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 Supreme Court

_____

BRIEF FOR THE RESPONDENT

_____

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STATEMENT OF THE ISSUES PRESENTED

The issues are whether searches conducted pursuant to the ordinance permitted under the special needs exception to the Fourth Amendment, and 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 was selected by the Professional Baseball Association to host the league's 2015 All-Star Game. R. at 2. The game was held on July 14, 2015 at Cadbury Park, which is located in the Starwood Park neighborhood of Victoria City. *Id.* Starwood Park is known to have gang activity by two local gangs. *Id.* One is called the Starwood Homeboyz and the other is the 707 Hermanos. *Id.* The gang activities have included robbery, narcotics sales, murder, and human trafficking. *Id.* Some of the people involved in the human trafficking are believed to be children. *Id.* The human traffickers advertise on websites that are hard to monitor, and as a result, are difficult for law enforcement officers to find. *Id.*

Citizens that lived near Starwood Park were concerned that the All-Star Game would attract an increase in human trafficking due to a high volume of men travelling without their female partners. *Id.* In response, the city passed an ordinance called Local Ordinance 1923 ("L.O. 1923"). *Id.* L.O. 1923 authorizes a law enforcement officer to search anyone obtaining a room at a hotel or a motel if the officer has a reasonable suspicion that the person is a minor engaged in a commercial sex act as defined by federal law, or an adult or minor who is facilitating or attempting to facilitate the use of a minor for a commercial sex act as defined by federal law. *Id.* L.O. 1923 is only valid for seven days, from July 11, 2015 to July 17, 2015, and

is only valid in Starwood Park. *Id.* L.O. 1923 further states that the search shall be limited in scope and duration to which is only necessary to determine if the person is engaged in a commercial sex act. *Id.*

On May 6, 2015, the city released a press statement notifying the citizens that it had enacted L.O. 1923. R. at 3. Included in the statement was statistics for sex trafficking in Starwood Park. *Id.* It also included statistics on how sex trafficking accompanies major sporting events. *Id.* It concluded by saying that the city intends to make the week of the All-Star Game fun for all of the visitors. *Id.*

On July 12, 2015, in accordance with L.O. 1923, Officers Richols and Nelson were inspecting patrons at the front desk of the Stripes Motel, which is located in Starwood Park. *Id.* During this time, Respondent William Larson ("Mr. Larson") entered the motel with a female named W.M. *Id.* The officers assumed that W.M. was much younger than Mr. Larson, and observed that they were not carrying any luggage. *Id.* The officers noticed that Mr. Larson had two tattoos that identified him with the Starwood Homeboyz gang. *Id.* One of the tattoos was the letters "S" and "W" imprinted on a wizard's hat, and the other was the numbers "4-11-5-11." *Id.*

Officer Nelson knew from his training and experience that the tattoos meant that Mr. Larson was a gang member of the Starwood Homeboyz and that the Hermanos gang was their rival gang. R. at 3, 28. Based on the fact that they thought W.M. was much younger than Mr. Larson, and that Mr. Larson was probably affiliated with a gang, the officers believed that they were authorized to search the two of them. *Id.* The government has conceded that there was no probable cause to initiate a search. *Id.*

The Officers searched Mr. Larson and found nine condoms, a butterfly knife, lube, two oxycodone pills, a list of names with allotments of time, and $600 in cash. R. at 3-4. The

officers then searched W.M. R. at 4. She showed them her driver's license identifying her as a 16-year-old female. R. at 4, 29. Upon finding out that she was sixteen, the officers arrested Mr. Larson for sex trafficking of a minor under 18 U.S.C. § 1591(a)(1). R. at 4, 28.

Officer Nelson believed W.M. to be the victim so he did not arrest her. R. at 4, 29. He asked her if she had a safe place to spend the night. R. at 29. W.M. responded by saying yes, and that she lived with Mr. Larson in an apartment a couple of blocks away. R. at 4. Officer Nelson asked if she would talk to him more about her relationship with Mr. Larson and she agreed. *Id.* W.M. told Officer Nelson that Mr. Larson was her boyfriend. R. at 29. She told him the reason that they were there was to do business with the All-Star game fans. *Id.* W.M. told Officer Nelson that Mr. Larson's name was on the lease for the apartment. *Id.* Officer Nelson asked her if she lived there all of the time and she stated that she was homeless but had been staying there for about a year. R. at 30. Officer Nelson thought that she had mutual use of the apartment, but was not entirely sure. *Id.* He asked her if she kept any of her belongings in the apartment, and she said that she kept a duffel bag with some clothes in it, but that was it. *Id.* She told him that she had mail delivered to the apartment. R. at 31.

After speaking with her, Officer Nelson asked if he could search the apartment to which she answered yes. R. at 4, 31. He then walked with her to the apartment. R. at 4. W.M. opened the door with a spare key that was underneath a fake rock. R. at 31. Officer Nelson then began searching the apartment. R. at 4. He searched under the bed and found a semi-automatic handgun. R. at 4, 31. He impounded the gun which was later identified as belonging to Mr. Larson. R. at 4.

