No. 21A____

IN THE

Supreme Court of the United States

NANCY POWERS,

Applicant,

v.

STATE OF ALABAMA,

Respondent.

APPLICATION FOR EXTENSION OF TIME WITHIN WHICH TO FILE A PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

TO THE HONORABLE CLARENCE THOMAS, ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES AND CIRCUIT JUSTICE FOR THE ELEVENTH CIRCUIT:

Pursuant to Supreme Court Rule 13.5, Nancy Powers respectfully requests a 30-day extension of time, up to and including May 23, 2022, within which to file a petition for a writ of certiorari in this case. Applicant will seek review of the judgment in *Ex parte Powers*, No. 1200764 (Ala. Jan. 21, 2022). *See* App. A. Absent an extension of time, Ms. Powers' petition for certiorari would be due on April 21, 2022. This application is filed more than 10 days before the date the petition is due. *See* Sup. Ct. R. 13.5. The Court's jurisdiction will be invoked under 28 U.S.C. §1257(a).

1. The Supreme Court of Alabama's ruling implicates an important issue of federal law which divides state courts of last resort: Whether the search of a purse of a visitor present at a residence during the execution of a premises warrant violates the Fourth Amendment.

Under the Fourth Amendment, "a search or seizure of a person must be

supported by probable cause particularized with respect to that person." *Ybarra* v. *Illinois*, 444 U.S. 85, 91 (1979). As this Court has held, that particularity requirement cannot be "avoided by simply pointing to the fact that coincidentally there exists probable cause . . . to search the premises where the person may happen to be." *Id.* Since *Ybarra*, courts have repeatedly recognized that containers such as purses or backpacks "are so closely associated with one's person that a search of them must be supported by a warrant which satisfies the particularity requirement, or by one of the exceptions to the warrant requirement." *United States* v. *Robertson*, 833 F.2d 777, 784 (9th Cir. 1987).

Despite this clear constitutional command, when officers executing a premises warrant on the residence of another individual unexpectedly found Ms. Powers (who was not described in the warrant or affidavit in support of the warrant) at the residence, they searched the purse she had placed on the table next to her. App. A at 2. During that search, the police officer located narcotics. *Id.* at 4. Ms. Powers was arrested following the search, and later sought to suppress the contents of the search of her purse. *Id.* at 2. The trial court denied Ms. Powers' motion to suppress, and the Alabama Court of Criminal Appeals and then the Supreme Court of Alabama affirmed the denial. *Id.* at 2-3.

2. An extension is warranted because this case presents a substantial question of law on which both federal courts and state courts of last resort are divided. First, state courts of last resort have developed a variety of conflicting tests to determine whether the search of a visitor's property under these circumstances is reasonable. Certain courts look to the totality of the circumstances. *See*, *e.g.*, *State* v.

Molnau, 904 N.W.2d 449 (Minn. 2017). Other jurisdictions rely on the so-called relationship test, which "examine[s] the relationship between the person and the place." *United States* v. *Micheli*, 87 F.2d 429, 430 (1st Cir. 1973); *see also United States* v. *Young*, 909 F.2d 442 (11th Cir. 1990); *United States* v. *Giwa*, 831 F.2d 538 (5th Cir. 1987); *People* v. *Reyes*, 273 Cal. Rptr. 61 (Cal. Ct. App. 1990). Still other courts apply a "notice" test, which asks whether the officers conducting the search had actual notice that the personal property belonged to the visitor, in which case the search would be unlawful. *See, e.g., Waters* v. *State*, 924 P.2d 437, 439 (Alaska Ct. App. 1996); *State* v. *Thomas*, 818 S.W.2d 350, 360 (Tenn. Crim. App. 1991); *People* v. *McCabe*, 192 Cal. Rptr. 635, 637 (1983); *Childers* v. *State*, 281 S.E.2d 349, 351 (Ga. Ct. App. 1981). Finally, a minority of courts apply a "physical possession" or "proximity" test, which "focuses on the physical location of the container and whether the individual wore the container at the time it was searched in order to determine whether the container was an extension of the person or part of the premises." *United States* v. *Vogl*, 7 F. App'x 810, 815 (10th Cir. 2001); *see also United States* v. *Johnson*, 475 F.2d 977, 979 (D.C. Cir. 1973); *State* v. *Gilstrap*, 332 P.3d 43, 46 (Ariz. 2014); *State v. Reid*, 77 P.3d 1134, 1143 (Or. 2003); *State v. Lepier*, 761 A.2d 458, 461 (N.H. 2000). While the Alabama Supreme Court did not purport to adopt a single test, citing cases relying on the possession test it upheld the search of Ms. Powers' purse in substantial part because the purse was not on her person but instead sitting on the table next to her. App. A at 14, fn. 3.

