No. _____

In The
Supreme Court of the United States

STATE OF IOWA,

Petitioner,

v.

MARVIS LATRELL JACKSON,

Respondent.

On Petition For Writ Of Certiorari To The Iowa Supreme Court

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

When an individual consents to the search of a room he occupies, when may a law enforcement officer, consistent with the Fourth Amendment, search a closed container found within that room?

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The opinion of the Iowa Supreme Court is published at *State v. Jackson*, 878 N.W.2d 422 (Iowa 2016). Pet. App. 1. The Iowa Court of Appeals decision is unpublished and can be found at 867 N.W.2d 195 (Table) 2015 WL 2089357 (Iowa Ct. App. filed May 6, 2015). Pet. App. 87. The relevant suppression order is also unpublished, but attached at Pet. App. 98.

JURISDICTION

The judgment of the Iowa Supreme Court was entered on April 29, 2016. Pet. App. 1. This Court has jurisdiction. 28 U.S.C. §§ 1257(a), 2101(c).

CONSTITUTIONAL AND STATUTORY PROVISIONS

I. United States Constitution, Amendment 4.

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated. . . .

STATEMENT OF THE CASE

This case presents a common issue of criminal procedure: whether it is reasonable under the Fourth Amendment for police to search closed containers

within a residence to which they have been given permission to search by one of its tenants. A recognized split of authority has emerged. Some courts have held that the search of closed containers requires more than consent to search the place in which the containers have been found. Because others might possess an interest in that property, these courts hold that no reasonable officer would search a closed container without additional inquiry of the consenting party as long as there is any uncertainty as to who owns the container. Other courts have held that a person's consent to the search of a place over which he or she has apparent authority presumptively provides consent to search closed containers within that room unless it is obvious from the particular circumstances that the container is owned by someone else.

The Iowa Supreme Court divided 4-3 over whether it was reasonable for an officer to search a backpack in a bedroom after the bedroom's occupant had given permission to search that room. The majority concluded that the officer was required to inquire further. The dissent disagreed, finding that the officer acted reasonably in searching the closed container based on the initial consent to search the room. This case presents an ideal vehicle to resolve the conflict over when officers may search closed containers found during consensual searches.

A. Factual Background

1. The Crimes

The facts are largely undisputed and were summarized by the district court in ruling on the motion to suppress.

Jackson is charged with two separate robberies in the first degree. In the first instance, Iowa City Officer Michael McKenna was dispatched to the On the Go BP gas station in Iowa City at 9:39 p.m. on November 13, 2012, to investigate a reported armed robbery. Pet. App. 100. On The Go BP employee March Schumacher, the store clerk during the robbery, explained to Officer McKenna that a black male with a thin build wearing a black mask and a red coat had come into the store, pointed a gun at Schumacher, and demanded the money in the cash register and a carton of Newport 100's cigarettes. Pet. App. 100. Schumacher reported that $476.00 in cash and $62.00 worth of cigarettes were stolen. Pet. App. 101.

A few days later, Detective Scott Stevens watched the surveillance video and observed that "the robber was a medium-height, black male, wearing a red coat, a black face mask, and black and white tennis shoes." Pet. App. 101. The robber pointed "a black semi-automatic pistol" at Schumacher demanding money and cigarettes. Pet. App. 101.

On December 13, 2012, a customer told Schumacher that the robber's uncle identified the robber as "Juicy," using his street name. Pet. App. 101. Detective

Stevens thereafter identified Juicy as Marvis Latrell Jackson but was unsuccessful in locating him on a pre-existing warrant. Pet. App. 101

In the second case, directly leading to the search in question**,** an armed robbery was reported at 12:35 a.m. on December 31, 2012. Pet. App. 102. Iowa City Police Officer Michael Smithey was dispatched to Gumby's Pizza in Iowa City to investigate. Gumby's Pizza employee Adam Carlson was working on that night. Pet. App. 101. He reported to Officer Smithey that two black males had entered the restaurant and demanded money. Pet. App. 102. One of the men had a black handgun and pointed it at Carlson when he made the demand. Pet. App. 102. Carlson estimated that the robbers took $125 in one-dollar bills, $50 in five-dollar bills, and one twenty-dollar bill.

Matthew Smith was outside when the robbers ran away from the restaurant and relayed that information to the officers who called for a canine unit to help locate the two men. Pet. App. 102. Using shoeprints in the snow, officers tracked the men to an apartment building on South Gilbert Street. Pet. App. 102. There, "Officer Smithey noticed a tall black male looking intently at them out of a window from a second-floor apartment," and when officers approached the door of that apartment, the lights went off and they heard the door lock from inside. Pet. App. 102-03. When "Officer Smithey knocked on the door and announced that he was a police officer," Wesley Turner answered the door. Pet. App. 103.

B. The Search

Officers explained they were investigating a robbery. Pet. App. 103. When asked who else was present, Turner said he, his girlfriend Allyssa Miller, and Gunnar Olson lived there. Pet. App. 103. Turner said Olson was sleeping in his room. Pet. App. 103. Officers asked to speak to Olson, who came out of one bedroom to speak to Officer Smithey. Pet. App. 103. Olson said he lived there with Turner and Miller. Pet. App. 103.

When Officer Smithey asked to look in Olson's room, Olson first said his cousin was sleeping in there, but then could not provide a last name. Pet. App. 103-04. Olson then admitted the person was not a cousin and said he was surprised to find Jackson sleeping next to him when he was woken up. Pet. App. 103-04. Jackson was shirtless and lying on the only bed, which was an air mattress on the floor. Pet. App. 104. Both officers observed that Jackson had sweat on the back of his neck and brow. Pet. App. 104. Olson attempted to rouse Jackson, which seemed more difficult "than it should have been." Pet. App. 104. When Jackson identified himself, officers discovered the outstanding arrest warrant and placed him into custody without incident before handing him over to another officer. Pet. App. 104.

At that point, Olson said he did not know when Jackson had arrived, that "he [Olson] lives in that bedroom alone," and he did not know of any guns in the room. When asked, Olson gave Smithey consent to

search his bedroom to look for evidence of guns and the robbery. Pet. App. 104.

When Officer Smithey began searching Olson's bedroom he noticed a closed backpack on the floor at the edge of the closet without visible identification. Pet. App. 104. Officer Smithey opened the backpack and saw a wallet, dark jeans that were wet around the ankles, and a black handgun underneath the jeans. Pet. App. 104. Inside the wallet, Smithey found identification belonging to Jackson. At that point, he stopped searching and took a photograph of the gun to use in a search warrant application for the apartment. Pet. App. 104-05.

C. Procedural Background

Jackson was charged in Johnson County District Court with two counts of robbery in the first degree. Iowa Code § 711.2 (2013). Pet. App. 123. He moved to suppress, contending the search of a backpack violated his rights under the Fourth Amendment. Pet. App. 98-99. The district court denied the motion. Pet. App. 121. Following a bench trial, the court convicted Jackson of both counts of second-degree robbery. Pet. App. 142.

The court of appeals affirmed in a unanimous opinion, concluding that nothing about the circumstances should have caused the officers to question Olson about the ownership of the backpack. Pet. App. 87-88, 94. Although not citing any federal cases, the

court of appeals recognized that it was reasonable for the officer to conclude that Olson, the occupant of the bedroom, consented to the search of closed containers in the bedroom that might contain the gun they were seeking.

The Iowa Supreme Court reversed in a 4-3 opinion. The court concluded that the State had not proven that the officer obtaining the consent and conducting the search had a reasonable belief that the scope of the search included the backpack in the bedroom. That was so, found the court, even though the bedroom was the consenting party's bedroom and a second person's presence in the bedroom was unexplained. To resolve the case, the court adopted the general rule that officers cannot search closed containers in an area to which the occupant has given consent without further inquiry of others in the dwelling that might have a possessory interest in that item. Pet. App. 42.

The court recognized that the question begins with an analysis of *Illinois v. Rodriguez*, 497 U.S. 177, 186 (1990), that held apparent authority exists when objectively the officer possessed a reasonable belief that the individual consenting to a search had authority over the place. Pet. App. 14, 17. However, the court noted that *Rodriguez* did not resolve the case at bar because "[t]he Supreme Court has yet to apply the doctrine of consent by apparent authority to a closed container found within the home under these circumstances." Pet. App. 17. The court then found that, absent definitive guidance from this Court, the federal

courts of appeals are divided over how the apparent-authority doctrine is applied when closed container searches are at issue. Pet. App. 18-30.

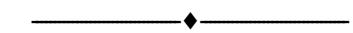
More specifically, the court noted that some courts impose a duty of additional inquiry after consent is given if the authority of the person giving consent is ambiguous as to any closed containers. By contrast, other jurisdictions have determined that absent some reliable information obvious to the officer that indicates the person does not have authority to consent to a search of a closed container within their residence, a search of those containers is reasonable based upon the original consent. Pet. App. 18, 25. The court identified the Sixth and Tenth Circuits as subscribing to the first position while the Second and Seventh Circuits subscribe to the second. Pet. App. 18-30. Ultimately, the Iowa Supreme Court majority sided with the Sixth and Tenth Circuits, concluding that "to flip the presumption of reasonableness that generally applies to warrantless searches merely because a third party explicitly granted consent to a premises search would be inconsistent with *Rodriguez*." Pet. App. 33. Because the officer did not make any additional inquiries of the resident about the backpack in his room, the officer, according to the majority, violated the Fourth Amendment by searching it pursuant to the consent. Pet. App. 42.

Three justices dissented. The dissent noted that the officers were following tracks from a robbery that had just occurred and those tracks led to the apartment building where this apartment was located. Pet.

App. 63, 67. Turner, an apartment resident, consented to the officer's entry into the apartment. Pet. App. 63, 67. Miller, Turner's girlfriend and an apartment resident, was also in the apartment. Pet. App. 63, 67. Turner and Miller told the officers no one else but Olson was present. Pet. App. 63, 67. Turner claimed to have been in the apartment since 9:00 p.m. and claimed to have seen nothing suspicious. Pet. App. 64, 67. Roused from his supposed sleep, Olson, like Turner and Miller claimed no one else was in that apartment. Pet. App. 64, 67. The dissenting justice recognized that all three were obviously lying to the police at this time because Jackson was obviously there. Pet. App. 68. In fact, Olson admitted his cousin Marvis had arrived supposedly sometime after he had fallen asleep, but almost immediately conceded that Marvis was not his cousin and he did not, in fact, know the individual's last name. None of the three residents suggested that Jackson broke in to the apartment, nor did they suggest he was a tenant, or an overnight guest. Based upon these facts, the dissent was unwilling to accept the majority opinion that Turner had been home since 9:00, that no one had arrived at the apartment recently, and that Turner had not seen anything suspicious. The dissent concluded that the statements accepted by the majority "defy credibility." The majority also found no explanation of the defendant's feigned sleep and obvious sweating necessary, because he was cooperative "once he was awake." Pet. App. 69. The dissent found this conclusion equally incredible. Pet. App. 69. While the majority believed the lack of concern shown by the tenants indicated that Jackson was a regular presence in

the apartment, it was more probable that the tenants were simply maintaining a ruse to lead police away from Jackson.

Finally, the dissent characterized the majority's opinion as entering "into the realm of fantasy" because it suggested that the individual who had likely just fled a robbery, arrived at the apartment minutes before, threw his clothes off and jumped into bed to feign sleep had a key to the apartment. Pet. App. 71. The dissent noted that Turner, Miller, and Olson had all tried to conceal Jackson's presence and never explained it after their original lies. The majority opinion concluded that he must have had a key, but the dissent thought it much more likely that Jackson had just arrived barely evading police pursuit and Turner, Miller, and Olson were hiding him hoping to avoid capture. Pet. App. 71-72.



REASONS FOR GRANTING THE WRIT

In *Illinois v. Rodriguez*, the Court reiterated that the Fourth Amendment does not demand that an officer be correct when executing a search or seizure; it requires only that he or she act reasonably. *Rodriguez*, 497 U.S. at 184. When explicit consent is given to a requested search, the surrounding circumstances define whether a reasonable person would doubt the assertion being made by the individual and not act upon it without further inquiry. As with other factual

determinations bearing upon search and seizure, determination of consent to enter and search must "be judged against an objective standard: would 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?" *Id.* at 188. Lower courts have struggled, however, in applying that test to closed containers found during consensual searches.

Some courts have modified the *Rodriguez* test to require officers to inquire further concerning ownership of closed containers before they may search those items – even where consent to search that location has been given and the evidence being sought could be contained therein. Other courts have concluded that containers that might contain the evidence sought are included within the scope of consent to search the area unless it is obvious that the person consenting lacked authority over the specific containers. An open and persistent split among the lower courts now exists. *See* Frank J. Stretz, *An Objective Solution to an Ambiguous Problem: Determining the Ownership of Closed Containers*, 61 DePaul L. Rev. 203, 214 (2011) (noting the circuit split and labeling it the Obviousness/Ambiguity split). The Court should use this case to resolve the split.

I. The Courts are Deeply Divided on Whether Officers, Consistent with the Fourth Amendment, May Search Closed Containers Located in Areas to Which Consent to Search has been Given.

In *Illinois v. Rodriguez*, 497 U.S. at 181, the court found law enforcement may rely on a person's *apparent* authority, as determined by an objective, totality-of-the-circumstances test to consent to the search of a place. Courts have split over how to apply the apparent authority concept when the individual has apparent authority over a room (or other area), but might not have authority over the effects within that room. This case asks the question whether it is reasonable for an officer to rely upon the apparent authority of a person consenting to the search of a room to search closed containers within that room.

The Fourth Amendment protects against unreasonable search and seizures. U.S. Const. amend. IV. As a general rule, searches conducted without a warrant are presumptively unreasonable. *Katz v. United States*, 389 U.S. 347, 357 (1967). Yet, because the touchstone of the Fourth Amendment is reasonableness, there are certain exceptions to the general principle, one of those exceptions being consent. *Id.* A search may be conducted by law enforcement officers, even without probable cause, as long as the consent is voluntary and given by someone with apparent authority to consent. *Fernandez v. California*, 134 S.Ct. 1126, 1129-30 (2014). The apparent authority of the person consenting should allow officers to search both the place to

which the person consents and the closed containers within that room absent some obvious concern that the person consenting lacks the authority to consent to the search of those containers.

1. The federal courts of appeals are divided 2-2 over the proper approach. The Second and Seventh Circuits have held that a person's consent to search a place, like a room, includes containers in that place unless it is obvious to the police that the containers belong to somebody else. For instance, in *United States v. Melgar*, 227 F.3d 1038, 1041 (2000), the Seventh Circuit held that when police obtain consent from someone in possession of the place to be searched that person's consent to search includes containers in that place as long as police have no reliable information that the containers belong to somebody else. Relying in part on *Florida v. Jimeno*, 500 U.S. 248 (1991), the court decided that consent to search a place, whether automobile, apartment, or house, ordinarily includes the effects within that place capable of hiding the article for which the search is being conducted. *Id. Jimeno* held that any "superstructure" such as separate permission to search each container within a space is not supported by the Fourth Amendment. *Jimeno*, 500 U.S. at 252. *Melgar* refused to draw a distinction between the search of a hotel room (at issue there) and the search of a car (at issue in *Jimeno*). *Melgar*, 227 F.3d at 1041. The court of appeals therefore upheld a search of a purse in a hotel room rented by Rita Velasquez. *Id.* at 1039. When police arrived at the hotel room to investigate a counterfeit check scheme, they found

four people present. *Id.* Three others, including Rita Velasquez, arrived shortly thereafter. *Id.* Velasquez then consented to the search of the room she had rented. *Id.* Police searched a purse and discovered evidence implicating Melgar who had arrived with Velasquez. *Id.* The circuit court held that the officer had no reason to believe that the purse belonged to anyone other than Velasquez, rendering the officer's conduct reasonable.

The Second Circuit adopted essentially the same rule in *United States v. Snype*, 441 F.3d 119 (2d Cir. 2006), when it held that consent to search an apartment includes consent to search the effects in the apartment absent things obviously belonging to someone else. In *Snype*, the apartment owner, Bean, had consented to a search of his entire apartment in which the defendant, Snype, had left a knapsack and a red plastic bag. *Id.* at 136. Without credible evidence that the two items were obviously and exclusively Snype's, the court did not find the officer's decision to search those items unreasonable. *Id.*

2. On the other side of the conflict are the Sixth and Ninth Circuits, which adopted the rule embraced by the Iowa Supreme Court here. In a series of cases, the Sixth Circuit added the "superstructure" rejected in *Jimeno*, holding that consent does not extend to closed containers where there is some ambiguity as to their ownership. *See United States v. Taylor*, 600 F.3d 678 (6th Cir. 2010); *United States v. Purcell*, 526 F.3d 953 (6th Cir. 2008); *United States v. Waller*, 426 F.3d 838 (6th Cir. 2005). In *Taylor*, for example, in a search

for a gun, police obtained consent from a female tenant to search the apartment. *Taylor*, 600 F.3d at 679. Because the shoebox in which the gun was found was under men's clothing in a spare bedroom, the court held that ownership of the box was ambiguous and that the officer therefore had to make further inquiry before searching it. *Id.* at 682. The dissenting judge in *Taylor* acknowledged a circuit split, found that requiring additional inquiry was the wrong approach, and commented that the lack of Supreme Court guidance had resulted in appreciable disorder and unpredictability among the circuits. *Id*. at 686 (Kethledge, J., dissenting).

The Ninth Circuit echoed the decisions of the Sixth Circuit, in the related context of the search of specific rooms within an apartment. In *United States v. Arreguin*, 735 F.3d 1168 (9th Cir. 2013), the court held that "a reasonable person would not presume, without further inquiry" that a third party had control of a bedroom within an apartment in which she was a resident. *Id.* at 1178. If the Ninth Circuit was unwilling to accept the apparent authority of a resident to consent to a search of a room within the apartment, it is exceedingly unlikely the court would accept that the same individual could consent to a search of closed containers in any room.

3. State courts have split along the same lines as the federal courts of appeals. Illustrative of courts following the Seventh Circuit is *People v. Trevino*, 2011 WL 9692696 (Ill. Ct. App. May 27, 2011). The *Trevino* court noted that the rule followed by the Sixth and

Ninth Circuits would essentially prevent closed container searches unless the consenting individual gives ex ante consent to each and every item in a room. This concern convinced the Illinois court that the *Melgar* approach was the most consistent with Fourth Amendment precedent. *Id.* Where an officer has no reason to know that an item may belong to a different individual, the individual giving consent has apparent authority to allow a search of that item. *Id.*

Similarly, the New Hampshire Supreme Court recognized that an ambiguity does not defeat the consent to search given by one of the occupants of a vehicle, even when the object searched is just as likely to have belonged to either person. *State v. Sawyer*, 784 A.2d 1208, 1211 (N.H. 2001). Significant in *Sawyer* was the failure of the second party to object to the search or even identify items belonging to him when seized – which was so in this case as well. The *Sawyer* decision found that it was reasonable for an officer to search a container discovered during a consent search especially where the other person, later identified as the owner of the container, did not object despite knowing that a search would take place or that the driver had consented to a search of the item. *Id.* While Jackson was not present when the consent was obtained, he did not request the bag when leaving or ask that it be secured.

Sawyer, in turn, relied upon *State v. Maristany*, 627 A.2d 1066, 1070 (N.J. 1993). *Maristany* held that where there was nothing to alert the officer to the ownership of a gym bag and a suitcase found in a car,

consent to search by the driver of the vehicle would not be undermined by the presence of other persons. *Id.* Specifically, the officer in *Maristany* asked the driver's consent to search a car and it was granted. The bags in the trunk had no identification and there was nothing about them that indicated who in the car owned either bag. *Id*. When the consent was requested, the driver did not indicate either container was not his. *Id.* Under those circumstances, the court found it was reasonable for the officer to believe the driver had authority to consent to the search.

Although the disparate facts and imprecise language makes a direct comparison sometimes difficult, the states of North Carolina, North Dakota, Oklahoma, and Virginia have followed the *Melgar* approach. *See Glenn v. Commonwealth*, 654 S.E.2d 910, 915 (Va. 2008) (grandfather's consent included grandson's backpack under apparent authority doctrine); *State v. Odom*, 722 N.W.2d 370, 373 (N.D. 2006) (consent to search hotel room included all containers therein); *State v. Jones*, 589 S.E.2d 374, 376 (N.C. Ct. App. 2003) (consent search of a car and a jacket inside the car considered within the apparent authority of the driver); *Pennington v. State*, 913 P.2d 1356, 1368 (Okla. Crim. App. 1995) (consent to search defendant's duffel bag by wife and father-in-law sufficient).

4. Iowa now joins several state supreme courts that do not take a consenter's apparent authority to encompass authority over closed containers absent an obvious reason not to. For example, in *State v. Frank*, the Minnesota Supreme Court invalidated a consent

search of a suitcase found in the trunk of the vehicle because it was unreasonable for the officer to believe that the owner/operator of the vehicle could consent to a search of the suitcase when there was another occupant in his car. *State v. Frank*, 650 N.W.2d 213, 219 (Minn. Ct. App. 2002). In other words, the mere presence of a passenger in the vehicle created an ambiguity that the officer had to expressly resolve before searching containers in that car. "[W]hen a vehicle search is based only on consent, an officer has an obligation to ascertain the ownership of items not owned by or within the control of the consenter when the circumstances do not clearly indicate that the consenter is the owner or controls the item to be searched." *Id.*

Similarly, in *State v. Westlake*, 353 P.3d 438 (Idaho Ct. App. 2015), the Idaho Court of Appeals flatly rejected *Melgar* and *Snype*, and held that an officer's decision to search a bag in a hotel suite without inquiring further in light of the ambiguous circumstances was unreasonable. In *Westlake*, Katherine Gallagher answered a knock by police at a hotel suite door. *Id.* at 440. Gallagher consented to a search of the suite including the second bedroom where Raymundo Chavez was sleeping. *Id.* Chavez was arrested on an outstanding warrant and removed. *Id.* Dona Westlake had also been removed when officers were talking to Gallagher. Gallagher then consented to a search of the hotel suite. A backpack was searched in the first bedroom and it contained methamphetamine. *Id.* Gallagher told the police after the discovery that the backpack belonged to Westlake. *Id.* In rejecting the reasonableness of the

search, the Idaho court criticized the *Melgar* decision as based upon a false premise that "apparent authority must be either never present or always present whenever the evidence as to actual authority is not explicit." *Id.* at 443.

Westlake follows two other state decisions implicitly rejecting *Melgar*'s analysis. *See State v. Edwards*, 570 A.2d 193, 202-03 (1990) (host cannot consent to search of guest's luggage, and although "there might have been a clearer expectation of privacy in a backpack that was locked . . . such a security measure is not essential" where there was no evidence that the defendant ever authorized the host to inspect the contents of his backpack); *People v. Gonzalez*, 667 N.E.2d 323, 325 (1996) (host could not consent to search of guest's duffel bag guest kept under mattress of his bed, as courts have "rejected the sufficiency of a host's general consent to search premises to validate the search of a guest's overnight bag, purse, dresser drawers used exclusively for the guest's personal effects, or similar objects"). Similar holdings can be found in *Norris v. State*, 732 N.E.2d 185 (Ind. Ct. App. 2000) (driver's consent to search of backpack in the backseat of the vehicle was not reasonable in light of other occupants) and *Commonwealth v. Brooks*, 388 S.W.3d 131 (Ky. Ct. App. 2012) (consent to search of home by homeowner could not reasonably authorize search of purse in basement).

II. The Question Presented is Recurring and Important.

1. As the foregoing discussion illustrates, many courts have weighed in on the issue of consent searches and closed container searches. Consent searches are an important investigative tool and a useful means by which persons both guilty and innocent can beneficially manifest cooperation with police investigating criminal activity. *See*, *e.g.*, *People v. McKinstrey*, 852 P.2d 467, 475 (Colo. 1993) (citing 3 Wayne R. LaFave, *Search and Seizure* § 8.3 at 62 (1993 Supp.); *People v. James*, 645 N.E.2d 195, 199 (Ill. 1994); *People v. Adams*, 422 N.E.2d 537, 541 (N.Y. Ct. App. 1981). It is reasonable to believe that because of this importance, law enforcement agencies will continue to pursue consent searches. As this court has noted "Consent searches are part of the standard investigatory techniques of law enforcement agencies" and are "a constitutionally permissible and wholly legitimate aspect of effective police activity." *Fernandez*, 134 S.Ct. at 1131 (citing *Schneckloth v. Bustamonte*, 412 U.S. 218, 228, 231-32, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973)). Police forces embrace the technique as a valuable tool in rooting out and discovering crime. *See*, *e.g.*, www.policemag.com. channel/patrol/articles/2013/02/consent-searches.aspx.

The stakes are high. For example, reviewing some of the cases already discussed, a different rule applied in *Snype* risked suppression of evidence necessary to prosecute a bank robber who threatened multiple individuals with a gun while committing the robbery. The robbers then fled the scene at speeds in

excess of 85 miles per hour on the New York State Thruway until crashing and then engaged in a shootout with police. *Snype*, 441 F.3d at 124. Snype escaped the scene but was found a few days later at Jennifer Bean's Queens apartment. *Id.* Bean voluntarily gave consent to the search of her apartment after Snype had been arrested and removed. *Id.* In a knapsack police discovered $13,000 in cash taken in the robbery, two loaded firearms, and a business card for a storage facility. *Id.* In a red bag police found a lease for a storage bin and an access code to that facility. *Id.* This evidence tied Snype to the commission of the robbery and the possession of the weapons used in that robbery. It is even more significant when considering that Snype had three prior robbery convictions. *Id.* at 144.

