NO. 16-157

IN THE SUPREME COURT OF THE UNITED STATES

STATE OF IOWA,

Petitioner,

vs.

MARVIS LATRELL JACKSON,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE IOWA SUPREME COURT

RESPONDENT'S BRIEF IN OPPOSITION

Respectfully submitted,

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COUNTER-STATEMENT OF

QUESTION PRESENTED FOR REVIEW

When an individual provides law enforcement officers with consent to search a room he occupies but another person is also present, does the Fourth Amendment allow officers to search closed containers found within that room without any further inquiry if it is unclear who has authority over the containers?

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STATEMENT OF THE CASE

Marvis Jackson was convicted of two robberies after law enforcement officers conducted a search of an apartment where he was temporarily staying based upon a tenant's consent to search the premises. Pet. App. p. 2. Jackson was found partially naked and sleeping in a bedroom and was removed from the room on an outstanding warrant before officers obtained the tenant's consent to search the room. Pet. App. pp. 5-7. Officers searched a backpack near the mattress where Jackson had been sleeping and found evidence from the robberies. Pet. App. pp. 7-8. Officers made no inquiries into whether Jackson was staying in the apartment or whether anything in the room belonged to Jackson before conducting their search. Pet. App. pp. 5-7.

In a 4-3 decision, the Iowa Supreme Court held the Fourth Amendment to the United States Constitution invalidated the search. Pet. App. 42. Citing *Illinois v. Rodriguez*, 497 U.S. 177 (1990), the Court found the officers were faced with an ambiguity as to who owned the backpack and neglected to make any further inquiry. Pet. App. pp. 14-17, 35-42. The majority recognized that some jurisdictions require a defendant to affirmatively establish the existence of ambiguity, while others place the burden on the government to establish a lack of ambiguity. Pet. App. pp. 17-29. The majority sided with those jurisdictions placing the burden on the government. Pet. App. pp. 29-35. The dissenting justices agreed the burden was properly placed on the government, but deemed there was no ambiguity under the facts as presented. Pet. App. pp. 59-78.

Petitioner now asks this Court to essentially equate a third party's scope of consent to search a premises with his authority to consent to the search when it comes to searching closed containers. Pet. p. i. Petitioner believes such warrantless searches should be permitted unless ambiguity as to a third party's authority was "obvious." Pet. p.p. 25-26. Petitioner's position is inconsistent with *Rodriguez*, inconsistent with the history of requiring the State to establish the validity of warrantless searches, and would eviscerate a guest's privacy interests in items he brings into his host's home. The petition for certiorari should be denied.

A. Factual Background

On its de novo review, the Iowa Supreme Court found that on December 31, 2012, two black males with covered faces entered Gumby's Pizza in Iowa City. Pet. App. p. 3. The suspects pointed a gun at the clerk, obtained money, and ran northbound on Gilbert Street. Pet. App. p. 3.

Iowa City police officers Alex Stricker and Michael Smithey, along with a canine unit, followed footprints in the snow after a witness reported seeing two black males run by with money in their hands. Pet. App. p 3. The dog stopped near a building that contained apartments on the second floor, where Smithey observed a black male watching from one of the apartment windows above. Pet. App. p. 4. When the officers attempted to make contact with the occupants, the light in the apartment went off and the door locked. Pet. App. p. 4. The officers knocked and announced their presence. Pet. App. p. 4.

Wesley Turner answered the door and, when asked, said only he, his girlfriend Alyssa Miller, and Gunnar Olson were present. Pet. App. p. 4. Turner told officers Olson was asleep, but brought Olson to speak with them at their request. Pet. App. pp. 4-5. Olson told Smithey that only he, Turner, and Miller lived in the apartment. Pet. App. p. 5. When Smithey asked if he could look in Olson's room, Olson then said he had gone to sleep after getting off work and woke to his cousin Marvis asleep next to him. Pet. App. p. 5. Olson later said he did not know Marvis' last name and admitted they were not really cousins. Pet. App. p. 5. Smithey did not ask Olson if Jackson had been staying at the apartment. Pet. App. p. 5.

In the bedroom, officers observed Marvis Jackson, wearing only pajama bottoms and lying on an air mattress apparently sleeping. Pet. App. p. 5. Olson attempted to awaken Jackson, which Smithey thought "was considerably more difficult than it should have been." Pet. App. p. 5. Jackson identified himself to officers, but said he had no identification. Pet. App. p. 6. Jackson was not asked if he was staying in the apartment, was an overnight guest, or had any belongings in the apartment. Pet. App. p. 6. Smithey confirmed that Jackson had an active arrest warrant, removed him from the room, and turned him over to another officer. Pet. App. p. 6.

After Jackson was removed from the apartment, Olson consented to a search of his bedroom. Pet. App. pp. 6-7. Neither Stricker nor Smithey asked Olson if Jackson had been staying in the apartment or if he had any belongings in the

bedroom. Pet. App. p. 7.

After searching around the air mattress, Smithey grabbed a closed backpack that was a few feet away from the air mattress near the closet. Pet. App. p. 7. Smithey saw no obvious identification on the outside of the bag. Pet. App. p. 7. He opened the bag to find a wallet – which he laid on a chair and did not open --, a pair of dark-colored jeans that were wet around the cuffs, and a black handgun. Pet. App. pp. 7-8. Smithey then opened the wallet and found Jackson's identification. Pet. App. p. 8. He photographed the gun and stopped the search, instructing the others that they were locking down the apartment to apply for a search warrant. Pet. App. p. 8.