Officer Nelson continued to search the apartment and found a smart phone on a nightstand in the bedroom. *Id.* The phone was located on a nightstand that also had men's

glasses, a man's watch, and some condoms. R. at 35. There was another nightstand in the room that had an issue of Seventeen magazine and a pink sleep mask on it. R. at 37.

The smart phone had a custom cover with an "S" and a "W" wrapped around a wizard's hat. R. at 4. This design was identical to the one that Mr. Larson had tattooed on his left forearm. *Id.* Officer Nelson asked W.M. whom the phone belonged to and she told him that she shared it with Mr. Larson. R. at 4, 31. He asked W.M. if she had chosen the sticker on the phone and she said that it was Mr. Larson's sticker. R. at 32. Officer Nelson then asked her who paid the phone bill and she said that Mr. Larson did. *Id.* Officer Nelson asked her if he would need a password to access the device, and she told him that the password was 4-11-5-11. R. at 4. He asked her if he could search the phone and W.M. said that he could. R. at 4, 32. Officer Nelson was able to access the phone using the password and found several photos of Mr. Larson holding a gun, suggestive photos of W.M., and a video of Mr. Larson rapping about pimping. *Id.*

On August 1, 2015, a federal grand jury returned an indictment against Mr. Larson, charging him with sex trafficking of children in violation of 18 U.S.C. § 1591(a)(1) and being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g)(1). R. at 5. Mr. Larson filed a Motion to Suppress the evidence that was seized during the searches. *Id.* On October 22, 2015, the United States District Court, Western District of Victoria, denied the Motion to Suppress. R. at 1. Subsequently, Mr. Larson was convicted at trial on both charges. R. at 15. On January 10, 2016, Mr. Larson filed an Appeal with the United States Court of Appeals for the Thirteenth Circuit. *Id.* The Thirteenth Circuit Court reversed and remanded for a new trial. *Id.* The United States of America filed an Appeal with this Court and it granted certiorari. R. at 24.

SUMMARY OF THE ARGUMENT

The Fourth Amendment protects persons and their effects from unreasonable searches and seizures, but there are commonly recognized exceptions that allow searches without warrants. One exception is when the government has special needs beyond the normal need for law enforcement. The special needs exception is usually applicable in administrative searches that are not criminal in nature. The situations that give rise to special needs exception are usually in public schools, employment-employee relationships, and probation cases. However, the exception would never apply when the purpose of the search is for criminal prosecution.

In this case, there is no administrative reason for applying the special needs exception to any of the searches. Mr. Larson is neither a student nor in an employer-employee relationship with Officer Nelson, and furthermore, he is not on probation. Because there is no administrative issue in this case, the special needs exception should not apply to the warrantless searches.

Moreover, if the intent of the search is to produce evidence that incriminates the person who is the subject of the search, the special needs exception cannot apply. The purpose of the ordinance was to convict persons for human trafficking. This is evidenced by the fact that law enforcement officers are the ones performing the searches. The reason that Officer Nelson searched Mr. Larson's body, home, and cell phone was to find evidence that would lead to his conviction. The searches were fueled with the goal of convicting someone of human trafficking. Mr. Larson was the only person arrested for human trafficking that night. Therefore, because the items found in the search were used to convict Mr. Larson, the special needs exception does not apply.

In applying the Fourth Amendment protections against unreasonable searches of homes, a third party with common authority over the premises may validly consent under certain

circumstances. If the third party has actual or apparent authority to consent to the search, then the government would be reasonable in believing in such authority and proceed to conduct the search. The facts available to a reasonable man of caution at the time of the search would lead him to believe that the third party has authority over premises and property to be searched, otherwise the government must do further inquiry.

Apparent authority arises when at the time of the search, the officer would reasonably believe that the third party has unlimited access to the home, pays some of the bills and has her name on the lease, has sufficient belongings in the home, and third party is of right age and sophistication among other things. W.M.'s name was not on the lease or anything else and she did not pay for any of the bills. Also, her belongings were in a small duffel bag and she did not even have her own key to the house, showing limited access thereto. Because the officer had reason to know that Mr. Larson was sexually trafficking W.M., a minor, he should have reasonably believed that her consent was not valid as to the search of the house.

Additionally, an officer's belief in the third party's having joint access to another's phone should be reasonable, especially when the officer should know the phone does not belong to the third party. Mr. Larson's phone was on his nightstand and had his initials on it. Furthermore, the phone was accessible with a password that belonged to the Mr. Larson. W.M.'s use of the phone was limited and there are no facts indicating that Mr. Larson left the phone at home for her to use it because she was with him at the time of his arrest. Because the phone did not belong to W.M., and because all of the facts present to the officer at the time of the search indicated that the phone belonged to Mr. Larson, W.M.'s consent to the search of the phone was invalid.

