R. 3.

No. 03-240

In the

Supreme Court of the United States

UNITED STATES OF AMERICA,
Petitioner,

v.

WILLIAM LARSON
Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRTEENTH CIRCUIT

REPLY BRIEF FOR THE RESPONDENT

COUNSEL FOR RESPONDENT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes and Secondary Sources

ISSUES PRESENTED

I. Whether the search of William Larson was permitted pursuant to enforcement of L.O. 1923 under the Special Needs Exception to the Fourth Amendment.

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

STATEMENT OF THE CASE

Victoria City, Victoria was named the host of the Professional Baseball Association's 2015 All-Star Game, to be held on July 14, 2015 at Cadbury Park in the Starwood Park neighborhood in downtown Victoria City ("Starwood"). Record ("R.") at 2. This neighborhood was notoriously infiltrated by two gangs, the Starwood Homeboyz ("Homeboyz") and 707 Hermanos ("707), and the members of these gangs were known to engage in a variety of criminal enterprises, including human trafficking. *Id.* at 2. Following concerns about the potential increase in human trafficking activity which can accompany large sporting events, L.O. 1923 was passed on May 5, 2015 by the Board. *Id.* at 3. L.O. 1923 allowed police to conduct warrantless searches of people who the officer determined to possess particular suspicion.[1] The ordinance was limited in date, location and particular suspicion, respectively: July 11 – July 17, 2015, the three mile radius around Cadbury Park and situations where an individual was obtaining a hotel or motel room and suspected to be involved in the trafficking of minors in commercial sex. *Id.* at 2.

On the night of July 12, 2015, William Larson ("Respondent") was searched and arrested by Officers Joseph Richols ("Officer Richols") and Zachary Nelson ("Officer Nelson"), after entering the lobby of the Stripes Motel with a young female companion ("W.M"). Officers Richols and Nelson searched Respondent and W.M. pursuant to L.O. 1923, despite the admitted lack of probable cause. *Id* at 3. The officers found items in Respondent's jacket which they believed demonstrated that he was acting as a pimp, and W.M. produced a driver's license that revealed she was sixteen (16) years old. *Id.* at 3-4. The officers arrested Respondent for violation of federal

[1] Criterion for finding particular suspicion under L.O. 1923 included the following: "[A]ny individual obtaining a room in a hotel, motel…if that officer has reasonable suspicion to believe that the individual is…a minor engaging in a commercial sex act… [or] an adult or a minor who is facilitating or attempting to facilitate the use of a minor for a commercial sex act as defined by federal law." *Id* at 2-3.

law 18 U.S.C. §1591(a)(1). *Id*. at 4. Officer Nelson then proceeded to engage in lengthy questioning of W.M., going so far as to escort W.M. to Larson's apartment, where W.M. stated she also resided, to conduct a complete and warrantless search of the residence. Throughout the course of his questioning of W.M., Officer Nelson asked questions about W.M.'s relationship with Respondent, the nature of her living arrangements and for consent to search 621 Sasha Lane. W.M. stated that during Nelson's questioning she was nervous and "even shaking a little bit…". *Id.* at 37. In the course of this line of questioning, W.M. revealed that she did not have a key to the apartment and that she did not pay rent. *Id* at 20. Officer Nelson testified that W.M. said "something like, ' yah, that's fine or okay'" in response to his request to search the apartment. *Id*. at 31.

Officer Nelson proceeded to search the entirety of Respondent's apartment. In Respondent's bedroom, under the bed, he found a semi-automatic handgun and a cell phone on the nightstand. R. at 37. The cell phone had a sticker on the phone emblazoned with an "S" and a "W" wrapped around a wizard's hat. *Id.* at 4. Officer Nelson recognized the design as the same one he had seen tattooed on Respondent's forearm. *Id.* W.M. told Officer Nelson that the phone belonged to Respondent, but that she was allowed to use it to access certain social media accounts. *Id.* at 32. She said she did not have to ask permission to use the phone if she was going to access those particular accounts. *Id.* Officer Nelson immediately searched the phone and found photos of Respondent holding the firearm that had been found under his bed, suggestive photos of W.M., and a video of Respondent rapping about pimping. *Id.* at 4.

Respondent was indicted on August 1, 2015 for violations of 18 U.S.C. § 1591(a)(1), Sex Trafficking of Children, and 18 U.S.C. § 922(g)(1), possession of a firearm as a felon. R. at 1. Respondent filed a timely motion to suppress evidence obtained on the date of the arrest and on

October 22, 2015, this motion was denied by the United States District Court for the Western District of Victoria in favor of the government. *Id.* at 1. Respondent appealed this decision to the United States Court of Appeals for the Thirteenth Circuit on January 10, 2016. *Id*. at 14. On February 3, 2016, the Appellate Court ruled in favor of the Respondent, finding that the evidence seized on the date of Respondent's arrest was taken in violation of the Fourth Amendment. *Id*. at 19, 23. Petitioner filed a Petition for certiorari which was granted. *Id*. at 24.

SUMMARY OF THE ARGUMENT

The Court of Appeals for the Thirteenth Circuit's properly found that the searches of Respondent, the apartment at 621 Sasha Lane, and the cell phone found therein were violations of the Respondent's constitutional protections afforded by the Fourth Amendment. R. at 15. Contrary to the government's assertion, the Special Needs Exception was not applicable to the search of Respondent because the primary purpose of the search was the interception and prosecution of criminal actors. Furthermore, the search exceeded the scope allowed under the Fourth Amendment, the Respondent had a reasonable expectation of privacy, and the search regime was not subject to standard or uniform application. Rather, these unreasonable, warrantless searches were made at the discretion of officers.