Snype is typical as this case illustrates. Individuals committing serious crimes will seek refuge in a home owned by others and may hide evidence of that crime in that home. When those suspects are found hiding in the home of others, police will want to search that place for evidence of the crime. That search will include any number of closed containers such as bags, boxes, drawers, and backpacks. It is reasonable for police to believe that the individual in possession of the place possesses the authority to permit a search of his or her home including the containers in that place absent obvious facts that indicate that the person lacks that authority.

Also typical is *Sawyer*. In *Sawyer*, a vehicle stop resulted in the discovery of multiple bags of marijuana

and hashish. 784 A.2d at 1209. The driver of the vehicle stopped for speeding replied "Yes, absolutely" when the officer asked for permission to search the car. *Id.* The two passengers in the vehicle said nothing when the request was made. *Id.* at 1213. Finding that the driver possessed apparent authority, the court noted that the bag was of the type that it could contain the evidence the officer was looking for, had no obvious indicia of ownership, was like a compact disc bag that many motorists would possess, and no one in the car objected to the search. *Id.* It was objectively reasonable for the officer to believe that the driver had the authority to consent even though conceivably the bag could have belonged to others. These kinds of encounters occur every day between police and individuals stopped for traffic violations. When reasonable suspicion – even probable cause – exists to believe that somebody in a car driving on interstate highways is trafficking drugs, an investigation will occur and the quickest way to resolve the matter for those involved, that will either result in an arrest or allow travelers on their way, is a consent search. Police need guidance as to their duties in these situations.

Finally, it is clear that shared living spaces between adults is an increasing phenomenon. For example, young Americans are increasingly living with parents, friends, or roommates. *See* Don Lee, *Why Millenials Are Staying Away from Homeownership Despite an Improving Economy*, L.A. Times (Mar. 1, 2016),

http://www.latimes.com/business/la-fi-0301-housing-economy-20160301-story.html; Tamar Lewin, *Millennials' Roommates Now More Likely to Be Parents Than Partners*, N.Y. Times (May 24, 2016), http://www.nytimes.com/2016/05/25/us/millennials-roommates-now-more-likely-to-be-parents-than-partners.html?_r=0. Homeownership rates among Americans between the ages of 35 and 64 have dropped precipitously in the past ten years, and homeownership rates for those demographic groups are now lower than they were in 1994. *See* Derek Thompson, *Homeownership in America Has Collapsed – Don't Blame Millennials*, The Atlantic (Oct. 28, 2014), http://www.theatlantic.com/business/archive/2014/10/homeownership-is-historically-weakdont-blame-millennials/382010/ ("The entire country rode the roller-coaster of the 2000s, during which the total homeownership rate cracked 69 percent in 2004 and 2005. Since then, it's been one long tumble down the other side of the mountain."). Police officers and courts across America can expect complicated apparent authority issues more frequently as a result of higher co-tenancy rates among all demographics. Police across the country may soon find themselves asking for consent to search these communal kitchens and living rooms, which would exacerbate the need for clarity regarding the effective scope of consent for searching any closed containers found in those spaces.

The increase in shared living arrangements gives context to Chief Justice Roberts's view that:

> [T]he more reasonable approach [to consent searches] is to adopt a rule acknowledging that shared living space entails a limited yielding of privacy to others, and that the law historically permits those to whom we have yielded our privacy to in turn cooperate with the government. Such a rule flows more naturally from our cases concerning Fourth Amendment reasonableness and is logically grounded in the concept of privacy underlying that Amendment.

Georgia v. Randolph, 547 U.S. 103, 137 (2006) (Roberts, C.J., dissenting). Increased co-tenancy rates will likely present more opportunities for well-meaning citizens to report otherwise hidden crimes to law enforcement, and attempt to consent to police intrusion into the shared spaces where the evidence of that crime would be found.

III. This Case is an Ideal Vehicle to Resolve the Question Presented.

The record in this case establishes facts that illustrate the split in a concrete way. One resident of an apartment consented to the officer's request to enter. Pet. App. 4-5. Another occupant, the occupant of the bedroom being searched, consented to the officer's request to search the room. Pet. App. 7. A third person was present in the bedroom whose presence in that room is unexplained. Pet. App. 5. Pursuant to the consent given to search the room, officers searched a backpack in the room that had not been expressly or

impliedly excluded by the consenter and the third party never indicated any ownership of the backpack before being removed from the room. Pet. App. 6-7. The Iowa Supreme Court majority concluded the presence of the person in the room with the attendant circumstances created an ambiguity that required further inquiry before searching the backpack. Pet. App. 36-37. Yet, as mentioned, the court found such an ambiguity though no restrictions had been placed on the scope of the search and the defendant never claimed to own anything in the room before being removed when arrested.

IV. The Iowa Supreme Court's Decision was Incorrect.

1. The Iowa Supreme Court resolved the question unaddressed in *Rodriguez* and concluded that any ambiguity in authority be resolved by further inquiry before police officers search closed containers in an area to which a consent to search has been granted. The Iowa Supreme Court saw the issue as turning upon burdens of proof and the failure of the State to prove that the officer reasonably believed that the person consenting had that authority. *Rodriguez* does not compel the framework the Iowa Supreme Court used. *Rodriguez* does not discuss burdens of proof or hold that ambiguities change the burden of proof. *Rodriguez*, consistent with all Fourth Amendment precedent, creates a totality-of-the-circumstances test that is used to determine whether the officer's conduct was reasonable. The way in which that test is applied in

Snype, Melgar, and *Trevino* strikes the right balance between the privacy interests of the individual and the state's interest in solving crime. The application of that test resolves whether the officer acted appropriately. Sometimes the application of the test will result in a finding that the search was appropriate, sometimes it will not. Even the court's application of facts in the totality of the circumstances was flawed.

As the dissent points out, *Rodriguez* contains the following proposition, "Even when the invitation is accompanied by an explicit assertion that the person lives there, the surrounding circumstances could conceivably be such that a reasonable person would doubt its truth and not act upon it without further inquiry." Pet. App. 54 (quoting *Rodriguez*, 497 U.S. at 188.) Only three people lived in the apartment, Turner, Miller, and Olson. Officers were told by those three that no one else was in the apartment. Pet. App. 36, 68. Once Jackson's presence was disclosed, no credible explanation was offered for Jackson's presence. Pet. App. 36-37, 68-69. Olson offered only that Jackson had not been there when Olson had gone to sleep and offered nothing to explain his presence when he awoke. Pet. App. 36. When Olson then consented to the search of his bedroom, it was reasonable for the officer to conclude that the consent included any containers therein. The officers told him they were looking for guns and evidence of the robbery. Pet. App. 73. Obviously, those items could be contained in a backpack and Olson would have understood the request included the backpack. Olson did not tell the officers that any items in the

room were not included in the consent or belonged to anyone else. Pet. App. 73. There was no reason to believe that the backpack belonged to Jackson because the evidence demonstrated he was not a guest or tenant, no one had described him as such, and he had likely just arrived.

The Iowa Supreme Court majority reaches an opposite conclusion by suggesting Jackson was an overnight guest with a key to the apartment and it determined that any reasonable officer would have drawn such a conclusion. Pet. App. 37-38. As the dissent notes, the majority opinion "blindly accepts the statements made by Turner, Olson, and Miller, even in the face of their obvious incredibility and dishonesty" and "enters into the realm of fantasy." Pet. App. 68. Not one of the occupants of the apartment offered that Jackson was a tenant or a guest. Pet. App. 37, 68. The dissent found it was much more likely that Jackson was the robber police had just followed from the scene of the robbery, and someone let him in to the apartment who was a co-conspirator or, at least, had knowledge of his participation in the crime and was providing a hiding place. Pet. App. 70. When more realistic factual finding and inferences are made, little ambiguity exists as to the authority of Olson to consent to the search of the backpack. In the words of the dissent: "It is inconceivable that the officers here would reasonably believe that Jackson simply arrived in Olson's bedroom when no one else was home sometime after Olson went to sleep but before Turner arrived home from work." Pet. App. 72. There is no reason to

suspect that Jackson would have any bag for an overnight stay because he was not staying at the apartment. He was hiding there. Accepting that Jackson had actually sought refuge from pursuit, officers had no reason to think that Jackson may have been carrying a backpack with supplies for an overnight stay.

There was no uncertainty as to the ownership of the backpack because police did not have any reliable information that the backpack did not belong to Olson. The room was Olson's, Jackson's presence in the room was obviously a recent occurrence, and nothing indicated that he would possess a backpack for an overnight stay. No name tag or other identification was attached to the bag. It was not an item that Olson would obviously not own. It was reasonable for the officer to believe Olson owned the backpack. No ambiguity existed and a rule that requires inquiry because of another's presence ignored the facts that make it reasonable to rely upon the consent.

———♦———

CONCLUSION

The Petition for writ of certiorari should be granted.

Respectfully submitted,

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IN THE SUPREME COURT OF IOWA

No. 14-0067

Filed April 29, 2016

Amended May 2, 2016

STATE OF IOWA,

Appellee,

vs.

MARVIS LATRELL JACKSON,

Appellant.

On review from the Iowa Court of Appeals.

Appeal from the Iowa District Court for Johnson County, Robert E. Sosalla, Judge.

A defendant requests further review of a court of appeals decision affirming the denial of a motion to suppress evidence obtained after a police officer searched a closed backpack. **DECISION OF COURT OF APPEALS VACATED; DISTRICT COURT JUDGMENT REVERSED AND CASE REMANDED.**

Mark C. Smith, State Appellate Defender, and Rachel C. Regenold (until withdrawal) and Theresa R. Wilson, Assistant Appellate Defenders, for appellant.

Thomas J. Miller, Attorney General, Sharon K. Hall, Assistant Attorney General, Janet M. Lyness, County Attorney, Anne M. Lahey, Assistant County Attorney, for appellee.

Alan R. Ostergren, Muscatine, for amicus curiae Iowa County Attorneys Association.

WIGGINS, Justice.

A police officer conducted a warrantless search of a closed backpack belonging to the defendant. The officer relied on a third party's consent in conducting the search. The third party possessed actual authority to consent to a search of the bedroom the backpack was in but lacked actual authority to consent to a search of the backpack itself. The defendant moved to suppress the evidence found in the backpack and the fruits of the search on the ground that the third party had neither actual authority nor apparent authority to consent to the search of the backpack. He argued the warrantless search violated his rights under the Fourth and Fourteenth Amendments of the United States Constitution and article I, section 8 of the Iowa Constitution. The district court denied the motion.

The defendant now seeks further review of a decision by the court of appeals affirming his convictions on two counts of robbery in the second degree. We conclude the warrantless search violated the Fourth Amendment of the United States Constitution because the third party who consented to the search of the bedroom lacked apparent authority to consent to the search of the defendant's backpack. Therefore, we vacate the decision of the court of appeals, reverse the judgment of the district court, and remand the case to the district court for a new trial.

I. Background Facts.

On our de novo review, we find the following facts. At 12:35 a.m. on December 31, 2012, the Iowa City Police Department dispatched Officer Michael Smithey to Gumby's Pizza after receiving a report an armed robbery had just taken place. When Officer Smithey arrived on the scene, the robbery victim met him outside the restaurant. The victim reported he had been alone working in the kitchen when two black males entered the restaurant wearing dark clothes, black hats, and black bandanas over their faces. One of the men had a gun and pointed it at the victim. The men ordered the victim to open the cash register. The victim complied and gave the men approximately $125 in small bills. After the men ran out of the store and headed northbound on Gilbert Street, the victim locked the door and called the police.

As Officer Smithey stood outside the restaurant speaking with the victim, a man approached and asked if there had been a robbery. The man stated he had just been standing outside smoking a cigarette when he observed two black males wearing dark clothes walk by. He noted one of the men appeared to be holding a fistful of cash. He also stated when the men saw him, they took off running between some houses.

Officer Smithey drove the witness to the location where he had last seen the men on foot. There was fresh snow on the ground, and Officer Smithey saw what appeared to be tracks in the snow. He then requested backup from a canine unit.

When the canine unit arrived, the handling officer and the canine tracked the suspects to the southeast corner of the building on South Gilbert Street. Officer Smithey followed, joined by Officer Alex Stricker. The officers observed the lower floor of the building was a retail location, but the second story contained apartments with outside doors accessed by a common stairwell in the rear of the building. As the officers visually surveyed the exterior of the building, they saw the lights were on in one of the apartments and a tall black male who appeared to be very interested in what the officers were doing was looking out the window. The officers noticed the man appeared to match the descriptions of the suspects and quickly ducked out of sight when he saw the officers look up at him. The officers decided to approach the apartment. When they arrived at the front door to the apartment, they noticed someone had turned the lights off inside. As they stood outside the apartment door, they heard it lock from the inside. Officer Smithey then knocked on the door and announced the officers' presence.

A tall black male named Wesley Turner answered the door. The officers explained why they were there, and Turner allowed them inside. The officers entered the living room where they encountered Turner's girlfriend, Alyssa Miller, who also lived in the apartment. Turner and Miller indicated the only other person in the apartment was their roommate, Gunner Olson. Turner told the officers Olson was asleep in his room but agreed to wake him so the officers could speak with

him. After Turner knocked on the bedroom door, Olson, who was also a black male, emerged from his room.

The officers decided to speak to the two men separately. Officer Stricker stepped outside to speak with Turner. During their brief conversation, Turner indicated he had remained in the apartment since arriving home from work around nine and had not seen anything suspicious.

Meanwhile, Officer Smithey stepped into the kitchen to speak with Olson. Olson confirmed he lived in the apartment along with Turner and Miller. Officer Smithey asked Olson if he could peek inside his bedroom. Only then did Olson tell Officer Smithey his cousin Marvis was sleeping in his bed. Olson told Officer Smithey that Marvis arrived sometime after he went to sleep earlier that evening. When asked, Olson indicated he did not know Marvis's last name and explained they were not really cousins. Officer Smithey did not ask Olson if Marvis had been staying in the apartment.

Olson then led Officer Smithey back to his bedroom. Officer Stricker looked on from the hallway, having just finished his conversation with Turner. Inside the room, the officers saw a shirtless black male in green pajama pants lying on the air mattress in the corner. The air mattress was the only mattress in the room. At the officers' request, Olson roused the man by shaking him, but the officers noticed that waking the man appeared to be considerably more difficult than it should have been. The officers also noticed the

shirtless man was sweaty, which they thought odd because no one else in the apartment was sweating.

The man identified himself as Marvis Jackson. When asked if he had identification, Jackson indicated he did not. The officers had a brief conversation with Jackson, during which neither officer asked Jackson if he had been staying in the apartment, was an overnight guest, or had any personal belongings in the apartment. When the officers ran a check on Jackson's name, they discovered an outstanding warrant for his arrest for another armed robbery that took place at a gas station in November.[1] Officer Smithey notified Jackson he was under arrest, handcuffed him, and walked him out of the room. By that time, other officers had arrived at the apartment. Officer Smithey passed Jackson off to another officer for transport before returning to the bedroom.

While Officer Smithey was outside the bedroom passing Jackson off for transport, Officer Stricker spoke to Olson. Olson again indicated Jackson had arrived earlier that night after he had gone to sleep. Officer Stricker did not ask Olson if Jackson had been staying in the apartment, but Olson clearly indicated Jackson did not permanently reside in his bedroom. When asked if there were any guns in the room, he

[1] The court issued the arrest warrant after the owner received a tip that a man named "Juicy" had robbed the gas station and the detective in charge of the investigation learned from multiple sources Jackson went by the nickname "Juicy Jackson."

replied oddly that there should not be or that he did not know of any.

Officer Stricker then asked to search the bedroom for guns or any evidence of the robbery, and Olson consented to the search. Officer Stricker waited for Officer Smithey to return to the room. When Officer Smithey arrived, Officer Stricker informed him that Olson had consented to the search, and Olson confirmed he did not mind if Officer Smithey conducted the search. Neither officer asked Olson whether any of the items in the room might belong to Jackson. Officer Stricker then stepped outside the room with Olson to accompany him to the kitchen to get a glass of water.

Officer Smithey began searching Olson's room. He first searched the area around the air mattress. He searched under the sheets and blankets on top of the air mattress and then under the mattress itself. He then grabbed a backpack sitting a few feet away on the floor along the wall next to or partly inside the closet door, which was partially off its hinges. He placed the backpack on the chair sitting between the closet and the air mattress. The backpack was closed and had no obvious identifying marks or tags on its exterior indicating who owned it. Officer Smithey opened the backpack. He reached inside and located a wallet, which he removed and laid on the chair without opening it. When Officer Smithey reached inside a second time, he located a pair of dark jeans. He noticed the jeans were wet at the hem along the bottom of each leg, which led him to believe they had recently been worn outside in the snow. He then removed the jeans from the

backpack. Underneath the jeans, Officer Smithey saw a black handgun.

After removing the jeans and locating the handgun, Officer Smithey stopped removing items from the backpack. He opened the wallet he had placed on the chair a few moments before and saw that it contained identification belonging to Marvis Jackson. Officer Smithey took a photograph of the handgun inside the backpack to use in an application for a search warrant. He then emerged from the bedroom and informed the sergeant who was the supervising officer on the scene it was time to lock down the apartment. The officers conducted a protective sweep of the apartment and transported Olson, Turner, and Miller to the station for questioning.

Back at the station, Officer Smithey completed a statement in support of an application for a search warrant. Detectives spoke with Miller, Turner, Olson, and Jackson in a series of interviews conducted between approximately 2:49 a.m. and 6:00 a.m. Turner admitted to committing the armed robbery of the restaurant, and Olson admitted to cutting up a t-shirt to provide Turner and Jackson with the strips of fabric they used to cover their faces during the robbery. After being informed the police had obtained confessions from Turner and Olson and retrieved a gun and cash from the apartment, Jackson also confessed to committing the restaurant robbery.

In the morning, the detective investigating the gas station robbery conducted a second round of interviews

beginning after 7:00 a.m. During those interviews, the detective showed Turner and Miller photographs of the gas station robber captured by a security camera. Both Turner and Miller indicated the gas station robber looked like Jackson and recognized the shoes the robber was wearing. Turner also indicated Jackson had told him he had robbed a gas station, and Miller recognized the cap the robber was wearing and told the detective where it could be found in the apartment. When the detective subsequently interviewed Jackson, he confessed to committing the gas station robbery.

During the interviews conducted throughout the night and in the morning, Miller, Turner, and Jackson all confirmed Jackson had been staying at the apartment for weeks prior to December 31 and acknowledged he had personal belongings in the apartment. When the police executed the search warrant on the apartment in the morning, they recovered $129 in one-dollar bills, $45 in five-dollar bills, and pieces of the t-shirt described by the men during their interviews the night before. The police also recovered a black Yankees cap matching the one worn by the gas station robber.

II. Prior Proceedings.

The State charged Jackson with two counts of robbery in the second degree, including one count for the restaurant robbery and one count for the gas station robbery. *See* Iowa Code section 711.3 (2011). Jackson pled not guilty on both counts and filed a motion to

suppress all evidence obtained as a result of the search of his backpack. In his motion to suppress, Jackson argued the warrantless search of his backpack was unreasonable and violated his rights under the Fourth and Fourteenth Amendments of the United States Constitution and article I, section 8 of the Iowa Constitution because Olson had neither actual authority nor apparent authority to consent to the search of his backpack. Jackson further asserted the officers had a duty to inquire as to the ownership of the backpack before searching it because they had encountered an ambiguous situation that gave them reason to doubt whether Olson had authority to consent to a search of the backpack. The State resisted the motion.

Following a hearing, the district court denied the motion to suppress. Jackson thereafter waived his right to a jury trial and stipulated to a trial on the minutes of testimony. The district court found Jackson guilty of both counts of second-degree robbery and sentenced him to two concurrent indeterminate terms of incarceration not to exceed ten years with a mandatory minimum sentence of seven years of incarceration.

Jackson appealed, and we transferred the case to the court of appeals. The court of appeals concluded Olson had apparent authority, but not actual authority, to consent to the search of the backpack. The court of appeals allowed Jackson to pursue his ineffective-assistance-of-counsel claim in a postconviction relief proceeding because it determined his trial counsel had not preserved his argument that the Iowa Constitution

requires consent from a person with actual authority to authorize a warrantless search.

Jackson filed an application for further review, which we granted.

III. Issues.

Jackson claims Officer Smithey violated his rights under the Fourth Amendment of the United States Constitution because Olson had neither actual authority nor apparent authority to consent to the search of his backpack. Alternatively, Jackson claims Officer Smithey violated his rights under article I, section 8 of the Iowa Constitution because Olson did not have actual authority to consent to the search of his backpack. Finally, Jackson claims that if the search did not violate the federal constitution, his trial counsel was constitutionally ineffective for failing to argue a different standard determines the constitutionality of warrantless searches authorized by consent under the state constitution.

IV. Standard of Review.

Jackson raises constitutional issues in this appeal. We review constitutional issues de novo. *State v. Kooima*, 833 N.W.2d 202, 205 (Iowa 2013).

V. The Federal Doctrine of Consent by Apparent Authority.

The Fourth Amendment of the United States Constitution provides,

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. amend. IV.

A warrantless search violates the Fourth Amendment unless a warrant was not required to authorize it. *See State v. Nitcher*, 720 N.W.2d 547, 554 (Iowa 2006). The State bears the burden of proving by a preponderance of the evidence that a warrant was not needed to authorize a warrantless search. *See id.* In determining whether the State has met this burden, we use an objective standard to assess the conduct of the officer who performed the search. *Id.*

Under the Fourth Amendment, a warrant is not required to authorize a search performed pursuant to voluntary consent. *State v. Pals*, 805 N.W.2d 767, 777-82 (Iowa 2011).[2] An officer may rely on third-party consent to authorize a warrantless search so long as the

[2] We have not determined whether voluntary consent authorizes a warrantless search under article I, section 8 of the Iowa Constitution, or whether article I, section 8 requires a knowing

circumstances indicate the third party had actual authority to consent to a search of the location searched. *See, e.g.*, *State v. Campbell*, 326 N.W.2d 350, 352 (Iowa 1982); *State v. Folkens*, 281 N.W.2d 1, 3-4 (Iowa 1979). To establish a third party had actual authority to consent to a search, the government may show the third party "possessed common authority over or other sufficient relationship to the premises or effects sought to be inspected." *Campbell*, 326 N.W.2d at 352 (quoting *United States v. Matlock*, 415 U. S. 164, 171, 94 S. Ct. 988, 993, 39 L. Ed. 2d 242, 250 (1974)). Common authority to consent to a search derives from "mutual use of the property by persons generally having joint access or control for most purposes." *Matlock*, 415 U.S. at 171 n.7, 94 S. Ct. at 993 n.7, 39 L. Ed. 2d at 250 n.7; *see State v. Bakker*, 262 N.W.2d 538, 546 (Iowa 1978).

Under the Fourth Amendment, an officer may also rely on third-party consent to authorize a warrantless search based on the third party's apparent authority to consent to the search. *State v. Lowe*, 812 N.W.2d 554, 576 (Iowa 2012). The doctrine of consent by apparent authority allows the government to demonstrate an officer who conducted a warrantless search was authorized to do so because the officer "reasonably (though erroneously)" relied on the apparent authority of the person who consented to the search. *Id.* (quoting *Illinois v. Rodriguez*, 497 U.S. 177, 186, 110 S. Ct. 2793, 2800, 111 L. Ed. 2d 148, 160 (1990)).

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and intelligent waiver of rights to authorize a warrantless search. *See Pals*, 805 N.W.2d at 782.

The State relies on the doctrine of consent by apparent authority to justify the officer's warrantless search of the backpack found in the bedroom. The doctrine has its genesis in the United States Supreme Court's decision in *Illinois v. Rodriguez*, 497 U.S. 177, 110 S. Ct. 2793, 111 L. Ed. 2d 148. In that case, an assault victim accompanied police officers to the defendant's apartment, unlocked the door with a key she had, and let the officers into the apartment. *Id.* at 179-80, 110 S. Ct. at 2796-97, 111 L. Ed. 2d at 155-56. The officers did not have an arrest warrant for the defendant or a search warrant to search the apartment. *Id.* at 180, 110 S. Ct. at 2797, 111 L. Ed. 2d at 155-56. As the officers moved through the premises, they observed drug paraphernalia and containers filled with white powder later determined to be cocaine in plain view in the living room. *Id.* at 180, 110 S. Ct. at 2797, 111 L. Ed. 2d at 156. They found additional containers filled with cocaine in two open attaché cases in the bedroom. *Id.* After the officers arrested the defendant on drug charges, he moved to suppress the evidence seized at the time of his arrest on the ground that the victim no longer lived in the apartment and therefore had no authority to consent to the entry and the search. *Id.*

The Supreme Court determined the State failed to prove the victim had common authority over the premises to consent to the search. *Id.* at 181-82, 110 S. Ct. at 2797-98, 111 L. Ed. 2d at 156-57. This was not, however, the end of the Court's inquiry. The Court stated the question of whether the officers violated the Fourth

Amendment turned on an objective factual determination as to whether the officers reasonably believed the woman had authority to consent to the entry. *See id.* at 188, 110 S. Ct. at 2801, 111 L. Ed. 2d at 161. The Court thus concluded a warrantless search conducted pursuant to consent by a third party does not violate the Fourth Amendment so long as the facts available to the officers at the moment it occurred would "'warrant a man of reasonable caution in the belief' that the consenting party had authority over the premises." *Id.* at 188-89, 110 S. Ct. at 2801, 111 L. Ed. 2d at 161 (quoting *Terry v. Ohio*, 392 U.S. 1, 21-22, 88 S. Ct. 1868, 1880, 20 L. Ed. 2d 889, 906 (1968)). "If not," the Court explained, "then warrantless entry without further inquiry is unlawful unless authority actually exists." *Id.*

In concluding searches conducted pursuant to consent by apparent authority satisfy the Fourth Amendment, the Court reasoned the Fourth Amendment requires law enforcement to make reasonable, not perfect, factual determinations concerning the scope of authority possessed by a person who consents to a search:

> It is apparent that in order to satisfy the "reasonableness" requirement of the Fourth Amendment, what is generally demanded of the many factual determinations that must regularly be made by agents of the government . . . is not that they always be correct, but that they always be reasonable. . . .
>
> We see no reason to depart from this general rule with respect to facts bearing upon the authority to consent to a search. Whether

> the basis for such authority exists is the sort of recurring factual question to which law enforcement officials must be expected to apply their judgment; and all the Fourth Amendment requires is that they answer it reasonably. The Constitution is no more violated when officers enter without a warrant because they reasonably (though erroneously) believe that the person who has consented to their entry is a resident of the premises, than it is violated when they enter without a warrant because they reasonably (though erroneously) believe they are in pursuit of a violent felon who is about to escape.