3. Additionally, in reaching its conclusion, the Alabama Supreme Court created a split with state appellate courts, which have held that nearly identical

searches are unreasonable. *See State* v. *Lambert*, 710 P.2d 693, 697–98 (Kan. 1985) ("Since the officer executing the search warrant had no reason to believe that the purse lying on the kitchen table next to the defendant belonged to Randy, the officer could not reasonably believe that the purse was part of the premises described in the search warrant."); *State* v. *Nabarro*, 525 P.2d 573, 577 (Haw. 1974).

4. Ms. Powers respectfully submits—and will argue in her petition—that the search of her purse could not have been reasonable given that, among other factors, the warrant was issued for the property of a man, the police did not expect Ms. Powers to be present at the residence during the search, she was not named in the warrant or the underlying affidavit, the purse was located immediately next to her person, and she had advised the officers prior to the search that the purse was hers. Moreover, the Supreme Court of Alabama's decision further exacerbated the divisions amongst federal and state courts of last resort by failing properly to apply the correct test set out by this Court's precedents for Fourth Amendment searches and seizures: to examine the totality of the circumstances. *See*, *e.g.*, *Samson* v. *California*, 547 U.S. 843, 848 (2006) ("Under our general Fourth Amendment approach, we examine the totality of the circumstances to determine whether a search is reasonable within the meaning of the Fourth Amendment." (internal quotation marks omitted)); *United States* v. *Drayton*, 536 U.S. 194, 201 (2002). Further, in adopting a physical possession-focused analysis, the court erroneously relied on this Court's warrantless automobile stop case law, *see Wyoming* v. *Houghton*, 526 U.S. 295 (1999), an analogy already rejected by many other state courts, *see State* v. *Light*, 306 P.3d 534, 543 (2013); *Brown*, 905 N.W.2d at 850.

5. Good cause for an extension also exists because Ms. Powers' counsel have other significant obligations between now and immediately following the current deadline to file the petition for certiorari, including, amongst others: witness interviews with the Department of Justice in *United States* v. *Google*, No. 20-cv-02010 (S.D.N.Y) on April 8, 2022; a reply brief in support of summary judgment in *The Mosaic Company et al.* v. *OCP S.A.*, No. 21-00116 (Ct. Int'l Trade) due on April 13, 2022; an opposition to a motion to dismiss in *Apple Inc.* v. *NSO Group Technologies Limited et al.*, No. 5:21-cv-9078 (ND Cal.) due on April 18, 2022; substantial completion of discovery in *AECOM Energy & Construction, Inc.* v. *United States*, No. 20-2016 C (Fed. Cl.) by May 2022; and responses to multiple Civil Investigative Demands, SEC investigative requests, and Grand Jury Subpoenas.

6. Lastly, good cause for an extension exists because the State of Alabama does not object to an extension of time to file the petition.

7. For the foregoing reasons, Ms. Powers respectfully requests that the time for filing a petition for a writ of certiorari in this case be extended by 30 days, to and including May 23, 2022.

Respectfully submitted.

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April 2022

APPENDIX A

Rel: January 21, 2022

SUPREME COURT OF ALABAMA

OCTOBER TERM, 2021-2022

1200764

Ex parte Nancy Catherine Powers

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS

(In re: Nancy Catherine Powers

v.

State of Alabama)

(Mobile Circuit Court, CC-19-2058; Court of Criminal Appeals, CR-18-1196)

SELLERS, Justice.

On November 26, 2018, pursuant to a premises search warrant, police in Mobile searched the residence of Joshua Moyers, seeking evidence of drug activity. Although Moyers was referenced in the affidavit supporting the issuance of the warrant, no individuals were named in the warrant itself. At approximately 8:50 a.m., police entered Moyers's house and discovered Nancy Catherine Powers sleeping on a couch in the first room of the house. Powers's purse was sitting on a table next to the couch. After confirming with Powers that the purse belonged to her, police searched the purse and discovered methamphetamine, a digital scale, and cash. Relevant to these proceedings, Powers was charged with possession of methamphetamine with intent to distribute. See § 13A-12-211(c)(6), Ala. Code 1975.