Moreover, the court correctly found that W.M. did not have authority to consent to Officer Nelson's warrantless searches of either the Respondent's apartment or Respondent's cell phone because W.M lacked the authority to consent to these searches. R. at 21. The facts presented to Officer Nelson should have lead a reasonable person to believe that W.M. lacked authority to consent, or at least, that further inquiry was necessary into the scope of her authority to consent. The circumstances of her detention by the officers, her age, and her tangential contacts with Respondent's property required Officer Nelson to investigate further before invading the privacy of Respondent's home. Finally, the Respondent's cell phone, located on his bedside table, W.M.'s

limited access to the device, and W.M.'s assertion that she did not pay the bill for the phone presented great ambiguity as to the scope and breadth of W.M.'s ability to consent to a search of the entire device. A reasonable law enforcement officer in this circumstance, when confronted with conflicting information regarding access and ownership, would clearly have been aware of the ambiguity of ownership. It was therefore incumbent upon Officer Nelson at this point to either get a search warrant or conduct further inquiry regarding W.M.'s ability to consent, prior to his inspection of the contents of the cell phone. In failing to do either, Officer Nelson violated the Fourth Amendment by unreasonably relying on W.M.'s consent to search the apartment, the bedroom, and Respondent's cell phone.

STANDARD OF REVIEW

Questions which involve facial challenges to the constitutionality of a statute are considered a questions of law, and review of such questions are addressed *de novo. United States v. Perelman*, 658 F.3d 1134, 1134-35 (9th Cir. 2011); *United States v. Vongxay*, 594 F.3d 1111, 1114 (9th Cir. 2010). As such, to the question of the constitutionality of the search of Respondent pursuant to the officers' execution of L.O. 1923, the standard of review would be *de novo.*

The review of the district court's finding that W.M. possessed authority to consent to a search the apartment or the cell phone is a question of law and fact, insofar as the rule of law regarding consent is not in dispute, but rather the facts underlying the consent obtained is at issue. In circumstances such as these, it is generally accepted that the standard of review is *de novo* with regard to the application of the facts to the legal requirements. *Pullman-Standard v. Swint*, 456 U.S. 273, 289 n.19 (1982).

Further, clear error review is applicable where there is a question regarding a factual determination of whether a person provided such consent. *United States v. Shaibu*, 920 F.2d 1423,

1425 (9th Cir.1990); *United States v. Hunt*, 893 F.2d 1028, 1032 (9th Cir.1990). Since the questions presented relative to W.M.'s consent involve her capacity and authority to consent, rather than the factual determination of whether she actually provided it, the question would be subject to *de novo* standard of review. However, both standards provide the authority for this Court to reverse the holdings of the lower courts.

ARGUMENT

Respondent's Fourth Amendment rights were violated when Officer Nelson conducted a warrantless search of his person pursuant to L.O. 1923 without probable cause because the Special Needs Exception did not apply. Furthermore, the searches of Respondent's apartment, bedroom, and cell phone pursuant to W.M.'s consent were unlawful, as W.M. did not possess the authority to provide consent to the searches conducted and Officer Nelson did not act with the due diligence constitutionally required of him when presented with W.M.'s ambiguous authority to consent.

I. THE SEARCH OF RESPONDENT PURSUANT TO L.O. 1923 WAS NOT PERMISSIBLE UNDER THE SPECIAL NEEDS EXCEPTION TO THE FOURTH AMENDMENT

Under the Fourth Amendment of the U.S. Constitution the people have the right "to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. Amend. IV. Searches conducted without prior approval by a neutral and detached judge or magistrate, are considered to be per se unreasonable unless they fall within a specific exception to this rule. U.S. Const. Amend. IV; *Katz v. United States*, 389 U.S. 347, 356 (1967). This rule applies to one's person as much as to their homes. *Terry v. Ohio*, 392 U.S. 1, 9 (1968). It is firmly established that "[n]o right is held more sacred… than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law." *Union Pac. R. Co. v. Botsford*,

141 U.S. 250, 251 (1891). The government stipulated at trial that they did not possess probable cause to search Respondent and did not obtain a warrant to conduct a search of his person. R. at 3.

Where government actors conduct a search of a person without a warrant issued by a neutral and detached magistrate based upon a showing of probable cause, the state must show that the search was within the scope of an exception to this requirement. *Coolidge v. New Hampshire*, 403 U.S. 443, 455 (1971); *Griffin v. Wisconsin*, 483 U.S. 868, 875 (1987) (involving a warrantless search of a probationer's home). Under the Special Needs Exception, searches which are not supported by a warrant or probable cause are to be deemed constitutional where the primary purpose of the warrantless search serves a societal interest which is unrelated to law-enforcement. *Ferguson v. City of Charleston*, 532 U.S. 67, 74 (2001) (drug testing of expecting mothers was unconstitutional because "the immediate objective of the searches was to generate evidence for law enforcement purposes".) Id at 83. Here, the government has erroneously asserted that the search of Respondent falls under the Special Needs Exception to the Fourth Amendment. R. at 6.

The first consideration in determining the application of the Special Needs exception involves balancing the government's ultimate purpose of protecting children against their primary goal of interdicting criminals. "If the primary purpose [of a search policy] is ordinary law enforcement, the special needs doctrine does not apply and the search cannot be upheld under the doctrine." *United States v. Sczubelek*, 255 F.Supp.2d 315, 320 (D. Del. 2003). While protecting children was the ultimate societal goal, the vehicle the government used to achieve this protection was the interdiction and prosecution of criminal actors. L.O. 1923 was used to gather evidence to support conviction of a criminal act, which primarily is a law enforcement goal that ultimately protects society. This stands in opposition to the basic tenets of the Special Needs Exception and the protections of the Fourth Amendment, because all law enforcement goals have societal benefits

that ultimately protect society. In order for a warrantless search to be justified under the Special Needs Exception, the search "serves[s] as [its] immediate purpose an objective distinct from ordinary evidence gathering associated with criminal investigation." R. at 6 quoting *United States v. Amerson*, 483 F. 3.d 73, 81 (2nd Cir. 2007).