At last, a third party's consent is valid when Mr. Larson does not refuse where police have not made it impossible for Mr. Larson to object by removing him from the situation. Officer

Nelson knew that Mr. Larson would have probably objected to the search of his home and so he asked W.M. for consent after he arrested Mr. Larson and removed him from the situation. Because the officer made it impossible for Mr. Larson to object by removing him and asking a minor victim for consent, W.M.'s consent in the Mr. Larson's absence was not valid.

STANDARD OF REVIEW

This Court should apply a de novo standard in reviewing the lower court's decision. In doing so, this Court should give deference to the lower court's finding of fact.

ARGUMENT

I. This Court should reverse the District Court's ruling and uphold the Appellate Court's decision because there was no special needs exception to the Fourth Amendment's warrant requirement that allowed the search of Mr. Larson's person, home, and property; and W.M.'s consent was not valid because she did not have apparent authority over the home or the phone.

The Fourth Amendment states that people have a right to be "secure in their persons, houses, papers, and effects, against unreasonable searches and seizures," and "no warrants shall issue, but upon probable cause." U.S. Const. amend. IV. However, there are exceptions to this rule which would allow officers to conduct a search without a warrant. *See, e.g., Carroll v. United States*, 237 U.S. 132, 144, 155 (1925) (finding only reasonable searches without warrants to be constitutional); *see also, e.g., Horton v. California*, 496, U.S. 128, 130 (1990) (finding that the Fourth Amendment does not prohibit evidence seized in plain view in spite of a warrantless search); *see also, e.g., Sutterfield v. City of Milwaukee*, 751 F.3d 542, 556 (7th Cir. 2014) (finding an exigent circumstance to be an exception to warrantless searches under the Fourth

Amendment); *see also, e.g.*, *Zap v. United States*, 328 U.S. 624, 630 (1947) (finding individual consent an exception to the Fourth Amendment searches).

The special needs exception doctrine to the warrantless searches arises where there is a special need beyond the normal need for law enforcement, such as: in public schools, in employer-employee relationships regarding safety-sensitive positions, and in probationary situations. *Griffin v. Wisconsin*, 483 U.S. 868, 873-74 (1987); *New Jersey v. T.L.O.*, 469 U.S. 325, 334-35 (1985); *Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602, 606 (1989). Furthermore, a valid third party consent to searches arises where a co-occupant with common authority over premises and property has actual or apparent authority over the same premises and property being searched. *Georgia v. Randolph*, 547 U.S. 103, 121-23 (2009); *Illinois v. Rodriguez*, 497 U.S. 177, 177 (1990); *United States v. Matlock*, 415 U.S. 164, 171 (1974). Here, because the special needs exception to warrantless searches of Mr. Larson's person, home, and property is inapplicable; and because W.M.'s consent to the search of the home and the cell phone is invalid, this Court should uphold the Thirteenth Circuit's judgment.

A. This Court should find the searches violated the Fourth Amendment because they do not fall under any of the recognized special needs exceptions.

The Fourth Amendment gives people the right "to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures," unless a warrant is issued based on probable cause. U.S. Const. amend. XIV. However, "because the ultimate touchstone of the Fourth Amendment is 'reasonableness,' the warrant requirement is subject to certain exceptions." *Brigham City v. Stuart*, 547 U.S. 398, 403 (2006).

One exception that has been recognized by this Court is the "special needs" exception. The creation of the special needs exception was for non-criminal, administrative purposes. In *Camara*, a lessee refused to permit a housing inspector to enter his apartment without a warrant. *Camara v. Municipal Court*, 387 U.S. 523, 526-27 (1967). This Court held that "administrative searches of the kind at issue here are significant intrusions upon the interests protected by the Fourth Amendment, that such searches when authorized and conducted without a warrant procedure lack the traditional safeguards which the Fourth Amendment guarantees to the individual." *Id.* at 534. It was not until 1985 when the exception began to apply to criminal cases.

This Court has recognized that where there is a situation where there is a special need, which is something "beyond the normal need for law enforcement," there can be a "departure from the usual warrant and probable-cause requirements." *Griffin*, 483 U.S. at 873-74. However, even when there is a special need in a criminal case, the reason for the unreasonable search has to be for non-law enforcement purposes. These non-law enforcement purposes only come up in narrowly tailored situations.

The searches performed on Mr. Larson's body, apartment, and cell phone do not fit one of these narrowly tailored situations. Therefore, this Court should find that the special needs exception does not apply and find that the searches violated the Fourth Amendment.

i. The special needs exception does not apply because the searches did not take place in a school.

This Court has recognized that the special needs doctrine applies to searches performed in schools. In fact, the first time the special needs exception to the Fourth Amendment warrant requirement was recognized was in *New Jersey v. T.L.O. T.L.O.*, 469 U.S. at 351. In *T.L.O.*, a vice principle of a high school searched the purse of a student who had been found smoking in

the school bathroom, which was a violation of school policy. *Id.* at 328. This Court determined that the Fourth Amendment protection against unreasonable searches and seizures does apply to students. *Id*. at 333. To determine whether the search was reasonable, the Court balanced what the intrusion of the search against privacy expectation of the individual student. *Id*. The Court determined the teachers' need to maintain discipline and order in the school outweighed the privacy interests of the students. *Id.* at 339, 341. The Court recognized that there is a "special need" to immediately respond to the kind of behavior that would threaten the students' and the teachers' safety; and that the "educational process" itself is justified as an exception to the probable cause and warrant requirements, and "in applying a standard determined by balancing the relevant interests." *Id.* at 353 (Blackmun, J., concurring). Because of these circumstances, the Court found the search to be reasonable. *Id.* at 347.