It was only after the group was taken to the police station for questioning that Miller, Turner, and Jackson all confirmed that Jackson had been staying at the apartment for several weeks prior to the robbery, and that he had personal belongings in the apartment. Pet. App. p. 9.

B. Procedural Background

Respondent generally agrees with Petitioner's recitation of the procedural background of this case, with a few clarifications.

1. The "unanimous" decision of the Iowa Court of Appeals was a unanimous decision of a three-judge panel. Pet. App. p. 87. Respondent clarifies that there are nine judges on the Iowa Court of Appeals. Iowa Code § 602.5102(1) (2015).

2. On further review, the Iowa Supreme Court began its analysis by making the unremarkable statement that the government bears the burden of proving a

warrant was not necessary to justify a warrantless search. Pet. App. p. 12. The conduct of the officers involved would be reviewed using an objective standard. Pet. App. p. 12.

The Court recognized an officer could rely on a third party's actual or apparent authority to consent to the search. Pet. App. pp. 12-13. Because the State of Iowa conceded Olson did not have actual authority to consent to a search of the backpack, the Court considered Olson's apparent authority to do so. Pet. App. pp. 14, 35.

Relying upon *Illinois v. Rodriguez*, 497 U.S. 177 (1990), the Court determined officers were required to make "reasonable, not perfect, factual determinations concerning the scope of authority possessed by a person who consents to a search." Pet. App. p. 15. Where surrounding circumstances would lead a reasonable person to question whether the consenting party had the requisite authority, a warrantless entry or search without further inquiry would be unlawful. Pet. App. p. 16. The Court noted that *Rodriguez* placed the burden of establishing effective consent on the government. Pet. App. pp. 16-17.

The Court acknowledged the United States Supreme Court had yet to address whether *Rodriguez*'s duty of inquiry applied to the search of closed containers within a residence. Pet. App. p. 17. The Court noted a split in the circuit courts of appeals as to whether the burden of proof regarding ambiguity should fall upon the government or the defendant. Pet. App. pp. 17-29. Ultimately, the Iowa Supreme Court determined it was most appropriate to place the burden of

proof on the government given the holding of *Rodriguez*, the government's traditional burden to justify warrantless searches, and a guest's privacy interest in personal belongings he brings into a host's home. Pet. App. pp. 29-35.

3. The dissenting justices held there was "no question" that *Rodriguez* placed the burden on the government to prove the consenting party had actual or apparent authority. Pet. App. p. 59. Furthermore, the dissent clarified that "[n]one 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." Pet. App. p. 59. The outcome of each case, according to the dissent, will depend on the objective review of the facts of each case. Pet. App. pp. 58-59.

4. It is the interpretation of the facts surrounding the search of Jackson's backpack where the majority and dissent parted ways. The majority found ambiguity because 1) Jackson was an overnight guest, 2) officers should have known Jackson had clothes other than his pajama pants in the apartment, 3) Jackson's clothes were likely in the room where he was sleeping, and 4) Olson made statements suggesting there were items in his room that did not belong to him. Pet. App. pp. 35-42. The majority determined the officers did not make any inquiry to clear up the ambiguity arising from these circumstances. Pet. App. pp. 39-40.

The dissent, meanwhile, found no ambiguity in Olson's authority to consent to a search of his room. The dissent faulted the majority for "blindly accept[ing] the statements made by Turner, Olson, and Miller, even in the face of their obvious

incredibility and dishonesty," yet relied upon their statements that no one else lived there to render the officers' belief in Olson's authority to consent to the search of the backpack as reasonable. Pet. App. pp. 68, 70. The dissent also found the situation unambiguous, in large part, because the scene as officers found it was consistent with Jackson having just fled the scene of a robbery. Pet. App. pp. 69-72. In other words, the purpose of the search coupled with the circumstances presented in the apartment would give officers no reason to believe Jackson was an overnight guest or that the backpack belonged to him. Pet. App. pp. 69-72.

REASONS FOR DENYING THE PETITION

I.

Petitioner's Claim of a "Deep Division" Is Illusory.

The Fourth Amendment to the United States Constitution protects individuals against unreasonable searches and seizures. U.S. Const. amend IV. The warrantless search of an individual's home is ordinarily considered presumptively unreasonable. *Payton v. New York*, 445 U.S. 573, 586 (1980). Furthermore, Fourth Amendment protections extend to people, not places, and apply to items a person "seeks to preserve as private, even in an area accessible to the public." *Katz v. United States*, 389 U.S. 347, 351 (1967). This may include items an individual chooses to store at another's residence. *United States v. Karo*, 468 U.S. 705, 726 (1984)(O'Connor, J., concurring)("Insofar as it may be possible to search the container without searching the home, the homeowner suffers no

invasion of his privacy when such a search occurs; the homeowners also lack the power to give effective consent to the search of the closed container.").