Secondary to this analysis, should a special need be found, there must be a balancing of the Government's interests against the privacy interests of Respondent, in order to determine if the warrant requirement was made impracticable because of the special need. *Griffin*, 483 U.S. 868 (1987). In this analysis, consideration of the nature and character of the privacy interest must be considered and balanced against the "nature and immediacy of the government concern at issue." *Vernonia School Dist. v. Acton*, 515 U.S. 646, 654-661 (1995). The Special Needs exception has previously been upheld in limited cases where a person is already subjected to a reduced expectation of privacy. *Skinner v. Railways Labor Executives' Association*, 489 U.S. 602, 617 (1989) (drug testing in the course of employment); *Nicholas v. Goord*, 430 F.3d 652 (2005) (convicted felons required to submit DNA to index database); *Maryland v. King*, 133 S.Ct. 1958 (2013) (DNA taken from an arrestee for index database). Here, the Respondent was subjected to a warrantless search of his person while in a public place by the government without a proper showing of probable cause, a search which is the very foundation upon which the Fourth Amendment is built to protect, and there is no basis to establish that Respondent was a member of a class to which a diminished expectation of privacy may have been considered. The Special Needs Exception can only be substituted for the requirements set forth by the Framers of the Constitution where both a special need and warrant impracticability can be established. *Henderson v. City of Simi Valley*, 305 F.3d 1052 (9th Cir. 2002).

A. The immediate purpose of L.O. 1923 was the law enforcement goal of interdicting and prosecuting criminal actors, rather than a non-law-enforcement related societal interest.

The noble goal of L.O. 1923, as set forth in its inception and introduction, was the reduction and prevention of harm to children who have become victims of human trafficking. R at 2. To be considered constitutional, the primary purpose of searches conducted under the auspices of L.O. 1923 must be a special need which is non-law-enforcement related and this special need must make a warrant impracticable. *National Treasury Employees Union v. Von Raab*, 489 U.S. 656, 665 (1989); *Griffin v. Wisconsin*, 483 U.S. 868 (1987). In the instant matter, the search of Respondent was conducted by law enforcement officers and the Respondent faced immediate prosecution. R. at 4. All law enforcement ultimately serves societal interests, and therefore, for the Special Needs Exception to apply, a statute's immediate rather than ultimate objective is determinative in establishing a search ordinance's primary purpose. *Ferguson v. City of Charleston*, 532 U.S. 83 (2001). It is clear in this case that the prosecution of criminal actors, a fundamental law-enforcement goal, was the primary purpose of L.O. 1923.

In categorizing ultimate versus immediate goals, *Nicholas v. Goord*, is instructive. In Nicholas, the government required convicted felons to provide DNA samples to be indexed in a state database absent a warrant or probable cause, which constituted a search under the Fourth Amendment. *Nicholas v. Goord*, 430 F.3d 652 (2005). In *Nicholas*, the U.S. Court of Appeals found that there was no constitutional violation because the primary purpose of the index served the interests of solving potential crimes distinguished from rather than detecting crime or "deterring recidivism." *Id* at 668. Conversely, while the special need identified by L.O. 1923 was the protection of children, this goal was achieved by means of the arrest and prosecution of

perpetrators of human trafficking. The special need was the ultimate goal, while deterring criminal activity was the primary objective.

Moreover, while L.O. 1923 was motivated by concern for children's safety, the actions of the officers in combination with the implementation of the ordinance demonstrate that the primary and immediate purpose of the ordinance was the interdiction of sex traffickers. When Officers Nelson and Richols stopped Respondent and W.M. in the motel lobby, they did so under the auspices of L.O. 1923, based upon suspicions that Respondent was trafficking a person. Officer Nelson stated that their concerns were based upon the subjective observations regarding the age of W.M. relative to Respondent, the clothing W.M. was wearing, the lack of suitcases, and Respondent's tattoos which Nelson testified he recognized as gang identifiers. R. at 28. The officers conducted a full search of Respondent, including the pockets of his jacket. R. at 4, 28. Based upon this search, the officers found evidence they believed were related to pimping. R. at 4. They immediately arrested Respondent and conducted a warrantless search of W.M., lacking probable cause for either search. R. at 4-5, 28. W.M. produced a driver's license which stated she was sixteen years old. R. at 4.

At this time, instead of providing advocacy, offering medical treatment, or acting in the primary interest of the safety of the child, W.M., Officer Nelson continued asking questions immediately began a full-scale criminal investigation. His primary concern was this investigation, going so far as to follow W.M. to the apartment where she was staying so that he could conduct a warrantless search of Respondent's apartment. Even when W.M. revealed that Respondent had been violent with her in the past (R. at 30), was controlling of her communication with people outside himself (R. at 30), controlling of all finances (R. at 29), required W.M. to provide housekeeping duties at the apartment (R. at 33), and had been engaging in unlawful sexual relations

with W.M., a minor, (R. at 33) the government failed to provide safety and advocacy for W.M., and rather conducted the ordinary duties of law-enforcement as it pertains to the interdiction of sex traffickers. It is clear that the goals of the government were primarily to conduct warrantless searches for the primary purpose of arresting sex-traffickers.