Id. at 185-86, 110 S. Ct. at 2800, 111 L. Ed. 2d at 159-60.

However, the Court cautioned that apparent authority does not necessarily exist merely because a person explicitly asserts a factual basis suggesting he or she has authority to consent. *Id.* at 188, 110 S. Ct. at 2801, 111 L. Ed. 2d at 161. Rather, a person could make such an assertion and "the surrounding circumstances could conceivably be such that a reasonable person would doubt its truth and not act upon it without further inquiry," in which case "warrantless entry without further inquiry" would be unlawful unless the consenting party had actual authority. *Id.* at 188-89, 110 S. Ct. at 2801, 111 L. Ed. 2d at 161. Thus, the Court emphasized courts must use an objective standard to determine whether apparent authority exists. *Id.* at 188, 110 S. Ct. at 2801, 111 L. Ed. 2d at 161. In addition, the Court acknowledged the government bears the burden

of establishing the effectiveness of third-party consent. *Id.* at 181, 110 S. Ct. at 2797, 111 L. Ed. 2d at 156. The Court remanded the case for a determination as to whether the officers reasonably relied on apparent authority to authorize their entry into the apartment because the appellate court had not determined whether officers had reasonably believed the victim had authority to consent. *Id.* at 189, 110 S. Ct. at 2801, 111 L. Ed. 2d at 161.

Rodriguez involved a circumstance in which officers discovered evidence in plain view after they entered a home without a warrant based on consent given by a person who lacked actual authority to consent to a search of the home. In contrast, this case requires us to consider how the doctrine of consent by apparent authority applies to a closed container found inside a home searched by officers relying on consent given by a person who had actual authority to consent to the search of the home but lacked actual authority to consent to a search of the container. The Supreme Court has yet to apply the doctrine of consent by apparent authority to a closed container found within a home under these circumstances. Nor is there agreement among the federal circuit courts of appeals concerning how the apparent-authority doctrine applies under such circumstances. *See, e.g.*, *United States v. Taylor*, 600 F.3d 678, 685 (6th Cir. 2010); *United States v. Snype*, 441 F.3d 119, 136-37 (2d Cir. 2006); *United States v. Waller*, 426 F.3d 838, 847-49 (6th Cir. 2005); *United States v. Melgar*, 227 F.3d 1038, 1041-42 (7th

Cir. 2000); *United States v. Salinas-Cano*, 959 F.2d 861, 865-66 (10th Cir. 1992).

A. Circuits Concluding Officers Have a Duty to Inquire Before Searching a Closed Container if a Reasonable Officer Would Conclude the Authority of the Person Who Consented to a Premises Search is Ambiguous. The Tenth Circuit applied the apparent-authority doctrine in the context of a closed-container search in *United States v. Salinas-Cano.* After officers arrested the defendant following a drug buy, they asked his girlfriend for permission to search her apartment and indicated they were specifically interested in the defendant's possessions. *Salinas-Cano*, 959 F.2d at 862. She consented and led the officers to the area of the apartment where the defendant kept his belongings. *Id.* The officers opened a closed suitcase belonging to the defendant and found cocaine inside. *Id.* The district court denied the defendant's motion to suppress the evidence, and the defendant appealed. *Id.* at 863.

The Tenth Circuit reversed, emphasizing the government bears the burden of proving the effectiveness of third-party consent. *Id.* at 862, 864. The court concluded the government cannot meet this burden when officers faced with an ambiguous situation concerning the authority of the consenting party proceed to search without making further inquiry. *Id.* at 864. The court determined a warrantless search is unlawful without further inquiry "if the circumstances make it unclear whether the property about to be searched is subject to

'mutual use' by the person giving consent." *See id.* (quoting *United States v. Whitfield*, 939 F.2d 1071, 1075 (D.C. Cir. 1991)). The court reasoned that under *Rodriguez*, apparent authority exists only in "situations in which an officer would have had valid consent to search *if the facts were as he reasonably believed them to be.*" *Id.* at 865 (quoting *Whitfield*, 939 F.2d at 1074). The court therefore concluded the officer's subjective belief that the girlfriend had authority to consent to a search of the suitcase was insufficient to legitimize the search under the apparent-authority doctrine. *Id.* at 866.

> It is not enough for the officer to testify, as he did here, that he *thought* the consenting party had joint access and control. The "apparent authority" doctrine does not empower the police to legitimize a search merely by the incantation of the phrase.

Id. at 865 (citation omitted).

Based on *Rodriguez*, the Tenth Circuit concluded proper analysis of apparent authority "rests entirely on the *reasonableness* of the officer's belief" that the consenting party had common authority over the container searched. *See id.* The officers had not asked any question that would have permitted them to determine whether the defendant's girlfriend had mutual use of his suitcase and authority to consent to a search of it. *Id.* at 866. Therefore, because the information known to the officers was insufficient to support a reasonable belief that the girlfriend had actual authority to consent to a search of the defendant's suitcase, the court

concluded she did not have apparent authority to consent to the search. *See id.* According to the court, "To hold that an officer may reasonably find authority to consent solely on the basis of the presence of a suitcase in the home of another would render meaningless the Fourth Amendment's protection of such suitcases." *Id.*

The Tenth Circuit subsequently confirmed officers have a "duty to investigate" when it is ambiguous whether the person who consents to a premises search has authority over the location to be searched before conducting a warrantless search of a closed container:

> Importantly, "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." Thus, the government cannot meet its burden of demonstrating a third party's apparent authority "if agents, faced with an ambiguous situation, nevertheless proceed without making further inquiry."

United States v. Cos, 498 F.3d 1115, 1128 (10th Cir. 2007) (citations omitted) (quoting *United States v. Kimoana*, 383 F.3d 1215, 1222 (10th Cir. 2004)).

The Sixth Circuit Court of Appeals analyzed whether a third party had apparent authority to consent to a search of a closed container in a similar manner in *United States v. Waller.* In *Waller*, officers arrested the defendant in the parking lot of an apartment complex where his friend was a tenant. 426 F.3d at 842. After the officers secured the defendant and proceeded to the apartment, the tenant told them the

defendant had been storing some property there. *Id.* The tenant consented to a search of the apartment. *Id.* During the search, the officers opened a closed luggage bag they found in a bedroom closet and discovered a firearm. *Id.* The officers asked the tenant and his girlfriend whether the luggage bag or the firearm belonged to either of them. *Id.* Both individuals denied ownership of both the bag and the firearm. *Id.* The defendant appealed his conviction for being a felon in possession of a firearm. *Id.* at 843. He argued the district court erred in denying his motion to suppress the firearm evidence by ruling the officers had actual or apparent authority to search the luggage bag. *Id.*

After determining the tenant lacked common authority over the luggage bag, the Sixth Circuit considered whether the tenant had apparent authority to consent to the search of the bag. *Id.* at 844-46. The court summarized the doctrine of consent by apparent authority established in *Rodriguez* as follows:

> "When one person consents to a search of property owned by another, the consent is valid 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.'" Whether the facts presented at the time of the search would "warrant a man of reasonable caution" to believe the third party has common authority over the property depends upon all of the surrounding circumstances. The government cannot establish that its agents reasonably relied upon a third party's apparent authority

> "if agents, faced with an ambiguous situation, nevertheless proceed without making further inquiry. If the agents do not learn enough, if the circumstances make it unclear whether the property about to be searched is subject to 'mutual use' by the person giving consent, 'then warrantless entry is unlawful without further inquiry.'" Where the circumstances presented would cause a person of reasonable caution to question whether the third party has mutual use of the property, "warrantless entry without further inquiry is unlawful[.]"

Id. at 846 (alteration in original) (citations omitted) (first quoting *United States v. Jenkins*, 92 F.3d 430, 436 (6th Cir. 1996); then quoting *Rodriguez*, 497 U.S. at 188, 110 S. Ct. at 2801, 111 L. Ed. 2d at 161; then quoting *United States v. McCoy*, Nos. 97-6485, 97-6486, 97-6488, 1999 WL 357749, at *10 (6th Cir. May 12, 1999); and then quoting *Rodriguez*, 497 U.S. at 188-89, 110 S. Ct. at 2801, 111 L. Ed. 2d at 161). The court thus concluded the search of the bag was unlawful because under the circumstances it was unclear to the officers whether the tenant had common authority over it. *Id.* at 847, 849. Based on the facts known to the officers, the court concluded a reasonable officer would have found ambiguity existed with respect to the ownership of the bag and thus with respect to the question of common authority. *Id.* at 849.

In arriving at this conclusion, the Sixth Circuit reasoned that in the context of a closed container, the existence of common authority to consent derives from

"mutual use of the property by persons generally having joint access or control for most purposes." *Id.* at 845, 848-49 (quoting *Matlock*, 415 U.S. at 171 n.7, 94 S. Ct. at 993 n.7, 39 L. Ed. 2d at 250 n.7). Thus, the court emphasized that although officers might have believed the tenant had some level of control over the bag, in light of what the government would have had to prove to establish the tenant had common authority to consent to a search of it, a reasonable officer would have been "on notice of his obligation to make further inquiry prior to conducting a search." *Id.* at 848-49. In concluding the circumstances were sufficiently ambiguous to place a reasonable officer on notice that the tenant might not have had authority to consent to the search, the court found both the context of the search and its purpose to be relevant:

> The facts in this case are clear: the police never expressed an interest in [the tenant's] belongings in [the tenant's] apartment. The very purpose of the police presence was to search for (presumably) illegal possessions of [the defendant's]. Why would the police open the suitcase if they reasonably believed it belonged to [the tenant]? The answer is that they would not have opened the bag. They opened the bag precisely because they believed it likely belonged to [the defendant]. The police knew [the defendant] was storing belongings at the [the tenant's] apartment. Most people do not keep a packed, closed suitcase in their own apartment. Deliberate ignorance of conclusive ownership of the suitcase does not excuse the warrantless search of the

> suitcase, especially when actual ownership could easily have been confirmed.

Id. at 849 (emphasis omitted).

The Sixth Circuit concluded the district court erred in denying the defendant's motion to suppress and reversed his conviction. *See id.* It did so because the officers failed to make inquiry before searching the bag despite being on notice the tenant might not have had authority to consent to a search of it. *Id.* at 848-49. The court thus concluded an officer has a duty to inquire before relying on consent in circumstances in which the authority of the consenting person is ambiguous. *Id.* at 846-47. The court stressed its conclusion was consistent with the Supreme Court's decision in *Rodriguez* and decisions by other courts to consider such circumstances. *Id.* (citing cases).

The Sixth Circuit revisited this issue in *United States v. Taylor.* There, officers arrested the male defendant in the apartment of his childless female friend. *Taylor*, 600 F.3d at 679, 682. The officers then asked the defendant's friend for permission to search her apartment, which she granted. *Id.* at 679. When the officers conducted the search, they found a closed shoebox for a pair of men's basketball shoes partially covered by men's clothes in the closet of a spare bedroom containing men's clothes, children's clothes, and children's toys. *Id.* Though the defendant's friend lived alone in the apartment, the officers made no inquiry to determine whether she had authority to consent to a search of the closed shoebox before opening it. *Id.*

Inside the shoebox, they found a handgun and ammunition belonging to the defendant. *Id.* at 680. The government charged the defendant with being a felon in possession of a firearm and ammunition. *Id.* The district court granted the defendant's motion to suppress the evidence, finding the defendant's friend had neither common authority nor apparent authority to consent to the search of the shoebox. *Id.*

The Sixth Circuit affirmed the district court decision granting the defendant's motion to suppress. *Id.* at 679. In doing so, the court acknowledged the officers might have begun the search with a reasonable belief that everything in the apartment was subject to mutual use by its sole tenant. *Id.* at 681. But the court concluded "a reasonable person would have had substantial doubts about whether the box was subject to mutual use" by the tenant based on both the location where it was found and the label indicating it was for a pair of men's shoes. *Id.* at 682. The court stated its conclusion was reinforced by the fact the district court found the officers likely would not have opened the shoebox if they had believed it belonged to the tenant, rather than the defendant. *Id.*

B. Circuits Concluding the Defendant Bears the Burden of Demonstrating Officers Had Reason to Question the Authority of the Person Who Consented to a Premises Search. The Seventh Circuit considered apparent authority in the context of a closed-container search in *United States v. Melgar.* In *Melgar*, officers investigating the passing of counterfeit checks obtained consent to search a motel room

from the woman who had rented it. 227 F.3d at 1039-41. While conducting a search of the room, the officers found a purse with no identifying marks under the mattress of one of the beds. *Id.* at 1040. Though the officers knew several other women were staying in the room, they opened the purse without asking any questions to determine whether it belonged to the woman who rented the room. *See id.* at 1039-40. Inside, they discovered counterfeit checks and a fake identification bearing a photograph of the defendant, who was also staying in the room but had not consented to the search. *Id.* at 1040. The defendant challenged the district court's denial of her motion to suppress the evidence found inside the purse. *Id.*

The Seventh Circuit concluded that because the police had no reason to know the woman who consented to the search of the room could not consent to a search of the purse, the district court correctly denied the defendant's motion to suppress. *Id.* at 1041. The court rejected the defendant's argument the officers should have inquired as to the owner of the purse because they had matched the other purses in the room to the other women staying there. *Id.* at 1040-41.

The Seventh Circuit acknowledged the lack of binding authority concerning the proper application of the apparent-authority doctrine to closed-container searches. *See id.* at 1041. However, the court framed the question presented as follows:

> In a sense, the real question for closed container searches is which way the risk of uncertainty

> should run. Is such a search permissible only if the police have positive knowledge that the closed container is also under the authority of the person who originally consented to the search . . . , or is it permissible if the police do *not* have reliable information that the container is *not* under the authorizer's control.

Id.

In concluding the district court correctly denied the defendant's motion to suppress, the Seventh Circuit invoked the general rule that consent to search a space generally extends to a container within it so long as "a reasonable officer would construe the consent to extend to the container" and precedents governing the searches of containers found in automobiles. *Id.* at 1041-42. The court thus concluded apparent authority exists so long as the officer who conducts a warrantless search pursuant to third-party consent has no reliable information indicating the consenting party has no control over the container being searched. *See id.* In other words, the court concluded an officer may reasonably construe a third party's consent to search a premises to extend to all closed containers within that premises unless the officer has "reliable information" indicating a particular container is not within the third party's control.[3] *See id.* at 1041.

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[3] In cases decided both before and after *Melgar*, the Seventh Circuit expressly acknowledged officers have "a duty to inquire further as to a third party's authority to consent to a search" before searching a closed container when "the surrounding circumstances make that person's authority questionable." *United States*

The Second Circuit came to a similar conclusion in *United States v. Snype.* In that case, officers discovered the defendant on the floor in the bedroom of an apartment belonging to his friend's girlfriend. *Snype*, 441 F.3d at 126-27. After the officers arrested the defendant and removed him from the apartment, they obtained the girlfriend's consent to search it. *Id.* at 127. During the search, the officers opened a closed knapsack and a closed red plastic bag they found on the floor in the room from which they had just removed the defendant. *Id.* The knapsack and the bag were sitting next to an open teller's box filled with cash taken from the bank the defendant was accused of robbing. *Id.* The defendant appealed his conviction for conspiracy to commit bank robbery, arguing the district court improperly admitted the evidence found in the knapsack and the bag. *Id.* at 125, 136.

The Second Circuit concluded the district court properly determined the voluntary consent of the host

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v. Goins, 437 F.3d 644, 648 (7th Cir. 2006); *Montville v. Lewis*, 87 F.3d 900, 903 (7th Cir. 1996). Although the court has acknowledged "officers have a duty to inquire further as to a third party's authority" in some circumstances, it emphasizes "that is only true when the circumstances make the authority questionable in the first place." *United States v. Pineda-Buenaventura*, 622 F.3d 761, 777 (7th Cir. 2010). To the extent these decisions seem inconsistent, that inconsistency may stem from the fact that the *Melgar* court concluded ambiguity concerning the authority of a third party exists only when an officer has "reliable information" a container is not within the control of the person who consents to a search. *See Melgar*, 227 F.3d at 1041. It is hard to see how ambiguity concerning who has authority over a container could exist only when an officer has "reliable information" concerning the answer to that very question.

had authorized the warrantless search of the entire apartment and all items within it, including the knapsack and the bag belonging to the defendant. *Id.* at 137. The court dismissed as conclusory the defendant's argument that the officers "had no objectively reasonable basis for concluding" the tenant had any interest in the closed containers found beside him. *See id.* at 136-37. Although the court acknowledged the host's open-ended consent could not authorize a search or seizure of items found within the apartment that "obviously belonged exclusively" to another person, it found the district court did not err in admitting the evidence found inside the knapsack and the red plastic bag. *Id.* at 137. Rather, the court concluded the search did not violate the Fourth Amendment because the defendant failed to adduce credible evidence demonstrating the knapsack and the bag "so obviously belonged exclusively to him that the officers could not reasonably rely" on the host's unrestricted consent to search the premises. *See id.* at 136-37.

C. Determination of the Applicable Test. Under *Rodriguez*, a warrantless search of a closed container conducted pursuant to consent by a third party does not violate the Fourth Amendment so long as the person who consented had actual or apparent authority to consent to the search. *See Rodriguez*, 497 U.S. at 188-89, 110 S. Ct. at 2801, 111 L. Ed. 2d at 161 (quoting *Terry*, 392 U.S. at 21-22, 88 S. Ct. at 1880, 20 L. Ed. 2d at 906). The dispute among the federal circuit courts of appeals concerns the question of who bears the burden of proving third-party consent did or did not authorize

a container search when the third party had actual authority to consent to a search of a premises but lacked actual authority to consent to a search of a container on that premises. The Sixth and Tenth Circuits have concluded the government bears the burden of demonstrating the officer inquired before searching a closed container if the circumstances would have alerted a reasonable officer that the person who consented to a search of the premises might not have had authority to consent to a search of a closed container. *See Taylor*, 600 F.3d at 681; *Salinas-Cano*, 959 F.2d at 864. The Second and Seventh Circuits have concluded the defendant bears the burden of adducing evidence to show the officer could not have reasonably relied on third-party consent so long as the third party had authority to consent to a search of the premises. *See Snype*, 441 F.3d at 136-37; *Melgar*, 227 F.3d at 1041. For the following reasons, we find the reasoning of the Sixth and Tenth Circuits to be more persuasive than the reasoning of the Second and Seventh Circuits.

First, we recognize a privacy interest in a closed container is not necessarily coextensive with a privacy interest in the surrounding location in which the container is located:

> A privacy interest in a home itself need not be coextensive with a privacy interest in the contents or movements of everything situated inside the home. This has been recognized before in connection with third-party consent to searches. A homeowner's consent to

> a search of the home may not be effective consent to a search of a closed object inside the home. Consent to search a container or a place is effective only when given by one with "common authority over or other sufficient relationship to the premises or effects sought to be inspected."

United States v. Karo, 468 U.S. 705, 725, 104 S. Ct. 3296, 3308, 82 L. Ed. 2d 530, 548 (1984) (O'Connor, J., concurring) (quoting *Matlock*, 415 U.S. at 171, 94 S. Ct. at 993, 39 L. Ed. 2d at 250). As the Indiana Supreme Court has pointed out, the *Melgar* court did not acknowledge third-party consent to search a premises may implicate privacy interests in a closed container that are distinct from those the third party had in the premises. *See Krise v. State*, 746 N.E.2d 957, 967-68 (Ind. 2001). We reject the notion that a guest assumes the risk the government might unreasonably intrude upon a privacy interest in a closed container merely by bringing the container into the home of another person. *See id.* As the United States Supreme Court has noted, "what is at issue when a claim of apparent consent is raised is not whether the right to be free of searches has been *waived*, but whether the right to be free of *unreasonable* searches has been *violated*." *Rodriguez*, 497 U.S. at 187, 110 S. Ct. at 2801, 111 L. Ed. 2d at 161.

Second, both the Supreme Court and this court have recognized the home is entitled to special status in the Fourth Amendment context. *See Kyllo v. United States*, 533 U.S. 27, 31, 121 S. Ct. 2038, 2041, 150

L. Ed. 2d 94, 100 (2001); *State v. Ochoa*, 792 N.W.2d 260, 276-77, 287 (Iowa 2010). It does not square with the Fourth Amendment's recognition of the sanctity of the home to suggest bringing an object into a home might diminish, rather than enhance, a person's privacy interest in that object. *See Karo*, 468 U.S. at 717, 104 S. Ct. at 3304, 82 L. Ed. 2d at 542 (holding warrantless electronic monitoring of a beeper inside a drum brought inside a home violated the Fourth Amendment).

Third, when a defendant moves to suppress evidence obtained when an officer conducted a warrantless search, the State bears the burden of proving the search did not violate the Fourth Amendment. *Nitcher*, 720 N.W.2d at 554. The Supreme Court has indicated this burden remains with the government in the context of third-party consent. *Rodriguez*, 497 U.S. at 181, 110 S. Ct. at 2797, 111 L. Ed. 2d at 156. *Rodriguez* made clear the government may meet its burden of proving the effectiveness of third-party consent by two possible means. *Id.* at 181, 188-89, 110 S. Ct. at 2798, 2801, 111 L. Ed. 2d at 156, 161. First, the government may demonstrate the person consenting to the search had actual authority to consent to a search of the location searched. *Id.* at 181, 110 S. Ct. at 2798, 111 L. Ed. 2d at 156. Second, the government may demonstrate the facts available to the officer when the officer conducted the search would have warranted a person of reasonable caution in the belief that the person consenting had authority to consent to a search of the location searched. *Id.* at 188-89, 110 S. Ct. at 2801, 111

L. Ed. 2d at 161. It would improperly reverse the burden of proof to require a defendant to *disprove* the effectiveness of the consent relied upon by officers who searched a closed container belonging to the defendant.

Finally, to flip the presumption of unreasonableness that generally applies to warrantless searches merely because a third party explicitly granted consent to a premises search would be inconsistent with *Rodriguez*. As the Supreme Court recognized in *Rodriguez*, even when a person makes an assertion he or she has authority to authorize a search, "the surrounding circumstances could conceivably be such that a reasonable person would doubt its truth and not act upon it without further inquiry." *Id.* at 188, 110 S. Ct. at 2801, 111 L. Ed. 2d at 161.

The lesson of *Rodriguez* is that a warrantless search is not authorized when the circumstances would cause a reasonable officer to doubt whether the party consenting had authority to consent with respect to the location to be searched. The mere fact that an officer subjectively relied on third-party consent does not render that reliance reasonable. *See id.* at 188-89, 110 S. Ct. at 2801, 111 L. Ed. 2d at 161. Reliance on apparent authority to authorize a search is only reasonable when the authority of the person consenting is actually apparent with respect to the location to be searched. Thus, when the totality of the circumstances indicates a reasonable officer would have conducted further inquiry to determine whether the person who consented to a premises search had authority to

consent to a search of a closed container, the government must demonstrate the officer did just that in order to establish the search of the container was reasonable.

The government bears the burden of proving a warrantless search was reasonable. Therefore, in determining whether a warrantless search of a container was reasonable based on the apparent authority of the consenting party, the relevant question is not whether the defendant has adduced enough evidence to prove an officer's reliance on third-party consent was unreasonable.[4] Rather, the question is whether the government has proved by a preponderance of the evidence that circumstances existing when the container was searched would have warranted a person of reasonable caution in the belief that the person who consented to a search of the premises also had authority over the container. *Waller*, 426 F.3d at 846 (quoting *Rodriguez*, 497 U.S. at 188, 110 S. Ct. at 2801, 111 L. Ed. 2d at 161).

The government cannot demonstrate an officer reasonably relied on apparent authority to authorize a search if the officer proceeded without making further inquiry when faced with an ambiguity concerning the question of whether the container to be searched was

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[4] The defendant *may* prove it was unreasonable for an officer to rely on third-party consent by demonstrating the officer had reliable information indicating the consenting party lacked authority to consent to the search of a closed container or that it was obvious the container belonged exclusively to the defendant. *Cf. Snype*, 441 F.3d at 136-37; *Melgar*, 227 F.3d at 1041.

subject to ownership or mutual use by the consenting party. *See id.* at 846-47. When an officer faced with such ambiguity searches a closed container without a warrant and without inquiring enough to clarify whether the person who consented to a premises search had authority to consent to a search of the container, the search is unlawful. *See Rodriguez*, 497 U.S. at 188-89, 110 S. Ct. at 2801, 111 L. Ed. 2d at 161; *Waller*, 426 F.3d at 846.

D. Analysis. As the district court noted, the State presented no evidence to indicate Olson had actual authority to consent to a search of Jackson's backpack. In addition, the State conceded Jackson maintained control over his backpack as a guest in Olson's bedroom. Thus, we must determine whether Olson had apparent authority to consent to the search of Jackson's backpack.