Although warrantless searches are generally prohibited, one established exception to the warrant requirement is a search based on consent. *Schneckloth v. Bustamonte*, 412 U.S. 218, 219 (1973). Consent may come from those who have common authority to consent. *United States v. Matlock*, 415 U.S. 164, 171, (1974). Common authority rests "on mutual use of the property by persons generally having joint access or control for most purposes, so that it is reasonable to recognize that any of the co-inhabitants has the right to permit the inspection in his own right and that the others have assumed the risk that one of their number might permit the common area to be searched." *Id.* n.7.

Apparent authority to search will suffice under the Fourth Amendment because law enforcement need not always be correct in their determination that someone had the authority to consent, but the officers must "always be reasonable." *Illinois v. Rodriguez*, 497 U.S. 177, 185 (1990). When there is a claim of authority by a third party, however, "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. The standard is an objective one:

> "[W]ould 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? If not, then warrantless entry without further inquiry is unlawful unless authority actually exists. But if so, the search is valid.

Id. (quoting *Terry v. Ohio*, 392 U.S. 1, 21-22 (1968)).

Because *Rodriguez* involved third-party consent to search a room where the illegal items were in plain view, the *Rodriguez* Court did not specifically address the question of whether the third-party consent was valid as to closed containers within the residence. *Id.* at 180. Petitioner claims this has led to a "deep division" among lower courts as to whether the Fourth Amendment likewise imposes a duty of inquiry upon officers when there is ambiguity as to the ownership of closed containers. Pet. pp. 12-19. Respondent respectfully contends any claim of a "deep division" is illusory.

A. Federal Circuit Courts of Appeals

1. Circuits Requiring Defendants to Establish Ambiguity

Petitioner cites the Seventh Circuit as taking the position that police should be permitted to inspect closed containers unless an ambiguity as to ownership is obvious and dedicates significant time to discussing *United States v. Melgar*. Pet. pp. 13-14. *United States v. Melgar*, 227 F.3d 1038 (2000). Petitioner's effort is all for naught as *Melgar's* holding has been placed into question by more recent cases.

Melgar involved the search of a purse in a motel room after a third party – the renter of the room – had given consent to search the room. *Id.* at 1309. An officer held up the purse and asked someone to claim ownership of it, but no one did. *Id.* Contraband was discovered upon a search of the purse. *Id.*

The *Melgar* Court posited the "real question for closed container searches [as] which way the risk of uncertainty should run." *Id.* at 1041. Were police required to have "positive knowledge" that the third party had authority to consent to the

search of the purse, or was the search permissible if the police did not have "reliable information that the container is *not* under the authorizer's control"? *Id.* The *Melgar* Court was not willing to accept the "strict view" of positive knowledge and found it sufficient that police had "no reason to know" the purse did not belong to the woman who authorized the search. *Id.*

It is worth noting that the *Melgar* Court specifically explained "Our conclusion here rests in part on the discussion in *Houghton* that indicates the container rule rests on general principles of Fourth Amendment law that do not depend on the special attributes of automobile searches." *Id.* at 1042 (citing *Wyoming v. Houghton*, 526 U.S. 295, 302 (1999)). This was a reference to *Houghton*'s reliance on probable cause to search an automobile for contraband as a basis for searching closed containers in the vehicle that might contain contraband. *Wyoming v. Houghton*, 526 U.S. 295, 302 (1999). *Houghton* was a probable cause case and not a consent case. *Houghton* and *Melgar* are therefore unhelpful in an analysis of the question presented.

Furthermore, the precedential value of *Melgar* in the Seventh Circuit is questionable. In 1996, the Seventh Circuit held that *Rodriguez* "imposes on law enforcement officers a duty to inquire further as to a third party's authority to consent to a search if the surrounding circumstances make that person's authority questionable." *Montville v. Lewis*, 87 F.3d 900, 903 (7th Cir. 1196). In the 2006 case of *United States v. Goins*, the Seventh Circuit recognized *Montville* and that it had to determine whether officers had "a duty to inquire further before accepting [the

consenting party's] representations." *United States v. Goins*, 437 F.3d 644, 649 (7th Cir. 2006). Ultimately, the *Goins* Court determined the officers in that case fulfilled their obligations to verify the consenter's authority to search. *Id.* *See also United States v. Basinski*, 226 F.3d 829 (7th Cir. 2000)(apparent authority relies not on consenting party's mere possession of closed container, but on government's knowledge of consenting party's use of, control over, and access to container).

Respondent concedes that the Second Circuit has fairly consistently held to the rule that a third-party's apparent authority to consent to a search of a room permits a search of items found in the room "with the exception of those 'obviously' belonging to another person," and that the defendant has the burden to provide evidence that the items "were obviously and exclusively his." *United States v. Snype*, 441 F.3d 119, 136 (2d Cir. 2006). Notably, *Snype* does not refer to *Rodriguez* but to *United States v. Zapata-Tamallo*, which in turn is based on *United States v. Isom*. *See id.* at 136-37; *United States v. Zapata-Tamallo*, 833 F.2d 25, 27 (2d Cir. 1987); *United States v. Isom*, 588 F.2d 858, 861 (2d Cir. 1978).