The interests which have qualified a search policy under the Special Needs Exception are varied, however the theme resonates in the ultimate goal being a societal purpose other than prosecution. *Vernonia School Dist*., 515 U.S. 646, 661 (1995) (warrantless drug analysis to ensure safety of student athletes held to be constitutional); *Skinner*, 489 U.S. 602, 617 (1989) (drug screens following major accidents designed to reduce conductor's driving trains while under the influence ruled constitutional). Accordingly, a checkpoint program was determined unconstitutional in *Indianapolis v. Edmond*, because the primary purpose of the checkpoint was detecting criminal wrongdoing in the form of interdicting illegal narcotics. *Indianapolis v. Edmond*, 531 U.S. 32, 34 (2000). Likewise, in *Ferguson*, the search policy instituted by a hospital to test the urine of expectant mothers was ruled unconstitutional, despite the assertion that the search was being conducted for the protection of the child, because the hospital provided the information gained from the search to law enforcement, resulting overwhelmingly in prosecution. *Ferguson*, 532 U.S. 67 (2001). While the ultimate objective of L.O. 1923 was laudable, the implementation of the ordinance resulted primarily and immediately in prosecution and the interdiction of criminal actors. It is firmly established that the special needs test is not satisfied where "the immediate objective of the searches was to generate evidence for law enforcement." *Ferguson v. City of Charleston*, 532 U.S. 67, 83 (2001).

L.O. 1923 proposed to serve a special need, the protection of children, through ordinary law enforcement means, the interception and prosecution of criminal actors. This does not

conform to the requirements of the Special Needs Exception, because the primary goal was law enforcement and, where the search's immediate purpose is "evidence gathering associated with crime investigation", the Special Need Exception is inapplicable. R. at 6; *United States v. Amerson*, 483 F.3d 73, 81 (2nd Cir. 2007). If L.O. 1923 allowed for the detention or search of at-risk children to ensure their safety or created indexes of felons known to engage in human trafficking for prevention purposes, these may have fallen within the purview of the Special Needs Exception. However, the ordinance merely undermined the Fourth Amendment's basic protections to facilitate prosecution of suspected human trafficking perpetrators and this is a fundamental law enforcement objective.

Undeniably, the governmental interest stated at the inception of L.O. 1923, the protection of children from the atrocities of sex trafficking, is as compelling an interest as it is urgent. However, societal goals, many of which are immediate and compelling, are nearly always a component of law enforcement. Therefore, suggestion that the immediacy of the concern for children in this context precludes the necessity for adherence to the U.S. Constitution sets the tone for immunization of "virtually any nonconsensual suspicionless search or objective." Ferguson, 532 U.S. 67, 83 (2001). On this basis, while the concern for all victims crime is immediate, officers are duty-bound to refrain from suspicionless searches. Searches conducted by law enforcement officers that immediately result in prosecution and fail to address the immediate welfare of the suspected victim, fall outside the scope of the Special Needs Exception.

B. The Special Need Identified in L.O. 1923 Did Not Make the Warrant and Probable Cause Requirements Impracticable.

A warrant and probable cause would not be impracticable in this case because there was not a sufficient special need, as discussed above, to support application of the Special Need Exception. To support a search falling within the scope of the Special Needs Exception there must

be a finding that a special need made the warrant and probable cause requirements of the Fourth Amendment impracticable. *Vernonia School Dist.*, 515 U.S. 646 (1995); *State v. Villarreal*, 475 S.W. 3d 784 (2015) (searches of a DWI suspect's blood were unconstitutional where it was taken to further prosecutorial goals and the warrant/probable cause requirement was not impracticable); *Von Raab*, 489 U.S. 656 (1989). In consideration of whether a search regime makes a warrant and probable cause impracticable, the court will first weigh the privacy interests of the Respondent against the nature and immediacy of the government's interests and then analyze the character of the intrusion. *Id* at 665-66. The nature of the balancing test has faced critique, because "the balancing test triggered by the language is so malleable and unprincipled it fails to adequately safeguard the rights protected by the Fourth Amendment…" Buffaloe, Jennifer Y. Special Needs and the Fourth Amendment: An Exception Poised to Swallow the Warrant Preference Rule, 32 Harv. C.R.-C.L. L. Rev. 529 (1997).

In balancing a person's privacy interests against the nature and immediacy of the government's interests, the right of a person to be free from unreasonable searches is firmly rooted in American jurisprudence. A search and seizure under the Fourth Amendment has occurred where there has been a compromise of a person's personal privacy or dominion over his person or property. *Horton v. California*, 496 U.S. 128, 137 (1990); quoting *United States v. Jacobsen*, 466 U.S. 109, 113 (1984). In fact, warrantless searches and seizures of a person are at the heart of the Fourth Amendment. U.S. Const. Amend. IV. The ordinance was outside the scope of the Special Needs Exception and the search conducted of Respondent's person was well-within the protections of the Fourth Amendment. Conducting a full search of a person, including "an individual's person or possessions", is considered anything but *de minimus* and is specifically designated as a search under the Fourth Amendment. U.S. Const. Amend IV; *Terry v. Ohio*, 392 U.S. 1 (1968). The

Petitioner argued to the Appellate Court of the Thirteenth Circuit that L.O. 1923 "authorizes only minimal invasions of privacy." R. at 6. *Terry v. Ohio* is instructive, holding that even cursory, investigative pat-downs of outer-garments for weapons in the course of a brief detention are subject to scrutiny as an unreasonable search and seizure. *Id.*

Furthermore, as in *Horton v. California*, a person maintains their reasonable expectation of privacy when entering a public place, although police are entitled to observe the person. *Horton v. California*, 496 U.S. 128, 137 (1990). The Petitioner reasoned that the invasion was minimal because the scope of the search was limited geographically and to a specified time period, and the searches were to be conducted only where there was individualized suspicion of a particular crime. R at 9. However, searches which are conducted without probable cause that involve a full search of an individual's person are fully within the scope of the Fourth Amendment's protections and the government's interests in law enforcement are not outweighed by a person's reasonable expectation of privacy. U.S. Const. Amend. 4. The fact that incriminating evidence was found does not support the constitutionality of the warrantless search. *U.S. v. Jacobsen*, 466 U.S. 109 (1984) ("a warrantless search could not be characterized as reasonable simply because, after the official invasion of privacy occurred, contraband is discovered.) *Id.* at 114.

