsequently. The search would be an exception to a search warrant and allow law enforcement personal special circumstances to suspend Fourth Amendment's warrant or probable cause requirements; which also allowed law enforcement to further the scope of the search by searching Mr. Larson's apartment, **after** arresting and apparently after being given permission by said human trafficking victim, W.M.

THERE ARE NO EXIGENT CIRCUMSTANCES FOR OFFICER TO CONDUCT AN EXTENDED SEARCH OF MR. LARSON'S APARTMENT.

Aside from Officer Nelson not obtaining a search warrant and without the 'special needs exception', Officer Nelson could believe in exigent circumstances in order to have searched Mr. Larson's apartment. A basic principle of the Fourth Amendment is searches and seizures inside homes without warrants are presumptively unreasonable, and that search or seizure carried out on suspect's premises without warrant is per se unreasonable unless police can show that it falls within one of carefully designed set of exceptions based on presence of "exigent circumstances". *Payton v. New York*, 445 U.S. 573 (1980). This argument shall fail however because there were no exigent circumstances for the search of Mr. Larson's apartment, after he was arrested at the Stripes Motel. The continuation of this search from his arrest did not create an exigent circumstance.

Under the 'emergency aid exception' to the Fourth Amendment's warrant requirement, officers may enter a home without a warrant to render emergency assistance to an injured occupant or to protect an occupant from imminent injury. *Kentucky v. King,* 563 U.S. 452 (2011). Irrespective of Officer Nelson's belief that W.M. was a sex trafficking victim, and her response

to being Mr. Larson's girlfriend, once Mr. Larson was arrested, there was no 'emergency' that ensued. W.M. was not injured, nor were there any circumstances to believe she would suffer imminent injury. This would invalidate the 'emergency assistance' exception.

Police officers may enter premises without a warrant when they are in hot pursuit of a fleeing suspect. *King, supra.* (2011). Mr. Larson was arrested by the time the extended search continued. There was no hot pursuit, therefore invalidating a hot pursuit exception in Officer Nelson not obtaining a warrant.

The search incident to a lawful arrest exception to the warrant requirement derives from interests in officer safety and evidence preservation that are typically implicated in arrest situations. *Arizona v. Gant,* 556 U.S. 332 (2009). The limitation to a search incident to arrest, that it may only include the arrestee's person and the area within his immediate control, that is the area from within which he might gain possession of a weapon or destructible evidence, defines the boundaries of this exception to the warrant requirement and ensures that the scope of a search incident to arrest is commensurate with its purposes of protecting arresting officers and safeguarding any evidence of the offense of arrest that an arrestee might conceal or destroy. *Id*. Mr. Larson was arrested at the Stripes Motel. He was not in his home. Under *Gant,* Mr. Larson had nothing within his immediate control since he was already arrested and since his apartment was not the location of his arrest. Therefore, search incident to arrest would be an invalid exception used by the Petitioner.

Seizure of property in plain view involves no invasion of privacy and is presumptively reasonable, assuming that there is probable cause to associate property with criminal activity, and objects such as weapons or contraband found in public place may be seized without warrant.

Payton, supra. (1980). The seizure of a gun underneath Mr. Larson's bed violated the plain view doctrine. A gun underneath a bed, is not in plain view. The underneath of a bed is not a public place. The plain view doctrine is invalid in the seizure of the gun. Mr. Larson's cell phone, although in plain view, under *Riley v. California,* 134 S. Ct. 2473 (2014) officers remain free to examine physical aspects of phone to ensure that it could not be used as weapon, digital data stored on phones could not itself be used as weapon to harm officers or to effectuate arrestees' escape, and, to extent dangers to officers could be implicated in particular cases, those dangers could be addressed through consideration of, for example, exception for exigent circumstances. However, we have already established this is not an exigent circumstance, and any evidence collected from accessing the cell phone should be suppressed.