In *Isom* – decided years before *Rodriguez* – a tenant gave police consent to search a locked box belonging to the defendant, who was a guest in her apartment. *United States v. Isom*, 588 F.2d 858, 860 (2d Cir. 1978). The Second Circuit questioned whether the tenant had authority to consent to the search of the box, and was troubled by the prospect of using the third-party consent doctrine to vitiate a guest's reasonable expectation of privacy in items they bring into a host's home. *Id.* at 861. In dicta, the *Isom* Court held "the police might reasonably conclude that

appellant did not own the box and Ames' consent included within its scope the search of the box." *Id.* The Court's decision was more motivated, however, by Isom's specific disclaimer of ownership of the box and the fact that police had probable cause to seize the box. *Id.* The Second Circuit's intra-circuit case history renders its decisions irrelevant to a discussion of *Rodriguez*'s application to closed containers.

2. Circuits Requiring Officers to Inquire in Light of Ambiguity

Respondent agrees that the Sixth Circuit has consistently applied *Rodriguez* to impose a duty of inquiry upon police officers when there is ambiguity as to whether a third-party who has consented to a search of an area has apparent authority over closed containers within that area. *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).

Petitioner makes much of the dissenting opinion in *Taylor*, which referred to a "circuit split" with the Second and Seventh Circuits on one side of the issue while negating to mention the circuits on the other side. *United States v. Taylor*, 600 F.3d 678, 686 (6th Cir. 2010)(Kethledge, J. dissenting). The dissent also referred to "appreciable entropy among the circuits" for lack of Supreme Court guidance. *Id.* As discussed in this section, however, any entropy among the circuits is hardly appreciable, and what entropy there may be can be resolved within the circuits.

Petitioner also takes issue with the Sixth Circuit's supposed resurrection of the "'superstructure rejected in *Jimeno*.'" Pet. p. 14. Petitioner neglects to point out

that *Florida v. Jimeno* involved the consent search of Jimeno's automobile and that *Jimeno* did not involve any issue of third-party consent. *See generally Florida v. Jimeno*, 500 U.S. 248 (1991). Additionally, as several courts have aptly noted, *Jimeno* addressed an officer's reasonable interpretation of a driver's *scope* of consent, not a driver's *authority* to consent. *State v. Westlake*, 353 P.3d 438, 443 n.1 (Idaho Ct. App. 2015); *Norris v. State*, 732 N.E.2d 186, 189 (Ind. Ct. App. 2000).

Petitioner fails to mention the D.C. Circuit in its analysis. In *United States v. Peyton*, the D.C. Circuit recognized *Rodriguez*'s holding that police can rely on apparent authority for consent to search so long as the officers' factual determinations were reasonable. *United States v. Peyton*, 745 F.3d 546, 552 (D.C. Cir. 2014). But merely having common authority over a house does not mean that person also has authority over closed containers within the house, particularly in the case of shared spaces. *Id.* "Apparent authority does not exist where it is uncertain that the property is in fact subject to mutual use." *Id.* at 554. Where ambiguity exists, police have a duty of further inquiry. *Id.* (citing *United States v. Taylor*, 600 F.3d 678, 680-85 (6th Cir. 2010); *United States v. Whitfield*, 939 F.2d 1071, 1075 (D.C.Cir. 1991).

Likewise, Petitioner neglects to discuss *United States v. Salinas-Cano*, in which the Tenth Circuit held it was the government's burden to come forward with evidence establishing authority over a closed container. *United States v. Salinas-Cano*, 959 F.2d 861, 864 (10th Cir. 1992). Disagreeing with the lower court's finding that there was no evidence to negate the tenant's authority to consent to a search of

items in the apartment that did not belong to her, the Tenth Circuit judges held "[o]wnership and control of property does not automatically confer authority over containers within it." *Id.* at 865. Rather, the proper question was whether there was any evidence to establish that the tenants had mutual use of or joint interest and control over the luggage at issue. *Id.* The officer knew the apartment was rented by the tenant and that the luggage belonged to Salinas-Cano, but failed to ask questions clarifying the tenant's mutual control over the luggage, therefore rendering the apparent authority doctrine inapplicable. *Id.* at 866.

Finally, Petitioner places the Ninth Circuit in support of Iowa's position. Pet. p. 15. Petitioner correctly recognizes, however, that *United States v. Arreguin* did not address the question presented. *United States v. Arreguin*, 735 F.3d 1168 (9th Cir. 2013). *Arreguin* did little more than apply *Rodriguez* to the factual and legal context *Rodriquez* specifically addressed – the duty of police to inquire when there is an ambiguity as to whether an apartment's resident has apparent authority to consent to the search of a room in the apartment. *Id.* at 1178. Assessing whether, as Petitioner suggests, the Ninth Circuit would extend this holding to close containers within a residence would be an exercise in speculation and remains a question best addressed to the Ninth Circuit.

3. Summary

There is no "deep division" among the circuit courts of appeals. The Second Circuit is an extreme outlier, placing an affirmative burden on the defendant to establish ambiguity based upon intra-circuit cases and not upon *Rodriguez*. The Seventh Circuit's decision in *Melgar* is less extreme than that adopted in the Second Circuit, but has been placed into question by later cases. The D.C., Sixth, and Tenth Circuits have adopted the position Iowa has taken, and that position is consistent with and a logical expansion of *Rodriguez*.

B. State Courts

Petitioner also cites to various cases that, it claims, show a split of authority among the state courts. Once again, any supposed split is illusory.