The first step in our analysis is to determine whether the State proved by a preponderance of the evidence the facts and circumstances known to the officers when Jackson's backpack was searched would have warranted a person of reasonable caution in the belief that Olson had authority over the backpack. If so, Officer Smithey reasonably relied on apparent authority to authorize the warrantless search without making further inquiry. To answer this question, we must consider whether a reasonable officer would have found Olson's authority to consent to a search of the backpack ambiguous based on the facts and circumstances known to the officers. *See Waller*, 426 F.3d at 847.

The evidence shows the officers knew the following facts when Officer Smithey conducted the search of the closed backpack. The officers initiated contact with the occupants of the apartment because they saw a black male observing them from the window and suspected he was involved in the robbery. The officers had just responded to a call about a robbery allegedly committed by two black males and followed footprints in the snow to the building in which the apartment was located. They were not responding to a call originating inside the apartment. When the officers knocked on the front door, it was nearly 1:00 a.m. After Turner answered the door and let the officers inside, Turner and Miller told the officers they lived in the apartment with their roommate, Olson.

Turner and Miller indicated Olson was the only other person present in the apartment, but that turned out to be untrue. When Officer Smithey asked Olson if he could peek inside his bedroom, Olson acknowledged Jackson was asleep in his bed. Olson told the officers Jackson was not in the apartment when he went to sleep and he awoke to discover Jackson sleeping beside him, but he did not suggest he was alarmed to discover Jackson in his bed. No one suggested to the officers that Jackson had broken into the apartment or had recently arrived, and no one indicated anything suspicious had occurred that evening. Rather, Turner indicated he had been home since approximately 9:00 p.m. and nothing suspicious had occurred since that time. The officers did not ask Turner, Miller, or Olson if Jackson was staying in the apartment or if he had

any belongings there. Although the officers noticed Jackson was sweaty and difficult to rouse from slumber, they found him to be cooperative once he was awake.

Before Officer Smithey informed Jackson of the outstanding warrant for his arrest and escorted him from the room, the officers did not ask him if he was staying in the apartment or had any belongings there. When the officers later asked Olson if there were any guns in his bedroom, he responded that there should not be or there were not any that he knew of. Olson then consented to a search of the room for guns or evidence of the robbery, but neither officer asked whether he owned the backpack or confirmed that everything in the room belonged to him. The backpack was sitting a few feet from the bed where Jackson had just been sleeping along the wall next to or partly inside the closet door, which was partially off its hinges.

We conclude the circumstances existing when Officer Smithey conducted the search of the backpack would cause a person of reasonable caution to question whether the backpack belonged to Jackson or Olson and whether it was subject to mutual use by Olson. *See id.* at 849. First, although no one in the apartment referred to Jackson as an overnight guest, the circumstances clearly suggested Jackson was an overnight guest. When the officers arrived at the apartment in the middle of the night, Jackson appeared to be asleep in a bed. Olson stated he was not sure when Jackson arrived, but he was not alarmed when he awoke to discover Jackson partially clothed beside him in bed.

Obviously Olson and Jackson were familiar enough that Jackson's presence in Olson's room late at night was not an unusual occurrence. In fact, there was reason to believe Jackson had a key to the apartment because Turner and Miller did not appear to know Jackson was in the apartment and Olson indicated Jackson arrived when he was asleep. In other words, the information available to the officers suggested Jackson arrived at the apartment when no one was home sometime after Olson went to sleep but before Turner arrived home from work.

Second, the circumstances known to the officers were sufficient to alert them to the fact that Jackson had clothes other than the pajama pants he was wearing at the apartment. The officers knew it was cold enough outside that Jackson probably had some sort of warmer apparel at the apartment, as there was fresh snow on the ground and they had followed footprints in the snow to the apartment building. The floor plan of the apartment was such that Jackson would have had to enter it from outdoors.

Third, the circumstances indicated it was likely the clothes Jackson was wearing when he arrived at the apartment were in Olson's bedroom. Jackson was asleep on the bed in Olson's bedroom wearing pajama pants when the officers arrived. Yet the statements Turner and Miller made to the officers indicated they did not know Jackson was in the apartment. Had Jackson changed into the pajama pants in the bathroom, kitchen, or living room and left his clothes there, Turner and Miller likely would have seen them and

known Jackson was in the apartment. Thus, the fact that Turner and Miller did not know Jackson was in the apartment suggested he either changed into the pajama pants in Olson's room or moved his clothes to Olson's room after putting the pajama pants on. Moreover, a backpack is the sort of container a person staying overnight in a place other than his or her home might use to hold clothing and other personal items.

Fourth, the statements Olson made suggested he knew there were items in his bedroom that did not belong to him. Olson did not answer definitively when asked whether there was a gun in the room. Had everything in the room that could conceal a gun belonged to Olson, he could have stated with certainty that there was no gun in the room. Instead, Olson waffled. His uncertainty in response to a direct question suggested he knew there were items in the room that did not belong to him and knew that one of those items might be a container concealing a gun from plain view.

Faced with these circumstances, we conclude a reasonable officer would have doubted whether Jackson owned the backpack and questioned whether Olson had authority to consent to a search of it. *See id.* at 848. The State does not dispute the officers made no inquiry concerning who owned the backpack before Officer Smithey searched it. Nor does the State suggest either officer ever asked anyone whether Jackson was staying in the apartment or had any personal belongings there. Had the officers asked questions intended to clarify whether Olson had authority to consent to the search of the backpack, Officer Smithey might

have reasonably relied on the answers the officers received to proceed with a warrantless search based on Olson's apparent authority to consent. However, the officers asked no questions to clarify who owned or used the backpack before Officer Smithey searched it even though the circumstances indicated Olson's authority to consent to a search of the backpack was ambiguous. Because the officers asked no such questions, Officer Smithey's reliance on Olson's consent to a search of his room to authorize a warrantless search of the backpack was unreasonable. In short, because the circumstances were unclear and the officers sought no clarification, Officer Smithey could not reasonably rely on apparent authority to authorize a warrantless search of the backpack.

The district court concluded the officers might have reasonably believed Jackson likely ran to the apartment after the robbery and feigned sleep. We do not disagree. However, the circumstances also suggested Jackson was either an overnight guest or staying in the apartment. The fact the officers might have reasonably thought one of these scenarios was more likely than the other does not eliminate the fact the circumstances were ambiguous. Moreover, if Officer Smithey reasonably believed Jackson was one of the restaurant robbers when he searched the backpack, that suggests he did not reasonably believe Olson had authority over the backpack when he searched it. If the very purpose of the search was to find evidence linking Jackson to the robbery, Officer Smithey would have had no motivation to open the closed backpack unless

he believed it might have belonged to Jackson. *See id.* at 849.

Finally, we note apparent authority is only a lawful basis for a search in "situations in which an officer would have had valid consent to search *if the facts were as he reasonably believed them to be.*" *Salinas-Cano*, 959 F.2d at 865 (quoting *Whitfield*, 939 F.2d at 1074). Thus, even if Officer Smithey reasonably believed Jackson had just arrived in the apartment, he could only reasonably rely on apparent authority to justify the search of the backpack *so long as* he reasonably believed Olson owned it. In light of the facts known to the officers when Officer Smithey opened the backpack, after realizing it contained a wallet and clothing recently worn outside, a reasonable officer would have been on notice that the backpack might not belong to Olson.

Nonetheless, when Officer Smithey removed the wallet from the backpack, he initially declined to open it. Instead, he reached into the backpack again, felt the wet hem on the jeans, and realized they had just been worn outside in the snow. At that point, if not before, a reasonable officer would have suspected the backpack likely belonged to Jackson. However, instead of stopping the search, Officer Smithey removed the jeans from the backpack and saw the gun beneath them. Only then did he open the wallet to confirm his suspicion that Jackson owned the backpack. The fact that he did so confirms he recognized it was unclear who owned the backpack by the time he removed the jeans from within it. Because Officer Smithey could not have reasonably believed it was certain that Olson owned

the backpack, yet declined to open the wallet sooner despite the ambiguous circumstances, his continued reliance on Olson's consent to authorize the warrantless search was unreasonable.

Because we conclude the circumstances were sufficiently ambiguous to place a reasonable officer on notice of his obligation to make inquiry as to who had authority to consent to a search of the closed backpack prior to searching it, we conclude the warrantless search of the backpack was unlawful under the Fourth Amendment. *See Waller*, 426 F.3d at 849. Thus, the district court erred in failing to suppress the evidence found in the backpack and the fruits of the unlawful search. *See Wong Sun v. United States*, 371 U.S. 471, 484-85, 83 S. Ct. 407, 415-16, 9 L. Ed. 2d 441, 453-54 (1963).

VI. The Defendant's Claim Under the Iowa Constitution.

Jackson also claims the State violated his rights under article I, section 8 of the Iowa Constitution. Article I, section 8 of the Iowa Constitution provides that "[t]he right of the people to be secure in their persons, houses, papers and effects, against unreasonable seizures and searches shall not be violated." Iowa Const. art. I, § 8.

We jealously guard our right to construe a provision of our state constitution differently than its federal counterpart, though the two provisions may contain nearly identical language and have the same

general scope, import, and purpose. *Kooima*, 833 N.W.2d at 206; *see Varnum v. Brien*, 763 N.W.2d 862, 878 n.6 (Iowa 2009). We also reserve our right to independently apply a federal standard more stringently than federal caselaw when construing the requirements of our state constitution, whether or not a party has advanced a different standard applies under the state constitution. *Kooima*, 833 N.W.2d at 206; *see Varnum*, 763 N.W.2d at 879 n.6.

However, because we conclude the warrantless search violated the federal constitution, we need not decide whether independent analysis or a more stringent application of the federal standard governing warrantless searches is required under our state constitution. *See Ochoa*, 792 N.W.2d at 267; *cf. Racing Ass'n of Cent. Iowa v. Fitzgerald*, 675 N.W.2d 1, 4-7 (Iowa 2004) (describing this court's obligation to independently evaluate constitutionality under our state constitution when conduct does not violate the federal constitution). Thus, we do not consider whether a warrantless search is valid under our state constitution when the individual who consented to a search of a premises had apparent authority, but not actual authority, to consent to a search of a closed container on that premises. *See, e.g.*, *State v. Lopez*, 896 P.2d 889, 903 (Haw. 1995); *State v. McLees*, 994 P.2d 683, 690-91 (Mont. 2000); *State v. Wright*, 893 P.2d 455, 460-61 (N.M. Ct. App. 1995); *State v. Will*, 885 P.2d 715, 719-20 (Or. Ct. App. 1994). Nor do we consider whether Jackson's trial counsel was constitutionally ineffective for

failing to argue the state constitution permits a warrantless search of a closed container based on consent to a premises search only when the person who consented to the premises search had actual authority to consent to a search of the closed container.

VII. Disposition.

Because the State failed to prove Olson had apparent authority to consent to a search of Jackson's backpack, we conclude the warrantless search was unlawful under the Fourth Amendment of the United States Constitution without further inquiry. Because the district court erred in denying Jackson's motion to suppress the evidence found in the backpack and the fruits of the unlawful search, we vacate the decision of the court of appeals, reverse the judgment of the district court, and remand the case for a new trial.

DECISION OF COURT OF APPEALS VACATED; DISTRICT COURT JUDGMENT REVERSED AND CASE REMANDED.

All justices concur except APPEL, J., who concurs specially, and ZAGER, WATERMAN, and MANSFIELD, JJ., who dissent.

APPEL, Justice (concurring specially).

I concur in the majority opinion. I would base the decision in this case, however, on article I, section 8 of the Iowa Constitution.

First, article I, section 1 declares that men and women have certain "inalienable rights," among those being "enjoying and defending life and liberty. . . ." The general declaration of inalienable rights is given further definition in article I, section 8 of the Iowa Constitution, which provides,

> The right of the people to be secure in their persons, houses, papers and effects, against unreasonable seizures and searches shall not be violated; and no warrant shall issue but on probable cause, supported by oath or affirmation, particularly describing the place to be searched, and the persons and things to be seized.

The constitutional focus of article I, section 8 is on protecting *personal, inalienable* rights at the very heart of freedom, the right to be secure in one's home and personal effects from unwarranted government invasions. *See State v. Young*, 863 N.W.2d 249, 278 (Iowa 2015) ("The bill of rights of the Iowa Constitution embraces the notion of 'inalienable rights'. . . ."); *State v. Short*, 851 N.W.2d 474, 484 (Iowa 2014) (noting the role of article I, section 1 in this court's decision in *Coger v. Nw. Union Packet Co.*, 37 Iowa 145 (1873), which rejected the notion that African Americans could be subjected to different treatment in public transportation); Joseph R. Grodin, *Rediscovering the State Constitutional Right to Happiness and Safety*, 25 Hastings Const. L. Q. 1, 22 (1997) ("[M]ost courts have assumed that the inalienable rights clauses have some judicially enforceable content.").

Second, the United States Supreme Court, in recent innovations, has undercut its own previous recognition of the traditional and fundamental concept that search and seizure protections are personal rights. In *Stoner v. California*, the Court declared that the right to be free from a warrantless search was "a right . . . which only the petitioner could waive . . . either directly or through an agent." 376 U.S. 483, 489, 84 S. Ct. 889, 893, 11 L. Ed. 2d 856, 860 (1964). Consistent with the personal-rights theory of search and seizure protections, after *Stoner*, the Court held that search and seizure rights are personal rights which cannot be asserted by a third party. *Rakas v. Illinois*, 439 U.S. 128, 133-34, 99 S. Ct. 421, 425, 58 L. Ed. 2d 387, 391 (1978). Although the Court significantly and unworkably undermined the concept of consent in *Schneckloth v. Bustamonte*, consent was still described as a situation "where a person foregoes a constitutional right." 412 U.S. 218, 245, 93 S. Ct. 2041, 2057, 36 L. Ed. 2d 854, 873 (1973).

The Court, however, upset the logic and balance of its prior consent cases in *Illinois v. Rodriguez*, 497 U.S. 177, 110 S. Ct. 2793, 111 L. Ed. 2d 148 (1990). In *Rodriguez*, the Court abandoned its focus on the personal nature of search and seizure protections and instead developed a new test of consent based on the reasonableness of police conduct. *Id.* at 184, 110 S. Ct. at 2799, 111 L. Ed. 2d at 158; *see* Christo Lassiter, *Consent to Search by Ignorant People*, 39 Tex. Tech L. Rev. 1171, 1173 (2007) (characterizing *Rodriguez* as "a new approach").

This new approach to consent embraced by the Court in *Rodriguez* stands in strong contradiction to its prior caselaw. We should not embrace this new approach to consent under the Iowa Constitution, which protects inalienable rights, including those related to search and seizure in article I, section 8. We have rejected "socio-juristic rationalizations" or "dilution" theories in search and seizure law. *State v. Cullison*, 173 N.W.2d 533, 536 (Iowa 1970).

Third, while the United States Supreme Court in *Rodriguez* and other later cases has sought to shrink the warrant requirement through radiations emanating from a highly pliable reasonableness clause, we have declined to adopt this additional revision of traditional search and seizure law under article I, section 8 of the Iowa Constitution. Instead, we have reaffirmed the primacy of the warrant requirement. *See State v. Ochoa*, 792 N.W.2d 260, 269 (Iowa 2010).

We examined these developments at length in *State v. Short*, 851 N.W.2d 474. As noted in *Short*, our constitutional jurisprudence has long emphasized the primacy of the warrant requirement. *Id.* at 503. In *Short*, we reiterated the traditional view that the constitutional workhorse of the search and seizure protections under article I, section 8 is the warrant requirement. *Id.* at 506. As explained in *Short*, the warrant requirement mandates not only that searches be approved by a neutral magistrate, but equally importantly that the scope of the search be well defined and that probable cause exists to support it. *Id.* at 502-03. *Short* firmly rejected the view that a freestanding

concept of "reasonableness . . . [was] the touchstone of search and seizure law." *Id.* at 501. We stated in *Short* that such an approach eviscerated the protections available under search and seizure law. *Id.* at 501-02.

There are, as recognized in *Short*, exceptions to the ordinarily required warrant based largely upon the impracticability of obtaining a warrant. *Id.* at 496-97. There is no claim in this case that the warrantless search here was supported by exigent circumstances or a search incident to arrest. The search is supported solely on the theory of consent. The question thus is whether the defendant here consented to forego the constitutional protections offered by the warrant requirement under article I, section 8. If a person grants consent to a search or seizure, the protections of article I, section 8 are inapplicable.

Fourth, in evaluating consent, the sole focus is whether the individual has elected to forgo personal constitutional protections, thereby rendering constitutional limitations inapplicable. The focus should laser in on the only relevant constitutional issues: Did the defendant give consent, and was the consent voluntary or coerced?

We must thus separate the wheat from the chaff. Consent searches have nothing to do with the impracticability of obtaining a warrant. Impracticability is beside the point. Consent searches have nothing to do with the reasonability of police conduct. Otherwise, the personal search and seizure protections of article I, section 8 are turned upside down and subverted from

providing personal protections into an enabling act allowing police to engage in warrantless searches without consent as long as the search meets some freewheeling post-hoc concept of reasonableness. *See* Thomas Y. Davies, *Denying a Right by Disregarding Doctrine: How Illinois v. Rodriguez Demeans Consent, Trivializes Fourth Amendment Reasonableness, and Exaggerates the Excusability of Police Error*, 59 Tenn. L. Rev. 1, 6 (1991) [hereinafter Davies].

Here, it is clear there was no actual consent. Further, it is undisputed that no third party had actual authority to give consent. Under article I, section 8, a warrant is thus required to conduct the search, unless some exception to the warrant requirement is present. Because the State does not claim any other basis to support the search, the results of the search are based on an unauthorized third-party consent and must be suppressed.

In this case, counsel for Jackson did not argue that article I, section 8 of the Iowa Constitution should be construed differently from its federal counterpart. In my view, Jackson received ineffective assistance of counsel because of his failure to raise the issue. As we have previously stated, defense lawyers must "take pains to guarantee that their training is adequate and their knowledge up-to-date in order to fulfill their duty as advocates." *State v. Vance*, 790 N.W.2d 775, 785 (Iowa 2010) (quoting ABA Standards for Criminal Justice: Prosecution Function and Defense Function 4-1.2(e) cmt., at 122-23 (3d ed. 1993)). Further, an effective attorney is one who "diligently devotes him

or herself to scholarly study of the governing legal principles" implicated in a given case. *Id.* at 786 (quoting 16 Gregory C. Sisk & Mark S. Cady, *Iowa Practice Series: Lawyer and Judicial Ethics*, § 5:1(b), at 140 (2007)). A lawyer conforming to these standards would have been aware of the willingness of state courts, including Iowa's, to depart from United States Supreme Court precedent in the search and seizure area, of the caselaw from other jurisdictions where state supreme courts have declined to follow *Rodriguez*, and of the academic literature criticizing the consent doctrine adopted in *Rodriguez*. *See State v. Lopez*, 896 P.2d 889, 901-02 (Haw. 1995); *State v. McLees*, 994 P.2d 683, 691 (Mont. 2000); *State v. Wright*, 893 P.2d 455, 461 (N.M. Ct. App. 1995); *State v. Will*, 885 P.2d 715, 719 (Or. Ct. App. 1994); *State v. Morse*, 123 P.3d 832, 838 (Wash. 2005); Davies, 59 Tenn. L. Rev. at 8-10.

For the above reasons, I would thus hold that the search in this case is constitutionally infirm under article I, section 8 of the Iowa Constitution.

ZAGER, Justice (dissenting).

I respectfully dissent.

After thoroughly reviewing all of the evidence, the district court concluded that under the Fourth Amendment, Olson had apparent authority to consent to the search of the backpack located in his bedroom. I agree, and I would affirm the decision of the court of appeals and the judgment of the district court.

As a preliminary matter, I agree with the conclusion reached by the majority that this case can be decided under the Fourth Amendment to the United States Constitution and the cases cited therein. *See Illinois v. Rodriguez*, 497 U.S. 177, 186, 110 S. Ct. 2793, 2800, 111 L. Ed. 2d 148, 160 (1990). However, I also think it is important to recognize the standard of review that must be utilized. Our review in this case is de novo. *State v. Gaskins*, 866 N.W.2d 1, 5 (Iowa 2015). "Because this case concerns the constitutional right to be free from unreasonable searches and seizures, our review of the district court's suppression ruling is de novo." *Id.* (quoting *State v. Watts*, 801 N.W.2d 845, 850 (Iowa 2011)). "We independently evaluate the totality of the circumstances found in the record, including the evidence introduced at both the suppression hearing and at trial." *Id.* (quoting *State v. Vance*, 790 N.W.2d 775, 780 (Iowa 2010)).

I. General Search and Seizure Principles.

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. amend. IV. Both the Fourth Amendment and article I, section 8 of the Iowa Constitution protect the right of individuals to be free from unreasonable searches and seizures. *Id.*; Iowa Const. art. I, § 8.

"Warrantless searches are per se unreasonable if they do not fall within one of the well-recognized exceptions to the warrant requirement." *State v. Tyler*, 867 N.W.2d 136, 169 (Iowa 2015) (quoting *State v. Lowe*, 812 N.W.2d 554, 568 (Iowa 2012)). Under the Fourth Amendment, a warrant is not required to authorize a search performed pursuant to voluntary consent. *See State v. Pals*, 805 N.W.2d 767, 777 (Iowa 2011). Likewise, we have recognized that an officer may rely on the consent of a third party to authorize a warrantless search, so long as the circumstances indicate the third party had actual authority to consent to a search of the location. *See, e.g.*, *State v. Campbell*, 326 N.W.2d 350, 352 (Iowa 1982). The State has conceded that there was no actual authority for the third party – Olson – to consent to the search of the backpack.

II. Apparent Authority to Consent to a Search.

Under the Fourth Amendment, a law enforcement officer is entitled to rely on the consent of a third party authorizing a warrantless search based on that third party's apparent authority to consent to the search in question. *Rodriguez*, 497 U.S. at 186, 110 S. Ct. at 2800, 111 L. Ed. 2d at 160. The Supreme Court has made it clear that under the Fourth Amendment, law enforcement officers may conduct a search based on the

consent of a party who does not have actual authority over the property to be searched, so long as the officers reasonably (though erroneously) believe that the person who has consented to their entry had authority over the premises. *Id.* In *Rodriguez*, the Court concluded a warrantless search conducted after obtaining the consent of a third party does not violate the Fourth Amendment so long as the facts available to the officers at the time of the search occurred would "'warrant a man of reasonable caution in the belief' that the consenting party had authority over the premises." *Id.* at 188, 110 S. Ct. at 2801, 111 L. Ed. 2d at 161 (quoting *Terry v. Ohio*, 392 U.S. 1, 21-22, 88 S. Ct. 1868, 1880, 20 L. Ed. 2d 889, 906 (1968)). If not, "warrantless entry without further inquiry is unlawful unless authority actually exists." *Id.* at 188-89, 110 S. Ct. at 2801, 111 L. Ed. 2d at 161. The Court cautioned that "surrounding circumstances could conceivably be such that a reasonable person would doubt [an individual's assertion of authority] and not act upon it without further inquiry." *Id.* at 188, 110 S. Ct. at 2801, 111 L. Ed. 2d at 161. As such, we utilize an objective standard to determine whether apparent authority existed at the time of a warrantless search. *Id.*

We have adopted these doctrines through our own case law. *See, e.g.*, *Lowe*, 812 N.W.2d at 576. Relying on *Rodriguez*, we confirmed that the authority to consent includes not only actual authority, but also apparent authority. *Id.* We also confirmed that apparent authority validates a search when officers "enter without a warrant because they reasonably (though erroneously)

believe that the person who has consented to their entry" had the authority to do so. *Id.* (quoting *Rodriguez*, 497 U.S. at 186, 110 S. Ct. at 2800, 111 L. Ed. 2d at 160). We apply an objective standard when analyzing consent and ask, "[W]ould the facts available to the officer at the moment . . . warrant a [person] of reasonable caution in the belief that the consenting party had authority over the premises?" *Id.* (second alteration in original) (quoting *Rodriguez*, 497 U.S. at 188, 110 S. Ct. at 2801, 111 L. Ed. 2d at 161).

A. Apparent Authority Applied to Closed Containers. As the majority properly notes, the Supreme Court has yet to apply the doctrine of consent by a third party to the search of another's closed container under the theory of apparent authority. I also recognize that there is a split of authority as to the application of the doctrine among the federal circuit courts of appeals. However, what is clear is that any analysis of the doctrine is highly fact-specific. It is equally clear that it is only in those circumstances where ambiguity exists that it is reasonable to require that officers make further inquiry regarding the ownership of the closed container. "Even when the invitation is accompanied by an explicit assertion that the person lives there, the surrounding circumstances could conceivably be such that a reasonable person would doubt its truth and not act upon it without further inquiry." *Rodriguez*, at 188, 110 S. Ct. at 2801, 111 L. Ed. 2d at 161. While acknowledging a split of authority, a review of various decisions of the United States Courts of Appeal confirms several conclusions. First,

the facts in those cases are distinguishable from the facts presented here. Second, there is no ambiguity relating to the authority of Olson to consent to the search of the backpack in this case. Therefore, the law enforcement officers had no duty to make further inquiry before they searched the backpack.