Ten years later in *Vernonia*, the Fourth Amendment protection against unreasonable search and seizure was again challenged on behalf of a student. *See Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646 (1995). In *Vernonia*, the school allowed random drug testing of student athletes. *Id.* at 648-651. The drug test was determined to be a "search" under the Fourth Amendment. *Id.* at 652. However, the Court again recognized that there is a "special need" in public schools where requiring a warrant for a search "would unduly interfere with the maintenance of the swift and informal disciplinary procedures that are needed." *Id.* at 653. Because this exception exists, the Court had to look at the reasonableness of the search. *Id.* at 652-53. In order to do this, the Court applied the balancing test, balancing the "intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests." *Id.* The Court determined that students have a lesser expectation of privacy and that student athletes have an even lesser expectation of privacy. *Id.* at 657. The Court further

determined that the intrusion of privacy to collect the urine sample for the drug test is no more than when the students use the public bathrooms at school. *Id.* at 658. The results of the tests are turned over to a limited number of school personnel and are not turned over to law enforcement for prosecution purposes. *Id.* The government interest in "deterring drug use by our Nation's schoolchildren" is high. *Id.* at 661. After balancing these factors, the Court determined that the school's policy was reasonable and did not violate the Fourth Amendment. *Id.* at 665.

The special needs exception has been identified for searches involving students at school because teachers and administrators need to maintain order within the school in order to educate the students. *T.L.O.*, 469 U.S. at 350. In this case, Mr. Larson was not a student at a public school when he was searched.

Another reason that schools present a special need is that obtaining a warrant would unduly burden the school. Teachers are not schooled in what constitutes probable cause in order to obtain a warrant, like police officers are. *Id.* at 343, 353 (Blackmun, J., concurring). Unlike in *T.L.O.*, Mr. Larson was searched by police officers who are schooled in the process of obtaining warrants and had the ability to do so.

Because Mr. Larson was not a student at a school, and because he was searched by police officers and not teachers, the special needs exception does not apply. Because there is not a special needs exception, there is no need to proceed with the balancing test. *Id.* at 351 (Blackmun, J., concurring), Christopher Mebane, *Rediscovering the foundation of the special needs exception to the Fourth Amendment in Ferguson v. City of Charleston*, 40 Hous. L. Rev. 177, 190 (2003).

ii. The special needs exception does not apply because the searches were not performed by an employer on an employee that holds a safety-sensitive position.

This Court has recognized that special needs exception applies in employer-employee relationships, especially when the safety of the employees and the public are at risk. In *Skinner*, the Court had to determine if railroad regulations that allowed employers to drug test their employees violated the Fourth Amendment. *Skinner*, 489 U.S. at 606. According to the Federal Railroad Administration ("FRA"), employers are required to drug test their employees after they have been involved in a train accident. *Id.* Employers may drug test their employees if there has been a safety violation, the employer has reasonable suspicion that an incident was the employee's fault, or the employer "has a reasonable suspicion that [the] employee is under the influence of alcohol." *Id.* at 611. Because drug testing employees, by either a urine test, blood test, or breath test, has been identified as a search under the Fourth Amendment, there must either be a warrant issued prior to the search or the search must fall under one of the exceptions to the warrant requirement. *Id.* at 616-17, 620. The Court held that "[t]he government's interest in regulating the conduct of railroad employees to ensure safety, like its supervision of probationers or regulated industries, or its operation of a government office, school, or prison" presents special needs beyond normal law enforcement, justifying searching without warrants. *Id.* at 620 (quoting *Griffin,* 483 U.S. at 873-74).

The FRA regulations apply to covered employees that "are engaged in safety-sensitive tasks." *Id.* at 620. The purpose of the regulations was not "normal law enforcement" such as assisting in the prosecution of employees, but rather "to prevent accidents and casualties in railroad operations that result from impairment of employees by alcohol or drugs." *Id.* at 620-21. The Court balanced the governmental interest in the safety of the employees and the public

against the privacy interests of the employees. *Id.* at 621. It determined that the privacy invasion of a drug test is minimal. *Id.* at 624-28. Because the government interest in protecting the employees and the public was higher than the privacy invasion, the Court found the drug tests to be reasonable under the Fourth Amendment. *Id.* at 634.