The Mobile Circuit Court denied Powers's motion to suppress the evidence found in her purse. Thereafter, Powers pleaded guilty and appealed to the Court of Criminal Appeals, challenging the trial court's denial of the motion to suppress. The Court of Criminal Appeals unanimously affirmed the trial court's ruling. Powers v. State, [Ms. CR-18-1196, Feb. 5, 2021] ___ So. 3d ___ (Ala. Crim. App. 2021). This

Court granted Powers's petition for a writ of certiorari to consider a question of first impression. We affirm the judgment of the Court of Criminal Appeals, although based on slightly different reasoning.

Facts

The Court of Criminal Appeals set forth the following relevant facts:

> "On November 16, 2018, Officer Shaun Wood of the Mobile Police Department secured a warrant to search Joshua Moyers's house and to seize
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> > " 'illegal drugs, to wit: methamphetamine, phone bills, cell phone, documents, ledgers, currency, prerecorded U.S. currency, photographs, lock boxes and safes and contents thereof, paraphernalia, weapons that may be used to facilitate in illegal drug transactions, articles of property tending to establish the identity of persons in control of premises, vehicles, storage areas, and containers being searched to include utility receipts, addressed envelopes, and keys.'
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> "(C. 19.) According to Officer Wood, the probable cause supporting the search of Moyers's home was that a confidential informant had purchased methamphetamine from Moyers at Moyers's house.
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> "On the morning of November 26, 2018, Officer Wood and other law-enforcement officers executed the search warrant for Moyers's house. When they entered the house, Powers was the first person they encountered. She was asleep on a couch in the first room inside the front door. Powers's black purse was

sitting next to her on the side table by the couch. No one else was in the room with Powers when police officers entered the house. The officers found Moyers and two other individuals in other areas of the house, each asleep in a separate bedroom. The officers then read Powers her [rights under Miranda v. Arizona, 384 U.S. 436 (1966)], and, after she waived those rights, they asked her if there was anything illegal belonging to her in the house. Powers said that there was not. The officers then asked Powers if the black purse belonged to her, and she said that it did. (C. 43.) The officers then searched the purse, finding in it a digital scale, over $800, and a clear plastic bag containing what they believed to be methamphetamine. (C. 43.) Powers admitted that the substance in her purse was methamphetamine and explained that she had the digital scale to weigh the methamphetamine. Powers was arrested for unlawful possession of methamphetamine with the intent to distribute and possession of drug paraphernalia. She was later indicted for those offenses.

"Powers filed a pretrial motion to suppress the evidence obtained from the search of her purse and her resulting statements, arguing that 'the search and seizure of [Powers's] purse was in violation of the Fourth Amendment ... in that certain acts on the part of the investigating officers constituted an unreasonable search and seizure.' (C. 15.) Specifically, Powers claimed that '[n]o person is specifically named in the search warrant as a person to be specifically searched' and that '[a] search warrant for premises does not permit searches of persons who are not reasonably associated with the premises.' (C. 16.)

"On August 27, 2019, the trial court held a pretrial hearing on Powers's motion. Officer Wood was the only person who testified. At the hearing, Officer Wood said that, although

> Powers was not mentioned in the search warrant, he 'knew about her' because the confidential informant had mentioned her 'in the past,' 'that she usually has meth,' and that she does not 'stay [at Moyers's house] full time.' (R. 5.) Officer Wood explained that law-enforcement officers had 'never made a control[led] buy on her' and that he did not know that Powers was going to be in the house when they executed the search warrant. (R. 5, 7.) When asked what led him to believe that Powers had anything illegal in her possession, Officer Wood responded: 'I mean, besides being nervous, I mean, and her mentioning that was her purse, she told me that she didn't have nothing on her or with her.' (R. 6.)
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> "After the hearing, the trial court denied Powers's motion to suppress. Powers then pleaded guilty and reserved the right to appeal the trial court's decision to deny her motion to suppress.[1] During the guilty-plea colloquy, the State explained that it expected the evidence to show that Powers 'was found to be in possession of approximately [17] grams of suspected methamphetamine that was separated into three clear plastic bags.' (R. 19-20.) The court then sentenced Powers."