1. *Tenth Circuit Court of Appeals.* In *United States v. Salinas-Cano*, the defendant was arrested following a controlled drug buy. 959 F.2d 861, 862 (10th Cir. 1992). After his arrest, police went to his girlfriend's apartment and asked her for permission to search. *Id.* The police told her they were specifically interested in Salinas-Cano's possessions. *Id.* She consented to the search and told the police where Salinas-Cano kept his belongings at her apartment. *Id.* The police opened what they had just been advised was Salinas-Cano's closed but unlocked suitcase, where they discovered cocaine. *Id.*

In addition to the obvious differences between the facts of *Salinas-Cano* and the case presently before us, the legal arguments were also distinct. In *Salinas-Cano*, the government primarily relied on the concepts of actual authority, joint access, and control in arguing for the admissibility of the evidence. *See id.* at 863. The government also attempted to utilize the apparent authority doctrine because the officer testified he *thought* the consenting party – the girlfriend – had joint access and control. *Id.* at 865. As properly concluded by the court, apparent authority "does not empower the police to legitimize a search merely by the incantation of the phrase." *Id.* The analysis should instead rest entirely

upon the reasonableness of the officer's belief in the apparent authority. *Id.*

There is no logical correlation between the facts in *Salinas-Cano* and the facts in the case now before us. I would agree there may arguably be ambiguity under the facts presented in *Salinas-Cano* regarding actual authority, joint access, and control. Under those circumstances, further inquiry by police would appear reasonable. The failure to make this further inquiry regarding actual authority, joint access, and control over what the officers knew was someone else's property was unreasonable. However, the decision in that case bears no factual similarity to the facts of our case and does not help inform the outcome here.

2. *Sixth Circuit Court of Appeals.* The case currently before us is also clearly distinguishable from the facts considered by the Sixth Circuit in *United States v. Waller*, 426 F.3d 838 (6th Cir. 2005). After a falling out with the owners of his previous residence, Waller obtained permission from a friend to store his personal belongings in the friend's apartment. *Id.* at 842. Waller kept a brown luggage bag, garbage bags of clothing, and food at the friend's apartment. *Id.* He also ate, showered, and changed clothes at the apartment, but he did not sleep there. *Id.* Waller was later arrested in the parking lot of the apartment complex where the friend resided. *Id.* After arresting Waller in the parking lot, the arresting officers proceeded to the apartment. *Id.* Waller's friend, the tenant, advised the officers that Waller had been storing some property in his apartment. *Id.* The friend consented to the search

of the apartment, and the police began searching for personal items belonging to Waller. *Id.* One of the officers found the zipped brown luggage bag in the bedroom closet, opened it, and discovered two handguns. *Id.*

Relying on *Rodriguez*, the court stated, "[W]here the circumstances presented would cause a person of reasonable caution to question whether the third party has mutual use of the property, 'warrantless entry without further inquiry is unlawful[.]' " *Id.* at 846 (alteration in original) (quoting *Rodriguez*, 497 U.S. at 188-89, 110 S. Ct. at 2801, 111 L. Ed. 2d at 161). The court concluded that "the circumstances made it unclear whether Waller's luggage bag was 'subject to mutual use by' [his friend] and therefore the officers' warrantless entry into that luggage without further inquiry was unlawful." *Id.* at 847. As will be discussed below, ambiguous facts related to mutual use and apparent authority are not present in our case.

3. *Seventh Circuit Court of Appeals.* The facts considered by the Seventh Circuit in *United States v. Melgar* are most analogous to the facts before us now. 227 F.3d 1038 (7th Cir. 2000). In their investigation of the charges of passing counterfeit checks, officers obtained consent to search a motel room from the woman who had rented it. *Id.* at 1039. There were a number of other people in the room when the officers arrived. *Id.* While conducting a search of the room, the officers found a purse with no identifying marks on it under the mattress of the hotel bed. *Id.* at 1040. Without inquiring further as to which of the occupants owned the purse, the officers opened it. *Id.* The court rejected the

argument that the officers should have inquired further as to the actual ownership of the purse. *Id.* at 1041-42. The court concluded that apparent authority exists so long as the officer who conducts a warrantless search pursuant to third-party consent has no reliable information indicating that the consenting party has no authority over the container being searched. *Id.*

The majority rejects the Seventh Circuit's approach for requiring such "reliable information." However, I believe that requiring some reliable facts is the most logical approach. The facts are even stronger in our case. Olson, the sole tenant of the room, provided consent to search his bedroom. After being granted consent to search, police had no reason to believe there was any limitation on the consent unless some information, whether expressed by someone or clear from the circumstances, alerted the officers that the authority to search a closed container in his bedroom may be in question. A simple "that purse isn't mine" on the facts of *Melgar*, or a simple "that's not my backpack" here, would seem to suffice. Simply standing mute does not.

4. *Second Circuit Court of Appeals.* The facts of the Second Circuit's decision in *United States v. Snype* are so convoluted that even a full recitation would not, in my opinion, contribute to a principled resolution of our case. *See* 441 F.3d 119, 125-27 (2d Cir. 2006). However, the one principle that does evolve from this opinion is the approach to apparent authority taken by the Second Circuit. The approach taken in *Snype* is that an open-ended consent to search an apartment by a lessee

permits the search and seizure of any items found in the apartment with the exception of those that "obviously belonged" to another person. *Id.* at 137. This is a fact question to be decided objectively based on a review of the unique facts and circumstances of each case.

III. Applicable Test.

The majority spends a considerable number of pages attempting to decide who has the burden of proof in a case of apparent authority to search when consent is given by a third party. There is really no question that the government bears the burden of proving that any search does not violate the Fourth Amendment. Under *Rodriguez*, when consent to a warrantless search is given by a third person, such consent must be based on actual or apparent authority. *See Rodriguez*, 497 U.S. at 188-89, 110 S. Ct. at 2801, 111 L. Ed. 2d at 161. None of the authorities cited by the majority stand for the proposition that the defendant must come forward with evidence to show the officer could not have reasonably relied on the third-party consent. There is no burden placed on the defendant. Rather, an objective review of the facts of each case will speak for themselves. Likewise, the various competing interests discussed by the majority are already subsumed in the standards that the courts have been utilizing for decades.

In *Rodriguez*, the Court clearly established that the government has two potential avenues for meeting

its burden of proving the effectiveness of third-party consent. First, the government may introduce evidence demonstrating that the person who consented to the search had actual authority to consent. *Id.* at 181, 110 S. Ct. at 2798, 111 L. Ed. 2d at 155-56. Second, the government may introduce evidence demonstrating that the facts available to the officer at the time of the search would have warranted a person of reasonable caution in the belief that the person whose consent had been obtained had the authority to consent to the search. *Id.* at 185-86, 110 S. Ct. at 2801, 111 L. Ed. 2d at 161. Nothing in these standards shifts the burden of proof to the defendant.

This brings us to the issue of ambiguity. The majority takes the position that any time there is a question of ownership of a container, no matter how remote or how attenuated it may be, an ambiguity exists which requires further inquiry by police. Failing to make this further inquiry makes the search unlawful. However, this is not what the law or the Constitution requires.

> *Rodriguez* neither imposes a duty of exhaustive inquiry by police before apparent authority will be found to exist, nor credits willful ignorance; it requires that the officer's belief in the consenter's authority over the place or object be objectively reasonable.

State v. Westlake, 353 P.3d 438, 442 (Idaho Ct. App. 2015). Police may not accept an invitation to search if the existing circumstances would cause a reasonable person to doubt the consenter's authority, absent any

further inquiry. *Id*. The question here is whether a reasonable police officer, looking at all the facts available, would doubt that Olson had the authority to consent to the search of his bedroom and the contents of his bedroom, including the backpack. The answer is that there is no reasonable doubt. There is also no ambiguity requiring further inquiry. There was no Fourth Amendment violation here.

IV. Analysis.

The parties stipulated Olson did not have actual authority to consent to the search of Jackson's backpack. In addition, the State conceded Jackson maintained control over his backpack located in Olson's bedroom. We must therefore determine whether Olson had the apparent authority to consent to the search of Jackson's backpack. Any analysis must begin with a full recitation of the facts.

A. Facts. On November 13, 2012, Iowa City police officer Michael McKenna was dispatched to the On the Go BP gas station in Iowa City after a report of an armed robbery. The store clerk reported that a black male with a thin build, wearing a black mask and a red coat, entered the store, pointed a gun at him, and demanded the money in the cash register and a carton of Newport 100's cigarettes. Detective Scott Stevens of the Iowa City Police Department was the primary investigator for the On the Go BP robbery. Detective Stevens watched the surveillance video of the robbery with the store owner. The video showed a medium

height, black male enter the store wearing a red coat, a black face mask, and white tennis shoes. On December 13, the store owner called Detective Stevens and told him that a customer had identified the robber as a man with the street name "Juicy." With this information, Detective Stevens was able to identify "Juicy" as Marvis Latrell Jackson. After unsuccessful attempts to reach Jackson, Detective Stevens obtained a warrant for his arrest.

At 12:35 a.m. on December 31, Iowa City police officer Michael Smithey was dispatched to Gumby's Pizza after a report of an armed robbery. The Gumby's employee told Officer Smithey that two black males had entered the restaurant wearing black hats and had black bandanas covering their faces. One of the men had pointed a handgun at him and demanded money from the cash register. The employee complied and estimated that the robbers took $125 in one dollar bills, $50 in five dollar bills, and one twenty dollar bill. The men ran out of the store and headed northbound on Gilbert Street.

While Officer Smithey met with the employee, another man approached the officer and asked if there had been a robbery. The man stated he had just witnessed two black males walking away from the area and one of the men appeared to be holding a fistful of cash. He also stated that when the men saw him, they took off running. Officer Smithey drove the witness to the location where he had last seen the men on foot. Officer Smithey noticed footprints in the fresh snow and called for a canine unit. Officer Brandon Faulkcon

and his canine partner arrived and were able to track the scent and the footprints to the southeast corner of a building located on South Gilbert Street. Also present were Officer Smithey and Officer Alex Stricker. The street level of the building was a retail establishment, while the second story contained apartments with outside doors accessible by a common stairwell in the rear of the building. The officers visually surveyed the exterior of the building. They saw lights on in one of the apartments and observed a tall black male looking out of the window inquisitively. The man appeared to match the description of one of the robbery suspects. When he saw the officers looking up at him, he quickly ducked out of sight.

After this observation, the officers decided to approach the apartment. When the officers arrived at the front door, they noticed that the lights in the apartment had been turned off. While they were standing outside the front door, they heard the apartment door lock from the inside. Officer Smithey knocked on the door and announced he was a police officer. A tall black male answered the door and identified himself as Wesley Turner. The officers explained why they were there, and Turner allowed them inside the apartment. When officers asked who else was present in the apartment, Turner answered that it was only him, his girlfriend Alyssa Miller, and their roommate Gunnar Olson. Turner told officers that Olson was asleep in his room, but he agreed to wake him so officers could speak with him. After Turner knocked on the bedroom door, Olson, who is also a black male, emerged from his room.

The officers decided to speak with the men separately. Officer Stricker continued to speak with Turner in the living room while Officer Smithey spoke with Olson in the kitchen. Turner said he had been in the apartment since he returned home from work at 9:00 p.m. He reported he had not seen anything suspicious. When asked who lived in the apartment, Turner confirmed that he lived in the apartment with only Olson and Miller.

In the kitchen, Olson also confirmed that the only residents of the apartment were himself, Turner, and Miller. Officer Smithey asked Olson if he could look in his room. Olson told him that he had been sleeping in his room after work and awoke to find his cousin, Marvis, sleeping next to him. Upon further questioning by Officer Smithey, Olson admitted that he did not know Marvis's last name and that they were not really cousins. When Officer Smithey entered Olson's bedroom, he observed a black male – who he later identified as Jackson – lying on an air mattress, shirtless but wearing pajama bottoms. Officer Smithey observed that Jackson's neck and brow were sweaty, which he thought was odd since the apartment was not warm and no one else was sweating. Olson then attempted to wake Jackson. Officer Smithey thought it seemed considerably more difficult than it should have been to wake him. After Jackson got up, he was asked for identification. Jackson stated that he did not have any identification, but identified himself as Marvis Latrell Jackson. The officers ran Jackson's name through dispatch and were advised of the outstanding warrant for

his arrest. Officer Smithey arrested Jackson and turned him over to another officer, who removed Jackson from the apartment. Jackson did not indicate he had any personal possessions in the apartment or ask to retrieve any personal property.

After Jackson was taken from the apartment, Officer Stricker continued to speak with Olson. Olson repeated that Jackson had apparently arrived sometime earlier that evening after he had gone to sleep. He again confirmed that no one else lived in the apartment except for the three tenants. When Olson was asked whether there were any guns in the room, he replied that there should not be or that he did not know of any. Olson repeated that he lived in the bedroom alone. Officer Stricker asked Olson if he would consent to the search of his bedroom for guns or any evidence of the robbery. Olson consented. When Officer Smithey arrived, Officer Stricker informed him that Olson had consented to the search of his bedroom for guns and any evidence of the robbery. Officer Smithey confirmed with Olson that he consented to the search of his bedroom.

Officer Smithey performed the search. He began the search of the bedroom by searching under and around the air mattress and on a chair. He then grabbed a backpack that was sitting on the floor in the doorway of the bedroom closet. The backpack was closed and had no obvious identifying marks or tags. Officer Smithey opened the closed backpack and took out a wallet and placed it, unopened, on a nearby chair. Officer Smithey reached in a second time and retrieved

a pair of dark jeans that were wet around the cuffs. Upon removing the jeans, Officer Smithey saw a black handgun in the backpack. After discovering the handgun, Officer Smithey discontinued his search.

Officer Smithey then checked the wallet for identification and found that it contained identification belonging to Jackson. Officer Smithey took a photograph of the handgun located inside the backpack to use in an application for a search warrant. He instructed the other officers to lock down the apartment so a search warrant could be obtained. After the officers locked down the apartment, they conducted a protective sweep. During the sweep, the officers observed a marijuana grinder and pipe, which they photographed and included in the search warrant application. Officer Smithey also included the photograph of the handgun in the application. Investigator Tom Hartshorn of the Iowa City Police Department applied for and obtained the search warrant for the apartment. Investigator Hartshorn executed the warrant and found clothes matching the description of the Gumby's robbers, in addition to money in an amount matching the description of the money taken from Gumby's.

B. Application. The threshold question in this case is whether, based on all of the facts presented, Officer Smithey reasonably relied on the apparent authority of Olson to consent to the search of the backpack located within his bedroom, or whether Officer Smithey reasonably needed to make further inquiry as to the ownership of the backpack. Based on the fact-intensive, objective standard that we must

utilize, a reasonable person in Officer Smithey's position would have concluded that Olson had the apparent authority to consent to the search of the backpack located on the floor of his bedroom. We only need to review the facts presented here to support this conclusion.

As a starting point, contrary to the position of the majority, there is nothing ambiguous about Olson's authority to consent to the search of his room, including the backpack. The officers initiated contact with the occupants of the apartment as part of their investigation of an armed robbery that had just occurred. Their investigation revealed a direct path leading from the site of the robbery to the door of the apartment. This all occurred between 12:35 a.m. and 1:00 a.m. There is no dispute that officers knocked on the door, identified themselves, and explained that they were investigating a robbery that had just occurred. Turner consented to their entry into the apartment. They encountered Turner's girlfriend, Miller, who also acknowledged that she lived in the apartment. Both Turner and Miller told officers that the only other person in the apartment was their roommate, Olson.

Turner went to Olson's bedroom and woke him. The officers decided to speak with the two men separately. Officer Stricker spoke with Turner. Turner indicated that he had been in the apartment since he arrived home from work at approximately 9:00 p.m. He had observed nothing suspicious. Meanwhile, Officer Smithey spoke with Olson in the kitchen. Olson confirmed he lived alone in the apartment with Turner

and Miller. Olson told the officer the bedroom was his alone. Both Turner and Olson independently confirmed that there were no other tenants of the apartment, and there was no one else present in the apartment. Despite repeated affirmations from all three tenants to the contrary, when Officer Smithey asked Olson if he could peek inside his bedroom, he learned there was another person in the apartment. Olson claimed that he had gone to sleep, alone, earlier in the evening. It was only after he had been awakened by Turner that he realized his cousin Marvis had slipped into bed with him and was sleeping. When asked, Olson acknowledged that he did not know Marvis's last name and they were not really cousins.

Olson led Officer Smithey to his bedroom while Officer Stricker looked on. It is at this point that an objective review of the facts becomes critical. The majority blindly accepts the statements made by the Turner, Olson, and Miller, even in the face of their obvious incredibility and dishonesty. No one suggested that Jackson had broken into the apartment, and no one suggested that the tenants were alarmed that Jackson was found in the apartment. However, these are not facts or evidence of anything. Likewise, none of the inhabitants – Turner, Miller, or Olson – even

remotely suggested to the officers that Jackson was a tenant[5] or an overnight guest.[6]

The majority is persuaded by the statements from Turner that he had been home since 9:00 p.m., that no one had recently arrived at the apartment, and that he had not observed anything suspicious. Of course, all of these statements defy credibility. Further, the majority fails to explain the obvious feigned sleep or the sweat observed on Jackson's forehead. This apparently does not require an explanation since "they found him to be cooperative once he was awake."

It was at this time that Jackson was informed of the outstanding warrant for his arrest. While neither officer could specifically remember telling Jackson to put his shirt back on before exiting the apartment, they both believe Jackson got dressed since it was the middle of winter. The officers did not ask Jackson if he was staying in the apartment or if he had any of his belongings in the apartment. Nor do I believe they were required to do so. The officers were following up on an armed robbery that had just occurred. The robbers had fled from the scene of the robbery to the

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[5] Generally, one cotenant may consent to a search of a shared living area. *United States v. Matlock*, 415 U.S. 164, 171, 94 S. Ct. 988, 993, 39 L. Ed. 2d 242, 249-50 (1974). However, if one of the physically present cotenants does not consent to the search, the search is rendered "unreasonable and invalid" as to that cotenant. *Georgia v. Randolph*, 547 U.S. 103, 106, 126 S. Ct. 1515, 1518-19, 164 L. Ed. 2d 208, 217 (2006).

[6] Overnight guests may have a legitimate expectation of privacy in a host's home. *Minnesota v. Olson*, 495 U.S. 91, 99-100, 110 S. Ct. 1684, 1689-90, 109 L. Ed. 2d 85, 95 (1990).

apartment. In an attempt to elude detection, Jackson threw off his clothes, jumped into Olson's bed, feigned sleep, and hoped that the tenants could prevent officers from detecting him. Officers were repeatedly told by all three tenants that there was no one else in the apartment and that no one else lived there. There is nothing ambiguous about this scenario. There is nothing in this record which would alert a reasonable officer to stop and ask Jackson whether he was staying there or whether he had any personal property located in the apartment. Of course, if Jackson wanted to alert officers that some of his property was located in Olson's bedroom, he could easily have spoken up.

Officers then asked Olson for consent to search his bedroom, which was granted. More importantly, Olson was specifically asked for consent to search his bedroom to look for guns and any evidence of the robbery. When asked if any guns would be found, he replied there should not be any guns, or at least no guns that he knew of. Olson consented to the search, without limitation. Olson also failed to inform the officers that some of the property in his bedroom might not belong to him. Neither officer asked Olson whether he owned the backpack, or confirmed with Olson that everything in his bedroom belonged to him. Again, nothing in the record would require such an inquiry. There is no ambiguity under the facts here. Nothing would have alerted Officer Smithey, as a person of reasonable caution, to question whether a backpack located near or partially in Olson's bedroom closet actually belonged to him.

Certainly there were no facts tending to show the backpack belonged to Jackson. There is simply no evidence to support this. The majority first asserts that the circumstances clearly suggested that Jackson was an overnight guest. But let's look at the facts. The majority finds significant that it was the middle of the night. However, the armed robbery the officers were investigating had occurred only minutes before. Jackson appeared to be asleep – yet the feigned heaviness of the sleep and the obvious sweat observed on Jackson's forehead belies that he was asleep. Olson told the officers that he did not know when Jackson disrobed and got into bed with him, but he was not alarmed. After first lying about Jackson's mere existence in his bedroom, Olson could not even tell the officers Jackson's last name. Under this set of facts, the majority concludes that "obviously Olson and Jackson are familiar enough that Jackson's presence in Olson's room late at night was not an unusual occurrence." I find this incredible.

The majority then enters into the realm of fantasy by suggesting that Jackson may have even had a key to the apartment because Turner and Miller did not appear to know Jackson was in the apartment and Olson claimed Jackson arrived after he was asleep. Or perhaps Jackson and someone else committed an armed robbery, Jackson ran to Turner's apartment where they were let in, Jackson ran into Olson's bedroom, disrobed and pretended to go to sleep, and hoped that Turner and Miller could hold the authorities at

bay. It is inconceivable that the officers here would reasonably believe that Jackson simply arrived in Olson's bedroom when no one else was home sometime after Olson went to sleep but before Turner arrived home from work.

Second, I agree that officers would have reasonably known that Jackson was probably wearing clothing other than his pajama pants prior to his entering Olson's bedroom. However, I do not believe that adds any cogent facts to our analysis. His clothing could have been literally anywhere in the apartment. The officers had no reason to assume an overnight guest would stuff their wet pants in a backpack. It is much more likely the guest would toss their wet pants over a chair, in the closet, or on the tub in the bathroom. The officers here were not looking for wet pants in a backpack, nor would they have any other reason to assume that the backpack belonged to Jackson. None of the facts in this record would lead a reasonable officer to question the ownership of the backpack.

Similarly, the majority claims that the officers should have somehow reasonably known that Jackson's clothes were concealed in an unmarked backpack located in Olson's bedroom because he was in his pajama pants. To support this inference, the majority repeats the already discredited story from Turner and Miller that they had no idea that Jackson was in the apartment. If they had seen his clothes in the bathroom, kitchen, or living room, then they would have known Jackson was there. The majority believes this "suggests" Jackson either changed into pajama pants

in Olson's room or moved the clothing to Olson's room after changing. Then Jackson had the courtesy to stuff only his pants into the backpack, because this is the sort of container a person staying overnight in a place other than his own home might use to hold clothing and other personal items. But where is all of Jackson's other clothing? Where did he find the clothing that he presumably wore out of the apartment? Other than speculation and conjecture, there is simply nothing in these facts that aid Jackson.

Last, the qualified statements made by Olson clearly do not alert officers that he knew there were items in his bedroom that did not belong to him, namely the backpack. Olson did not give the officers a definitive answer when asked whether there was a gun in his room. This should not come as a shock based on the lack of honesty by all of the residents of the apartment up until this time. The majority takes this uncertainty in response and again suggests Olson knew there were items in the room that did not belong to him and knew that one of those items might be a container concealing a gun. I do not believe that Olson's avoidant answer to the question about a gun suggests anything close to this to a reasonable officer, nor would it suggest anything to a reasonable person.

C. Conclusion. Based on all of the above unique facts and circumstances, the majority concludes a reasonable officer would have questioned the ownership of the backpack and questioned whether Olson had the apparent authority to consent to the search of it.

However, this conclusion rests upon the improper application of the Constitution and case law. Our inquiry under the Federal Constitution is whether it was reasonable for Officers Smithey and Stricker to believe that Olson had authority to consent to the search of the bedroom and the backpack contained therein. *See Rodriguez*, 497 U.S. at 186, 110 S. Ct. at 2800, 111 L. Ed. 2d at 160 ("Whether the basis for such authority exists is the sort of recurring factual question to which law enforcement officials must be expected to apply their judgement; and all the Fourth Amendment requires is that they answer it reasonably."). In determining whether it was reasonable for the officers to conclude Olson had authority to consent, we apply an objective standard. *See Lowe*, 812 N.W.2d at 576. We ask if "the facts available to the officer at the moment . . . [would] 'warrant a man of reasonable caution in the belief that the consenting party had authority over the premises.'" *Rodriguez*, 497 U.S. at 188, 110 S. Ct. at 2801, 111 L. Ed. 2d at 161 (quoting *Terry*, 392 U.S. at 21-22, 88 S. Ct. at 1880, 20 L. Ed. 2d at 906). All of the facts presented here would warrant a man of reasonable caution to believe that Olson had the authority to consent to the search of his room and the contents therein, including the backpack.

The majority creates ambiguity in the undisputed facts by suggesting scenarios I have discounted above. Nothing in the facts suggests Jackson was either an overnight guest or staying at the apartment. There is no reasonable ambiguity here. Importantly, when officers searched the backpack, they did not know who was

involved in the restaurant robbery. The point of the consent search was an attempt to find evidence of the robbery. Jackson had been arrested for an unrelated robbery that occurred weeks before. Jackson had not been arrested for the restaurant robbery that had just occurred.

The majority then leaps to the conclusion that the very purpose of the search of the backpack was to find evidence linking *Jackson* to the restaurant robbery – rather than Olson, whose bedroom was being searched. There is nothing in the record to support this statement. And there is nothing in the record to suggest the backpack even belonged to Jackson. Then the majority imputes to Officer Smithey that "he would have no motivation to open the closed backpack unless he believed it might belong to Jackson." Nothing in the record even remotely suggests this. In fact, the only evidence in the record is that officers did not know who might be involved in the restaurant robbery.

Officers were investigating a robbery and were interested in trying to find the gun that was used and any other evidence of the robbery. Olson repeatedly and unqualifiedly consented to the search of his bedroom. Nothing in the record suggests an alternative, improper motive by officers in their search of the backpack in Olson's bedroom – certainly nothing targeting Jackson or his personal property.

Finally, the majority concludes that Officer Smithey could not reasonably rely on the apparent authority

doctrine to search the backpack because it was not reasonable to believe that Olson owned it. But what evidence suggests Officer Smithey would not reasonably believe Olson owned the backpack? Officers were repeatedly told by all the occupants that only the three tenants lived there. Olson confirmed that he lived in his bedroom by himself. Olson originally denied that there was anyone else in his bedroom. When caught, he did not even know Jackson's last name.