The character of the government's intrusion in their search of Respondent and the ordinance under which it was permitted was unconstitutional, because it relied too heavily on the discretion of the officer. As established in *City of Los Angeles, Calif. v. Patel*, warrantless search regimes must "sufficiently constrain police officers' discretion" when determining when searches are appropriate. *City of Los Angeles, Calif. v. Patel*, 135 S. Ct. 2443, 2456 (2015). Here, the geographic area and duration of the ordinance was specific, however, it was left to the officer's discretion to decide whether there was "reasonable suspicion" of trafficking. R. at 2. This broad

sweeping generalization may have applied to anyone who walked into the hotel where the officers were posted, since there is not sufficient basis to apply a standard test to all people searched. As stated in *Horton*, "evenhanded law enforcement is best achieved by the application of objective standards of conduct, rather than standards that depend upon the subjective state of mind of the officer. *Horton v. California*, 496 U.S. 128, 138. A uniform search regime further removes it from a Fourth Amendment violation, because where the searches can be standardized, whether implemented by either a magistrate or an individual, the requirement of the warrant becomes impracticable or redundant. The discretion of law enforcement officers is widely accepted as unconstitutional in instances where criminal prosecution is virtually a foregone conclusion. R. at 19; *Camara v. Municipal Court of City and County of San Francisco*, 387 U.S. 523, (1967) (determining "broad statutory safeguards are no substitute for individualized review, particularly when those safeguards may only be invoked at the risk of a criminal penalty"). *Id* at 533.

As stated in *Skinner*, the "essential purpose[s] of a warrant requirement is to protect privacy interests by assuring citizens subject to a search or seizure that such intrusions are not the random or arbitrary acts of government agents." *Skinner*, 489 U.S. 602, 621-622. (drug testing of railway employees was conducted immediately following an incident causing damage, as the Court noted that "alcohol and other drugs are eliminated from the bloodstream at a constant rate.") *Id*. at 623. In *Skinner*, anytime there was an incident which caused damage, a drug and alcohol screen was mandated and the rapid elimination of evidence supported the immediacy of the government's concerns in this case and as a result, the search regime suggested by the policy was uniform and standardized. *Id.* Likewise, in *King* and *Nicholas*, DNA was taken from all members of a particular class (arrestees or felons convicted of specific crimes, respectively) for the purposes of indexing, not prosecution. *Nicholas*, 430 F.3d 652 (2005); *King*, 133 S.Ct. 1958 (2013). In all of

these cases, as noted in *Skinner*, there were "virtually no facts for a neutral magistrate to evaluate, in light of the standardized nature of the tests and the minimal discretion vested in those charged." *Skinner*, 489 U.S. 602, 604 (1989). In the instant matter, conversely, the invasion was unsupported by any standard test for application of L.O. 1923. Therefore, with broad and general direction as to the application, the officer's discretion became the definitive factor in whether a person was subjected to a search.

The search conducted pursuant to L.O. 1923 by law enforcement should properly be ruled as a violation of Respondent's Fourth Amendment protections, and all evidence from this search should be suppressed. The ordinance and resulting search of Respondent was for the purposes of interception and prosecution of criminals, violated Respondent's right to be free from unreasonable searches, and relied too heavily on the subjective discretion of the officers.

II. OFFICER NELSON IMPROPERLY RELIED ON W.M.'S AUTHORITY TO CONSENT TO A SEARCH TO AVOID OBTAINING A SEARCH WARRANT FOR RESPONDENT'S APARTMENT AND CELL PHONE.

The government violated Respondent's Fourth Amendment rights when Officer Nelson relied on the consent of W.M. to search Respondent's apartment, bedroom and cell phone. Officer Nelson unreasonably assumed that W.M. had authority to consent to the apartment despite the circumstances under which Respondent was arrested and the ambiguous nature of the relationship between W.M. and Respondent. Officer Nelson was obliged to have made further inquiry given the circumstances herein. Furthermore, in his search of Respondent's cell phone, Officer Nelson exceeded the scope of consent which W.M. would reasonably have been able to provide based upon the information which was available to him at the time of his search.

A. Officer Nelson's warrantless search of Respondent's apartment, including the bedroom, was per se unreasonable under the Fourth Amendment because the search did not fall within an exception to the warrant requirement.

Officer Nelson failed to adequately ascertain the limits and scope of W.M.'s ability to consent, and therefore conducted a search that violated Respondent's Fourth Amendment rights as it relates to one of society's most sacrosanct places, a person's home. The "physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed." *Welsh v. Wisconsin,* 466 U.S. 740, 748 (1984) quoting *United States v. United States District Court,* 407 U.S. 297, 313 (1972). This Court has long recognized that a person's home is where their privacy interests are the very highest. *Payton v. New York,* 445 U.S. 573, 590 (1980). ("[T]he Fourth Amendment has drawn a firm line at the entrance to the house."). Thus, searches and seizures inside a home without a warrant are presumptively unreasonable. *Id.* at 586. That presumption is subject only to a few specifically established and narrowly defined exceptions, consent being one of those special exceptions. *Schneckloth v. Bustamonte,* 412 U.S. 218, 219 (1973); *Katz v. United States,* 389 U.S. 347, 357 (1967). Finally, for consent to be valid it must be given freely and voluntarily. *Bumper v. North Carolina,* 391 U. S. 543, 548 (1996).

