R16

In the Supreme Court of the United States

October Term 2016

Docket No. 03-240

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 FOR RESPONDENT,
WILLIAM LARSON

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QUESTIONS PRESENTED

I. Do searches conducted pursuant to Local Ordinance 1923 violate the Fourth Amendment when the ordinance was intended to be a tool for law enforcement and the vague language of the ordinance allows searches into highly protected and legitimate privacy interests?

II. Can an underage sex trafficking victim, who showed signs of being controlled and manipulated, grant valid authority to search Mr. Larson's home and cell phone under the Fourth Amendment without requiring a further inquiry?

STATEMENT OF THE CASE

1. Statement of Facts

On July 12, 2015, Respondent, William Larson entered the Stripes Motel accompanied by the minor, W.M. R. at 3. Mr. Larson wore a jacket, did not carry luggage, and his tattoos were visible. R. at 3-4. W.M. also did not have luggage, is younger than Mr. Larson, and wore a low-cut shirt and tight fitting shorts. R. at 3. Mr. Larson and W.M. were searched by police. R. at 3-4. They found on Mr. Larson condoms, a butterfly knife, lube, two oxycodone pills, a list of names with allotments of time, and $600. R. at 4. The government conceded that there was no probable cause to initiate this search. R. at 3. Mr. Larson was arrested as a result of that search. R. at 4.

The search was the result of Local Ordinance 1923 ("L.O. 1923"). R. at 3. The ordinance was designed to "give police the tools they need to act when they spot signs of child sex trafficking." R. at 41. It attempted to accomplish this goal by allowing police to search any individual checking into a public lodging facility so long as the officer had reasonable suspicion that the person was involved with child sex trafficking. R. at 2.

These searches were only limited in scope and duration to what was reasonably necessary for the officer to determine whether the individual was actually involved in child sex trafficking. R. at 2. Although child sex trafficking is a problem every week of the year, this ordinance was only valid from July 11, 2015, through July 17, 2015, and to be enforced within three miles of Cadbury Park Stadium ("Stadium"). R. at 2-3, 41.

This ordinance was a response to Victoria City hosting the Professional Baseball Association's 2015 All-Star Game ("All-Star Game"). R. at 2. The Victoria City Board of Supervisors ("Board") believed the game would bring an increase in child sex trafficking. R. at 41. The Board considered the ordinance an innovative step. R. at 41.

After arresting Mr. Larson, an officer spoke with W.M., asking her if she had a safe place

to spend the night. R. at 4. The sixteen-year-old girl responded that she lived with Mr. Larson in an apartment close by. R. at 4. She stated that Mr. Larson and her were dating, and were in the area to do business with the All-Star Game's fans. R. at 29. She claimed she lived with Mr. Larson for about a year, after running away from home. R. at 30. She mentioned that Mr. Larson and her shared everything; yet, only Mr. Larson's name was on the apartment lease, only he paid rent, and he held all the money. R. at 29, 33. She only kept a backpack and *spare* clothes in his closet and lacked other belongings at his apartment. R. at 30, 33.

Using that information, the officer obtained W.M.'s permission to search the home. R. at 4. W.M. lacked a key to open the door, and instead, used a hidden spare key. R. at 31. While searching inside, the officer seized a handgun from beneath Mr. Larson's bed. R. at 4. Additionally, on Mr. Larson's nightstand, there was a cell phone with a custom cover featuring an "S" and "W" wrapped around a wizard's hat. R. at 4. The design was identical to the tattoo on Mr. Larson's arm. R. at 4. This nightstand also had a fake men's Rolex watch, condoms, and men's glasses. R. at 35. A second nightstand held W.M.'s pink eye-cover, and her "Seventeen" magazine. R. at 37.

When asked who the phone belonged to, W.M. claimed to share it with Mr. Larson. R. at 4. She said Mr. Larson got mad at her for texting a boy, slapped her, and monitored her phone use. R. at 30. She clarified, however, that Mr. Larson added the custom sticker, and paid the phone's expenses. R. at 32, 34. She claimed to use the phone to check her Facebook, Snapchat and Instagram accounts and send *some* personal texts and calls. R. at 32. She also said that Mr. Larson used the phone to send calls and texts. R. at 32. When asked if the phone had a password, W.M. said it was "4-11-5-11." R. at 4. The officer asked for her consent to search the phone without asking how she knew the password. R. at 4. Relying only on her verbal consent, he

searched Mr. Larson's cell phone and found incriminating photos and a video. R. at 4.

2. Procedural History

Mr. Larson was indicted by a federal grand jury on August 1, 2015, for sex trafficking of children, and being a felon in possession of a firearm. R. at 5. Mr. Larson filed a motion to suppress evidence collected on the day of his arrest, which the district court denied. R. at 1. Mr. Larson was convicted on all the charges. R. at 15. Mr. Larson appealed the denial of the motion to suppress on January 10, 2016, and the Thirteenth Circuit reversed the district court's decision. R. at 14-15. The appellate court found the evidence was collected in violation of the Fourth Amendment, and should be excluded. R. at 19, 23. The government now appeals this decision. R. at 24.

SUMMARY OF THE ARGUMENT

Mr. Larson asks this Court to affirm the circuit court decision; thereby, granting his motion to suppress. This Court should affirm because Mr. Larson's Fourth Amendment rights were violated by the police during two searches: (1) the search of Mr. Larson pursuant to L.O. 1923, which is not a special need; and (2) an officer relied on W.M.'s illegitimate consent to search Mr. Larson's apartment and cell phone.