After Olson roused him, Jackson told the officers his name, but he also told them he had no identification. Jackson did not tell officers his identification was in his wallet in his backpack located a few feet away. After being arrested on the outstanding warrant, Jackson did not alert officers that he had a backpack located nearby. The backpack was located on the floor near or in Olson's bedroom closet. During the search, Officer Smithey opened the backpack, discovered a wallet, and set it aside. According to the majority, this should somehow have alerted Officer Smithey that the backpack may belong to someone other than Olson. How does this raise that inference? We have no idea where Olson may have kept his billfold. This is not as unusual as the majority suggests, and it does not point to the backpack belonging to someone other than Olson. Many people carry their wallet in a separate bag or backpack. Further, officers had just been explicitly told by Jackson that he had no identification.

Officer Smithey reached into the backpack and discovered the jeans with the wet hem. Again, officers did not know who the jeans belonged to, but it was easy

to conclude the jeans may have been related to the robbery. The majority then concludes a reasonable officer should have suspected the backpack belonged to Jackson. I disagree. This is only evidence that someone recently came in from the outdoors – which was exactly what the officers were investigating. At this point, it was more likely for a reasonable officer to believe that the pants belonged to Olson than to someone else. The majority then faults the officers for removing the jeans from the backpack, which lead to the discovery of the gun. After this discovery, and only then, was it reasonable to determine the ownership of the backpack. It was not, as stated by the majority, to clear up any ambiguity that officers reasonably had as to the ownership of the backpack. Nothing in the record would have led a reasonable officer to doubt that Olson owned the backpack or would have put in doubt Olson's ability to consent to its search.

The facts and circumstances here were not ambiguous. Nothing in the record would put a reasonable officer on notice of any duty to make additional inquiry as to who had the authority to consent to the search of the closed backpack located in or around the closet of Olson's bedroom. There was repeated, unqualified consent to search authorized by Olson. Olson clearly had the apparent authority to consent to the search of his bedroom and the contents of his bedroom. Nothing in the record shows any ambiguity in the facts requiring officers to inquire further as to the ownership of the backpack. Consent here was valid and lawful under the Fourth Amendment and supported by numerous

authorities. *See, e.g.*, *id.* The district court was correct in denying the motion to suppress.

V. The Defendant's Claim Under the Iowa Constitution.

Jackson also argues that the State violated his rights under article I, section 8 of the Iowa Constitution. Article I, section 8 of the Iowa Constitution provides that "[t]he right of the people to be secure in their persons, houses, papers and effects, against unreasonable seizures and searches shall not be violated." Iowa Const. art. I, § 8. Because I would conclude that there was no violation of the Fourth Amendment to the Federal Constitution in the search conducted here, I also address Jackson's claim under the Iowa Constitution. *See Pals*, 805 N.W.2d at 772 ("When, as here, a defendant raises both federal and state constitutional claims, the court has discretion to consider either claim first or consider the claims simultaneously.").

Jackson argues this court should adopt a more stringent standard of actual authority under the Iowa Constitution than that provided by the Federal Constitution. However, the State argues that Jackson's claim under the Iowa Constitution was not preserved because he did not specifically argue that there should be a more stringent actual-authority standard under the Iowa Constitution. Jackson argues that error is preserved for appellate review when a defendant's pretrial motion to suppress is overruled. In the alternative, Jackson argues that, to the extent error was not

preserved, his counsel was ineffective for failing to adequately argue for the adoption of an actual-authority standard under the Iowa Constitution.

Jackson's motion to suppress states that "the search and evidence subsequently obtained violated the defendant's rights under the 4th and 14th amendments to the United States Constitution and Article I, Section 8 of the Iowa Constitution." The motion to suppress does not argue for any other specific application or interpretation of the Iowa Constitution that would be different than under the United States Constitution. Notably, Jackson's motion to suppress did not specifically argue that the standard for consent to a warrantless search under the Iowa Constitution should be actual authority rather than the federal apparent-authority standard. For purposes of this dissent, I assume without deciding that error was preserved because I find Jackson's claim that we should adopt an actual-authority standard under the Iowa Constitution to be without merit. *See State v. McNeal*, 867 N.W.2d 91, 99 (Iowa 2015).

1. *Iowa law.* Jackson argues that we should adopt a more stringent standard under the Iowa Constitution than that afforded under the United States Constitution and federal case law. He urges us to adopt a standard that would require a third party to have actual authority in order to consent to a search of a closed container.

Article I, section 8 of the Iowa Constitution is the "*nearly* identical [provision] to the Fourth Amendment

to the United States Constitution." *State v. Short*, 851 N.W.2d 474, 500-01 (Iowa 2014) (discussing the differences in punctuation between the state constitution and the Federal Constitution and how members of this court have interpreted said differences). It provides,

> The right of the people to be secure in their persons, houses, papers and effects, against unreasonable seizures and searches shall not be violated; and no warrant shall issue but on probable cause, supported by oath or affirmation, particularly describing the place to be searched, and the persons and things to be seized.

Iowa Const. art. I, § 8. Even when we hear "cases in which no substantive distinction had been made between state and federal constitutional provisions, we reserve the right to apply the principles differently under the state constitution compared to its federal counterpart." *King v. State*, 797 N.W.2d 565, 571 (Iowa 2011). "Further, even where a party has not advanced a different standard for interpreting a state constitutional provision, we may apply the standard more stringently than federal caselaw." *State v. Kooima*, 833 N.W.2d 202, 206 (Iowa 2013). However,

> our independent authority to construe the Iowa Constitution does not mean that we generally refuse to follow the United States Supreme Court decisions. . . . What is required under the Iowa Constitution, in each and every case that comes before us, is not mere identification of a potentially analogous

> federal precedent, but exercise of our best, independent judgment of the proper parameters of state constitutional commands.

Short, 851 N.W.2d at 490.

Only a few states have chosen to require an actual-authority standard under their own constitutions that is more stringent than the federal apparent-authority standard. *See State v. Lopez*, 896 P.2d 889, 903 (Haw. 1995) (holding that the individual giving consent to a search must possess actual authority to do so under the Hawaii Constitution); *State v. McLees*, 994 P.2d 683, 691 (Mont. 2000) (finding that under the Montana Constitution, "for third-party consent to be valid as against the defendant, the consenting party must have actual authority to do so"); *State v. Will*, 885 P.2d 715, 719 (Or. Ct. App. 1994) (finding that it was consistent with the Oregon Supreme Court precedent to require actual authority to consent to a search under the Oregon Constitution). Both Hawaii and Montana, two states that have adopted this more stringent standard, have a search and seizure provision in their state constitution that specifically grants their citizens the right to privacy – a right not contained in the Iowa search and seizure provision. Each of those cases was decided under the concept of "invasions of privacy." No comparable provision is contained in the Iowa Constitution. *Compare* Haw. Const. art. I, § 7, *and* Mont. Const. art. II, § 10, *with* Iowa Const. art. I, § 8.

Jackson also relies on the New Mexico case of *State v. Wright* for the proposition that actual authority is required under the New Mexico Constitution. *See* 893 P.2d 455, 460-61 (N.M. Ct. App. 1995). However, the facts of that case are clearly distinguishable from the facts presented here. In that case, officers went to a trailer after receiving a tip about possible drug dealing activity. *Id.* at 457. They were met at the door by a woman. *Id.* While there was some dispute in the record as to exactly when the consent was given by the woman to look into the bedroom occupied by the defendant, there is no dispute that prior to their entry she told the officers, "Oh, it's not my place, but go ahead." *Id.* Officers proceeded to open the door to the bedroom, where they discovered the defendant and drug paraphernalia. *Id.* at 457-58. The State attempted to argue the woman who answered the door had apparent authority to consent to the search. *Id.* at 460. One of the officers testified that he did not believe what the woman told him about the trailer not being hers. *Id.* However, he also stated he thought that she might have been a babysitter. *Id.* Relying on these facts, the State argued the officer reasonably believed that she possessed common authority over the premises. *Id.*[7] The court concluded that the State's reliance on the officers' subjective belief the woman had apparent authority to consent to the search of the residence and bedroom occupied by the defendant ran counter to the provisions

[7] I note that our case does not involve a claim of common authority, which also distinguishes this case.

of article II, section 10 of the New Mexico Constitution. *Id.* at 460-61.[8]

I agree with this resolution and would have reached the same result under our own Constitution. But the facts in *Wright* are a far cry from the facts in our case and warrant a different conclusion. New Mexico accepts the minority approach under its own constitution. *Id.* Consent to conduct a search may also be given by someone who is clothed with common authority or possesses some other sufficient relationship concerning the premises in question. *Id.* at 461. In *Wright*, the problem was there were no additional facts that indicated the woman granting the consent had a "sufficient relationship to the premises," and therefore, it was unreasonable for the officers to rely on her consent. *Id.* (quoting *United States v. Matlock*, 415 U.S. 164, 171, 94 S. Ct. 988, 993, 39 L. Ed. 2d 242, 250 (1974)). I suggest that, given the facts of our case, and even utilizing the standards adopted by the New Mexico court, that court would have had no problem with the consent provided by Olson.

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[8] Article II, section 10 of the New Mexico Constitution provides,

> The people shall be secure in their persons, papers, homes and effects, from unreasonable searches and seizures, and no warrant to search any place, or seize any person or thing, shall issue without describing the place to be searched, or the persons or things to be seized, nor without a written showing of probable cause, supported by oath or affirmation.

N.M. Const. art. II, § 10.

Jackson argues that Oregon has also rejected the concept of apparent authority to the consent to a search. The Oregon Court of Appeals rejected the concept of apparent authority but stated actual authority is still required under the state constitution. *Will*, 885 P.2d at 719. The Oregon courts have stated that, "[b]efore police can enter or search without a warrant in reliance on third-party consent, they must inquire and ascertain whether the consenting party has common authority; they cannot rely on subjective good faith." *Id.* at 719-20. This approach is inapplicable to the facts of our case, and we have never adopted it. The Oregon case Jackson relies on deals with a minor's authority to consent to the search of a parent's home, a situation entirely different than the one we decide today. *Id.* at 720.

However, the vast majority of states continue to apply the federal apparent-authority standard for third-party consent to a search, and many have done so under their own state constitutions. *See Nix v. State*, 621 P.2d 1347, 1349 (Alaska 1981); *State v. Girdler*, 675 P.2d 1301, 1305 (Ariz. 1983) (en banc); *Bruce v. State*, 241 S.W.3d 728, 731 (Ark. 2006); *Petersen v. People*, 939 P.2d 824, 831 (Colo. 1997) (en banc); *State v. Buie*, 94 A.3d 608, 609 (Conn. 2014) (per curiam); *Westlake*, 353 P.3d at 441; *People v. Pitman*, 813 N.E.2d 93, 107 (Ill. 2004); *State v. Porting*, 130 P.3d 1173, 1178-79 (Kan. 2006); *Commonwealth v. Nourse*, 177 S.W.3d 691, 696 (Ky. 2005); *Commonwealth v. Porter P.*, 923 N.E.2d 36, 52 (Mass. 2010); *State v. Taylor*, 968 P.2d 315, 322 (Nev. 1998) (per curiam); *State v. Maristany*, 627 A.2d 1066,

1069 (N.J. 1993); *State v. Gatlin*, 851 N.W.2d 178, 183 (N.D. 2014); *State v. Linde*, 876 A.2d 1115, 1125 (R.I. 2005); *State v. Laux*, 544 S.E.2d 276, 277-78 (S.C. 2001); *Glenn v. Commonwealth*, 654 S.E.2d 910, 915 (Va. 2008); *State v. Tomlinson*, 648 N.W.2d 367, 375 (Wis. 2002); *Smallfoot v. State*, 272 P.3d 314, 318 (Wyo. 2012).

The Pennsylvania Supreme Court has held that it is not inconsistent with the Pennsylvania Constitution to only require apparent authority for a third party to consent to a search. *Commonwealth v. Hughes*, 836 A.2d 893, 902-03 (Pa. 2003). Unlike the Hawaii and Montana constitutional provisions noted above, Pennsylvania's constitutional provision on search and seizure does not include a right to privacy. *Compare* Haw. Const. art. I, § 7, *and* Mont. Const. art. II, § 10 *with* Pa. Const. art. I, § 8. Rather, Pennsylvania's search and seizure provision is more similar in content to our own search and seizure provision. *Compare* Pa. Const. art. I, § 8, *with* Iowa Const. art. I, § 8.[9]

I agree with the states that continue to apply the apparent authority doctrine for third-party consent to

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[9] The Pennsylvania searches and seizures provision reads:

> The people shall be secure in their persons, houses, papers and possessions from unreasonable searches and seizures, and no warrant to search any place or to seize any person or things shall issue without describing them as nearly as may be, nor without probable cause, supported by oath or affirmation subscribed to by the affiant.

Pa. Const. art. I, § 8.

a search, which is consistent with its federal constitutional counterpart. I would not find that the Iowa Constitution should be applied more stringently, as none of the authorities cited by Jackson are similar. Nor are Jackson's authorities persuasive enough to urge the court to hold that this state should diverge from the well-established precedent under the Federal Constitution. *See State v. Jorgensen*, 785 N.W.2d 708, 713 (Iowa 2009) (noting that even when a party does advance a standard for interpreting the Iowa Constitution differently, we may still interpret it using the federal analysis if we find that the defendant did not offer "sound reasons" for the distinction).

VI. Conclusion.

For all of the reasons set forth above, I would find that it was reasonable for the officers to conclude that Olson had the apparent authority to consent to the search of the bedroom and the backpack under the federal constitution. I would decline to adopt an actual-authority standard under the Iowa Constitution as urged by Jackson. I would affirm the decision of the court of appeals, the district court ruling on the motion to suppress, and Jackson's convictions.

Waterman and Mansfield, JJ., join this dissent.

IN THE COURT OF APPEALS OF IOWA

No. 14-0067
Filed May 6, 2015

STATE OF IOWA,
Plaintiff-Appellee,

vs.

MARVIS LATRELL JACKSON,
Defendant-Appellant.

Appeal from the Iowa District Court for Johnson County, Robert E. Sosalla, Judge.

Defendant appeals from the district court's denial of his motion to suppress. **AFFIRMED**.

Mark C. Smith, State Appellate Defender, and Rachel C. Regenold, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Sharon K. Hall, Assistant Attorney General, Janet M. Lyness, County Attorney, and Anne M. Lahey, Assistant County Attorney, for appellee.

Considered by Danilson, C.J., and Potterfield and Bower, JJ.

DANILSON, C.J.

Marvis Jackson appeals from the district court's denial of his motion to suppress. Jackson maintains the district court wrongly concluded a third party, Gunnar Olson, had apparent authority to consent to

the search of Jackson's backpack. In the alternative, he maintains the protections provided by the Iowa Constitution should be applied more stringently, requiring a party who consents to a search to have actual authority to do so rather than apparent authority. Finally, he maintains that if his alternative argument regarding the Iowa Constitution was not preserved, trial counsel was ineffective for failing to properly preserve the argument.

Because we do not believe the circumstances raised reasonable doubt as to whether the backpack was Olson's, we find the officers properly relied on Olson's apparent authority to consent to the search. Additionally, we find the argument regarding the Iowa Constitution was not preserved for our review, and we preserve Jackson's claim of ineffective assistance of counsel for possible postconviction-relief proceedings. We affirm.

I. Background Facts and Proceedings.

On December 31, 2012, Iowa City police officers responded to a report that Gumby's Pizza had been robbed by two men, one of whom was armed with a gun. Officers Smithey and Stricker followed the K-9 unit to an apartment building, and noticing a second-floor resident seemed to be intently watching their actions, they decided to make contact with the individual. As the officers approached the door of the apartment, they noticed the interior light had been turned off.

Wesley Turner answered the door when the officers knocked. He told the officers he and his girlfriend, who was also present, lived in the apartment. Turner told the officers their roommate, Olson, was the only other person in the apartment and was sleeping in his bedroom. The officers asked Turner to wake Olson so they could speak to him. Officer Stricker initially spoke with Olson, who stated he had been sleeping in his room since he returned home from work at approximately 9:00 p.m. He denied seeing anything suspicious. When Officer Smithey asked Olson if he could look in his room, Olson stated that upon being awakened to speak to the officers, Olson realized his cousin was also sleeping in Olson's bed. He identified the person in his bed as Marvin, but he could not provide a last name. After further questions, Olson explained Marvin was not technically his cousin. Olson then led the officers to his bedroom.

Officer Smithey observed a male, later identified as Jackson, lying on the bed. Smithey noticed the male was sweating, even though he was shirtless and no one else in the apartment appeared to be sweating. At the officers' request, Olson tried to wake Jackson, which, according to Officer Smithey, "was considerably more difficult than it seemed like it should be." Jackson told the officers his name but claimed not to have any identification with him. Officer Smithey checked the name and found Jackson had an active arrest warrant. Jackson was then handcuffed, removed from the room, and given to other officers to transport.

Officer Stricker asked Olson if he could search the bedroom, and Olson consented. Officer Smithey then began searching the room. He found a backpack near the edge of the closet and opened it. He removed a wallet and a pair of pants that were wet around the cuffs before finding a black handgun in the bag. He then checked the wallet and saw it contained identification belonging to Marvis Jackson. Officer Smithey stopped the search, took a picture of the weapon while it was still in the backpack, and alerted the other officers they needed to "lock down the apartment" while he applied for a search warrant.

Turner, Miller, and Olson were each taken to the police station for questioning. Turner admitted to participating in the robbery with Jackson. After being confronted with evidence of the gun and Turner's confession, Jackson also admitted participating in the robbery.

Jackson was charged with two counts of robbery in the second degree.[1] Jackson entered not-guilty pleas to each of the charges and filed a motion to suppress, asserting Olson did not have the authority to consent to the search of Jackson's backpack, thus the warrantless search was per se unreasonable. The State resisted the motion, and a hearing was held May 15, 2013. The district court denied the motion on July 5, 2013, finding Olson had apparent authority to consent to the search.

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[1] Jackson also confessed to a robbery that had taken place on November 13, 2012, in Iowa City.

On October 8, 2013, Jackson waived his right to a jury trial and stipulated to a trial on the minutes of testimony. The district court found Jackson guilty of both counts of second-degree robbery on November 20, 2013. Jackson was sentenced to two concurrent terms of incarceration not to exceed ten years with a seventy-percent mandatory minimum.

Jackson appeals.

II. Standard of Review.

"Claims that the district court failed to suppress evidence obtained in violation of the Federal and Iowa Constitutions are reviewed de novo." *State v. Short*, 851 N.W.2d 474, 478 (Iowa 2014). We independently evaluate the totality of the circumstances shown in the record. *State v. Reinders*, 690 N.W.2d 78, 82 (Iowa 2004). We give deference to the district court's findings of fact due to its opportunity to assess the credibility of witnesses, but we are not bound by those findings. *Id.* "Warrantless searches and seizures are per se unreasonable unless the State proves by a preponderance of the evidence that a recognized exception to the warrant requirement applies." *State v. Howard*, 509 N.W.2d 764, 766 (Iowa 1993).

III. Discussion.

The Fourth Amendment of the United States Constitution and article I, section 8 of the Iowa Constitution provide protection from unreasonable searches

and seizures. Warrantless searches are per se unreasonable unless a recognized exception to the warrant requirement applies. *Howard*, 509 N.W.2d at 766. Consent to search is an exception to the warrant requirement. *Reinders*, 690 N.W.2d at 83.

A. Apparent Consent to Search.

Here, the question is not whether Olson had the authority to consent to the search of his room. Even if Jackson was an overnight guest who had a privacy interest in the room, Olson had the right to consent to the general search of the space. *See State v. Matlock*, 415 U.S. 164, 170 (1974) ("[T]he consent of one who possesses common authority over premises or effects is valid as against the absent, nonconsenting person with whom that authority is shared."). However, "[g]uests in a home retain a privacy interest in their personal items that cannot be waived by their host's consent to search the general premises." *State v. Grant*, 614 N.W.2d 848, 854 (Iowa Ct. App. 2000); *see also United States v. Karo*, 468 U.S. 705, 726 (1984) (O'Connor, J., concurring) ("[W]hen a guest in a private home has a private container to which the homeowner has no right of access, . . . the homeowner . . . lacks the power to give effective consent to the search of the closed container."). Thus, Olson did not have actual authority to consent to the search of Jackson's backpack.

Although Olson did not have actual authority to consent, law enforcement officers may rely on the apparent authority of the consenting party. *Grant*, 614

N.W.2d at 854. "For officers to rely on a claim of apparent authority, they must 'reasonably (though erroneously) believe that the person who has consented to their' search had authority to do so." *Id.* (citing *Illinois v. Rodriguez*, 497 U.S. 177, 186 (1990)). If the surrounding circumstances raise reasonable doubts as to the authority of the consenting party, officers have an obligation to make further inquiries into the precise nature of the situation. *Grant*, 614 N.W.2d at 854. "Without further inquiry, the search is unlawful." *Id.* Thus, the determinative question is whether the circumstances raised reasonable doubt as to whether the backpack was Olson's.

Jackson cites *Grant* as an authority showing the search was unlawful because there was ambiguity about the ownership of the backpack and the officers failed to inquire further. 614 N.W.2d at 851. We acknowledge there are some similarities in the facts. In both cases, the officers came upon a sleeping party in some state of disrobement. *Id.* at 851. Here, the officers found Jackson at least feigning sleep while wearing only pajama pants. As it was winter and the officers testified there was snow outside, it should have been clear Jackson had at least some articles of clothing in the apartment. Similarly, in *Grant*, the officers found two nude people sleeping in a guest room. *Id.* Our court reasoned, "It was clear Grant and her companion were guests and, given their state of disrobement, at least some of the clothing in the room belonged to them. . . . It was only after an officer discovered the crack cocaine did officers inquire into who owned the jacket." *Id.* at

854-55. However, here the evidence in question was not found in an article of clothing, but rather a backpack. Neither Jackson's state of dress nor any comments made to the officers should have led the officers to question whether the backpack was Jackson's. Additionally, unlike *Grant*, Jackson, a guest, was staying in the bedroom also occupied by one of the resident roommates. Thus, it was reasonable for the officers to believe the backpack in the room was Olson's, unlike *Grant*, where the nonconsenting parties were staying in a separate guest bedroom.

Our supreme court has acknowledged that a frequent overnight guest enjoys an expectation of privacy in the room where personal belongings are kept. *State v. Campbell*, 714 N.W.2d 622, 631 (Iowa 2006). The court also stated, "That expectation of privacy, however, is applicable only to the unwarranted actions of government actors. It does not ensure the guest's possessions will not be disturbed by the host and those persons for whom the host allows entry." *Id.* Here, there was no evidence Jackson was a frequent overnight guest or that the officers' actions were unwarranted.

In sum, we do not believe the circumstances raised reasonable doubt as to whether the backpack was Olson's before the search of the backpack, and we do not believe the law enforcement actions were unwarranted. Thus, the officers did not have an obligation to inquire further.

B. Actual Authority to Consent.

Jackson maintains, in the alternative, that the Iowa Constitution should be applied more stringently than the federal constitution. Specifically, he maintains under the Iowa Constitution, only consent from someone with the actual authority to do so should be an exception to the warrant requirement. If we find this argument has not been preserved for our review, he maintains trial counsel was ineffective for failing to properly preserve the argument.

Although trial counsel argued Jackson's rights had been violated under article I, section 8 of the Iowa Constitution, counsel did not argue for the adoption of a new standard as Jackson does now. The State maintains, and we agree, that Jackson's argument regarding the more stringent application of the Iowa Constitution was not preserved for our review. *See Meier v. Senecaut*, 641 N.W.2d 532, 537 (Iowa 2002) ("It is a fundamental doctrine of appellate review that issues must ordinarily be both raised and decided by the district court before we will decide them on appeal."). Thus, we consider Jackson's claim that trial counsel was ineffective for failing to preserve the argument.

We generally preserve ineffective-assistance-of-counsel claims for postconviction relief proceedings. *State v. Utter*, 803 N.W.2d 647, 651 (Iowa 2011); *see also* Iowa Code § 814.7(3) ("If an ineffective assistance of counsel claim is raised on direct appeal from the criminal proceedings, the court may decide the record is adequate to decide the claim or may choose to preserve

the claim for determination under chapter 822."). "Only in rare cases will the trial record alone be sufficient to resolve the claim on direct appeal." *State v. Tate*, 710 N.W. 2d 237, 240 (Iowa 2006). We prefer to reserve such claims for development of the record and to allow trial counsel to defend against the charge. *Id.* As "[e]ven a lawyer is entitled to his day in court, especially when his professional reputation is impugned." *State v. Bentley*, 757 N.W.2d 257, 264 (Iowa 2008). If the record is inadequate to address the claim on direct appeal, we must preserve the claim for a postconviction-relief proceeding, regardless of the potential viability of the claim. *State v. Johnson*, 784 N.W.2d 192, 198 (Iowa 2010).

Here the record is inadequate to address Jackson's claim, as we do not know what trial strategy trial counsel employed. *See State v. Laffey*, 600 N.W.2d 57, 61 (Iowa 1999) ("Improvident trial strategy, miscalculated tactics, or mistakes in judgment do not necessarily amount to ineffective assistance of counsel."). The issue of whether trial counsel was ineffective is preserved for possible future postconviction-relief proceedings. *See Johnson*, 784 N.W.2d at 198 (holding a claim of ineffective assistance of counsel that cannot be addressed on appeal because of an inadequate record must be preserved for postconviction-relief proceedings).