In *National Treasury*, the Court had to determine whether drug testing of United States Customs employees violated the Fourth Amendment. *Nat'l Treasury Employees Union v. Von Raab*, 489 U.S. 656, 659 (1989). The United States Customs service implemented a drug-testing program where employees that held positions that involved drug enforcement, carried firearms, or handled classified material, were subject to drug testing as a condition of their employment. *Id.* at 660-61. The Court again recognized that where the government needs to intrude upon individual privacy rights beyond the normal need for law enforcement, the privacy expectations of the individual must be balanced against the government's interest in order to find out if the government's conduct is reasonable. *Id.* at 665-66. The Court went on to explain that because the Customs Service's drug testing program's test results are not to be used to prosecute employees without their consent, the program's purpose is not for ordinary law enforcement needs. *Id.* at 666. One of the government's interests is in deterring drug use among the employees and not rewarding any existing drug users with a promotion. *Id.* This "substantial interest" may justify warrantless searches because it is in the category of special needs. *Id.* Another government interest is "ensuring that front-line interdiction personnel are physically fit, and have unimpeachable integrity and judgment." *Id.* at 670. The government also has an interest in protecting the public. *Id.* The public does not want someone who is allowed to carry a firearm and use deadly force to have "impaired perception and judgment." *Id.* at 671.

When the Court looked at the privacy interests of the employees, it found that the employees have a diminished expectation of privacy. *Id.* at 672. The Court reasoned that employees who are dealing with illegal drug interdiction or who are carrying firearms as their employment requires them to, should understand that they have lower expectations of privacy since the government can and should inquire after their health and fitness for their employment purposes. *Id.* After weighing all of the factors, the Court found that the minimal intrusion of the drug test, with the lower expectation of privacy, does not outweigh the government's "compelling interests" in protecting the borders. *Id.* The Court found the drug testing to be reasonable for employees that held positions dealing with illegal drugs and carrying firearms. *Id.* at 679.

Unlike in *Skinner* and *Nat'l Treasury*, Mr. Larson was not an employee engaged in a safety-sensitive task. The searches in *Skinner* and *Nat'l Treasury* were drug tests, which were a condition of their employment. The searches that Mr. Larson were subject to were more invasive, which included searching his person, his apartment and his cell phone. Unlike in *Skinner* and *Nat'l Treasury,* these searches were not a condition of any employment. Because Mr. Larson was not an employee engaged in a safety-sensitive task, the special needs exception does not apply. Because the special needs exception does not apply, there is no need to balance the government intrusion against Mr. Larson's privacy expectation.

iii. The special needs exception does not apply because Mr. Larson was not on probation.

This Court has recognized the special needs exception when the person being searched is a probationer. In *Griffin*, the defendant was on probation and as part of the terms of his probation, he had to allow a probation officer to "search [his] home without a warrant" if there

were "reasonable grounds" that there would be contraband at his residence, along with anything else he was not allowed to have according to his probation terms. *Griffin,* 483 U.S. at 870. Subsequently, his apartment was searched. The issue before the Court was whether the search violated the Fourth Amendment. *Id.* at 872. The Court stated that "[a] State's operation of a probation system, like its operation of a school, government office or prison, or its supervision of a regulated industry, likewise presents 'special needs' beyond normal law enforcement that may justify departures from the usual warrant and probable-cause requirements." *Id.* at 873-74. The Court went on to explain that supervising the probationer is a special need exception to the warrant requirement, even though this exception would not apply to everyone in the public precisely because it impinges on their privacy rights. *Id.* at 875-76. Because there was a "special need," the probable cause standard to obtain a warrant did not apply. *Id.* The "special need" lowered the probable cause standard to "reasonable grounds" in order to be able to perform a search here. *Id.* at 876. Based on this, the Court found that the search was reasonable under the Fourth Amendment. *Id.*

Unlike in *Griffin*, Mr. Larson was not on probation. Because Mr. Larson was not on probation, there was not a special needs exception to the warrant requirement and the searches were in violation of the Fourth Amendment. If the searches are within the exception, the probable cause requirement can be lowered, but that only occurs in certain circumstances. Because this was not one of those exceptions, Officer Nelson impinged on Mr. Larson's constitutional rights by lowering the probable cause standard. Therefore, because the exception does not apply, the searches violated the Fourth Amendment.

B. This Court should also find that the special needs exception does not apply because the purpose of the search was for crime investigatory reasons.

This Court had recognized that there is not a special needs exception when a search is performed for the purpose of investigating crimes. In *Edmond*, the Court considered whether city vehicle checkpoints with the purpose of finding unlawful drugs violated the Fourth Amendment. *Edmond*, 531 U.S. at 34. The Court noted that what "distinguishes these checkpoints from those we have previously approved is their primary purpose." *Id.* at 40. The primary purpose of the checkpoint is to "catch drug offenders." *Id.* at 41. Because special needs cases have a general administrative purpose rather than a criminal prosecution purpose, there is not a special need in *Edmond*. *Id.* at 47. The Court held that because the "primary purpose" of the Indianapolis checkpoint program cannot be distinguished from the "general interest" in crime control, the checkpoints are unconstitutional. *Id.* at 48.