Regarding the first issue, searches pursuant to L.O. 1923 do not fall under the special needs exception. Special needs searches must be outside the scope of normal law enforcement and the privacy interest that is intruded upon must outweigh the government's interest in the search. Preventing child sex trafficking is aimed at gathering evidence for criminal prosecution; thus, the searches are within the scope of normal law enforcement

The privacy interest of the individual is determined by weighing the legitimacy of the privacy interest, and the nature of that intrusion. Here, the invaded privacy interest is the individual's person, a constitutionally legitimate interest. Further, the nature of the intrusion is

significant because officers reached into Mr. Larson's pockets.

The government has a low interest when the concern is not immediate, or their means are ineffective in addressing the concern. The government concern here is not immediate because the Board did not know if child sex trafficking would increase in the city. Further, the ordinance is ineffective because it was only active for a week and only within a three-mile radius of the Stadium.

Regarding the second issue, the government relied on W.M.'s invalid consent to search Mr. Larson's home and cell phone when a reasonable officer would have doubted her authority. An individual has apparent authority when an officer has a reasonable, but erroneous belief that the third party has authority. When the circumstances are ambiguous, an officer has a duty to inquire before relying on that consent; otherwise, the search is unlawful.

This Court should *always* require police to conduct reasonable inquiries regarding authority. Lower courts have "dangerously sidestepped" the Fourth Amendment's protections by allowing officers to ignore potential ambiguity, even though the burden of asking additional questions is minimal. Always requiring reasonable inquiries is consistent with this Court's precedent. Under this rule, the officer failed to ask enough questions relating to determine W.M.'s authority; thus, the search was unlawful.

However, if this Court chooses not to adopt this rule, the circumstances were still ambiguous and a reasonable officer had a duty to inquire anyways. A reasonable officer would have doubted W.M.'s authority over Mr. Larson's apartment because she lacked a key, barely had any belongings in the home, and was being physically and financially controlled. This doubt would also have spilled over to W.M.'s claimed authority over Mr. Larson's cell phone, as the phone was located on Mr. Larson's nightstand. All of these red flags were a cry for a further

inquiry, which the officer neglected. Ultimately, this Court should affirm the circuit court decision, thereby suppressing the evidence.

STANDARD OF REVIEW

Before this Court are two disputes of the Circuit Court's findings of law. The first issue addresses whether a local ordinance falls within the special needs exception. The second issue addresses whether there was valid apparent authority for a search of a home and cell phone. Both issues arose from a motion to suppress. As such, the Court will review the case de novo. *United States v. Ruiz*, 428 F.3d 877, 880 (9th Cir. 2005). In doing so, the Court views the case from the same position as the district court. *See Lewis v. United States*, 641 F.3d 1174, 1176 (9th Cir. 2011). This Court considers the matter as if no decision previously had been rendered. *See Freeman v. DirecTV, Inc.*, 457 F.3d 1001, 1004 (9th Cir. 2006).

ARGUMENT

I. THE EVIDENCE FOUND ON MR. LARSON SHOULD BE EXCLUDED BECAUSE SEARCHES PURSUANT TO L.O. 1923 ARE FOR GENERAL CRIME CONTROL AND INVADE LEGITIMATE PRIVACY INTERESTS.

This Court should uphold the Thirteenth Circuit decision and thereby, suppress the items obtained by police through the search of Mr. Larson because L.O. 1923 violates the Fourth Amendment. The Fourth Amendment ensures the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. amend. IV. There are exceptions to the warrant requirement, such as in situations where "special needs, beyond the normal need for law enforcement, make the warrant . . . requirement impracticable." *New Jersey v. T.L.O.*, 469 U.S. 325, 351 (1985) (Blackmun, J., concurring). But even when the special need is outside of normal law enforcement, the Court balances the substantial privacy intrusion against the government's interest in the search. *Ferguson v. City of Charleston*, 532 U.S. 67, 78 (2001). This situation does not allow such an exception because: (A)

searches pursuant to L.O. 1923 are for normal law enforcement and not a special need, and (B) the individual's privacy interest outweighs the government's interest.

A. Searches Pursuant to L.O. 1923 Are Within the Scope of Normal Law Enforcement Because the Ordinance's Immediate Objective Is to Gather Evidence for Prosecution.

Searches conducted pursuant to L.O. 1923 do not satisfy the special needs exception to the warrant requirement because the searches are within the scope of normal law enforcement. To qualify as a special need, L.O. 1923 must have a purpose that is *distinguishable* from the government's general interest in crime control. *City of Indianapolis v. Edmond*, 531 U.S. 32, 44 (2000). In a concurrence, Justice Blackmun stated that searches without warrants should be allowed "only in those exceptional circumstances in which special needs, beyond the normal need for law enforcement, make the warrant . . . requirement impracticable." *T.L.O.*, 469 U.S. at 351. The local ordinance's purpose is indistinguishable from ordinary crime control; thus, it does not meet this threshold requirement to be considered a special need.

To be classified as a special need, the immediate purpose of the regulation must be outside the scope of ordinary law enforcement. *Ferguson*, 532 U.S. at 83-84. In *Ferguson*, this Court examined a program where pregnant women were drug tested and their results were provided to law enforcement. *Id*. at 71-72. This Court noted that the *ultimate* goal of the drug testing program was to get the pregnant women off of drugs, which is outside the scope of ordinary law enforcement. *Id*. at 81-83. However, this Court reasoned that the *immediate* objective of the program was to generate evidence for law enforcement purposes because the policy focused mainly on chain of custody, possible criminal charges, and the significant role police had in the creation of the procedures. *Id*. at 82-83. Because the immediate object of the program was to generate evidence for law enforcement, the Court found that this kind of search was not a special need. *Id*. at 84.