Once again, Petitioners exigent circumstance argument will fail. There was no reasonable belief that evidence would be destroyed because Mr. Larson was already arrested. If Officer Nelson wished to conduct such a search, a validly issued search warrant would be needed. Areas that may legally be searched is broader when executing search warrant than when executing arrest warrant in home, but zone of privacy is nowhere more clearly defined than when bounded by unambiguous physical dimensions of individual's home, and at very core of Fourth Amendment stands right of man to retreat into his own home and there be free from unreasonable government intrusion, and this is true as against seizures of property and seizures of person. *Payton, supra.* (1980).

W.M. WAS NOT A PROPER PERSON TO GIVE CONSENT TO SEARCH MR. LARSON'S APARTMENT TO OFFICER NELSON.

Mr. Larson contends the searches of his apartment and his cellphone were improper and moves to suppress all the evidence found as a result. The lower court denied Mr. Larson's motion

to suppress, while the appellate court granted Mr. Larson's motion. This Court should affirm at the appellate level and suppress all the evidence found through the searches. In *Rodriquez*, the respondent Edward Rodriguez was arrested in his apartment by law enforcement officers and charged with possession of illegal drugs. The police gained entry to the apartment with the consent and assistance of Gail Fischer, who had lived there with respondent for several months.The evidence showed that although Fischer, with her two small children had lived with Rodriguez but almost a month before the search at issue, had gone to live with her mother. She took her and her children's clothing with her, leaving behind some furniture and household effects. She would spend the night at Rodriguez's apartment, but never invited her friends there, and never went there herself when he was not home. Her name was not on the lease nor did she contribute to the rent and she had a key to the apartment. The court held that the Fourth Amendment generally prohibits the government from making warrantless entries into residences to search for specific objects. *Illinois v. Rodriquez*, 497 U.S. 177, 181, 110 (1990). However, one of the exceptions to both a warrant and probable cause; is a search conducted pursuant to consent. *Schneckloth v. Bustamonte*, 412 U.S. 218, 219 (1973).

The Fourth Amendment prohibits against warrantless entry by police officers into residence, but does not apply in situations of voluntary consent has been obtained, either from the individual whose property is searched or from third party who possess common authority over premises. *Rodriquez*, *Id*. Here, W.M. did not have common authority over the premise. Analogous to *Rodriquez*, W.M. did not have authority to consent; W.M. did not have her name on the lease and she did not contribute in paying rent. Larson lived in the apartment prior to having W.M. move in and,W.M. did not have her own room. It would be reasonable to believe that W.M.

may leave at anytime. However, W.M. testified to performing household chores and having only a duffle bag of personal belongings. Even if this looks like apparent authority, unlike in Fischer- who had a key to Rodriquez's apartment, W.M. did not have a key to Mr. Larson's apartment. W.M. had to use a spare key under a fake rock to gain entry into the apartment. Therefore, W.M. did not have authority to enter the apartment.

A. FACTORS OF APPARENT OR ACTUAL AUTHORITY

The court gave several factors in determining whether person has actual or apparent authority to consent to warrantless search, to render a search reasonable under the Fourth Amendment, includes:

> (1) possession of key to premises; (2) person's admission that she lives at residence; (3) possession of driver's license listing residence as driver's legal address; (4) receiving mail and bills at that residence; (5) keeping clothing at residence; (6) having one's children reside at the address; (7) keeping personal belongings such as diary or pet; (8) performing household chores at home; (9) being on lease for premises and/or paying rent; and (10) being allowed into home when owner is not present. *United States v. Groves*, No. 3:04cr0076 (N.D.Ind. Nov. 8, 2004).