In *Ferguson*, this Court again recognized that there is not a special needs exception when a search is performed for the purpose of gathering evidence for a criminal conviction. *See Ferguson v. City of Charleston*, 532 U.S. 67 (2001). In *Ferguson*, the issue was whether a drug testing program that tested pregnant patients at a hospital without their consent violated the Fourth Amendment's warrant requirement. *Id.* at 69-70. In efforts to decrease the use of cocaine among pregnant women, the City Solicitor created a drug task force that consisted of hospital employees, police, and representatives for the County Substance Abuse Commission and the Department of Social Services. *Id.* at 71. The task force created a hospital policy where employees were required to drug test pregnant women who were suspected of using cocaine. *Id.* If a patient tested positive the first time, the police were notified; and if the patient tested positive a second time, she was arrested. *Id.* at 72. The Court of Appeals found that the special needs exception applied because the patients were being tested for "medical purposes." *Id.* at 75. This

Court analyzed whether the special needs exception applied. *Id.* at 76. It held that the difference between *Ferguson* and the other special needs cases is "the nature of the 'special need' asserted as justification for the warrantless searches. In each of those earlier cases, the 'special need' that was advanced as a justification for the absence of a warrant or individualized suspicion was one divorced from the State's general interest in law enforcement." *Id.* at 79. Because there was not an interest separate from general law enforcement, the Court found that the special needs exception did not apply. *Id.* at 84. It reasoned that because the hospital policy was created with the focus of arresting and prosecuting "drug- abusing mothers," and because police and prosecutors were involved in the administration of the policy, it is "undistinguishable from the general interest in crime control." *Id.* at 80-82, (quoting *Indianapolis*, 531 U.S. at 32). Because there was no special needs exception, the searches violated the Fourth Amendment. *Id.* at 86.

The United States District Court for the Eastern District of Michigan has followed this Court's rulings, and has also held that there is not a special needs exception when a search is performed for the purpose of gathering evidence for a criminal conviction. In *Spencer*, a city ordinance that was enacted allowed police officers to administer a breath test to anyone under the age of twenty-one without a warrant. *Spencer v. City of Bay City*, 292 F. Supp. 2d 932, 934 (E.D. Mich. 2003). The city argued that there was a special needs exception that allowed the search. *Id.* at 939. It argued that the special need was protecting the public from the kind of damage that would be caused by the "young people under the influence of alcohol." *Id.* at 941. The court rejected this argument and found that the purpose of the ordinance was "to gather evidence in aid of a criminal prosecution." *Id.* It relied on this Court's holding in *Ferguson* and reasoned that if the objective is to gather evidence of crime, then "non-criminal purposes of a law authorizing warrantless searches" will never be an exception to getting a warrant upon probable cause. *Id.* at

942. Because there was not a special need, the court held that searches pursuant to the city ordinance were unconstitutional. *Id.* at 946.

Like in *Ferguson* and *Spencer*, there is not a special need in this case that would constitute an exception to the warrant requirement. Like in *Ferguson* and *Spencer*, the searches performed on Mr. Larson were for the purpose of a criminal prosecution. The reason that Local Ordinance 1923 ("L.O. 1923") was put into place was because "law enforcement often has difficulty locating the perpetrators of human trafficking." R. at 2. Law enforcement knew that there is criminal activity, including human trafficking, occurring in Starwood Park. *Id.* They had been unsuccessful in apprehending the perpetrators by following regular law enforcement policies, so L.O. 1923 was created in order to gather evidence without a warrant. *Id.* It is further evidenced by the fact that L.O. 1923 authorized searches by "law enforcement officer[s]." *Id.* In *Ferguson*, the Court found that when police officers are involved in the searches, the purpose of the search is for criminal prosecution. *Ferguson*, 532 U.S. at 80-82. Likewise, in *Spencer*, the searches being performed were by law enforcement officers and the court found that those searches were also for crime investigatory purposes. *Spencer*, 292 F. Supp. at 941.

The purpose of L.O. 1923 being for criminal prosecution is further evidenced by the fact that after Mr. Larson's body was searched, he was arrested for violation of 18 U.S.C. § 1591(a)(1), which is a sex trafficking of a minor. There was not any indication of sex trafficking at the time that Mr. Larson was arrested, yet he was arrested under the same purpose that L.O. 1923 was put in place for. Once Mr. Larson was in custody, there was no more reason to continue to search his apartment, and subsequently his cell phone, other than to gather evidence for a criminal case.

Because the purpose of L.O. 1923 was not anything other than to collect evidence for criminal prosecution, a special needs exception to the warrant requirement did not exist. Therefore, because there was not a special needs exception, this Court should find that the searches violated the Fourth Amendment.

C. This Court should also find that the searches violated Mr. Larson's Fourth Amendment rights because third party consent is valid only where officers reasonably believe the third party to have common authority over the premises being searched, where the third party has sufficient control over the personal property being searched, and the government does not obstruct the Respondent's presence in order to avoid his objection to the search.