The immediate goal of L.O. 1923 is within the scope of ordinary law enforcement. The Board published a press release describing the ordinance and purpose behind it. R. at 40-41. The Board decided that they needed to give "Victoria City's finest the tools they need to act when they spot signs of child sex trafficking." R. at 41. This statement shows that the purpose of L.O. 1923 is to give law enforcement another method of catching individuals engaged in child sex trafficking. This tool provides law enforcement with the ability to search individuals and gather evidence of criminal activity with only a reasonable suspicion that they are engaged in or facilitating child sex trafficking. Victoria City, Vic., Local Ordinance 1923 (May 5, 2015). Catching individuals engaged in criminal activity is within the scope of normal law enforcement. *Ferguson*, 532 U.S. at 81-82. Although L.O. 1923 has a long term goal of decreasing child sex trafficking, the ordinance cannot be justified as a special need because it is not outside the scope of normal law enforcement.

In a press release, the Board stated that the long term goal of L.O. 1923 is to protect children victimized by sex trafficking before the situations escalate. R. at 41. This is not the long term goal, however, because searches conducted pursuant to the ordinance were only valid for a week. R. at 2. In the same press release, the Board stated, "Human trafficking remains a problem every week of the year." R. at 41. L.O. 1923 could not address such a pervasive and consistent problem through enforcement over the course of only one week. This shows that the true purpose and goal of L.O. 1923 was to catch individuals facilitating or engaging in child sex trafficking, and thus, was within the scope of normal law enforcement.

If the purpose of L.O. 1923 had been to deter people from engaging in child sex trafficking, rather than to catch individuals engaging in the act, the ordinance may have met the special needs exception. In *National Treasury Employees Union v. Von Raab*, 489 U.S. 656, 666

(1989), this Court found that a Customs Service drug-test, required for certain promotions, fell under the special needs exception because the need was outside the ordinary needs of law enforcement. This Court came to this conclusion because the purpose of the program was to *deter* drug use among employees seeking certain promotions. *Id.* The purpose of L.O. 1923 is not to deter individuals from engaging in child sex trafficking. Rather, L.O. 1923 serves as a method for law enforcement to *search and catch* individuals they suspect are engaged in or facilitating child sex trafficking. This only serves an immediate law enforcement purpose.

B. The Ordinance's Intrusion Into an Individual's Privacy Interest Heavily Outweighs the Governmental Concern of Reducing Child Sex Trafficking.

Searches pursuant to L.O. 1923 can be so invasive that the intrusion of the privacy interest held by the individual substantially outweighs the government's interest; thus, requiring a warrant. In *Ferguson*, this Court noted that when there is a need beyond normal law enforcement, a court must balance the individual's privacy interests against the government's interest to determine whether the requirement for a warrant is impracticable. *Ferguson*, 532 U.S. at 78. This is accomplished by weighing two factors: (1) the nature and *character* of the intrusion into the *legitimate* privacy interest must be measured; and (2) the "nature and immediacy of the governmental concern," and the effectiveness of the ordinance in meeting that concern must be analyzed. *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 654, 658, 660 (1995). This Court should find that Mr. Larson's privacy interest against invasive body searches outweighs the government's interest in preventing child sex trafficking through L.O. 1923.

1. L.O. 1923 Invades Into a Highly Protected and Legitimate Privacy Interest Because the Ordinance Authorizes Broad Searches of the Person.

L.O. 1923 significantly invades into a legitimate privacy interest, which weighs against a finding that the ordinance is a special need. The first factor the Court must examine to determine whether the search required a warrant is the nature and character of the legitimate privacy

interest which is intruded on by the search. *Id*. at 654, 658. To do so, the Court must determine whether Mr. Larson's expectation of privacy was one that society recognizes as legitimate. *T.L.O.*, 469 U.S. at 338.

a. The Character of the Search of Mr. Larson Violated His Legitimate Privacy Interest in His Body Because the Officers Searched Within His Outer Garments.

This Court previously recognized that even a limited pat down of the person is a substantial invasion of privacy. *Terry v. Ohio*, 392 U.S. 1, 24-25 (1968). In *Terry*, the Court allowed a patdown of the outer layer of the defendant's clothing so an officer could determine whether the suspect was carrying a concealed weapon. *Id*. at 7. This patdown was done to ensure the safety of the officer. *Id.* However, the officer's patdown was limited to the outer garments and he did not put his hands inside the defendant's clothes during the patdown until he felt a weapon. *Id*. Here, Mr. Larson was not just patted down for weapons. The officers searched into the pockets of the jacket Mr. Larson was wearing. R. at 28. This invasion of privacy is more substantial than the one in *Terry* because the officer actually searched *within* the outer garment.

Individuals have legitimate privacy interests in the pockets of their clothing. In one case, a police officer, without valid reasonable suspicion, reached into a man's pocket and pulled out envelopes of heroin. *Sibron v. New York*, 392 U.S. 40, 65 (1968). This Court held that reaching into an individual's pocket without a warrant or a preliminary *Terry* search is an unreasonable intrusion on a person's privacy interest. *Id*. at 65-66. Here, Mr. Larson's person was searched when officers found incriminating, but personal items inside Mr. Larson's jacket. R. at 3-4. This involved the officers reaching inside Mr. Larson's jacket to discover all of its contents. The district court was correct in noting that "the interest in not having one's person searched while checking into a hotel is substantial, and cuts against a finding of reasonability in this case." R. at 8-9. However, the court was ultimately incorrect by allowing this intrusion on Mr. Larson.

b. The "Reasonably Necessary" and "Reasonable Suspicion" Requirements of L.O. 1923 Expand the Character of Potential Privacy Intrusions of Searches.