At most, the state cases that Petitioner claims follow the Seventh Circuit's holding in *Melgar* appear to base the reasonableness of an officer's acceptance of third-party consent to search on whether a present defendant claimed ownership of the item or objected to the search. *People v. Trevino*, 2011 WL 9692696 at *3 (Ill. Ct. App. May 27, 2011); *State v. Sawyer*, 784 A.2d 1208, 1213 (N.H. 2001); *State v. Maristany*, 627 A.2d 1066, 1070 (N.J. 1993); *Glenn v. Commonwealth*, 654 S.E.2d 910, 136-37 (Va. 2008). The defendant in *Maristany* never even claimed ownership of the container on appeal. *State v. Maristany*, 627 A.2d 1066, 1069 (N.J. 1993). In *Pennington v. State*, meanwhile, the defendant specifically told police the gun was located in a duffle bag in the house where his wife was staying, and both he and his wife consented to the search. *Pennington v. State*, 913 P.2d 1356, 1362, 1368 (Okla.

Ct. Crim. App. 1995). These cases are unhelpful in addressing the situation here, where Jackson was taken from the room prior to officers obtaining consent to search.

Petitioner cites to *State v. Sawyer* and *State v. Maristany* for the proposition that ambiguity will not defeat the consent to search given by an occupant of a vehicle. *State v. Sawyer*, 784 A.2d 1208 (N.H. 2001); *State v. Maristany*, 627 A.2d 1066 (N.J. 1993). Both cases nonetheless recognize that an officer should make inquiry if ownership of the container is ambiguous. *State v. Sawyer*, 784 A.2d 1208, 1212 (N.H. 2001); *State v. Maristany*, 627 A.2d 1066, 1069 (N.J. 1993). In a companion cases to *Maristany*, the New Jersey Supreme Court held "the preferred procedure for law-enforcement officers seeking consent to search one of several pieces of luggage in a car with more than one occupant is for the officers to determine which occupant owns each item of luggage, so that the officers' reliance on consent to search may be justifiable." *State v. Suazo*, 627 A.2d 1074, 1077-78 (N.J. 1993).

Other cases cited by Petitioner in favor of the *Melgar* approach do not address *Rodriguez* as much as they address common authority to search or the scope of consent to search. *See generally State v. Jones*, 589 S.E.2d 374 (N.C. Ct. App. 2003)(relying upon *Florida v. Jimeno* and *United States v. Matlock* to find driver had common authority over passenger's jacket left in car); *State v. Odom*, 722 N.W.2d 370 (N.D. 2006)(scope of defendant's consent to search hotel room reasonably included locked safe).

The state cases that have joined Iowa in following a "duty of inquiry" approach recognize the difference between *scope* of consent and *authority* to consent. *State v. Westlake*, 353 P.3d 438, 443 n.1 (Idaho Ct. App. 2015); *Norris v. State*, 732 N.E.2d 186, 189 (Ind. Ct. App. 2000). Thus, a person's consent to the search of her motel room could reasonably lead officers to believe the scope of her consent included containers within the room, but would not necessarily mean that she had authority to consent to the search of an item in the room they have reason to believe does not belong to her. *State v. Westlake*, 353 P.3d 438, 443 n.1 (Idaho Ct. App. 2015). These cases adhere to the uncontroversial notion that when officers equate the scope of an individual's consent as authority to consent to search of items belonging to another, the officers commit a mistake of law. *See, e.g., State v. Edwards*, 570 A.2d 193 (Conn. 1990); *Commonwealth v. Brooks*, 388 S.W.3d 131, 135-136 (Ky. Ct. App. 2012); *State v. Frank*, 650 N.W.2d 213, 218-19 (Minn. Ct. App. 2002); *People v. Gonzalez*, 667 N.E.2d 323, 326-27 (N.Y. Ct. App. 1996).

C. Need for further development of the law

According to Respondent's analysis, five circuit courts have directly addressed the issue presented, with only one circuit – based on its intra-circuit jurisprudence – definitively taking the position favored by Petitioner. More than half of the circuit courts have yet to address the question presented herein.

It is also worth noting that the decisions from the circuit courts of appeals are not en banc, but panel decisions. One cannot predict how a full circuit might approach the issue. This appears particularly true in the Seventh Circuit, where

decisions have been somewhat mixed. It is generally the duty of the full circuit court, not the Supreme Court, to resolve any conflicts among circuit panel decisions. *Cf. Davis v. United States*, 417 U.S. 333, 340 (1974)(petition for certiorari denied after Solicitor General urged the intra-circuit conflict should be resolved by the Ninth Circuit).

Finally, many of the state cases cited by Petitioner are decisions from the states' intermediate appellate courts. State *v. Westlake*, 353 P.3d 438 (Idaho Ct. App. 2015); *Norris v. State*, 732 N.E.2d 186 (Ind. Ct. App. 2000); *Commonwealth v. Brooks*, 388 S.W.3d 131, 135-136 (Ky. Ct. App. 2012); *State v. Frank*, 650 N.W.2d 213 (Minn. Ct. App. 2002); *State v. Jones*, 589 S.E.2d 374 (N.C. Ct. App. 2003); *Pennington v. State*, 913 P.2d 1356 (Okla. Ct. Crim. App. 1995). One case is, in fact, an unpublished opinion from the Illinois Court of Appeals and, as such, has no precedential value. *People v. Trevino*, 2011 WL 9692696 (Ill. Ct. App. May 27, 2011); Ill. R. S. Ct. 23(e)(1) (2016). One cannot know how the highest court in these states would address the issue. The state supreme courts should be given the opportunity to do so.