The Fourth Amendment states that people have a right to be "secure in their persons, houses, papers, and effects, against unreasonable searches and seizures," and "no warrants shall issue, but upon probable cause." U.S. Const. amend. IV. However, consent is a valid exception to warrantless searches. *Rodriguez,* 497 U.S. at 177. Individual consent can be based on either actual authority or apparent authority to consent. *Randolph,* 547 U.S. at 121-23. Under the Apparent Authority doctrine, a third party may consent to a search if he or she "possesses" common authority over the premises or property to be searched, or a reasonable officer believes them to have this authority. *Matlock,* 415 U.S. at 171. Apparent authority exists if: 1) officer's determination of third-party consent is based on a false fact, 2) the officer's belief was "objectively reasonable," and 3) if the false premise was actually true, "the third party would have had authority". *United States v. Ruiz,* 428 F.3d 877, 880 (9th Cir. 2005); *United States v. Dearing,* 9 F.3d 1428, 1429-30 (9th Cir. 1993).

Here, because W.M. did not possess an apparent authority to consent to the search of Mr. Larson's home, and because W.M. neither owned Mr. Larson's cellular phone nor had sufficient control thereof, this Court should find that the government lacked a valid consent to the searches

of both the home and the phone. Furthermore, because Officer Nelson obstructed Mr. Larson from the scene by arresting him, and thereafter requested W.M.'s consent so to avoid Mr. Larson's objection, this Court should find W.M.'s consent invalid. Because W.M.'s consent is invalid and Officer Nelson's belief is unreasonable in her authority to consent, this Court should find that the Apparent Authority doctrine is inapplicable here and suppress all evidence stemming from both searches.

i. Mr. Larson's Fourth Amendment rights were violated when Officer Nelson unreasonably believed that W.M. had authority over the premises for the purpose of consent, and when he unreasonably believed that W.M.'s age and situation were not at issue for a valid consent.

This Court should not find apparent authority to consent, when in light of the surrounding circumstances, an officer would not reasonably believe that the third party's consent would be valid because of the third party's age and lack of sufficient authority over the premises. *Randolph*, 547 U.S. at 114. For a third party's consent to be effective, the factors other courts have considered are: the third party's access to the home and sufficient belongings therein that shows the third party lives there, the third party's name on the lease, whether the third party pays any of the bills, and third party's age and sophistication. *Randolph*, 547 U.S. at 112; *Rodriguez*, 497 U.S. at 184-89.

A third party lacks apparent authority to consent when she cannot access the home, does not pay any of the bills or have her name on the lease, and only has a few belongings in the home. *United States v. Groves*, 530 F.3d 506, 509-10 (7th Cir. 2008). In *Groves*, the third party had moved in with the Appellant five months prior to the search and had a key and "unlimited access" to the home. *Id.* at 510. The third party paid for the telephone bill and her name was on

it, her daughter's school had the Appellant's address on it, and she kept her clothes, mail and bills in the house. *Id.* The third party also cleaned the house frequently. *Id.* The court reasoned that because all of the facts showed that the third party more than resided in the Appellant's home, the officer's belief was reasonable in that the third party had common authority over the premises. *Id.* Therefore, because the third party had common authority over the premises for purposes of consent, the third party's consent to the search of the home was valid. *Id. See United States v. Gutierrez-Hermosillo*, 142 F.3d 1225, 1230-31 (10th Cir. 1998) (Finding that a minor is not automatically barred from consenting to a search unless the search exceeds the scope of the search). *Also, see United States v. Clutter*, 914 F.2d 775, 777-78 (6th Cir. 1990) (finding the minors' consent to search the whole house valid only because the smell of marijuana had filled up the whole house after the minors invited the officers in).

Here, even though W.M. had one duffel bag in the house and she cleaned the house, she did not have sufficient access to the home, enough belongings in the home, and neither her name was on the lease nor did she pay any of the bills. Unlike *Groves*, where the third party had a key and unlimited access to the home, here, W.M. pulled out a key from under a rock in front of the house, showing that her access was limited. Unlike *Groves*, where the third party had her name on the phone and paid for the bill and had mail in the house, here, W.M. did not have her name on anything and did not pay for anything in the house. Unlike *Groves*, where the third party cleaned the house on a regular basis, here, Officer Nelson had reason to believe that W.M.'s cleaning the house was not only sporadic, but was potentially forced by Mr. Larson. Also, unlike *Groves*, where the third party had moved in five months prior and already had personal belongings there with the address on her daughter's school, W.M. only had a duffel bag worth of personal belongings and nothing else to her name even though she had resided there for

approximately a year. Therefore, because W.M. did not have a key or unlimited access to Mr. Larson's home, and because after a whole year, she still had the same duffel bag that she moved in with and nothing more, Officer Nelson should have not reasonably believed that W.M. had common authority over the premises for purposes of consent.

ii. Mr. Larson's Fourth Amendment rights were violated when Officer Nelson searched Mr. Larson's phone, when unreasonably believing that the phone belonged to W.M., and that she had authority over the phone for the purpose of consent.