The vague nature of the ordinance allows searches that could invade legitimate privacy interests even more substantially than in Mr. Larson's case. Previously, this Court noted that statutes allowing searches without a warrant should contain safeguards to ensure that officers' discretion does not infringe on individuals' reasonable expectation of privacy. *Delaware v. Prouse*, 440 U.S. 648, 654-55 (1979).

Here, the vague ordinance does not provide adequate safeguards to limit the intrusion on privacy. First, while the ordinance attempts to limit searches by requiring officers not to exceed what is "reasonably necessary," this provision expands rather than limits the scope and duration of these searches. Local Ordinance 1923. This allows police officers to hold individuals for long periods of time until they can be assured that the individual is not engaged in child sex trafficking. This could take hours, or even days, especially when many people came from outside of the Victoria City area to see the All-Star Game, affecting law enforcement's ability to handle each case. R. at 2. Further, what an officer might think is reasonable to ascertain whether an individual was involved in child sex trafficking could range from: a *Terry* frisk for weapons; a search of an individual's clothing, bags, and other personal belongings; a search of an individual's naked body; and even medical examinations. The ordinance ultimately expands rather than limits the intrusions on an individual's privacy.

Second, reasonable suspicion does not mitigate the extreme invasions of privacy that individuals searched must endure because the officer still has the discretion of who to target for the search. The Second Circuit found the collection of DNA samples from sex offenders as a special needs exception to the warrant requirement. *Roe v. Marcotte*, 193 F.3d 72, 80 (2d Cir. 1999). As part of its analysis, the court found that a blanket approach to searches under the

statute minimized concerns for individual privacy invasions. *Id*. at 79. Here, if every person who attempted to obtain a room in a public lodging facility was searched, the concern for individual expectations of privacy would be diminished, as it was in *Roe*.

The nature of searches under L.O. 1923 can go too far because of the vague nature of the ordinance. This Court previously found that a search went too far when a school administrator made a female student strip to her underwear to search for hidden drugs. *Safford Unified Sch. Dist. #1 v. Redding*, 557 U.S. 364, 375 (2009). Here, because L.O. 1923 is limited in scope and duration by allowing what is "reasonably necessary," L.O. 1923 has the potential to allow searches to go too far. These kinds of searches could extend to both the perpetrators and victims of child sex trafficking. Officers could find it reasonably necessary to conduct a patdown, a strip search, a cavity search, or even conduct medical examinations.

2. The Government Interest in Searches Pursuant to L.O. 1923 Is Low Because Reducing Child Sex Trafficking Is Not an Immediate Concern, Nor Is It Effectively Reduced Through the Ordinance.

Reducing child sex trafficking is not an immediate concern in Victoria City, and L.O. 1923 is not an effective way to deal with child sex trafficking. The final factor this Court must weigh is the government interest in searches pursuant to the ordinance. This is done by (a) first defining "the nature and immediacy of the governmental concern" and then (b) analyzing whether the ordinance provides an effective means for meeting it. *Acton*, 515 U.S. at 660.

a. Increases in Child Sex Trafficking During Major Sporting Events Are Unknown, Therefore, Victoria City Does Not Have an Immediate Concern.

Child sex trafficking fails to be an immediate concern in Victoria City. This Court previously determined that drug testing of individuals seeking election to political positions did not meet the requirements to be classified as a special need. *Chandler v. Miller*, 520 U.S. 305, 309 (1997). "Where the risk to public safety is substantial and real, blanket suspicionless

searches [can be] 'reasonable.'" *Id.* at 323. However, when "public safety is not genuinely in jeopardy, the Fourth Amendment precludes the suspicionless search, no matter how conveniently arranged." *Id*. at 323. In *Chandler*, this Court determined that there was no "concrete danger demanding departure from the Fourth Amendment's main rule." *Id. at* 318-19.

Although L.O. 1923 does not grant "suspicionless" searches, *Chandler* provides an important point when weighing the government's interest in allowing the searches to take place. The search must be addressing a "real" problem. *Id*. at 319. While child sex trafficking is generally a problem worldwide, it is not a "real" problem to Victoria City. In fact, the Board conceded, "[H]uman trafficking remains a problem every week of the year." R. at 41. Further, the Board does not actually know whether there will be an increase in child sex trafficking. In their press release, the Board cites to an ESPN article by Richard E. Lapchick, which tracks the precautions major cities have implemented as a means to combat potential sex trafficking during various Super Bowls. R. at 40. In the first paragraph of that article, Lapchick admits, "The reality is that there is no hard data to support that there is actually an increase [in sex trafficking] during the Super Bowl."[1] This shows that it is unknown whether there will actually be an increase in any sex trafficking, let alone child sex trafficking in Victoria City. Thus, L.O. 1923 is not addressing an immediate concern. This risk to public safety is no more substantial or real than any other week of the year.

b. L.O. 1923 Is Ineffective Because It Was Only Active for a Week Within Three Miles of the Stadium and Was Hindered by Officer Bias.