IV. Conclusion.

Because we do not believe the circumstances raised reasonable doubt as to whether the backpack was Olson's or that the officers' actions were unwarranted, the officers properly may rely on Olson's apparent authority to consent to the search. Additionally, we find the argument regarding the Iowa Constitution was not preserved for our review, and we preserve Jackson's claim of ineffective assistance of counsel for possible postconviction-relief proceedings. We affirm.

AFFIRMED.

IN THE IOWA DISTRICT COURT
IN AND FOR JOHNSON COUNTY

State of Iowa,	**No. FECR100500**
Plaintiff,	**No. FECR100502**
vs.	**RULING ON MOTION TO SUPPRESS**
Marvis Latrell Jackson,	
Defendant.	(Filed Jul. 5, 2013)

Hearing was held May 15, 2013, on Defendant's Motion to Suppress, which has been resisted by Plaintiff. Appearance was made by Assistant Johnson County Attorney Anne M. Lahey on behalf of Plaintiff, and Defendant appeared in person and by his counsel, Attorney Edward J. Leff. At the time of the hearing, the Court heard testimony of Iowa City Police Officers Alex Stricker and Michael Smithey. The Court also received into evidence Plaintiff's Exhibits 1-9 and Defendant's Exhibits A-C.

Having considered the court file, the exhibits, the testimony received at the time of hearing, including the credibility of the witnesses, and the pleadings and authorities submitted by the parties, the Court makes the following findings of fact and conclusions of law and enters the following ruling.

FINDINGS OF FACT

A. Procedural History

The Defendant is charged by Trial Information in two cases for the crime of Robbery in the Second Degree, in violation of Iowa Code § 711.3. The first (FECR100502) was filed January 11, 2013, the second (FECR100500) was filed February 13, 2013. Defendant has entered pleas of not guilty in both cases. The charges stem from the robbery of On The Go BP on November 13, 2012, and the robbery of Gumby's Pizza on December 31, 2012. Defendant's Motion to Suppress was filed April 12, 2013. The Motion was set for hearing on May 15, 2013.

Defendant's Motion seeks to suppress: 1) evidence seized pursuant to a consent search; 2) inculpatory statements made by four individuals, including Defendant, about the Gumby's Pizza robbery; 3) evidence seized pursuant to a search warrant; and 4) the confession of Defendant to the On The Go BP robbery. Defendant's first argument is that his backpack was illegally searched by the police based on the consent of a third party who had no authority to consent to the search, and therefore, evidence obtained as a result of that search must be suppressed. Defendant's second argument is that the illegal search of the backpack was the cause of the inculpatory statements about the Gumby's Pizza robbery and the issuance and execution of the search warrant, and therefore, the statements and the evidence seized pursuant to the warrant must

be suppressed as fruits of the poisonous tree. Defendant's last argument is that his confession to the On The Go BP robbery was induced by the police through implied promises of leniency and, therefore, must be suppressed.

The State resists Defendant's Motion to Suppress. The State's first argument is that the backpack was not illegally searched because the consenting party had apparent authority to consent to a search of the backpack; therefore, the evidence obtained as a result of that search should not be suppressed. The State's second argument is that, based on the legality of the backpack search, neither the inculpatory statements nor the evidence seized pursuant to the search warrant should be suppressed as fruit of the poisonous tree. The State does not respond to the Defendant's promise of leniency argument.

B. Facts Related to the On The Go BP Robbery

At 9:39 PM on November 13, 2012, Iowa City Police Officer Michael McKenna was dispatched to the On The Go BP gas station in Iowa City after a report of an armed robbery. On The Go BP employee Mark Schumacher, the store clerk during the robbery, explained to Officer McKenna that a black male with a thin build wearing a black mask and a red coat had come into the store, pointed a gun at Schumacher, and demanded the money in the cash register and a carton of Newport 100's cigarettes. Schumacher reported that

$476.00 in cash and $62.00 worth of cigarettes were stolen.

Scott Stevens is a detective with the Iowa City Police Department. Detective Stevens was the primary investigator assigned to the On The Go BP robbery. Detective Stevens initially went to the store the night of the robbery and met with the store owner, Don Schumacher. Detective Stevens and Don Schumacher watched the surveillance video together. The video showed that the robber was a medium-height, black male, wearing a red coat, a black face mask, and black and white tennis shoes. The video also showed the robber take a black semi-automatic pistol out of his pocket, point it directly at Mark Schumacher, and request the money and cigarettes.

Detective Stevens had not determined who the robber was when, on December 13, 2012, he received a call from Don Schumacher. Schumacher told Detective Stevens that a customer had come in and identified a man with the street name "Juicy" as the individual who had committed the robbery. The customer had explained to Schumacher that Juicy's uncle told him that Juicy had acknowledged committing a robbery at On The Go BP. With the help of the Iowa City Police Department, Detective Stevens identified Juicy as Marvis Latrell Jackson, Defendant here. Detective Stevens attempted to contact Defendant, but was unsuccessful. He then obtained an arrest warrant for Defendant based on this information. On December 31, 2012, Detective Stevens learned that Defendant had been arrested and was in custody.

C. Facts Related to the Gumby's Pizza Robbery

At 12:35 AM on December 31, 2012, Iowa City Police Officer Michael Smithey was dispatched to Gumby's Pizza in Iowa City after a report of an armed robbery. Gumby's Pizza employee Adam Carlson was working on that night. He reported to Officer Smithey that two black males had entered the restaurant and demanded money out of the cash register. One of the men had a black handgun and had pointed it at Carlson when he made the demand. Both individuals were wearing black hats and had black bandanas covering their faces. Carlson estimated that the robbers took $125 in one-dollar bills, $50 in five-dollar bills, and one twenty-dollar bill.

After Officer Smithey made contact with Carlson, another man, Matthew Smith, came from the street (inquiring about whether there had just been a robbery) and stated that he had seen two men run away from the area with money in their hands. Smith brought Officer Smithey to the point that he had last seen the two men. At that point, Officer Smithey noticed shoeprints in the snow and called for a canine unit to track the two men. Officer Brandon Faulkcon and his canine partner came to the scene and were able to track the smell and the shoeprints in the snow to the area of [redacted]. Officer Smithey and Officer Alex Stricker were following behind Officer Faulkcon and the canine. While searching the area, Officer Smithey noticed a tall black male looking intently

at them out of a window from a second-floor apartment. The officers walked up to the apartment and noticed that the lights had just been turned off. They then heard the apartment door lock from the inside. Officer Smithey knocked on the door and announced that he was a police officer. Wesley Turner answered the door.

D. Facts Related to the Consent Search of Defendant's Backpack and the Subsequent Search Pursuant to a Warrant

Officers Smithey and Stricker explained to Turner that they were investigating a robbery and asked if they could enter. Turner let them in the apartment. Turner and his girlfriend/roommate Alyssa Miller had been in the living room. The officers asked if there was anybody else in the apartment and Turner stated that his other roommate, Gunner Olson, was in his bedroom. The officers testified that Turner was clear that only the three of them were in the apartment. Officer Smithey asked Turner to wake Olson and he complied. Officer Smithey talked with Olson in the kitchen while Officer Stricker continued to talk with Turner in the doorway. Officer Smithey asked Olson who lived in the apartment and Olson responded that only Turner, Miller, and he lived in the apartment. Officer Smithey then requested to peak into Olson's bedroom. Olson consented and, at that point, explained that his cousin Marvin was also in the bedroom sleeping. Turner told Officer Smithey that he had been surprised to find his cousin lying next to him when he awoke because his cousin had not been there when he had gone to sleep.

Olson did not say whether his cousin had been staying with them previously. Olson then explained that it was not really his actual cousin in the room, it was his friend.

The officers and Olson went into Olson's room and woke Defendant up. Defendant was lying on the bed without a shirt, wearing pajama pants. Officer Smithey testified that it was oddly difficult rouse Defendant. He also stated that Defendant was very sweaty, and that he thought that was odd because it was not warm in the house and no one else was sweating. After Defendant got up, the officers asked to see his identification and Defendant stated that he did not have any. He then identified himself as Marvis Latrell Jackson. The officers ran Defendant's name and found that he had a warrant out for his arrest. Officer Smithey arrested Defendant. After Office Smithey removed Defendant from the residence, Olson gave Officer Stricker consent to search his bedroom. When Officer Smithey returned, Officer Stricker notified him of Olson's consent. Olson and Officer Stricker left the room to get a glass of water and at that time, Officer Smithey began to search the bedroom. He searched under the mattress, on a chair, and then in a backpack in the doorway of the bedroom closet. Officer Smithey took out a wallet and a wet pair of jeans from the backpack. At that point he saw a black handgun in the backpack. After Officer Smithey observed the gun, he checked the wallet and found that it contained identification belonging to Defendant. At that time, he told Officer Stricker to lock the apartment down pending

application for a search warrant. Officer Smithey testified that he had no indication, at any time prior to or during the search, that Defendant was residing at or was an overnight guest at the apartment. Additionally, Officer Smithey had no indication that anyone other than Olson had personal property in the bedroom until he opened the wallet.

Officer Smithey took a picture of the handgun and included a printout of the picture in the application for the search warrant. During the lockdown of the apartment, the officers conducted a protective sweep. During that sweep, officers observed a marijuana grinder and pipe. These items were photographed and the pictures were included in the search warrant application as well. Tom Hartshorn is an investigator with the Iowa City Police Department. Investigator Hartshorn applied for and obtained the search warrant for the residence of Turner, Miller, and Olson. Investigator Hartshorn then executed the search warrant. He found, among other things, clothing matching the description of what the Gumby's Pizza robbers were wearing, 129 one-dollar bills, 9 five-dollar bills, and one twenty-dollar bill, matching the description of the money taken from Gumby's Pizza.

E. <u>Facts Related to the Interviews of Turner, Miller, Olson, and Defendant Relating to the Gumby's Pizza Robbery</u>

Turner, Miller, and Olson were taken to the police station for interviews after Officer Smithey found the

handgun and shut down the apartment. Officer Paul Bailey and Detective Jeremy Bossard interviewed the four individuals. First, the officers interviewed Miller. She stated that she did not know anything about the robbery. She stated that Turner was her boyfriend, and that she lived with him and Olson. She also stated that Defendant had been staying with them for a couple of weeks.

The officers then interviewed Turner. During that interview, the officers first explained the *Miranda* rights to Turner and he agreed to talk with them. The officers asked Turner if he knew anything about the robbery of Gumby's Pizza. Turner denied having anything to do with or knowing anything about the robbery. Officer Bailey then confronted Turner with evidence that could link him to the robbery. Officer Bailey discussed the shoeprints that led to Turner's apartment and the fact that the canine tracked the smell to the area of the apartment. Officer Bailey discussed the handgun that was found in the backpack and how it was similar to a gun used in the robbery, and he discussed the fact that they found Defendant sweating while he was pretending to be asleep, as though he had recently been running. After being confronted with the evidence, Turner began to confess his part in the robbery and eventually told the officers that he and Defendant had committed the robbery, that it was Defendant's idea, that Defendant held the gun, that he (Turner) grabbed the money, and that Olson was supposed to be a lookout.

The officers interviewed Olson third. During that interview, initially Olson denied having anything to do with or knowing anything about the robbery. The officers confronted Olson with the evidence against him and his roommates, including evidence of the shoeprints in the snow and the gun. They also explained that Turner had already told them everything. After being confronted with the evidence, Olson came clean and admitted that he knew about the robbery. He stated that it was Defendant's idea, that Turner and Defendant committed the robbery, that Defendant owned the gun, and that all he (Olson) had done was help cut up a tee-shirt that Defendant and Turner used as bandanas to cover their faces during the robbery. Olson maintained that he took no party in committing the actual robbery.

Lastly, the officers interviewed Defendant. Detective Bossard explained to Defendant his *Miranda* rights. Defendant stated that he understood his rights and signed a written waiver of those rights. Initially Defendant denied having anything to do with or knowing anything about the Gumby's Pizza robbery. The officers then confronted Defendant with all of the evidence, including the evidence of the shoeprints, the gun, and the inculpatory statements of Turner and Olson. Defendant, after being confronted with the evidence, eventually confessed to having committed the robbery with Turner.

F. Facts Related to the Interview of Defendant Relating to the On The Go BP Robbery

At some point after Defendant was taken into custody, Detective Stevens was called and notified. Detective Stevens went to the police station to interview Defendant about the On The Go BP robbery from November. When he arrived at the police station, he was notified that Defendant was in custody relating to an armed robbery at Gumby's Pizza and he was told that they had found a black handgun in Defendant's backpack that he had used in the robbery.

Detective Stevens interviewed Defendant a few hours after Officer Bailey and Detective Bossard had done so. Detective Stevens presented the evidence he had against Defendant to get him to confess. He told Defendant that an individual had identified Defendant as the person who had robbed the On The Go BP back in November. He also stated that he had a video of the robbery, and the robber in the video looked like Defendant, had the same shoes on as Defendant, and had a black handgun like the one that was found in Defendant's backpack. Defendant initially denied having anything to do with the robbery.

After fifteen minutes of not getting anywhere, Detective Stevens started discussing honesty. The following ensued:

> Detective Stevens: "I think we can at least agree that someone who is honest is better than someone who is not."
>
> Defendant: "All right."

> Detective Stevens: "Is that your opinion also?" Defendant: "Yea."
>
> . . . .
>
> Detective Stevens: "I recently had a guy in here whose mom had medical problems . . . He robbed a gas station . . . He came in here and talked to me and it went really well for him I think."
>
> . . . .
>
> [Defendant continues to deny involvement in the robbery]
>
> . . . .
>
> Detective Stevens: "I guess, I guess the bottom line is . . . how are you going to be about that. I mean you were cooperative last night, how do you think that is going to go for you? . . . It's going to go better for you that you talked about it right?"

After Detective Stevens' further discussion of the evidence and Defendant's continued denial of culpability, Detective Stevens explained the emotional pain that the robbery had caused the store clerk. After that, Defendant eventually confessed to the On The Go BP robbery. Defendant then wrote a letter of apology to the store owner.

CONCLUSIONS OF LAW

A. The Backpack Search

The Court first considers Defendant's argument that the search of his backpack in Olson's bedroom closet was illegal. The Court considers whether Olson had authority to consent to a search of Defendant's backpack. If the Court concludes that the search of the backpack was illegal, the Court will consider whether the subsequent evidence seized and inculpatory statements given should be suppressed as fruits of the poisonous tree.

a. Consent Searches

The Fourth Amendment to the United States Constitution and article I, section 8 of the Iowa Constitution protect persons from unreasonable searches and seizures. U.S. Const. amend. IV; Iowa Const. art. I § 8; *see also State v. Reinders*, 690 N.W.2d 78, 81 (Iowa 2004). "A Warrantless search violates the Fourth Amendment unless it falls within a recognized exception." *Reinders*, 690 N.W.2d at 83 (internal quotation marks omitted). Consent is one exception to the warrant requirement. *Id.* When determining whether a party's consent to a search is valid, the Court must consider whether the party had the authority to consent to the particular search. *See, e.g.*, *Illinois v. Rodriguez*, 497 U.S. 177, 110 S. Ct. 2793, 111 L. Ed. 2d 148 (1990); *State v. Grant*, 614 N.W.2d 848, 854 (Iowa Ct. App. 2000).

When a property owner is not available to consent to a search of the property, a search may be based on the consent of a third party if there is "mutual use of the property by persons generally having joint access or control for most purposes." *See Rodriguez*, 497 U.S. at 181, 110 S. Ct. at 2797, 111 L. Ed. 2d at 152 (internal quotation marks omitted). However, because a guest in a home generally does not give up control over his or her personal items after becoming a guest, the guest "retain[s] a privacy interest in [his or her] personal items that cannot be waived by the[ ] host's consent to search the general premises." *Grant*, 614 N.W.2d at 854 (internal quotation marks omitted). Furthermore, "[w]hile one may have the authority to consent to the search of a general area, that authority does not automatically extend to the interiors of every discrete enclosed space capable of search within the area." *Id.* Therefore, unless there is proof of joint access or control, a homeowner does not have actual authority to consent to a search of a guest's closed containers. *See United States v. Karo*, 468 U.S. 705, 726, 104 S. Ct. 3296, 3309, 82 L. Ed. 2d 530, 548-49 (1984) (O'Connor, J., concurring).

However, "[d]etermining whether a party's consent to a search is valid . . . is not driven solely by whether the party has actual authority to consent to the search." *Grant*, 614 N.W.2d at 854. A police officer may commence a consent search even if the consenting party does not have actual authority, as long as the party has apparent authority to give consent. *Id.* "For officers to rely on a claim of apparent authority, they

must 'reasonably (though erroneously) believe that the person who has consented to their' search had authority to do so." *Id.* (quoting *Rodriguez*, 497 U.S. at 186, 110 S. Ct. at 2800, 111 L. Ed. 2d at 160).

The standard of reasonableness requires that police make a further inquiry if they arrive at a situation where there is ambiguity as to whether an individual has actual authority to consent to a search. *Grant*, 614 N.W.2d at 854. If the officers are faced with an ambiguous situation and they fail to inquire further, "the search is unlawful." *Id.* (finding a search of a jacket unlawful where police received consent from a homeowner to search a guest room (where a guest was staying) containing the jacket, because the ownership of the jacket was ambiguous and the police failed to inquire further). However, if there is no ambiguity, police officers who receive consent are not required to separately inquire into whether they are allowed to search each closed container in an area. *See Florida v. Jimino*, 500 U.S. 248, 252, 111 S. Ct. 1801, 1804, 114 L. Ed. 2d 297, 303 (1991) ("[I]f his consent would reasonably be understood to extend to a particular container, the Fourth Amendment provides no grounds for requiring a more explicit authorization."). The Court applies an objective standard when considering whether there is ambiguity as to the consenter's authority. The standard is whether "the facts available to the officer at the moment . . . [would] warrant a [person] of reasonable caution in the belief that the consenting party had authority over the premises."

Rodriguez, 497 U.S. at 188, 110 S. Ct. at 2801, 111 L. Ed. 2d at 161 (internal quotation marks omitted).

Defendant cites *Grant* as authority for his argument that the search was unlawful because there was ambiguity as to the ownership of the backpack and the police failed to inquire further. The State's response is that the facts of this case are distinguishable from the facts of *Grant*. In *Grant*, a homeowner went to the police because he was upset with his houseguests. *Grant*, 614 N.W.2d at 850. He told the police that a guest had brought a gun to his home and he wanted the police to remove it. *Id.* at 851. The police went to the home and the homeowner directed them to the guest's room. *Id.* When the police entered the room, they found two people lying naked on the bed. *Id.* The police removed the two individuals from the room and searched for a gun. *Id.* During the search, an officer picked up the guest's coat and noticed a large bulge, so he decided to search inside of it. *Id.* The officer discovered and seized a package of cocaine. *Id.* The court determined that the search was unlawful because the situation was "fraught with ambiguity" and the police failed to inquire further to determine if the homeowner had authority to consent to a search of the jacket. *Id.* at 854-55. The court observed that the facts available to the police could not have warranted their belief that the homeowner had authority over the jacket. *Id.* at 854. The court explained this was, in part, because the police were aware the individuals were guests staying in the guest room and they were aware that the guests did not have all of their clothes on. *Id.* at 111.

b. Application of Law to Findings of Fact

Initially, Turner explained to the police officers that only he, Miller, and Olson were currently staying in the apartment. When Olson came out of his room, he also stated that only the three of them were there. Shortly afterwards, however, Olson told to the police officers that his cousin was also in his (Olson's) bedroom, but that he had not known that his cousin was going to be there or when his cousin had gotten there. When the officers went into Olson's bedroom and found out who Defendant was, Defendant was arrested pursuant to an arrest warrant and was taken away. Officer Stricker then obtained consent from Olson to search his bedroom. In the process of searching the room, Officer Smithey noticed a backpack in the doorway of the closet and searched it. In the backpack he found a black handgun similar to the gun reportedly used in the robbery. Officer Smithey realized that it was Defendant's backpack when he opened the wallet that was also in the backpack. After this, he stopped the search and determined that they should obtain a warrant to search the rest of the apartment.

The State has not presented any evidence that Olson had actual authority to consent to the search of the backpack. There is no claim that Olson had mutual control of or access to the backpack. The parties agree that Defendant maintained control over the backpack even as a guest in the apartment and in Olson's bedroom.

However, Olson did have apparent authority to consent to a search of the backpack. This is because the facts available to the Officer Smithey at the time he decided to search the backpack warranted a belief that Olson had authority over the backpack. The officers were not made aware that Defendant was a resident or a guest at the apartment; on the other hand, the officers were initially told by both Olson and Turner that the two of them (and Miller) were the only people staying in the apartment. And when Olson did tell Officer Smithey that Defendant was in his room, he stated that he did not know that Defendant was going to be there and that he only found out that Defendant was lying next to him when he had woken up a couple minutes earlier. Furthermore, the officers gave credible testimony that Defendant very sweaty in a cool room, and that it was considerably more difficult to rouse Defendant than it should have been. These observations would lead an objectively reasonable officer to a belief that Defendant was feigning sleep and, rather, had likely just run to the apartment. Based on this, it was reasonable for the officers to believe that Defendant was not staying in the apartment as a resident or a guest. Therefore, they had no reason to suspect that a backpack in Olson's room would belong to Defendant. The officers were not presented with an ambiguous situation when they came across the backpack in the doorway of Olson's bedroom closet and they had no duty to inquire further.

It is also worth pointing out that the facts in this case are not similar to the facts in *Grant*. The officers

here had no reason to believe that Defendant was staying at the apartment as a guest, where in *Grant* the homeowner told them that the individual was an overnight guest. Moreover, the closed container in this case was in the bedroom in which the consenting individual was living, rather than in a room in which only a guest was staying. Although Defendant was wearing pajama pants when they found him, the surrounding facts and circumstances led the police to a reasonable belief that Defendant was not staying at the apartment as a guest or a resident. The facts and circumstances would not have created an ambiguous situation in the mind of a reasonable police officer. There was no reasonable rationale for the police to inquire further into the authority of Olson to consent to a search of the backpack. Therefore, the search of the backpack was lawful and evidence obtained as a result of the search is not suppressed.

Because the backpack was not illegally searched, the items seized pursuant to the following search warrant and the inculpatory statements given by Miller, Olson, Turner, and Defendant about the Gumby's Pizza robbery are not suppressed because they are not fruits of the poisonous tree.

B. Implied Promises of Leniency and Defendant's Confession to the On The Go BP Robbery

This Court will consider Defendant's argument that his confession to the On The Go BP robbery to Detective Stevens should be suppressed because it was elicited through an implied promise of leniency. The Court considers whether the statements of Detective Stevens rose to the level of promises of leniency before Defendant confessed to the robbery.

a. Promises of Leniency

"[A] confession can never be received in evidence where the prisoner has been influenced by any threat or promise." *State v. Howard*, 825 N.W.2d 32, 40 (Iowa 2012) (internal quotation marks omitted). Iowa uses an evidentiary test rather than a totality-of-the-circumstances test when considering promises of leniency. *See State v. Madsen*, 813 N.W.2d 714, 726 (Iowa 2012). This means that rather than looking at the totality of the circumstances, if the court finds that there was a promise of leniency, the subsequent confession is automatically excluded regardless of other surrounding facts and circumstances. *See id.* Promises of leniency can be direct or implied. *See State v. Kase*, 344 N.W.2d 223, 225 (Iowa 1984).

The test of whether a statement qualifies as a promise of leniency "is whether the language used amounts to an inducement which is likely to cause the subject to make a false confession." *Howard*, 825

N.W.2d at 40 (internal quotation marks omitted). However, "the law cannot measure the force of the influence used or decide upon its effect on the mind of the prisoner." *Id.* Because of this, the Court focuses on the language used rather than on the effect that the language had on the individual. *Id.*; *see also Madsen*, 813 N.W.2d at 726 ("The use of a per se exclusionary rule eliminates the need for the court to attempt to read the mind of defendant to determine if his confession, in fact, was induced by or made in reliance upon the promise of leniency."). "An officer can tell a defendant that it is better to tell the truth without crossing the line between admissible and inadmissible statements from the defendant. Our cases, however, prohibit the investigator from communicating to defendants that an advantage is to be gained by making a confession." *State v. Polk*, 812 N.W.2d 670, 674-75 (Iowa 2012) (citations omitted) (internal quotation marks omitted).

The Iowa Supreme Court has recently summarized a number of Iowa cases where the statements were found to be promises of leniency:

> In *Polk*, we held "the [officer] crossed the line by combining statements that county attorneys 'are much more likely to work with an individual that is cooperating' with suggestions [the defendant] would not see his kids 'for a long time' unless he confessed." 812 N.W.2d at 676. In *McCoy*, we required a new trial because the defendant confessed after the detective told him twenty-five times that "if he didn't pull the trigger, he wouldn't be in any trouble." 692 N.W.2d at 28. In *Quintero*,

> we held the police improperly coerced defendant's confession by threatening that his sixteen-year-old nephew would be tried as an adult and sent to prison unless he cooperated. 480 N.W.2d at 50, 52. In *State v. Kase*, we reversed a conviction because the defendant confessed after a Division of Criminal Investigation agent told her "that if she told him what she knew about Vaughn's death and signed a consent to search her apartment no criminal charges would be filed against her; otherwise, she was told, she would be charged with murder." 344 N.W.2d 223, 226 (Iowa 1984). In *State v. Hodges*, we held that defendant's confession was inadmissible when he was told "that a lesser charge would be much more likely if he gave 'his side of the story.' " 326 N.W.2d 345, 349 (Iowa 1982).