Consent from someone other than the subject of the search may authorize an entry and search of a home. *U.S. v. Matlock,* 415 U.S. 164, 170 (1974). In order for that consent to be valid, the third party must have common authority to consent to an entry and search. *Illinois v. Rodriguez,* 497 U.S. 177, 181 (1990). The burden rests on the government to prove by a preponderance of the evidence that W.M. had the authority to consent. *Id*. at 181; *U.S. v. Rith,* 164 F. 3d 1323, 1328 (1999). Validity of a third party's consent to search relies upon an objective inquiry to be conducted by officers prior to the search to determine if the facts available to the officer at the time of the search would "warrant a man of reasonable caution" to believe that the party providing consent had authority over the premises." *Rodriguez,* 497 U.S. 177, 188 (1990).

As established in *United States v. Cos*, where "the facts known by the police cry out for further inquiry… it is not reasonable for the police to proceed on the theory that "ignorance is bliss." *United States v. Cos*, 498 F.3d 1115, 1128 (10th Cir. 2007) quoting 4 Wayne R. LaFave, Search and Seizure § 8.3(g) at 180 (4th ed. 2004). Therefore, turning a blind eye to his reasonable doubts was not proper and Officer Nelson's continued search of the apartment despite ambiguity of consent violated Respondent's reasonable expectation of privacy in his home. Importantly, Officer Nelson stated that when he found W.M.'s Driver's license, he "knew she was probably the victim here." R at 29. A reasonable officer who faces "an ambiguous situation" regarding the ability of a person to consent because of the unique nature of the circumstance is required to inquire further to resolve the ambiguity. *United States v. Kimoana*, 383 F. 3d 1215, 1222 (10th Cir. 2004) ("Where an officer is presented with ambiguous facts related to authority, he or she has a duty to investigate further before relying on the consent."); *Montville v. Lewis*, 87 F.3d 900, 903 (7th Cir.1996).

Doubting W.M.'s authority to consent to a search of Respondent's apartment was reasonable. In the case at hand, Officer Nelson chose ignorance over further inquiry. With twelve years of experience, Officer Nelson should have known that "the existence of consent to a search is not lightly to be inferred." *United States v. Reid*, 226 F.3d 1020, 1025 (9th Cir. 2000). His initial contact with W.M. led him to believe that W.M. was not at the motel as the Respondent's girlfriend, but a child victim of sex trafficking who was being used as a tool of his illicit activities. R. at 29. In questioning W.M., Officer Nelson found that she was a run-away, that she did not have a key to Respondent's apartment, and that she was "restricted to those areas that benefitted Respondent." R. at 20. In addition, Officer Nelson uncovered the fact that W.M. did not have her own bedroom, that she was forced to perform all the chores, was subjected to physical violence,

and that her possessions in the apartment were limited to a duffle bag. R. at 30-31. Finally, Officer Nelson observed that not too many 16-year-olds have control of their own apartment and this was "a pretty abnormal situation." R. at 34. By Officer Nelson's own admission, at one point in his questioning of W.M., he "wasn't entirely sure" whether W.M. had mutual use of the apartment. R. at 30. He stated that he felt "they were probably sharing the apartment" when he learned that W.M. kept a duffel bag of personal effects at the apartment and had mail delivered to the address. R. at 30-31.

Moreover, in *United States v. Purcell*, the Sixth Circuit found that "when a situation starts as unambiguous, but subsequent discoveries create ambiguity, any apparent authority evaporates, and once that apparent authority disappears, officers ought to obtain a warrant." *United States v. Purcell,* 526 F.3d 953, 964 (6th Cir. 2008). The situation herein was unambiguous in that it led two officers to presume that Respondent and W.M. were not checking into the motel as normal guests, and that it was very likely she was a victim of the sex trafficking gang.

The government argues that Officer Nelson reasonably concluded that W.M. had joint control of the apartment because she is the Respondent's girlfriend, therefore, she maintained a level of authority over the apartment to give consent to the search. R. at 31. Further, citing to *United States v. Hudson,* they asserted that W.M.'s statement that she lived at the apartment and production of a key is sufficient basis for apparent authority. *United States v. Hudson,* 405 F.3d 425, 441(6th Cir. 2005). (A defendant's girlfriend's assertion as to her domicile and production of a key constituted sufficient apparent authority). In this case, however, Officer Nelson saw that W.M. did not have her own key, but rather she gained access to the apartment by using a key located under a fake rock to unlock the door to Respondent's apartment. R. at 31.

Furthermore, W.M. told Officer Nelson that the Respondent allowed her to stay at the apartment after she ran away from home and that, despite spending over a year there, she only stored a small duffel bag of personal effects at the apartment. As discussed in *Penney,* "[a] co-occupant's "common authority" depends not on property rights, but on mutual use of the property by persons generally having joint access or control for most purposes." *United States v. Penney*, 587 F. 3d 297, 307 (6th Cir. 2009). The lack of a key and personal belongings serve to further detract from the likelihood that W.M. shared joint access and control to the apartment. Based on what Officer Nelson knew after briefly questioning W. M., her use of Respondent's apartment was limited in access and in control. R. at 20.