___ So. 3d at ___ (footnote omitted).

Analysis

To the extent that there are no disputed facts, the Court applies a de novo standard of review to a ruling on a motion to suppress. Ex parte

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[1]The Court of Criminal Appeals' opinion states that Powers pleaded guilty to possession of methamphetamine with intent to distribute. It is not clear how the possession-of-drug-paraphernalia charge was resolved.

State, 121 So. 3d 337, 350-51 (Ala. 2013). To the extent that there are disputed facts, we will apply the ore tenus standard. See Ruiz v. State, [Ms. CR-19-0307, Mar. 12, 2021] ___ So. 3d ___, ___ (Ala. Crim. App. 2021).[2]

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[2]The parties do not point to any binding authority establishing who bears the burden in the trial court when a defendant contends that police exceeded the scope of a premises warrant. Some courts have placed the burden on the defendant. See, e.g., United States v. Crawford, 220 F. Supp. 3d 931, 936-37 (W.D. Ark. 2016) (acknowledging that "the burden of proof for an allegation that the Government exceeded the scope of a search warrant does not appear to be clearly developed in the Eighth Circuit," but noting that burdens of production and persuasion generally rest on the movant seeking to suppress evidence and concluding that the defendant had "the initial burden to show that the search exceeded the scope of the warrant"); State v. Walker, 350 Or. 540, 555, 258 P.3d 1228, 1236 (2011) (holding that the defendant bore the burden of establishing that a search of her purse fell outside the scope of a premises warrant); People v. Reyes, 223 Cal. App. 3d 1218, 1224, 273 Cal. Rptr. 61, 63 (1990) ("Because the questioned search in this case occurred during execution of a search warrant, defendant had the burden of proving the search was beyond the warrant's scope."). See also Smith v. State, 588 So. 2d 561, 577 (Ala. Crim. App. 1991) (" 'With regard to search warrants, the general rule is that the defendant has the burden of proof in challenging the validity of the execution or service of the search warrant.' " (quoting Brownlee v. State, 535 So. 2d 217, 217 (Ala. Crim. App.), rev'd on other grounds, 535 So. 2d 218 (Ala. 1988))). But see State v. Reger, 277 Or. App. 81, 90, 372 P.3d 26, 32 (2016) ("The state bears the burden of demonstrating that the seizure or search of contested evidence falls within the scope of a valid warrant."); State v. Reid, 190 Or. App. 49, 53, 77 P.3d 1134, 1136 (2003) ("Defendant is correct that the state bears the burden

The Fourth Amendment to the United States Constitution protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures" and provides further that "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." See also Art. I, § 5, Ala. Const. 1901 (Off. Recomp.) ("That the people shall be secure in their persons, houses, papers, and possessions from unreasonable seizure or searches, and that no warrants shall issue to search any place or to seize any person or thing without probable cause, supported by oath or affirmation."); Ex parte Caffie, 516 So. 2d 831, 837 (Ala. 1987) (opinion on application for rehearing) ("This declaration [in the Alabama Constitution] of the right to be free from unreasonable searches and seizures is clearly analogous to the right afforded under the Fourth Amendment of the Constitution of the United States, and it obviously protects similar, if not identical,

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of demonstrating that the seizure or search of a contested item falls within the scope of a valid warrant."). In any event, we conclude that the Court of Criminal Appeals did not err in affirming the trial court's judgment regardless of which party bore the burden of persuasion.

interests."). According to Powers, police improperly searched her purse without a warrant. The State, on the other hand, asserts that Powers's purse was simply a container in Moyers's house that fit within the scope of the premises warrant.

There is precedent from this Court and the United States Supreme Court involving body searches of people who are mere visitors of premises covered by a search warrant. See, e.g., Smith v. State, 292 Ala. 120, 289 So. 2d 816 (1974); and Ybarra v. Illinois, 444 U.S. 85 (1979). But, in those cases, the searches clearly were conducted on the "person" of the defendants. In Smith, police searched clothing worn by Johnny Smith, a visitor to an apartment who had arrived while police were executing a premises warrant. Police discovered heroin in Smith's back pocket. This Court held the search unconstitutional:

> "A substantial majority of the courts which have considered the question have held that a lawful search of premises does not extend to the person of one who merely comes onto those premises while the search is being conducted. United States v. Festa, 192 F. Supp. 160 (D. Mass. 1960); State v. Bradbury, 109 N.H. 105, 243 A.2d 302 (1968); State v. Carufel, 106 R.I. 739, 263 A.2d 686 (1970); State v. Fox, 283 Minn. 176, 168 N.W.2d 260 (1969); State v. Massie, 95 W. Va. 233, 120 S.E. 514 (1923); People v. Smith, 21 N.Y.2d 698, 287

> N.Y.S.2d 425, 234 N.E.2d 460 (1967); Purkey v. Maby, 33 Idaho 281, 193 P. 79 (1920). Additional authority, by way of dictum, is found in United States v. Di Re, 332 U.S. 581, 587, 68 S.Ct. 222, 92 L.Ed. 210 (1948), where it was observed that a search warrant for a residence only would not authorize the search of all persons found in it.
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> "Most of the cases acknowledge the fact that the search of persons not named or described in the warrant, but found on premises or who come onto premises being searched, is not made lawful simply by their presence; the law requires that there be probable cause to believe that such persons are themselves participants in criminal activity.
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> "....
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> "A review of the facts before us shows conclusively that no probable cause existed to justify the search of Smith. Smith was not named in the warrant. He was totally unknown to the officers at that time. There was no probable cause to believe he had committed any offense. He was not suspected of any crime. There was nothing in his appearance or conduct to indicate his involvement in any crime. And, unlike the facts in the cases ... where searches of other persons were upheld, Smith did not make any furtive gesture, he was not present in the apartment while a crime was being committed, and there was no probable cause to believe he enjoyed any relationship to the ... apartment other than that of visitor. In sum, we are forced to conclude that there was no probable cause to make a search of Smith and seize the heroin."

292 Ala. at 121-22, 289 So. 2d at 817-18.

In Ybarra, law-enforcement officers executed a search warrant authorizing the search of a tavern and a bartender named "Greg." 444 U.S. at 88. When the officers entered the tavern, they discovered Ventura Ybarra standing in front of the bar next to a pinball machine. For all that appeared, Ybarra was simply a patron who happened to be present when the warrant was executed. A police officer searched Ybarra and found heroin in his pants pocket. The United States Supreme Court held that the search violated the Fourth Amendment:

> "It is true that the police possessed a warrant based on probable cause to search the tavern in which Ybarra happened to be at the time the warrant was executed. But, a person's mere propinquity to others independently suspected of criminal activity does not, without more, give rise to probable cause to search that person. Sibron v. New York, 392 U.S. 40, 62-63 [(1968)]. Where the standard is probable cause, a search or seizure of a person must be supported by probable cause particularized with respect to that person. This requirement cannot be undercut or avoided by simply pointing to the fact that coincidentally there exists probable cause to search or seize another or to search the premises where the person may happen to be."

Id. at 91 (footnote omitted). See also Thomas v. State, 353 So. 2d 54, 57 (Ala. Crim. App. 1977) (holding that a body search of someone appearing to police to be a "mere visitor" at an apartment that was the subject of a

premises warrant violated the visitor's constitutional rights because he "was a complete stranger to the [police] officers at the time, was not a suspect involved in the commission of any offense, was not named in the search warrant, and did nothing to indicate by his conduct or appearance that he possessed any weapon"); Brooks v. State, 593 So. 2d 97 (Ala. Crim. App. 1991) (holding that the mere presence of the defendant at a restaurant that was the subject of a premises warrant did not justify searching the defendant's person). In the present case, police did not search the clothing Powers was wearing when the premises warrant was executed. Police searched her purse, which she had set on a table next to the couch on which she was sleeping. The validity of a search of personal effects owned by someone who is present at a residence identified in a search warrant, but who does not permanently live at the residence and is not named in the warrant, is an issue of first impression for this Court.