Madsen, 813 N.W.2d at 726-27.

b. Application of Law to Findings of Fact

Defendant argues that statements made by Detective Stevens prior to Defendant's confession constitute implied promises of leniency and, therefore, his confession must be suppressed. Detective Stevens was attempting to get Defendant to be honest with him when he made two statements essentially explaining that it is good to be cooperative. Detective Stevens started to discuss the virtues honesty and then stated: "I recently had a guy in here whose mom had medical problems . . . he robbed a gas station . . . he came in here and talked to me and it went really well for him I think."

Then, after Defendant continued to deny committing the robbery, Detective Stevens asked Defendant: "you were cooperative last night, how do you think that is going to go for you? . . . It's going to go better for you that you talked about it right?"

There was no actual or implied promise of leniency in this case. The statements are not the sort that amount to an inducement likely to cause a false confession. The questioned statements were made after Detective Stevens asked Defendant if he agreed that people who are honest are better than people who are not. That question is permissible because it is a statement about how it is better to tell the truth. Detective Stevens' following example, about how it went well for someone who told the truth about committing a robbery, was made within the framework of how it is better to be honest. Within context, the statement implied that the individual who came to him and told the truth felt better afterwards because he was honest. This is true of the second statement as well. Detective Stevens reminded Defendant of how Defendant felt after being honest about the other robbery. There was no implication that criminal justice proceedings would go better for Defendant because he was honest, only that Defendant felt better after confessing. The statements were made as part of an interrogation technique, but they were not an attempt to coerce Defendant into confessing by making him believe he would obtain a better result if he confessed. Furthermore, the statements here are not similar to any statements that the Iowa

Supreme Court has held rise to the level of impermissible promises of leniency. Detective Stevens' statements that being cooperative makes things "go well" or "go better" were not implied promises of leniency. Therefore, Defendant's confession to the On The Go BP robbery is not suppressed.

RULING

IT IS THEREFORE ORDERED that Defendant's Motion to Suppress is **DENIED**.

Dated this 3 day of July, 2013.

Clerk to notify.

/s/ Robert E. Sosalla
ROBERT E. SOSALLA, JUDGE
Sixth Judicial District of Iowa

IN THE IOWA DISTRICT COURT
IN AND FOR JOHNSON COUNTY

State of Iowa Plaintiff, vs. Marvis Latrell Jackson, Defendant	No. FECR100500 and No. FECR100502 FINDINGS OF FACT, CONCLUSIONS OF LAW and VERDICTS (Filed Nov. 20, 2013)

These matters were tried to the Court on October 8, 2013, pursuant to assignment. The Defendant, Marvis Latrell Jackson, appeared in person and with his attorney, Edward Leff. The State appeared by Assistant Johnson County Attorney Anne Lahey.

The Defendant knowingly, intelligently and voluntarily waived his right to a jury trial in writing and on the record. The Court addressed the Defendant and made inquiry as to his waiver. The State of Iowa consented to the jury waiver for good cause shown. Pursuant to Iowa Rule of Criminal Procedure 2.17(1) and *State v. Stallings*, 658 N.W.2d 106 (Iowa 2003), the Court accepted the Defendant's waiver of a trial by jury.

The State and the Defendant then informed the Court that it reached a stipulation that the trial evidence would consist solely of the evidence contained in the Minutes of Testimony filed February 13, 2013 (in FECR 100500) and the Minutes of Testimony filed January 11, 2013 (in FECR100502). The Court addressed

the Defendant and made inquiry of the Defendant as to this stipulation. Following the in court colloquy, the Court approved the parties' stipulation and the matter was submitted.

Accordingly, this matter is submitted for the rendering of a verdict by the Court based solely upon the Minutes of Testimony and the Court will proceed with this case pursuant to Iowa Rule of Criminal Procedure 2.17(2).

The Defendant was charged by Trial Information with the crime of Robbery in the Second Degree, in violation of Iowa Code Section 711.3, a class C felony, in FECR 100500 and Robbery in the Second Degree, in violation of Iowa Code Section 711.3, a class C felony, in FECR 100502.

FINDINGS OF FACT – FECR 100500

A Trial Information was filed February 13, 2013, alleging that Defendant, on or about November 13, 2012, in Johnson County, Iowa, with the intent to commit a theft, committed an assault upon another, or threatened another with or purposely put another in fear of immediate serious injury in that the Defendant entered a convenience store, pointed a gun at the clerk and demanded money and cigarettes, fleeing with the money and cigarettes.

State's witness Mark Schumacher is employed at the On The Go BP convenience store located at 2315 Muscatine Avenue, Iowa City, Iowa. He was working at

this business on the evening of November 13, 2012, when he noticed a male subject walk past the store window and, as he walked by, put his hand up to cover his face. When this individual walked inside the store, he had on a black face mask and a gun at his side in his right hand. The individual raised the gun and pointed it at him demanding "Give me the money." The individual also demanded from Schumacher a carton of Newport 100 cigarettes. This individual left the store walking to the east, having taken $476 in cash and $62 worth of cigarettes.

State's witness Scott Stevens is a detective with the Iowa City Police Department and was the primary investigator assigned to the robbery which occurred at the On The Go BP in lowa City on November 13, 2012. Detective Stevens viewed the video of the robbery with store owner Don Schumacher. The video shows an individual appearing to be a black male of medium height wearing a black baseball cap, a black face covering, a red zipped coat with the hood up and black gloves. The individual was also wearing black denim jeans with large squared shaped back pockets and black and white tennis shoes. In addition, a white T-shirt which was tied was hanging down in the back from beneath the individual's coat. The video shows the individual removing a black semi-automatic pistol from his right coat pocket and holding it in his right hand. This individual then approached Mark Schumacher, pointing the gun directly at him. The video shows Mark Schumacher grabbing money from the cash register and handing it to the individual who

placed the money in his pocket. Then the video shows Mark Schumacher handing a carton of cigarettes to the individual, who took the carton and left the store, casually walking away.

On December 13, 2012, Detective Stevens received a phone call from Don Schumacher indicating a male customer had come into the store and spoke to the cashier about a possible suspect in the robbery. The customer indicated he had a conversation with a person who claimed to the uncle of a person who goes by the nickname "Juicy." The customer reported that the uncle was intoxicated and talking about "Juicy" robbing the On The Go BP. Detective Stevens was able to determine that the Defendant herein is known to use the nickname "Juicy."

On December 31, 2012, Detective Stevens received a phone call advising him that the Defendant was in custody for allegedly committing an armed robbery at Gumby's Pizza located on South Gilbert Street in Iowa City, Iowa. Detective Stevens responded to the police department to interview the Defendant, confirming with him his Miranda rights. Detective Stevens explained to the Defendant he had information linking the Defendant to a robbery at the On The Go BP. The Defendant initially denied committing a robbery there but nodded his head when Detective Stevens discussed details of the robbery, including using a BB gun and taking cash. Detective Stevens informed the Defendant the clerk at the On The Go BP was severely traumatized by having a gun pointed at him. Detective Stevens asked the Defendant what he would say to the

clerk if he could say something to him. The Defendant replied, "I'd apologize to him." When asked for the reason why he robbed the On The Go BP, the Defendant replied that he was "Sorry, but going through rough things, got nowhere to go, homeless." When asked if he would like a message delivered to the clerk, the Defendant replied that he would like Detective Stevens to apologize to the clerk for him and that he was not expecting to hurt anybody. The Defendant indicated that he used the money from the robbery for food, beer and marijuana and that he gave away some of the cigarettes and sold the rest for cash. Detective Stevens asked the Defendant if he would write an apology letter to the clerk, which the Defendant did. The Defendant indicated he knew the name of the store as the On The Go BP. The Defendant also reviewed the video from the store with Detective Stevens. The Defendant indicated that it was his idea but also the idea of Gunnar Olson to rob the store. The Defendant further indicated that the shoes of the individual robbing the store in the video are the same shoes he was wearing when talking with Detective Stevens.

Detective Stevens also spoke with Wesley Turner. Turner told Detective Stevens that he had seen the Defendant with a gun two to two-and-a-half months before the On The Go BP robbery. Turner indicated that the Defendant had told him that he had the gun and that he needed to rob a place for money in order toleave the area. Turner indicated the Defendant decided on a gas station to rob. Turner reviewed the video from the On The Go BP robbery and said the person in

the video looked like the Defendant. He indicated that the jeans of the person in the video looked like those of the Defendant and that the Defendant would often wear his shirt tail out as the person in the video was. Turner also indicated the gun in the video looked like the gun that the Defendant had in his possession.

Detective Stevens also met with Alyssa Miller, who is Turner's girlfriend. He viewed the video of the robbery at the On The Go BP with her. Miller identified the person in the video robbing the store to be the Defendant. In addition, Miller indicated the baseball cap the suspect was wearing in the video was one she recognized as belonging to the Defendant. She said that this hat was in her apartment on the shelf in the living room. Detective Stevens and Miller went to her residence. Once there, Miller showed Detective Stevens the shelf in the living room where the Defendant's hat was found. The hat is described as a black fitted New York Yankees hat.

FINDINGS OF FACT – FECR 100502

A Trial Information was filed January 11, 2013, (which was amended by oral application on August 8, 2013, to reflect the correct name of the Defendant), alleging that Defendant, on or about December 31, 2012, in Johnson County, Iowa, with the intent to commit a theft, committed an assault upon another or threatened another with or purposely put another in fear of immediate serious injury in that the Defendant, acting

with another, put a gun to the head of a clerk and demanded money.

State's witness Michael Smithey is an Iowa City police officer. On December 31, 2012, he was dispatched to Gumby's Pizza at 702 South Gilbert Street, Iowa City, Iowa, for a report of an armed robbery. Adam Carlson reported to him that he had been in the kitchen area at Gumby's Pizza when two black males dressed in black with most of their faces covered entered the store armed with a gun. The individuals ordered him at gunpoint to open the cash register, which he did. The individuals took cash and fled on foot to the west of the store, turning northbound on Gilbert Street. Officer Smithey and Officer Brandon Faulkcon tracked the individuals, eventually arriving at 816 South Gilbert Street, Apartment Number 3, Iowa City, Iowa. Officer Smithey knocked on the door, which was answered by Wesley Turner. Turner allowed Officer Smithey into the apartment and told him the only people in the apartment were his girlfriend, Alyssa Miller, and his roommate, Gunnar Olson. Olson informed Officer Smithey that his cousin was also asleep in the bedroom and identified him as Marvis but was unable to provide his last name.

Officer Smithey observed this individual in Olson's bathroom. This individual, who identified himself as Marvin Jackson, appeared to have been sleeping and also appeared to be sweating. Officer Smithey thought it appeared odd to be sweating if this person was only sleeping. Upon a search of the bedroom, Officer Smithey retrieved a backpack that had been in a

closet, removing a wallet and a pair of dark colored jeans from the backpack. In addition, Officer Smithey found a black handgun under the jeans. The identification in the wallet indicated it belonged to Marvis Jackson.

Adam Carlson is employed at Gumby's Pizza in-Iowa City, Iowa. He was alone in the Gumby's Pizza kitchen shortly after midnight on December 31, 2012, when two black males entered demanding money from the cash register. One of the subjects was holding a hand gun. The individual holding the hand gun was a black male, approximately 5'11", and the other individual was a black male who was approximately 6'3". The shorter individual pointed the gun at Carlson's head. Carlson indicated he believed the suspects took approximately 125 one dollar bills, one $20 bill, ten $5 bills, and other loose $1 bills. Carlson indicated both men had yelled at him to give them the money while the gun was pointed at him.

Tom Hartshon is an investigator with the Iowa City Police Department. In the early morning hours of December 31, 2012, he applied for and obtained a search warrant for 816 South Gilbert Street, Apartment Number 3, Iowa City, Iowa. He, along with a colleague, served and executed the search warrant at that address. Among other things, he retrieved clothing and 129 one dollar bills, nine $5 bills, and one $20 bill.

Kevin Bailey is a police officer with the Iowa City Police Department. On December 31, 2012, he interviewed Adam Carlson concerning the events which

took place at Gumby's Pizza. He then interviewed Alyssa Miller and Wesley Turner. Turner admitted that he and the Defendant had robbed Gumby's Pizza a few hours earlier. Turner indicated that he did not go behind the counter and that the Defendant had the gun and that he did go behind the counter. Turner claimed the robbery was the Defendant's idea and that Gunnar Olson was the lookout. Turner identified and described Adam Carlson to Officer Bailey. Turner also indicated that although he was the one who grabbed the money, he gave the money to the Defendant. Turner claimed the Defendant pressured him to perform the robbery.

Officer Bailey also interviewed the Defendant He read the Defendant his Miranda rights and, although the Defendant initially denied any involvement with the Gumby's Pizza robbery, he later admitted that he robbed Gumby's Pizza with Turner. The Defendant admitted the gun belonged to him and described it as a BB gun. He also indicated the robbery was a spur-of-the-moment decision and the first time he had been in Gumby's Pizza. The Defendant indicated that Turner took the money as he held the gun on the employee and that he was planning on splitting the money with Turner.

CONCLUSIONS OF LAW

The defendant is presumed innocent and not guilty of the offense with which he is charged. The presumption of innocence remains with the defendant

throughout the trial unless the evidence establishes guilt beyond a reasonable doubt. Iowa Criminal Jury Instruction 100.4.

The burden is on the State to prove the defendant guilty beyond a reasonable doubt. Iowa Criminal Jury Instruction 100.10.

The State must prove all of the following elements of Robbery in the Second Degree:

1. On a date certain, the defendant had the specific intent to commit a theft.

2 In carrying out his intention or to assist him in escaping from the scene, with or without the stolen property, the defendant:

   a. committed an assault on a victim; or

   b. threatened a victim or purposely put a victim in fear of immediate serious injury.

If the State has proved all of the elements, the defendant is guilty of Robbery in the Second Degree. If the State has failed to prove any one of the elements, the defendant is not guilty of Robbery in the Second Degree. Iowa Criminal Jury Instruction 1100.2.

An assault is committed when a person does an act which is meant to cause pain or injury or place another person in fear of immediate physical contact which will be painful, injurious, insulting or offensive to another person, when coupled with the apparent ability to do

the act; or a person intentionally points a firearm toward another, or intentionally displays a dangerous weapon in a threatening manner toward another. Iowa Criminal Jury Instruction 800.8; Iowa Code Section 708.1.

Theft contains the following elements: That the defendant took possession or control of property; that the defendant did so with the intent to deprive the victim of the property; and the property, at the time of the taking, belonged to or was in possession of the victim. Iowa Criminal Jury Instruction 1400.1; Iowa Code Section 714.1(1).

Possession or control means to secure dominion or exert control over an object or to use an object in a manner beyond the person's authority to do so. Iowa Criminal Jury Instruction 1400.2; *State v. Donaldson*, 663 N.W.2d 882 (Iowa 2003).

Specific intent means not only being aware of doing an act and doing it voluntarily but, in addition, doing it with a specific purpose in mind. Iowa Criminal Jury Instruction 200.2; *State v. Rinehart*, 283 N.W.2d 319 (Iowa 1979).

An accomplice is a person who knowingly and voluntarily cooperates or aids in the commission of a crime. A person cannot be convicted only by the testimony of an accomplice. The testimony of an accomplice must be corroborated by other evidence tending to connect the defendant with the crime. Iowa Criminal Jury Instruction 200.4.

The defendant cannot be convicted by a confession alone. There must be other evidence the defendant committed the crime. Iowa Criminal Jury Instruction 200.16.

It has long been the law in Iowa that one may not be convicted on the testimony of an accomplice alone. *See* Iowa R. Crim. P. 2.21(3); *State v. Brandt*, 44 N.W.2d 690, 693 (1950). A similar rule exists with respect to a defendant's confession: "A confession standing alone will not warrant a criminal conviction unless other proof shows the defendant committed the crime." *See* Iowa R. Crim. P. 2.21(4); *State v. Polly*, 657 N.W.2d 462, 466 (Iowa 2003). Thus, when the prosecution relies on either type of proof, corroborating evidence independently linking the defendant to the offense is required. *Polly*, 657 N.W.2d at 466; *State v. Ware*, 338 N.W.2d 707, 710 (lowa 1983). The testimony of an accomplice and the confession of a defendant constitute acceptable corroboration, one for the other. *State v. Douglas*, 675 N.W.2d 567, 572 (Iowa 2004).

RULING – FECR 100500

In order to prove that the Defendant committed Robbery in the Second Degree, the State is required to show beyond a reasonable doubt that the Defendant, on or about November 13, 2012, had the specific intent to commit a theft and, in carrying out his intention or to assist him in escaping the scene, the Defendant committed an assault upon another or threatened another

with or purposely put another in fear of immediate serious injury.

In addition, to the extent that the State desires to use the testimony of an accomplice as evidence, the testimony of an accomplice must be corroborated by other evidence tending to connect the Defendant with the crime. Likewise, to the extent that the State intends to use statements made by or a confession of the Defendant, the State must present evidence that the Defendant committed the crime other than the statements made by the Defendant or a confession that the Defendant committed the crime.

In this case the Court finds beyond a reasonable doubt that the Defendant, on November 13, 2012, had the specific intent to commit a theft at the On The Go BP at 2315 Muscatine Avenue, Iowa City, Iowa, and that in carrying out this theft, the Defendant committed an assault on Mark Schumacher or put him in fear of immediate serious injury. Specifically, Mark Schumacher testified that he was working at the store at that location on November 13, 2012, and that he was forced at gunpoint to turn over money to an individual who was pointing a gun at him. The evidence also shows that Don Schumacher, the owner of the On The Go BP was told by a customer that another individual had talked about a person who goes by the name of "Juicy," admitting to robbing the On The Go BP. Officer Scott Stevens of the Iowa City Police Department determined that the Defendant herein is known by the nickname of "Juicy."

Further, Officer Stevens discussed the robbery with the Defendant on December 31, 2012. Upon explaining to the Defendant that he had information linking him to this robbery, the Defendant acknowledged by nodding his head that he was aware of the circumstances of the robbery. In discussing the robbery further with the Defendant, when Officer Stevens was discussing the trauma the clerk at the store suffered by having a gun pointed at him, the Defendant indicated that he did not expect to hurt anybody. The Defendant made further statements acknowledging a role in the robbery and his remorse for traumatizing the clerk at the store. During this discussion the Defendant indicated that he would like to apologize to the clerk and tell him that he was sorry but that he was going through some rough things. He also indicated that he was not expecting to hurt anyone. Upon questioning by Officer Stevens, the Defendant-indicated-that he used the money obtained in the robbery for food beer and marijuana. He also indicated he used the cigarettes he obtained in the robbery by giving some away and selling some for money. The Defendant then wrote a letter of apology to the clerk at the store. In discussing whose idea it was to rob the store, the Defendant admitted that he was one of the people who had the idea. The Defendant further admitted that the shoes the suspect in the video of the robbery was wearing were the same shoes he was wearing during his interview with Officer Stevens.

In addition to the Defendant's own statements acknowledging his role, Wesley Turner, an accomplice of

the Defendant's in this robbery, discussed with Officer Stevens that the Defendant was the one who supplied the gun for the robbery. In viewing the video of the On The Go BP robbery, Turner said the person in the video looked like the Defendant and the jeans the person was wearing looked like the Defendant's. Further, Turner indicated the Defendant wears his shirt tail out as the person in the video did.

Finally, Alyssa Miller, Turner's girlfriend, viewed the video of the robbery and indicated she recognized the hat the suspect was wearing as belonging to the Defendant. Ms. Miller then accompanied Officer Stevens to her apartment where she showed Officer Stevens where the Defendant's hat was found.

Based upon all of this, the Court finds beyond a reasonable doubt that the Defendant had the specific intent to commit a theft and did, in fact, commit a theft by demanding and taking cash and cigarettes, and in carrying out his intention, committed an assault on Mark Schumacher and/or purposely put him in fear of immediate serious injury by pointing a gun at him during the course of the theft. Based upon this, the Defendant is guilty of the crime of Robbery in the Second Degree.

Further, the Court finds that the statements, admissions and confession of the Defendant were corroborated by the statements of Wesley Turner. In turn, the statements of Wesley Turner were also corroborated by the admissions and confession of the Defendant. Finally, Alyssa Miller also provided further evidence

which connected the Defendant with the crime by identifying the Defendant's hat in the video of the robbery at the On The Go BP and by providing that hat to Officer Stevens.

RULING – FECR 100502

In order to prove that the Defendant committed Robbery in the Second Degree, the State is required to show beyond a reasonable doubt that the Defendant, on or about December 31, 2012, had the specific intent to commit a theft and, in carrying out his intention or to assist him in escaping the scene, the Defendant committed an assault upon another or threatened another with or purposely put another in fear of immediate serious injury

In addition, to the extent that the State desires to use the testimony of an accomplice as evidence, the testimony of an accomplice must be corroborated by other evidence tending to connect the Defendant with the crime. Likewise, to the extent that the State intends to use statements made by or a confession of the Defendant the State must present evidence that the Defendant committed the crime other than the statements made by the Defendant or a confession that the Defendant committed the crime.

In this case the Court finds beyond a reasonable doubt that the Defendant had the specific intent to commit a theft on December 31, 2012, at Gumby's Pizza, 702 South Gilbert, Iowa City, Iowa, and that in carrying out this theft, the Defendant committed an

assault on Adam Carlson or purposely put him in fear of immediate serious injury. Specifically, the evidence shows that Adam Carlson was working in the kitchen area at Gumby's Pizza on December 31, 2012. He reports that he was approached by two males dressed in black with their faces covered who entered the store armed with a gun. These individuals ordered him to open the cash register at gunpoint, which he did, and he turned over cash to these individuals. The individuals then fled on foot from the business.

Officer Michael Smithey presented evidence that he and his colleague tracked the Defendant and Wesley Turner to 816 South Gilbert Street, Apartment 3, Iowa City, Iowa. At this residence were the Defendant, Wesley Turner, Gunnar Olson and Alyssa Miller. Officer Smithey found in the bedroom where the Defendant was staying a backpack containing a black handgun.

Officer Tom Hartshon presented evidence that he found at 816 South Gilbert Street, Apartment 3, 129 one dollar bills, nine $5 bills, and one $20 bill. These amounts were similar to the amounts Adam Carlson testified he believed were taken from Gumby's Pizza during the robbery.

Wesley Turner presented evidence admitting that he and the Defendant robbed Gumby's Pizza on December 31, 2012. Turner indicated that he did not go behind the counter toward the employee at the business but that the Defendant did. Further, Turner indicated the Defendant was holding the gun at the employee.

Additionally, the Defendant confessed to his involvement in the robbery of Gumby's Pizza to Officer Kevin Bailey. The Defendant indicated that he robbed Gumby's Pizza with Wesley Turner and that he was aware the robbery was going to take place. The Defendant indicated that another individual also wanted to participate but since he was too nervous, they did not let him go with them. The Defendant further admitted that the gun that was used in the robbery belonged to him, although he indicated it was a BB gun.

Based upon all of this, the Court finds beyond a reasonable doubt that the Defendant had the specific intent to commit a theft and did, in fact, commit a theft by demanding and taking cash, and in carrying out his intention, committed an assault on Adam Carlson and/or purposely put him in fear of immediate serious injury by pointing a gun at him during the course of the theft. Based upon this, the Defendant is guilty of the crime of Robbery in the Second Degree.

Further, the Court finds that the statements, admissions and confession of the Defendant were corroborated by the statements of Wesley Turner. In turn, the statements of Wesley Turner were also corroborated by the admissions and confession of the Defendant. Finally, the gun used in the theft and an amount of cash. similar to the amount Carlson believed was taken from Gumby's Pizza, was found by the Iowa City Police on the Defendant and in the vicinity of where he was found after being tracked down on the night of the theft.

VERDICT – FECR 100500

For the reasons stated herein, I now enter of record a verdict of guilty against the Defendant, Marvis Latrell Jackson, to the offense of Robbery in the Second Degree, in violation of Iowa Code Section 711.1(2) and 711.3.

Pronouncement of judgment and sentence is hereby set for **January 9, 2014, at 3:30 p.m.** at the Johnson County Courthouse before Judge Stephen B. Jackson, Jr.

The Sixth Judicial District Department of Correctional Services is directed to prepare a presentence investigation report. An original and two copies shall be delivered to the Court Administrator at least three days prior to the date set for sentencing. Counsel may have access to electronic copies of the presentence investigation.

IT IS FURTHER ORDERED that the County Attorney shall promptly prepare a statement of pecuniary damages to victims of Defendant's criminal activity. The Clerk of Court shall promptly prepare a statement of court-appointed attorney fees or expenses of a Public Defender, if any, and court costs in connection with this matter. Both statements shall be promptly provided to the presentence investigator.

At the time of sentencing restitution will be ordered in the amount set out in the statement of pecuniary damages filed unless the Defendant gives notice of any objections thereto in writing prior to sentencing.

Pursuant to Iowa Code Section 811.1(1), Defendant shall not be admitted to bond.

VERDICT – FECR 100502

For the reasons stated herein, I now enter of record a verdict of guilty against the Defendant, Marvis Latrell Jackson, to the offense of Robbery in the Second Degree, in violation of Iowa Code Section 711.1(2) and 711.3.

Pronouncement of judgment and sentence is hereby set for **January 9, 2014, at 3:30 p.m.** at the Johnson County Courthouse before Judge Stephen B. Jackson, Jr.

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At the time of sentencing restitution will be ordered in the amount set out in the statement of pecuniary damages filed unless the Defendant gives notice of any objections thereto in writing prior to sentencing.

Pursuant to Iowa Code Section 811.1(1), Defendant shall not be admitted to bond.

Clerk to notify.

DATED: November 19, 2013.

/s/ Stephen B. Jackson, Jr.
STEPHEN B. JACKSON, JUDGE
SIXTH JUDICIAL DISTRICT
OF IOWA

[CC: CA-AL
DCS
PD-EL
11-20-13]
[Illegible]