II.

The Question Presented Does Not Compel the Grant of Certiorari. Petitioner Overstates the Impact.

Illinois v. Rodriguez was decided in 1990. In the 26 years since, most of the relatively few jurisdictions that have addressed the question presented have simply applied the reasoning of *Rodriguez* to the factual circumstances before them.

The critical question in these cases is ultimately a factual one: Were the circumstances at the time of the search sufficiently ambiguous that a reasonable officer should have made further inquiry? This is why the dissent departed from the majority in the case below. The justices did not disagree on the law, but on whether the facts created an ambiguity and thereby an obligation for further inquiry. Pet. App. pp. 33-42, 59-78. Where the ruling below is inherently fact-bound, review by this Court is not warranted. Sup. Ct. R. 10.

Furthermore, Petitioner overstates the impact of those cases extending *Rodriguez* to the search of closed containers. Jurisdictions applying *Rodriguez* to closed containers have often placed limitations on when an officer is reasonably expected to make further inquiry. *See, e.g., United States v. Basinski*, 226 F.3d 829, 834-35 (7th Cir. 2000)(analysis may consider the nature of the container, external markings on the container, and precautions taken to ensure privacy); *United States v. Salinas-Cano*, 959 F.2d 861, 864(10th Cir. 1992)(same); *State v. Westlake*, 353 P.3d 438, 444-45 (Idaho Ct. App. 2015)(acknowledging nature of container is important to analysis, including whether container is one normally used to store personal effects); *People v. Gonzalez*, 667 N.E.2d 323, 325 (N.Y. Ct. App. 1996)(guest's interest in closed container of particular relevance when container is "an article customarily used to hold one's most personal belongings"). Consistent with these jurisdictions, the Iowa Supreme Court remarked that the backpack at issue "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." Pet. App. 39.

Finally, Petitioner is asking this Court to overturn the decision of the Iowa Supreme Court out of fear that criminals will escape punishment. The Fourth Amendment is concerned with balancing legitimate governmental interests against "the degree to which [the search] intrudes upon an individual's privacy." *Wyoming v. Houghton*, 526 U.S. 295, 300 (1999). But even "[u]rgent government interests are not a license for indiscriminate police behavior." *Maryland v. King*, ___, U.S. ___, ___, 133 S. Ct. 1958, 1970 (2013). This must be particularly true where, as here, no judicial involvement constrained the actions of officers acting without probable cause. An individual's legitimate privacy interests in their personal belongings should not be extinguished by excusing officers' willful ignorance when presented with an ambiguous factual scenario. *State v. Maristany*, 627 A.2d 1066, 1071 (N.J. 1993)(Pollock, J., concurring in part and dissenting in part)(allowing officers to assume authority without inquiry "puts a premium on ignorance").

It is not too much to ask to have officers – who are supposedly trained in investigation – ask one simple clarifying question when it is unclear as to who owns an item they wish to search. This was the ultimate holding in *Rodriguez*: If the facts presented to the officer would lead a reasonable person to believe the consenting party had authority to authorize a search, the search was valid; if not, the search was invalid unless further inquiry was made. *Illinois v. Rodriguez*, 497 U.S. 177, 188-89 (1990). *Rodriguez* places the burden on officers, not defendants, to assume the risk when a person's authority to consent to a search is unclear.

III.

This Case is Not the "Ideal Vehicle" to Resolve Any Underlying Legal Issue. Jackson's Case Ultimately Turns on Determinations of Fact, Not Law.

The justices of the Iowa Supreme Court were not split on any legal issue. They agreed that the State had the burden to prove that the officers' acceptance of Olson's apparent authority to search the backpack was reasonable. Pet. App. pp. 33-35, 59. The difference of opinion came down not to what the law required, but whether the surrounding circumstances rendered Olson's authority to search ambiguous.

Petitioner makes much of the fact that the majority found 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." Pet. p. 25. Again, Petitioner confuses scope of consent with authority to consent. The two are not synonymous, and Olson's scope of consent does not establish his authority to consent to the search of another person's belongings. *See, e.g., United States v. Freeman*, 482 F.3d 829, 832 (5th Cir. 2007); *State v. Westlake*, 353 P.3d 438, 443 n.1 (Idaho Ct. App. 2015).

Furthermore, Petitioner should not be allowed to complain that Jackson never indicated an ownership interest in any items in the room prior to his arrest when officers never asked him to do so. Had an officer asked Jackson if he had any belongings in the room and Jackson specifically disclaimed any such ownership, the officer's reliance on such disclaimer would be objectively reasonable. *See, e.g.,*

United States v. Freeman, 482 F.3d 829, 834 (5th Cir. 2007); *United States v. Isom*, 588 F.2d 858, 861 (2d Cir. 1978). But Jackson was never presented with an opportunity to either claim or disclaim the backpack. In fact, Jackson was removed from the apartment before Olson was ever asked to consent to a search of the room.[1] Thus, this case is unlike *Sawyer*, *Maristany*, *Glenn*, and *Trevino*, where the defendants were present but failed to object to the search. *People v. Trevino*, 2011 WL 9692696 at *3 (Ill. Ct. App. May 27, 2011); *State v. Sawyer*, 784 A.2d 1208, 1213 (N.H. 2001); *State v. Maristany*, 627 A.2d 1066, 1070 (N.J. 1993); *Glenn v. Commonwealth*, 654 S.E.2d 910, 136-37 (Va. 2008).