"If the scope of the search exceeds that permitted by the terms of a validly issued warrant or the character of [a] relevant exception from the warrant requirement, the subsequent seizure is unconstitutional ...." Horton v. California, 496 U.S. 128, 140 (1990). The fact that Powers was

not named in the warrant is not dispositive. United States v. Kahn, 415 U.S. 143, 155 n.15 (1974) (" 'The Fourth Amendment requires a warrant to describe only "the place to be searched, and the persons or things to be seized," not the persons from whom things will be seized.' " (quoting United States v. Fiorella, 468 F.2d 688, 691 (2d Cir. 1972))). Generally speaking, " 'any container situated within residential premises which are the subject of a validly-issued warrant may be searched if it is reasonable to believe that the container could conceal items of the kind portrayed in the warrant.' " Dees v. State, 575 So. 2d 1225, 1228 (Ala. Crim. App. 1990) (quoting United States v. Gray, 814 F.2d 49, 51 (1st Cir.1987)). See also United States v. Ross, 456 U.S. 798, 820-21 (1982) ("A lawful search of fixed premises generally extends to the entire area in which the object of the search may be found and is not limited by the possibility that separate acts of entry or opening may be required to complete the search."). But, as one court put it, "special concerns" can arise "when the items to be searched belong to visitors, and not occupants, of the premises." United States v. Giwa, 831 F.2d 538, 544 (5th Cir. 1987). That said,"[t]he critical element in a reasonable search is not that the owner of the property is

suspected of crime but that there is reasonable cause to believe that the specific 'things' to be searched for and seized are located on the property to which entry is sought." Zurcher v. Stanford Daily, 436 U.S. 547, 556 (1978).

Efforts to judge the validity of searches of nonoccupants' personal effects have led courts to adopt various "tests." Some courts apply what has been labeled a "physical possession" test, which, in its strictest application, focuses solely on the location of the searched item in relation to its owner. See, e.g., United States v. Teller, 397 F.2d 494, 497 (7th Cir. 1968) (holding that the defendant's purse, which she had placed on a bed in another room, "was merely another household item subject to the lawful execution of the search warrant which the federal agents held and were enforcing"); State v. Gilstrap, 235 Ariz. 296, 300, 332 P.3d 43, 47 (Ariz. 2014) ("[B]ecause [the defendant] did not physically possess her purse when the officers found it, they were authorized to search it for the items listed in the [premises] warrant."). In applying the possession test, courts have suggested that personal effects that are being possessed are, in essence, being "worn" and should therefore be considered extensions of the

"person" being searched, but personal items that have been set down are simply part of the premises covered by the warrant. Gilstrap, 235 Ariz. at 299, 332 P.3d at 46 (discussing Ybarra and concluding that "the search of certain personal items, such as a purse, can in some circumstances amount to the search of a person"); Teller, 397 F.2d at 497 (concluding that the defendant was not "wearing" her purse, which was sitting on a bed in another room, and that the purse was a "household item" covered by the premises warrant). We decline to adopt a test that would make possession the sole determining factor.[3]

Other courts, including the Court of Criminal Appeals in the present case, have applied a "relationship" test, which focuses on "the relationship between the object, the person and the place being searched." United States v. Young, 909 F.2d 442, 445 (11th Cir. 1990). For example, in United States v. Micheli, 487 F.2d 429 (1st Cir. 1973), the court held that

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[3]Based on the facts of this case, Powers cannot possibly be deemed to have been "wearing" her purse when it was searched. Thus, it is not necessary to consider whether, or when, the search of a personal effect that might be considered "wearable" is the equivalent of searching a "person" for purposes of precedent like Ybarra.

the search of a briefcase located on the premises of a business that was the subject of a premises warrant was proper because the owner of the briefcase was more than "a mere visitor or passerby who suddenly found his belongings vulnerable to a search of the premises." Id. at 432. Rather, he was a co-owner of the business who "had a special relation to the place, which meant that it could reasonably be expected that some of his personal belongings would be there." Id. Accordingly, the probable cause supporting issuance of the premises warrant "reasonably comprehended within its scope those personal articles, such as [the defendant's] briefcase, which might be lying about the office." Id. In Giwa, supra, the court held that police properly searched a flight bag owned by someone who did not live at the residence that was the subject of a premises warrant. The court concluded that the defendant was more than a "casual visitor" or a "passerby" because he was staying overnight, was sleeping when officers arrived, answered the door wearing a bathrobe and slacks, and was alone in the residence at the time of the search. 831 F.2d at 545.[4]

[4]Courts also have applied what has been called a "notice" test, which Powers claims invalidates searches when "the officers are on notice that