Finally, this Court must turn to whether L.O. 1923 is an effective means to addressing the problem of child sex trafficking. This Court previously weighed the effectiveness of a highway

[1] Richard Lapchick, *Human trafficking is the Super Bowl of suffering*, ESPN (Jan. 19, 2016), https://espn.go.com/espn/story/_/id/14720095/the-scope-human-trafficking-continues-grow-awareness.

checkpoint set up by police to gather information of a previous hit and run. *Illinois v. Lidster*, 540 U.S. 419, 427 (2004). In *Lidster*, this Court found that the stop was effective because the checkpoint was near the location of the prior crime, and occurred about the same time of night. *Id*. This increased the likelihood that drivers on the roads during the stop were the same as drivers at the time of the crime. *Id*.

Here, the Board attempted to follow the example set in *Lidster*, but failed. Allowing the ordinance to be active only during the week surrounding the All-Star Game does not address a specific crime that already occurred, like in *Lidster*, but attempts to prevent child sex trafficking generally. Local Ordinance 1923. This week long time frame emphasizes the Board's unfounded belief that child sex trafficking will increase as a result of the game. R. at 41. Likewise, allowing the ordinance to be active only within a three-mile radius of the Stadium greatly hinders the ordinance's efficacy. Local Ordinance 1923. The ordinance's purported goal of reducing child sex trafficking cannot be accomplished if it is constrained to such a small area, as child sex trafficking surely occurs outside of this three-mile radius. Finally, the ordinance only allows searches of individuals obtaining a room in a public lodging facility. *Id*. This requirement fails to recognize that child sex trafficking occurs in locations other than public lodging facilities. Ultimately, L.O. 1923 is not an effective way to reduce child sex trafficking in Victoria City.

The ordinance is also ineffective because its reasonable suspicion requirement gives officers too much discretion. The signs officers use to determine involvement in child sex trafficking are not so unusual as to allow warrantless searches. Mr. Larson was searched because he did not have any luggage, had tattoos, and was accompanied by someone who looked younger than him. R. at 3. Many people checking into hotels, not engaged in child sex trafficking, easily fit this description. Gang-related tattoos alone are insufficient to indicate involvement in child

sex trafficking. Likewise, it is not unusual for individuals checking into a hotel to leave their luggage in their car. It is also not uncommon for people of varying ages to check into hotels together, such as a father and daughter. A difference in age alone does not indicate child sex trafficking. Searches under L.O. 1923 are ineffective in reducing child sex trafficking because police bias is allowed to dictate who is searched. This changes the focus from detecting signs of child sex trafficking to stopping and searching "shady characters."

Because L.O. 1923 does not deal with a substantial and real concern in Victoria City, the government's interest does not outweigh the significant intrusion on the individual's legitimate privacy interest. Additionally, the ordinance is ineffective in reducing child sex trafficking. Thus, searches pursuant to L.O. 1923 are not special needs.

II. THE EVIDENCE FOUND IN MR. LARSON'S APARTMENT AND CELL PHONE SHOULD BE EXCLUDED BECAUSE THE OFFICER RELIED ON CONSENT FROM A MINOR LACKING APPARENT AUTHORITY.

When a third-party consents to the search of another's home or property, law enforcement should always be required to conduct a reasonable inquiry to best uphold the Fourth Amendment's protections. The Fourth Amendment protects citizens from unreasonable searches and seizures in their homes, persons, papers, and effects. U.S. Const. amend. IV. While police generally cannot enter a home without a warrant, their entry is lawful when there is voluntary consent from a third party who has common authority over the premise. *Illinois v. Rodriguez*, 497 U.S. 177, 181 (1990). Common authority depends "on mutual use of the property by persons generally having joint access or control for most purposes, so that it is reasonable to recognize" that an individual assumed the risk that the person cohabiting may allow a search of the common area. *United States v. Matlock*, 415 U.S. 164, 171 n.7 (1974).

But third party consent is still valid when a third party lacks common authority as long as

the officer had a reasonable, but erroneous belief based on the available facts that would "'warrant a man of reasonable caution in the belief' that the consenting party had authority over the premise." *Rodriguez*, 497 U.S. at 185-86, 188-89 (citing *Terry*, 392 U.S. at 21-22). However, even if a third party explicitly asserts they live in the home they are inviting to be searched, the surrounding circumstances can cause a "reasonable person [to] doubt [the invitation's] truth and not act upon it without further inquiry." *Id.* at 188. In these circumstances, entrance without further inquiry makes the search unlawful. *Id.* at 188-89. In regards to Mr. Larson's case: (A) First, the Court should adopt a stricter rule under the apparent authority doctrine, requiring law enforcement to always conduct a reasonable inquiry before relying on third party consent, and (B) second, the Court should uphold the circuit court's decision and find that W.M. lacked apparent authority for both the apartment and cell phone searches.

A. The Court Should Require Police to Always Conduct Reasonable Inquiries When Relying on Third Party Consent to Prevent Questionable Searches.

Requiring law enforcement to always conduct reasonable inquiries will ensure that they properly meet their burden of establishing proper consent, as well as prevent reliance on illegitimate consent. When apparent authority is raised, the issue "is not whether the right to be free of searches has been *waived*, but whether the right to be free of *unreasonable* searches has been *violated*." *Id.* at 187. But while an individual's apparent authority would be easily proven or disproven if law enforcement asked questions regarding their authority during the initial conversation, the courts have yet to require this. Law enforcement should *always* be required to conduct a reasonable inquiry because: (1) lower courts have allowed Fourth Amendment protections to be sidestepped; and (2) this rule is consistent with this Court's precedent and with the Fourth Amendment.