Finally, Officer Nelson indicated that Respondent and W.M. appeared to be in an "affectionate relationship." R. at 12. This observation stands in direct opposition to Officer Nelson's observation that W.M. was a commercial sex trade victim of Respondent's. R. at 29. In fact, Officer Nelson had just arrested Respondent for sex trafficking of a minor in violation of 18 U.S.C. § 1591(a)(1) for crimes perpetrated against W.M. by Respondent. The contradictory nature of these observations serve two distinct interests, which are mutually exclusive. Either Officer Nelson thought that Respondent exercised abusive control over W.M. and encouraged or facilitated her, a child, to engage in commercial sex acts, and this suspicion justified his search and arrest of Respondent at the hotel, or, the two were in an "affectionate relationship."

Furthermore, a reasonable law enforcement officer with as much experience as Officer Nelson would have had reason to believe that a homeless child would easily become the target of sex traffickers, and that W.M. was a naïve 16 year-old who was mistaken or deliberately misled in her assessment of her relationship with Respondent. Tellingly to her misapprehension, she believed that she was an equal partner in the sex-trafficking business with Respondent, despite the

fact that she did not share in the profits of the venture, and was in fact, a child victim of the illegal enterprise. This further serves to create ambiguity in the nature and scope of authority W.M. possessed over the apartment.

In the face of yet another latent ambiguity in the relationship and the circumstance of the search of Respondent's apartment, Officer Nelson was obliged to exercise due diligence in establishing the scope of consent W.M. possessed and the objective nature of the relationship to a reasonable law enforcement officer. *U.S. v. Meada*, 408 F.3d 14, 21 (2005). (There is no constitutional violation where an officer reasonably, but mistakenly believe they have consent to search.) *United States v. Goins* demonstrates the due diligence to which an officer is bound in order to maintain the integrity of the Fourth Amendment regarding third party consensual searches of a private residence. *United States v. Goins*, 437 F.3d 644, 649 (7th Cir. 2006). Unlike in this case, when faced with ambiguity, the officers in *Goins* asked a substantial number of questions in order to ascertain the scope and breadth of a third party's authority, even going so far as to call the Assistant District Attorney to verify the acceptability of the consent obtained. *Id*. at 649.

Officer Nelson said that he and the other officer were looking for signs of human trafficking when they came upon Respondent and W.M. on the day of the search. R. at 27. The officers detained, searched and arrested Respondent for charges related to this crime and then followed W.M. to Respondent's apartment to conduct additional search. Because of this background, it is clear that, Officer Nelson knew this was not a normal lover's "affectionate relationship", but one of sinister dominion and control over the life of a human being. As established in *Rodriguez,* a law enforcement officer is allowed search without further inquiry if "the facts available to the officer at the moment ... warrant a man of reasonable caution in the belief that the consenting party had authority over the premises." *Rodriguez*, 497 U.S. 181, 188, (quoting *Terry v. Ohio*, 392 U.S.

1, 21–22 (1968)) (internal quotation marks omitted). It is clear that a reasonable officer had reason to seriously question the authority vested in the child victim of a sex-trafficking operation.

The government cites W.M.'s access to the apartment as evidence of her ability to consent to a full search of the entire premises. However, as discussed in *Cos*, the Court held that a "third party's mere presence on the premises to be searched is not sufficient to establish that a law enforcement officer of reasonable caution would believe that she had "mutual use of the property by virtue of joint access" or control for most purposes." *Cos*, 498 F.3d at 1115 (10th Cir. 2007) quoting *Rith*, 164 F.3d at 1329. The Court went on to say that in such instance, the government should have provided further evidence to back its claim of apparent authority. *Id.* In the situation herein, the circumstances would have lead a person of reasonable caution to believe that further evidence was needed to ascertain the true nature of W.M.'s authority or lack thereof.

Furthermore, W.M.'s mere access to the apartment was not conclusive evidence of her "mutual use" or joint control to Respondent's apartment. As established in *United States v. Turner*, apparent consent should not be deduced from an individual's simple access, and, when in doubt, the duty of an officer is to make further inquiries rather than "turn a blind eye to the situation." *United States v. Turner*, 23 F. Supp. 3d 290, 308 (S.D.N.Y. 2014). As the Appellate Court correctly concluded herein, "simple access is not enough to infer apparent authority. R. at 20.

Officer Nelson made inquiry into the true nature of W.M.'s relationship with Respondent which revealed numerous signs that W.M. was a victim subject to the control of Respondent: she did excessive work in the apartment, sometimes by physical force; she did not have her own key; she did not have her own money; she was not allowed to have her own cell phone; and she only had a duffle bag at the apartment. R. at 29-31.The facts presented suggested that W.M. was not authorized to consent to a search of Respondent's home and that a reasonable law enforcement

officer had significant reason to doubt W.M's authority. Officer Nelson's observations should have made a reasonable law enforcement officer aware of the predatory and controlling nature of the relationship between W.M. and the person arrested for perpetrating a child sex-trafficking operation at her expense. If further inquiry had left him with doubts and ambiguity, it was incumbent upon Officer Nelson to seek a warrant based on probable cause to search the apartment. Thus, the government did not meet its burden of showing that W.M. had common authority to authorize the search of Respondent's apartment.