The Court of Criminal Appeals embraced the relationship test because, the court concluded, it " 'best balances citizens' reasonable expectations of privacy with law enforcement needs.' " Powers, ___ So. 3d at ___ (quoting Perino v. Slaughter, No. Civ. 07-144 LH/WDS, Jan. 27, 2009 (D. N.M. 2009) (not reported in Federal Supplement). According to the Court of Criminal Appeals:

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the personal property being searched belongs to a non-resident of the property for which they obtained the warrant." See, e.g., State v. Gilstrap, 235 Ariz. 296, 298, 332 P.3d 43, 45 (Ariz. 2014) ("This test allows police to search an item that may contain the object of a premises warrant unless they are put on notice that the item belongs to a non-resident."); State v. Light, 306 P.3d 534, 541 (2013) ("Defendant encourages us to adopt the 'notice' approach that prohibits officers from searching the personal property of visitors on the premises to be searched if the officers knew or should have known that the personal property belonged to the visitor."). See also State v. Nabarro, 55 Haw. 583, 588, 525 P.2d 573, 577 (Haw. 1974) ("[W]ithout notice of some sort of the ownership of a belonging, the police are entitled to assume that all objects within premises lawfully subject to search under a warrant are part of those premises for the purpose of executing the warrant."). Powers did not expressly raise the notice test in the Court of Criminal Appeals before that court issued its opinion. In any event, to the extent that Powers asserts that her purse was immunized from a search simply because police were aware that it was owned by someone who was not a permanent occupant of Moyers's residence, we reject that argument. We also note that, because police undisputedly knew that the purse at issue belonged to Powers, it is not necessary in this case to consider situations in which police search personal effects without knowledge of who owns them.

> "[T]he relationship test better protects citizens' rights and reasonable expectations of privacy in their belongings because, unlike with the physical-possession test, they do not need to maintain control of their belongings (i.e., purse, wallet, jacket, etc.) when they visit a person's house to also maintain their Fourth Amendment rights if law-enforcement officers happen to execute a search warrant while they are there. A person's Fourth Amendment rights should not turn on whether they continuously maintain control over their possessions."

Powers, ___ So. 3d at ___. The Court of Criminal Appeals also suggested that the relationship test does not automatically immunize personal effects from a search simply because those items are in the possession of their owner:

> "The relationship test also better ensures that law-enforcement officers can effectively enforce criminal laws because it allows them to search the belongings (i.e., purse, wallet, jacket, etc.) of anyone who is present at the place being searched, regardless of whether that person is in physical possession of their belongings, as long as the law-enforcement officers can provide a reason why the relationship between the person, that person's belongings, and the place being searched warrant an intrusion into that person's belongings."

Id. at ___.[5]

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[5]During oral argument, counsel for Powers took the position that the Court of Criminal Appeals' reference to a jacket in the possession of its owner suggests a conclusion that clothing being "worn" by a visitor during a premises search may come within the scope of a premises-only warrant.

Applying the relationship test, the Court of Criminal Appeals concluded that the search of Powers's purse was proper:

> "Here, it is clear that, at the time the law-enforcement officers carried out the search warrant for Moyers's house, they would have perceived Powers as something more than a 'transient visitor' to Moyers's house. When the officers entered Moyers's house on the morning of November 26, 2018, Powers was by herself in the first room inside the house asleep on the couch, and she had left her black purse sitting next to her on the side table while she slept. (R. 4, 8.) In other words, Powers was, at least, an overnight guest in Moyers's house and was certainly more than a 'transient visitor.' Indeed, as Officer Wood testified at the suppression hearing, a confidential informant, who had participated in a controlled buy of drugs at Moyers's house, told Officer Wood about Powers -- namely, that Powers 'usually has meth' and that she does not 'stay [at

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Powers's counsel asserted that such a warrant never authorizes a body search and that the Court of Criminal Appeals' alleged suggestion conflicts with the principles espoused in Ybarra. As noted, however, Powers was not "wearing" her purse when it was searched, so it is unnecessary to consider whether Powers's interpretation of Ybarra is correct. See generally State v. Young, 909 F.2d 442, 445 (11th Cir. 1990) ("[R]equiring an analysis of a person's relationship to the place lawfully searched is perfectly consistent with the Supreme Court's decision in Ybarra .... [T]he Ybarra decision did not state that the relationship between the person searched, the warrant and the premises are irrelevant in determining whether a search falls outside the permissible scope of the Fourth Amendment. Indeed, it was the lack of such a relationship that pointed to a finding of no probable cause in Ybarra.").