1. Lower Courts Have "Dangerously Sidestepped" the Fourth Amendment Through the Apparent Authority Doctrine.

In applying the apparent authority doctrine, lower courts have been "dangerously sidestepping the Fourth Amendment" protections. *United States v. Andrus*, 483 F.3d 711, 723 (10th Cir. 2007) (McKay, J., dissenting). The dissent in *Andrus* elaborated on this "sidestepping." While the dissent agreed with the majority's fundamental rules regarding the apparent authority doctrine, it disagreed with how the majority reached their conclusions. *Id.* at 722.

In *Andrus*, the defendant was suspected of accessing child pornography online. Law enforcement relied on the consent of his 91-year-old father, to search the defendant's bedroom and computer while he was at work. *Id.* at 713. The court found the father possessed apparent authority over the defendant's bedroom *and computer* because the bedroom was unlocked – leaving the computer in plain view and open for use (*despite the father never having used the computer*), the email used for the child pornography subscription was linked to the father (*despite not being a suspect in the case*), and the father paid the Internet (*despite it being part of the cable bill*). *Id.* at 715. In fact, the district court stated it was a "close call" in determining apparent authority. *Id.* Further, law enforcement used forensic technology to bypass any computer login screens; thus, they were unaware if the computer was "locked" with a password. *Id.* at 723-24 (McKay, J., dissenting). Because they were unaware, the court found that law enforcement had "no obligation to ask clarifying questions." *Id.* at 720. Had law enforcement asked the father questions about the computer, law enforcement would have learned that the father lacked any authority over the computer.

In another case, an 86-year-old man voluntarily consented to a search of the defendant's bedroom, despite never entering the room because the room was padlocked. *United States v.*

Richards, 741 F.3d 843, 850 (7th Cir. 2014). The court found the old man lacked actual authority to the bedroom, since the defendant had sole access. *Id.* at 851. Yet, the court still found the old man had apparent authority, essentially because the old man *failed to inform* law enforcement: (1) that the bedroom was exclusive to the defendant, (2) that he lived with anyone else, (3) that he lacked a key to the padlock, and (4) his failure to object to the police's entry into the bedroom. *Id.* Due to the lack of information obtained from the old man, the officers were unaware of those facts; thus, the court found it reasonable for the officers to believe the old man had granted valid consent. *Id.* In addition, the court further stated that there were no signs posted, that the other guests did not object to the police's entry of the bedroom, and that the defendant did not say the lock was his and not the old man's. *Id.* Had law enforcement asked the old man questions about the padlock, then law enforcement would have learned that the old man also lacked any authority over the bedroom.

The burden of showing authority should always fall on the government – it is their burden to prove valid consent – and should never be shifted to a third-party's omission or failure to act. *Rodriguez*, 497 U.S. at 181. Officers should not act "on the theory that 'ignorance is bliss.'" *United States v. Cos*, 498 F.3d 1115, 1129 (10th Cir. 2007) (citing 4 Wayne R., *Search and Seizure* § 8.3(g) 180 (4th ed. 2004)). To avoid this, police should always be required to conduct a reasonable inquiry.

2. Always Requiring Reasonable Inquiries Fits This Court's Narrow and Limited Approach to the Apparent Authority Doctrine.

Requiring law enforcement to always conduct a reasonable inquiry to determine apparent authority is consistent with the Fourth Amendment and this Court's narrow interpretation of the apparent authority doctrine. This Court already requires law enforcement to inquire before relying on consent when the facts are ambiguous to a reasonable person. *Rodriguez*, 497 U.S. at

188-89. After all, the purpose of the Fourth Amendment's limitations is to require government officials to exercise their discretion with reasonableness. *Prouse*, 440 U.S. at 653-54.

This Court has even limited when officers can rely on consent of a third party. This Court has prohibited police from relying on consent from hotel staff. *Stoner v. California*, 376 U.S. 483, 490 (1964). In *Stoner*, this Court stated that it was the defendant's constitutional right to waive, not the clerk's nor hotel's. *Id.* at 489. After all, this would put the hotel guest's constitutional rights at the mercy of hotel staff. *Id.* at 490. In addition, this Court prohibits police from relying on a third party's invitation while a cotenant is present and objecting. *Georgia v. Randolph*, 547 U.S. 103, 114 (2006). In reaching this holding, the Court stated, "[N]o sensible person would go inside under those conditions." *Id.* at 113.

A reasonable officer would already reasonably inquire at all times. The government already has the burden to prove that the consent is based on valid authority. *Rodriguez*, 497 U.S. at 181. This rule not only makes the government's job easier, but prevents law enforcement from relying on illegitimate consent. The third party is already cooperating with law enforcement by consenting to the search; thus, it is only reasonable that law enforcement continues to ask for their cooperation by properly investigating about their authority.

B. The Officer Ignored the Ambiguous Circumstances Surrounding W.M.'s Authority Over Mr. Larson's Apartment and Cell Phone, Which Would Have Raised a Reasonable Officer's Doubt.

The circuit court correctly held that W.M. lacked apparent authority over Mr. Larson's apartment and cell phone because a reasonable officer would have doubted whether W.M. actually possessed authority. Common authority is assessed through "mutual use of the property by persons generally having joint access or control for most purposes." *Matlock*, 415 U.S. at 171 n.7. However, an individual may provide valid consent to a search even when the police have a

reasonable, but erroneous belief that the person has shared authority. *Rodriguez*, 497 U.S. at 186. However, when "facts known to the police cry out for further inquiry," they cannot "proceed on a theory of 'ignorance is bliss.'" *Cos*, 498 F.3d at 1129 (citing 4 Wayne R. LaFave, *Search and Seizure* § 8.3(g) 180 (4th ed. 2004)). Ambiguous facts before an officer create a duty to further inquire before relying on the consent, otherwise, the government fails to meet their burden of proving apparent authority. *United States v. Kimoana*, 383 F.3d 1215, 1222 (10th Cir. 2004). The Court should find that a reasonable officer would have doubted W.M. had authority to consent to the search of: (1) Mr. Larson's apartment, and (2) Mr. Larson's cell phone.