At this point, his assumption of apparent authority on W.M.'s part should have evaporated. It is then when Officer Nelson should have obtained a search warrant for the premises, including the bedroom. The facts in the case herein show that W.M. did not meet the *Matlock* standard of an individual "who generally had joint access or control for most purposes." *Matlock*, 415 U.S. 164, 170 (1974). It is the officer's contention that W.M. was a victim of Respondent, and as such, she was not a co-inhabitant "with a right to consent" to the inspection in her own right. Furthermore, a salient fact in the case at hand that distinguishes it from *Matlock* and other cases that cite *Matlock* is that W.M is not Respondent's wife or even a girlfriend, but that she is suspected of being the Respondent's victim in sex trafficking. *Matlock* makes it clear that relationships between husband and wife, boyfriend and girlfriend are not sufficient to establish "common authority" but such authority is usually present in cases that find common authority to consent exists. The relationship between W.M. and Respondent appears to be of the type which created a presumption of control and which led the officers to arrest Respondent. Their simple cohabitation relationship does not rise to a level that would trigger a presumption of "common authority" for W.M.

B. **Respondent's expectation of privacy in the cell phone was frustrated by Officer Nelson's private search because he proceeded without a warrant and assumed W.M. had apparent authority to consent**

Officer Nelson improperly relied on W.M.'s consent to search Respondent's cell phone. Where a police officer knows that a consenting party does not own a specific item, that officer may not rely on that party's apparent authority to conduct a search. *United States v. James*, 353 F.3d 606, 615 (8th Cir. 2003). Furthermore, where a law enforcement officer "realizes that he/she has stumbled upon sensitive information due to an increased expectancy of privacy, that officer should proceed with commensurate caution." *U.S. v. Smairat*, 503 F. Supp 2d 973, 991 (N.D. Ill, 2007).

The location of the cell phone on Respondent's nightstand suggests that it was the property of Respondent. It was evident from the layout of Respondent's bedroom that Respondent had his night table and W.M. had hers. Officer Nelson indicated that Respondent's night table showed condoms, men's glasses, a fake Rolex men's watch and an Apple iPhone 5S whereas W.M.'s night table showed a Seventeen Magazine and a pink eye cover. R. at 35. The cell phone was marked with a design that the officer recognized as associated with Respondent. These facts serve to suggest that the phone was Respondent's property.

Furthermore, Officer Nelson asked W.M. if the phone belonged to her and she responded that she shared it with Respondent. R. at 31. W.M. indicated that she did not choose the sticker on the phone, she did not pay for the expenses relating to its maintenance, and that any "joint access" was limited to what Respondent allowed. R. at 32. She further indicated that she was allowed to send some personal texts and make some calls, but that Respondent also used it to make calls and send texts for the business they had together. The "business" to which W.M. referred was suggested at the time of Officer Nelson's search to be a child sex trafficking ring of which

W.M. was a victim, although the nature of the shared business was intentionally not clarified by Officer Nelson. R. at 29. Respondent told W.M. to utilize this cell phone, subject to his well-delineated restrictions, after he became angry and violent when she used her own cell phone to communicate with someone of whom he disapproved. These restrictions further served to cause ambiguity with regard to W.M.'s authority to provide consent for a full search of the cell phone.

These facts taken together should have led a reasonable officer to believe that W.M. did not have joint access to or complete control of the cell phone and to "act with an overabundance of caution where the location and surroundings of an item indicate that it very likely belongs to somebody other than the party giving consent." *United States v. Taylor*, 600 F.3d 678, 681-682 (6th Cir. 2010); *see also Goins*, 437 F.3d 644 (7th Cir. 2006). Here, the location of the phone on Respondent's night table as well as the limitations on the scope of use Respondent placed on W.M. should have led Officer Nelson to believe that the cell phone was the property of Respondent. W.M. had limited access to some of the contents of the cell phone, but it is apparent from the facts presented to Officer Nelson that she did not have unlimited access to the device. Given the circumstances, there was significant basis to doubt W.M.'s authority to consent to a search of the entire cell phone.

Moreover, as established in *Trupiano v. U.S.*, "[i]t is a cardinal rule that, in seizing goods and articles, law enforcement agents must secure and use search warrants wherever reasonably practicable." *Trupiano v. U.S.*, 344 U.S. 699, 706 (1948). Respondent had a greater expectation of privacy in the cell phone because of the volume and quantity of personal information which is stored on cell phones. In *Riley*, the court found that searching a cell phone constitutes a deeper privacy intrusion because 90 percent of the population carries a cell phone and they often contain information which provides insight into different facets of a person's private life. *Riley v.*

California, 134 S. Ct. 2473, 2485 (2014). *Riley* went so far as to rule that generally cell phones cannot be searched without a warrant. *Id.* at 2479. The ambiguity in the scope of W.M.'s access and control over the device combined with the volume of private information and lack of exigent circumstances create no reasonable basis for Officer Nelson to circumvent the warrant requirements of the Fourth Amendment. As the court stated in *Riley*, "digital content cannot directly endanger police" and data can generally be recovered even where it has been deleted. *Riley,* 134 S. Ct. 2473, 2485 (2014). The cell phone could have been easily secured by Officer Nelson until he obtained a warrant. Because of the amount of private information on cell phones "can reveal every aspect of an individual's life", a search of a container with this volume of storage must be protected with the utmost regard for the owner's privacy. *Id* at 2488.

In the absence of exigency or consent, it was incumbent upon Officer Nelson to secure the device and seek a warrant before searching the entire cell phone, an item in which Respondent held a higher expectation of privacy. Since Officer Nelson searched Respondent's cell phone without proper consent or a warrant, evidence found on the Respondent's cell phone was obtained in violation of the Respondent's Fourth Amendment rights. For such reason, this Court should suppress the evidence found in the cell phone because the circumstances show that Officer Nelson improperly relied on W.M.'s authority to consent.

CONCLUSION

For the above reasons, the United States Court of Appeals for the Thirteenth Circuit's holding should be *affirmed.*

Respectfully Submitted,

Team R. 3.
Counsel for Respondent
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