This Court should find that Officer Nelson's belief was unreasonable in W.M.'s ownership or sufficient authority over the phone in order to give a valid consent to its search. Except in cases where it is absolutely necessary to search, warrantless search of the personal property of one without authority to consent is unreasonable. *Almeida-Sanchez v. United States*, 413 U.S. 266, 269 (1973); *South Dakota v. Opperman*, 428 U.S. 364, 381-82 (1976); *Stoner v. California*, 376 U.S. 483, 486 (1964); *Texas v. Brown*, 460 U.S. 730, 745 (1983). A third party has authority to consent to a search if third party has "joint access or control" of the property. *Matlock*, 415 U.S. at 171; *Rodriguez*, 497 U.S. at 181. A search is reasonable only when other means of trying to "identify and reach" the owner have been exhausted because only the owner's consent to search is valid. *Bumper v. North Carolina*, 391 U.S. 543, 548-550 (1968); *Opperman*, 428 U.S. at 394.

An officer's belief that a third party has joint access over the personal property being searched must be reasonable. *Frazier v. Cupp*, 394 U.S. 731, 740 (1969). In *Frazier*, the officers searched the Respondent's duffel bag via third party consent with joint access to the bag. *Id.* The third party was the Respondent's cousin and the bag was in the third party's home. *Id.* The Court reasoned that because the third party had permission to use the whole bag, the Respondent's objection as to a limited use in a specific compartment of the bag was meritless. *Id.* at 738-40.

The Court further reasoned that because the third party had joint access to the bag, his consent was valid. *Id.* Therefore, because the third party's consent was valid, the officers did not have to ask the Respondent's consent or get a warrant. *Id. But, See, e.g., United States v. Peden*, CR. 06-0300 WBS, 2007 WL 2318977 at *5-6 (E.D. Cal. Aug. 13, 2007) (Finding that even if a minor's consent to enter the home might be valid, searching the bedroom and the computer would exceed the scope of the consent because a minor's consent is limited to the home's threshold).

Here, W.M. did not have joint access to Mr. Larson's phone when she consented to its search. Unlike *Frazier*, where the third party had joint access of the phone because he was using it just like the Respondent would use it, here, W.M. did not have joint access of the phone even though she was allowed to use it in a limited way. Unlike *Frazier*, where the bag was in the third party's home and he was the Respondent's cousin, here, Officer Nelson knew that W.M. was probably being sexually trafficked by Mr. Larson and that this was not really W.M.'s home. Also, unlike *Frazier*, where the third party had equal access to the bag, here, Officer Nelson should have known that W.M.'s age along with the phone's password, its indications, its placement on Mr. Larson's nightstand, and the fact that the officer thought W.M. to be a victim of human trafficking would not give W.M. common authority over the phone in order to consent to its search. Therefore, because Officer Nelson's belief in that W.M. had joint access of the phone was unreasonable, this Court should find that W.M. did not have apparent authority over the phone in order to consent to its search.

iii. Mr. Larson's Fourth Amendment rights were violated when Officer Nelson arrested and removed him from the scene and instead asked W.M. for consent to search Mr. Larson's home, when Officer Nelson should have known that Mr. Larson would have objected.

The Fourth Amendment is a safe-guard against the government's unreasonable conducts if and when they occur. *Camara*, 387 U.S. at 528. If the government conduct during the search and seizure is unreasonable, any evidence stemming from this conduct should be suppressed to deter the government from acting this way. *Alderman v. United States*, 394 U.S. 165, 171 (1969). A co-occupant's consent is valid when the defendant does not refuse to consent, but only in circumstances where police have not obstructed the defendant from the scene in order to avoid objection to the search. *Randolph*, 547 U.S. at 121-22. With reasonableness being the touchstone of the Fourth Amendment, officers can make mistakes at times, but only those mistakes of "reasonable men," believing that facts of a case lead "sensibly" to the conclusion that they might be probable. *Brinegar v. United States*, 338 U.S. 160, 176 (1949); *Rodriguez*, 497 U.S. at 186.

Here, when Officer Nelson arrested Mr. Larson, he arrested him in believing Mr. Larson was guilty of human trafficking, and also he believed W.M. to be his victim. Officer Nelson then proceeded to look at W.M.'s identification and see that she was only 16 years of age. Nevertheless, he made sure to remove the obstacle that was Mr. Larson from the scene and ask W.M. for her consent to Mr. Larson's apartment. A reasonable man of caution would not believe that the minor victim in this case would be capable of consenting to a search of Mr. Larson's home and phone because of the lack of common authority. The same reasonable man of caution would not be allowed to admit this sort of evidence stemming from an invalid consent precisely because he should have known that Mr. Larson would have objected to the search of his apartment and phone, and rightfully so. Therefore, because Officer Nelson should have not

reasonably believed that W.M. had authority to consent when he obstructed Mr. Larson from the scene in order to avoid his objection to the search, this Court should find that Officer Nelson violated Mr. Larson's Fourth Amendment rights.

CONCLUSION

This Court should uphold the Thirteenth Circuit's judgment and find that the special needs exception does not apply to the searches of Mr. Larson's person, home, and property; and that W.M. did not have apparent authority to validly consent to searches of Mr. Larson's home and cell phone.

Respectfully submitted,

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