Although not a complete list, it is offered to show the types of facts that should and could be considered in evaluating the issue of authority to consent to a search. Id. at 319. In this case, W.M. did not have possession of keys. Even though she admitted to living at the residence, the facts do not indicate whether her driver's license listed the residence as her legal address. W.M. testified to having some medical bills and personal mail sent to Mr. Larson's residence and doing house chores. However, she was not on the lease nor paid rent. Also, W.M. and Mr. Larson bought and had their food separate. In addition, the facts do not indicate whether W.M. was allowed into the home when Mr. Larson was not present. Looking at the totality of the

circumstances, it appears W.M. does not have actual or apparent authority to consent to the search of Mr. Larson's apartment.

B. ACTUAL AUTHORITY

A third party's consent to search is valid if that person has either the "actual authority" or the "apparent authority". *United States v. Gutierrez-Hermosillo*, 142 F.3d 1225, 1230 (10th Cir. 1998). In *Gutierrez-Hermosillo*, police officers could reasonably believe that defendant's 14–year–old daughter had authority to allow them to enter motel room, where daughter appeared to be 14 years old, she answered door of motel room, and officers knew that she was traveling in company of her father; such facts were sufficient to establish officers' reasonable belief that daughter had mutual use of motel room and that defendant assumed the risk that she would permit officers to enter motel room. *Id*. A third party has "actual authority" if either (1) mutual use of the property by virtue of joint access, or (2) control for most purposes over it. *United States v. Rith*, 164 F.3d 1323, 1329 (10th Cir. 1999).

W.M. did not have actual authority because the apartment and cellphone were both owned by Mr. Larson and W.M. and Mr. Larson were not renting a motel room. Therefore, Mr. Larson does not assume the risk that W.M. could permit officers into the apartment especially if he is not there. In *Rith*, a jury found Mesa Rith guilty of unlawful possession of an unregistered sawed-off shotgun. *Id. Rith* challenges his conviction on that he revoked the consent his parents had given to search the house and, even if valid, their consent did not extend to his bedroom. *Id.* The court ruled that the parents did have authority to consent because there was a presumed relationship of control i.e. parent-child.

W.M. is not Mr. Larson daughter but she his girlfriend. The court also stated a simple co-tenant relationship does not create a presumption of control and actual access. Even if W.M. is considered a co-tenant, it does not necessarily equate authority to consent. She did not pay rent nor cellphone bills. There was also a sticker on the phone that W.M. said was Mr. Larson's, showing it belonged to Mr Larson. Mr. Larson specifically had W.M. use a phone that he bought and checked on. They both used the same phone; however, she was only allowed to use to access her social media accounts and make some texts/calls.

In regards to the apartment, W.M. had her backpack and some spare clothes. Indicating limited use of the property. Though, W.M. admitted to sleeping there in the same room as Larson, the facts that she did not have a key, her name was not on the lease, she did not pay rent, and did not have many belongings at the apartment, show that W.M. did not have control over the apartment.

The fact that a person has common authority over a house, an apartment, or a particular room does not mean that she can authorize a warrantless search of anything and everything within that area. *Donovan v. A.A. Beiro Construction Co.,* 746 F.2d 894, 901-902 (D.C.Cir 1984). Even if W.M. is argued to have authority, it does not mean she has authority to consent to the search of the phone and under the bed. The gun was found under the bed rather than in plain view. Mr. Larson has a reasonable expectation to privacy. Here, Officer Nelson had to go to the bedroom, look under the bed, in order to see that there was a gun. This is beyond the scope of plain view doctrine. The plain view doctrine is an exception to the warrant requirement which allows officers to seize items which they observe and immediately recognize as evidence or contraband while they are lawfully present in an area protected by the 4th Amendment.

Additionally, W.M. giving the authority to consent was not objectively reasonable. As a sixteen year old young girl, who ran away from home, it is suspicious as to whether W.M. had any kind of authority to consent. Even though, minority does not, per se, bar a finding of authority to grant consent, it is undermined. *Gutierrez-Hermosillo*, *supra*, (1989). It only further shows that W.M. did not have authority when to enter the house, she did not have her own set of keys but had to use the spare hidden under a rock. Simple access is not sufficient to show apparent authority.