1. W.M. Lacked Apparent Authority Over Mr. Larson's Apartment Because a Reasonable Officer Would Doubt They "Shared Everything."

The officer could not rely on W.M.'s consent to search Mr. Larson's apartment because a reasonable officer would have found the circumstances to be ambiguous. The Seventh Circuit uses several factors to consider whether an individual possesses actual or apparent authority. *United States v. Groves*, 470 F.3d 311, 319 (7th Cir. 2006). Some factors included in *Groves* were whether the individual giving consent: (1) possesses a key; (2) admits to living at that residence; (3) possesses a driver's license listing that residence as their legal address; (4) keeps clothes or personal belongings at that home; (5) performs household chores; (6) has their name on the lease or pays rent; and (7) is allowed to enter the home while the owner is away. *Id.* While not an exhaustive list, it shows the types of facts to be considered in evaluating authority. *United States v. Groves*, 530 F.3d 506, 509 (7th Cir. 2008).

In another case, the court found that a defendant's girlfriend reporting a domestic dispute had apparent authority. *United States v. Goins*, 437 F.3d 644, 649 (7th Cir. 2006). In *Goins*, the girlfriend told police that even though she had her own apartment with her children elsewhere, she lived on-and-off with the defendant for several months, had a key, and was allowed to be at

the defendant's apartment while he was away. *Id.* at 646, 649. She mentioned she did household chores, such as cleaning, cooking, and laundry, as well as having both clothing and belongings in that apartment. *Id.* at 646. Ultimately, the court found she had apparent authority.

Here, the officer could not reasonably believe W.M. had authority. While W.M. did use a key, it was a spare key hidden outside; thus, she did not have her own key. R. at 31. Also, mere access alone is insufficient to show apparent authority. *United States v. Reid*, 226 F.3d 1020, 1026 (9th Cir. 2000). Hotel managers and landlords have keys and property interests; yet, they lack the authority to invite guests in. *Stoner*, 376 U.S. at 489; *Chapman v. United States*, 365 U.S. 610, 616-18 (1961). Similarly, a friend may know where a hidden spare key is located, but still lacks the authority to invite guests inside.

W.M.'s age undermines a showing of apparent authority. While case law does not prohibit a finding of apparent authority based on age, courts do consider age as a factor for determining the voluntariness of consent. *United States v. Gutierrez-Hermosillo*, 142 F.3d 1225, 1230-31 (10th Cir. 1998). Similarly, the officers here should have considered W.M.'s age, maturity, and their belief that she was a sex trafficking victim in their determination of her authority. R. at 4. This child was likely deceived under the illusion of her romantic and business relationship with Mr. Larson. R. at 21. She was controlled, at times through violence, such as when she was slapped for texting another boy from school; and financially, by Mr. Larson possessing all the money. R. at 29-30. Even with the chores, the circuit court mentioned that she was forced to do them, possibly through the threat of physical force. R. at 21. A reasonable officer would have believed that a physically and financially controlled underage victim would have limited to no control of the apartment.

The contradictions in W.M.'s statement should have raised the officer's doubt. The

officer had checked her driver's license, and the record is silent as to the address listed there; thus, it can be assumed the address listed was *different* since W.M. had run away from home. R. at 29-30. Further, W.M. did not pay rent nor is her name on the lease. R. at 29, 33. Although W.M. claimed that Mr. Larson and her shared everything, a reasonable officer would have doubted her after hearing they had separate food and inquired about what else they do not share, since it is clear that her previous statement is false. R. at 29, 33. Also, she claimed they shared the profits from their business, yet, he held all of the money, further showing that the "sharing of everything" was suspicious and questionable. R. at 29.

W.M. had a limited presence at Mr. Larson's apartment. Even though she stored *some* of her belongings there, an officer could reasonably infer that the *rest* of her belongings were stored elsewhere; thus, raising doubt about her authority. R. at 30. Because she claimed to live with Mr. Larson for at least a year, this raises a reasonable officer's doubt because if W.M. actually had mutual use or control, she would have taken up more space with new belongings she acquired over the year. R. at 30. This is distinguishable from *Goins*, where the girlfriend there showed police her belongings in the home and wanted the police's assistance in retrieving them. *Goins*, 437 F.3d at 647. Also, while W.M. claimed that she did chores around the house, the record is silent as to the kinds of chores. R. at 33. This ambiguity does not answer how involved she was throughout the *whole* apartment. This is distinguishable from *Goins*, where the girlfriend's access was shown when she actually said *which* chores she did, such as laundry, cooking, and cleaning. *Goins*, 437 F.3d at 646.

Under the totality of the circumstances, the ambiguity raised several red flags. This should have prompted the officer to ask more questions before relying on W.M.'s invalid consent. These red flags cried for further inquiry, which the officer neglected. *Cos*, 498 F.3d at

1129 (citing 4 Wayne R. LaFave, *Search and Seizure* § 8.3(g) 180 (4th ed. 2004)). Thus, W.M. lacked apparent authority over the apartment.