Finally, Respondent feels obliged to point out that, even if this Court were to grant certiorari and reverse the decision of the Iowa Supreme Court, any such decision may not mean the ultimate resolution of Jackson's case.

On appeal, Jackson contended that the search violated not only the Fourth Amendment to the United States Constitution, but Article I Section 8 of the Iowa Constitution. Pet. App. p. 11. The majority opinion did not address these arguments because it was reversing Jackson's convictions on Fourth Amendment grounds. Pet. App. pp. 42-44. The three dissenting justices specifically held that they would not diverge from federal precedent in interpreting the Iowa Constitution and therefore rejected any state constitutional challenge. Pet. App. pp. 78-86. One

[1]. The purposeful removal of a co-tenant to prevent objection to a search is not at issue in this case. *Georgia v. Randolph*, 547 U.S. 103, 121-22 (2006).

concurring justice would have reversed Jackson's convictions based on a violation of Article I Section 8 of the Iowa Constitution. Pet. App. pp. 44-50.

Should this Court reverse the decision by the Iowa Supreme Court and remand the case for further proceedings, it is possible, if not probable, that the Iowa Supreme Court could uphold its suppression ruling on independent state grounds. *See generally Racing Ass'n of Central Iowa v. Fitzgerald*, 675 N.W.2d 1 (Iowa 2004)(applying federal equal protection principles in independent fashion under Iowa Constitution following reversal by United States Supreme Court). When it comes to the area of search and seizure, the Iowa Supreme Court has been particularly open to an independent interpretation of the Iowa Constitution. The Court has provided increased protections for probationers and parolees and has rejected the good faith exception to the exclusionary rule. *State v. Short*, 851 N.W.2d 474, 505-06 (Iowa 2014)(warrantless search of probationer's residence invalid under state constitution); *State v. Ochoa*, 792 N.W.2d 260, 291 (Iowa 2010)(rejecting, under Iowa Constitution, warrantless searches of parolees permitted under *Samson v. California*, 547 U.S. 843 (2006)); *State v. Cline*, 617 N.W.2d 277, 292-93 (Iowa 2000)(rejecting "good faith" exception to exclusionary rule adopted in *United States v. Leon*, 468 U.S. 897(1984)), abrogated on other grounds by *State v. Turner*, 630 N.W.2d 601, 606 n.2 (Iowa 2001)(scope of review). The Court has emphasized the sanctity of the home from warrantless intrusions, and has at least suggested a more stringent standard for valid consent. *See, e.g., State v. Short*, 851 N.W.2d 474, 503 (Iowa 2014)("Even if we were inclined to fuzzy up the

warrant requirement, a home invasion by law enforcement officers is the last place we would begin the process."); *State v. Pals*, 805 N.W.2d 767, 777-82 (Iowa 2011)(discussing, without deciding, whether Iowa Constitution would require a knowing and voluntary waiver of search and seizure rights for effective consent).

Accordingly, Respondent suggests this case is not the best vehicle to address the question presented.

IV.

The Iowa Supreme Court's Decision Was Correct.

Petitioner argues that the Iowa Supreme Court's framework was not compelled by *Illinois v. Rodriguez*. Pet. p. 25. It was, however, informed by *Rodriguez* and consistent with *Rodriguez*.

Petitioner criticizes the Iowa Supreme Court for focusing upon the burden of proof. Pet. pp. 25-26. While the majority opinion did recognize a split in the circuit courts of appeals as to whether it was incumbent upon the State to dispel ambiguity or upon the defendant to affirmatively establish ambiguity, ultimately all of the Justices agreed that any burden of proof fell upon the State. Pet. App. pp. 29-35, 59. This is consistent with Fourth Amendment jurisprudence that places the burden on the State to establish a valid exception to the warrant requirement and to establish the effectiveness of third-party consent. *Welsh v. Wisconsin*, 466 U.S. 740, 750 (1984)("the burden is on the government to demonstrate exigent circumstances that overcome the presumption of unreasonableness that attaches to

all warrantless home entries"); *Illinois v. Rodriguez*, 497 U.S. 177, 181 (1990)("The burden of establishing that common authority rests on the State.").

Petitioner contends *Rodriguez*'s "totality of the circumstances" test is best exemplified by the analysis in *Snype*, *Melgar*, and *Trevino*. Pet. pp. 25-26. Respectfully, those cases do not analyze the "totality of the circumstances" as much as presume that a person who has common authority to consent to the search of a residence likewise has authority to consent to a search of all containers within the residence. In other words, the existence of apparent authority is either black or white – never gray. *State v. Westlake*, 353 P.3d 438, 443 (Idaho Ct. App. 2015)("In our opinion, the *Melgar* approach is based on a false premise – that apparent authority must either be never present or always present whenever the evidence as to actual authority is not explicit."). *Snype* goes even further by placing the burden to establish ambiguity on the defendant – a proposition wholly inconsistent with Fourth Amendment jurisprudence. *United States v. Snype*, 441 F.3d 119, 136 (2d Cir. 2006).