OFFICER NELSON VIOLATED MR. LARON'S 4TH AMENDMENT RIGHT UNDER RILEY BY SEARCHING HIS CELL PHONE.

In *Riley v. California*, petitioner Riley was stopped for a traffic violation, which eventually led to his arrest on weapons charges. An officer searching Riley seized a cell phone from his pants pocket. The officer accessed information on the phone and noticed the repeated use of a term associated with a street gang. At the police station two hours later, a detective specializing in gangs further examined the phone's digital contents. Based in part on photographs and videos that the detective found, the State charged Riley in connection with a shooting that had occurred a few weeks earlier and sought an enhanced sentence based on Riley's gang membership. 134 S.Ct. 2473, 2489 (2014).

The Supreme Court, Chief Justice Roberts, held that: (1) interest in protecting officers' safety did not justify dispensing with warrant requirement for searches of cell phone data, and (2) interest in preventing destruction of evidence did not justify dispensing with warrant requirement for searches of cell phone data. *Id*. The court explained that under search incident to arrest exception, interest in protecting police officers' safety did not justify dispensing with warrant requirement before officers could search digital data on arrestees' cell phones; although officers

remained free to examine physical aspects of phone to ensure that it could not be used as weapon, digital data stored on phones could not itself be used as weapon to harm officers or to effectuate arrestees' escape, and, to extent dangers to officers could be implicated. *Id*. Mr. Larson was already arrested and taken to jail when Officer Nelson looked through the phone. There is no indication Mr. Larson was using the phone as a weapon, especially because if was found in the apartment, on Mr. Larson's side of the bed.

Further, the court went on to say that under search incident to arrest exception, interest in preventing destruction of evidence did not justify dispensing with warrant requirement before officers could search digital data on arrestees' cell phones. *Id*. Again, Mr. Larson was not present when Officer Nelson was looking through his phone. Mr. Larson did not have any way of destroying the evidence because he was not there. In addition, W.M. did not have the authority to consent because Larson's cellphone was on his nightstand. There were two nightstands, possibly indicating separate nightstands for him and her. Further, Officer Nelson should have inquired further when the lock screen contained a picture of both W.M. and Mr. Larson since it would be unclear to the reasonable person who that phone belongs to and how W.M. is a victim if she is pictured with Mr. Larson. Also, on the phone itself, there was a sticker which W.M. stated Mr. Larson put on, showing Mr. Larson did not have to ask W.M.'s permission if it was arguably her phone as well. For these reasons, the evidence from the cellphone should be suppressed.

EVIDENCE ON MR. LARSON'S PERSON AND IN HIS APARTMENT MUST BE SUPPRESSED UNDER *WONG SUN.*

"Fruit of the poisonous tree" doctrine states that evidence gathered with the assistance of of illegally obtained information must be excluded from trial. *Silverthorne*

Lumber Co. v. United States, 251 U.S. 385 (1920). In regards to the firearm and cell phone, in *Wong Sun*, the Court held that evidence seized during an unlawful search cannot constitute proof against victim of search, and exclusionary prohibition extends to indirect as well as to direct products of such invasions. *Wong Sun v. United States*, 371 U.S. 471, 484 (1963). The searches conducted by Officer Nelson were initially illegal under the false 'special needs' doctrine, and subsequently, W.M. did not have the authority to consent to the searches. Therefore, all evidence from the initial search to the search of the apartment are fruits of the poisonous tree and should be suppressed under *Wong Sun*.

CONCLUSION

Mr. Larson seeks to have all charges dropped, per the unlawful, invalid enactment of L.O. 1923. Mr. Larson also seeks suppression of evidence from the initial search at Stripes Motel due to the unwarranted and invalid search of his person by Officer Nelson; to the firearm and cellphone found in his room after Officer Nelson conducted an unlawful search of his apartment.