2. W.M. Lacked Apparent Authority Over Mr. Larson's Cell Phone Because a Reasonable Officer Would Doubt She Used It Freely.

A reasonable officer would have doubted W.M. had apparent authority over the cell phone because the circumstances were ambiguous. To determine an individual's apparent authority over an object, the third party's relationship to the object must be considered. *Andrus*, 483 F.3d at 717 (citing *Matlock*, 415 U.S. at 171). The Sixth Circuit considers: (1) the type of container and if it generally has a high degree of privacy, (2) if precautions were taken to protect the privacy interest, (3) if the third party initiated the police involvement, and (4) if the third party denied ownership of the container. *United States v. Taylor*, 600 F.3d 678, 683 (6th Cir. 2010).

In *Taylor*, the court applied those factors to a shoebox, holding that the third party lacked apparent authority because there was ambiguity. *Id.* at 685. After arresting the defendant, the officers searched the home relying on the female tenant's consent. *Id.* at 679. The police searched a closet in a spare bedroom. The closet contained men's clothes, children's clothes, toys and a men's Nike shoebox. *Id.* The box, which contained a handgun and ammunition, was slightly covered by men's clothes. *Id.* at 679-80. The officers waited until after they opened the shoebox to question the tenant. She told the officers that the defendant did not live with her, but stored his belongings in the spare bedroom, and that she did not really use the closet. *Id.* at 680.

The *Taylor* court held that "a reasonable person would have had substantial doubts about whether the box was subject to mutual use." *Id.* at 682. While shoeboxes do not typically "command a high degree of privacy," the court accepted that private items, such as letters and photographs, could be stored inside. *Id.* at 683. The defendant there took precautions, as he

closed and hid the box inside the closet with clothes covering it, and did not give the tenant permission to look inside. *Id.* The search of the shoebox was initiated by the police, not the tenant. *Id.* While the tenant did not deny ownership, the police were to blame since they searched the shoebox without asking if it was her shoebox. *Id* at 685. The court ultimately held that since the officers failed to cure the ambiguity, the tenant lacked apparent authority to consent to the search. *Id.*

Here, the container is a cell phone, which "commands a high[er] degree of privacy" than a shoebox. R. at 4. Because cell phones contain "the privacies of life," this Court now requires police to obtain a warrant before a search. *Riley v. California*, 134 S. Ct. 2473, 2495 (2014). This Court should consider the "metaphysical subtleties" of cell phones. *Frazier v. Cupp*, 394 U.S. 731, 740 (1969). The *Frazier* Court focused on the defendant assuming a risk by allowing a third party to carry and possibly search, the pockets of his duffle bag. *Id.* However, cell phones are distinguishable because a duffle bag's expectation of privacy is limited to its size; whereas, cell phones have an enormous storage capacity as they can connect to the Internet and a cloud. "Before cell phones, a search of a person was limited to physical realities" and had a narrow intrusion on an individual's privacy. *Riley*, 134 S. Ct. at 2478. But now, in a container the size of a cigarette pack, every piece of mail, book or article an individual has received can be carried – exposing their private life. *Id.* at 2489. Due to this high degree of privacy, the officer should have proceeded with caution by further inquiring.

Mr. Larson took precautions to protect his privacy interest, as his cell phone was password protected. R. at 4. In an unpublished district court case, a minor had apparent authority over a cell phone because the defendant *gave* her the password. *United States v. Gardner*, 16-CR-20135, 2016 WL 5110190, at *2 (E.D. Mich. Sept. 21, 2016). While W.M. did know Mr.

Larson's password, the officer never inquired as to *how* she knew it. R. at 3. It is material to know if Mr. Larson gave it to her, or if she guessed the password. Since the password relates to Mr. Larson's tattoo, it would be an easy guess. R. at 23. Thus, a reasonable officer would have doubted W.M.'s authority over the phone.

While the circuit courts have found third party authority in individuals who merely play games on computers or install applications, W.M.'s use of the phone was even more limited due to being controlled and monitored. *United States v. Buckner*, 473 F.3d 551, 555-56 (2007); *United States v. Morgan*, 435 F.3d 660, 663-64 (2006). When W.M. was caught texting another boy, she was punished through physical force, told not to talk to the boy, and her phone use was strictly monitored and controlled. R. at 30. With this knowledge, a reasonable officer would doubt she had free range of access and believe she was very limited in what she was allowed to do on the phone.

While nothing in the record reflects W.M. denied ownership of the phone, its location on the nightstand would cause a reasonable officer to believe it belonged to Mr. Larson, not W.M. R. at 35. The nightstand where the cell phone was found had condoms, men's glasses, and a fake Rolex watch. R. at 35. The opposite nightstand had a "Seventeen" magazine and a pink eye-cover, which would have caused a reasonable officer to believe it was W.M.'s nightstand. R. at 37. Thus, it was very likely that the nightstand with the phone was Mr. Larson's. This is similar to *Taylor*, where the shoebox was found covered in men's clothes, showing that the third party lacked authority. *Taylor*, 600 F.3d at 682. Thus, a reasonable officer would have doubted that W.M. possessed authority over the cell phone and would have further inquired before relying on her consent.

CONCLUSION

The Court should uphold the lower Circuit Decision, thereby granting the motion to suppress the unreasonably obtained evidence because the officer violated Mr. Larson's constitutional rights when: (1) he conducted a search on Mr. Larson's person pursuant to L.O. 1923, which is unconstitutional under the Fourth Amendment; and (2) when he searched both Mr. Larson's apartment and cell phone when the circumstances were ambiguous. All evidence obtained during the searches should be suppressed.