The cases proffered by Petitioner improperly conflate scope of consent with authority to consent. *United States v. Freeman*, 482 F.3d 829, 832 (5th Cir. 2007); *State v. Westlake*, 353 P.3d 438, 443 n.1 (Idaho Ct. App. 2015); *Norris v. State*, 732 N.E.2d 186, 189 (Ind. Ct. App. 2000). It may well be that an officer believes an apartment tenant has authority to consent to the search of his apartment and that the scope of his consent includes containers within the apartment. The scope of that consent, however, does not address whether the tenant has actual or apparent

authority to consent to a search of a container in the apartment that belongs to another person. To equate scope of consent with authority to consent would completely eviscerate any notion of an expectation of privacy in personal belongings an overnight guest might have in his host's home. It would call into doubt this Court's holdings in *Minnesota v. Olson*, 495 U.S. 91, 96-100 (1990) and *United States v. Karo*, 468 U.S. 705, 726 (1984)(O'Connor, J., concurring).

The Idaho Court of Appeals characterized *Melgar* and *Snype* as creating "a bright-line rule where *Rodriguez* calls for a case-by-case approach that takes into consideration the totality of the circumstances to determine a consenter's apparent authority over a place to be searched." *State v. Westlake*, 353 P.3d 438, 443 (Idaho Ct. App. 2015). This case-by-case approach is the approach taken by the Iowa Supreme Court. The central question is still one of ambiguity and whether the totality of the circumstances would have prompted a reasonable person to make further inquiry.

While the reasonableness of an officer's actions may be a question of law, "the determination of apparent authority is fact-driven." *Id.* at 442. There was ample evidence in the record to permit the Iowa Supreme Court to find that officers were faced with an ambiguity as to who owned the backpack when they conducted the search of the apartment.

When officers asked Turner, Miller, and Olson who lived in the apartment, they answered that they were the residents. Pet. App. pp. 4-5. None of the three volunteered that Jackson was also present in the apartment. Pet. App. pp. 4-5.

When Smithey asked if he could look in Olson's room, Olson only then acknowledged that he woke to his "cousin Marvis" sleeping next to him. Pet. App. p. 5. Even though this information was contrary to what officers had been previously told, Smithey did not ask Olson to clarify if Jackson had been staying at the apartment or for any other details regarding his presence. Pet. App. p. 5.

Jackson was in the bedroom, shirtless, wearing pajama bottoms, and lying on an air mattress apparently sleeping. Pet. App. p. 5. Jackson identified himself to officers, but said he had no identification. Pet. App. p. 6. Jackson was not asked if he had any belongings in the apartment. Pet. App. p. 6. Smithey confirmed that Jackson had an active arrest warrant, removed him from the room, and turned him over to another officer. Pet. App. p. 6.

After Jackson was removed from the apartment, Olson reiterated that Jackson showed up while he was sleeping. Pet. App. p. 6. Stricker did not ask Olson if Jackson had been staying in the apartment. Pet. App. p. 6. Stricker asked Olson for consent to search the room for guns and any evidence of the robbery. Pet. App. pp. 6-7. Smithey returned to the room, but neither officer asked whether any of the items in the room might belong to Jackson before beginning their search. Pet. App. p. 7.

After searching around the air mattress, Smithey grabbed a closed backpack that was a few feet away from the air mattress where Jackson had been lying. Pet. App. p. 7. Smithey saw no obvious identification on the outside of the bag. Pet. App. p. 7. The first item he found was a wallet, but he did not open the wallet to see

if it contained any identification. Pet. App. p. 7. Instead, he continued searching the bag and found a pair of dark-colored jeans that were wet around the cuffs, and a black handgun. Pet. App. pp. 7-8. Only then did Smithey open the wallet to find Jackson's identification. Pet. App. p. 8.

These factual circumstances correctly permitted the Iowa Supreme Court, upon its de novo review, to find that it was reasonable to believe Jackson was an overnight guest since no one in the apartment appeared alarmed by Jackson's presence. Pet. App. pp. 37-38. Jackson was wearing only pajama pants in December, and it was reasonable to conclude he had other clothing and possessions in the apartment. Pet. App. p. 38. Given Jackson's presence in the bedroom, it was reasonable to conclude his clothes were somewhere in the bedroom and likely in the backpack near the mattress. Pet. App. pp. 38-39. The Court recognized backpacks are often something overnight guests use for storing their personal possessions. Pet. App. p. 39. Finally, the Court determined it was reasonable to assume Jackson might have belongings in the apartment since Olson was hesitant to definitively answer whether there was a gun in the room. Pet. App. p. 39.

The question before the Iowa Supreme Court was not whether officers knew the backpack belonged to either Olson or Jackson. The question was whether officers had reason to believe it might have belonged to Jackson, rendering ambiguous Olson's apparent authority to permit a search of the backpack. The Iowa Supreme Court correctly determined officers had a duty to inquire, that they failed to do so, and that any evidence and fruit obtained from the search of the

backpack must be suppressed. Further review is not warranted.

CONCLUSION

For all of the reasons discussed above, Respondent respectfully requests that the petition for a writ of certiorari be denied.

Respectfully submitted,

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