> Moyers's house] full time' (R. 5), indicating that Powers does, at least, 'stay' at Moyers's house on occasion. Thus, Officer Wood could have reasonably believed that Powers's purse contained the 'illegal drugs' he was searching for as detailed in the search warrant. See, e.g., [United States v.] Giwa, 831 F.2d [538,] 545 [(5th Cir. 1987)] ('[W]e do not agree with the district court's finding that Giwa was merely a "casual visitor" to the apartment. Giwa was an overnight visitor to Aruya's apartment. Additionally, at the time the agents arrived at the apartment, Giwa had been sleeping and answered the door clad only in a bathrobe and slacks, apparel indicating that his was more than just a temporary presence in the apartment. Finally, Giwa was discovered alone in a private residence. These facts support the conclusion that Giwa was not a "mere visitor" or "passerby" and thus, the agents could reasonably believe his flight bag contained evidence of credit card fraud.')."

Powers, ___ So. 3d at ___. Accordingly, the Court of Criminal Appeals affirmed the trial court's judgment denying Powers's motion to suppress.

We agree that the trial court properly denied Powers's motion to suppress, but we decline to adopt any specific "test" to the exclusion of others. Each case must be evaluated based on the unique facts and circumstances relevant to a defendant's reasonable expectations of privacy and whether police reasonably can conclude that a particular personal effect comes within the scope of a premises warrant. See generally State v. Molnau, 904 N.W.2d 449, 452 (Minn. 2017) (declining to adopt a specific

test on this issue, noting that the "touchstone" of the Fourth Amendment is "reasonableness," and concluding that "[t]he determination of what is reasonable in a given situation is necessarily a fact-intensive inquiry best evaluated by considering all of the circumstances"). See also Ohio v. Robinette, 519 U.S. 33, 39 (1996) ("We have long held that the 'touchstone of the Fourth Amendment is reasonableness.' Florida v. Jimeno, 500 U.S. 248, 250 (1991). Reasonableness, in turn, is measured in objective terms by examining the totality of the circumstances."); Camara v. Municipal Ct. of City & Cnty. of San Francisco, 387 U.S. 523, 536 (1967) ("[T]here can be no ready test for determining reasonableness ...."); Micheli, 487 F.2d at 432 ("[N]o crisp formula can substitute for reasonable judgments.").

In United States v. Johnson, 475 F.2d 977, 978, 154 U.S. App. D.C. 393 (1973), police obtained a premises warrant authorizing the search of an apartment based on their knowledge that narcotics were being sold in the apartment. When police executed the warrant, the owner of the apartment attempted to escape, and the defendant was found sitting on a couch. Her purse was resting on a table in front of her. The court held

that the defendant's purse came within the scope of the premises warrant and that police had acted properly in searching it:

> "The prohibition of the Fourth Amendment is against 'unreasonable' searches and seizures. In determining whether under the circumstances of this case the search of [the defendant's] purse violated that standard, the protection of individual privacy embodied in the Fourth Amendment must be weighed against the public interest in effective law enforcement with respect to narcotics violations. The specific question for resolution is whether the scope of the search warrant embraced an object in the apparent possession of a person not an occupant of the premises searched. ...
>
> "Turning first to the privacy element of the question, we note that the search was of a purse resting separately from the person of its owner. As such, it was not being 'worn' by [the defendant] and thus did not constitute an extension of her person so as to make the search one of her person. United States v. Teller, 397 F.2d 494 (7th Cir. 1968); United States v. Riccitelli, 259 F. Supp. 665 (D. Conn. 1966). The invasion of [the defendant's] privacy was therefore of a lesser degree than if she had been subjected to a search of her clothing or of objects being held by her.
>
> "On the Government's side of the balance lies both the information presented in the affidavit supporting the warrant, indicating that [the] apartment was a place where narcotics were sold as well as stored; and the delay, the suspicious noises that preceded the executing officers' entry into the apartment, and the apparent effort of [the apartment's owner] to escape through the bedroom window, all suggesting attempts to thwart discovery of the illegal activity that the police suspected was being carried out on the premises. With

> emphasis on the limited nature of the circumstances presented, we hold that the search of [the defendant's] purse was consistent with the demands of the Fourth Amendment. Under these facts, the police could reasonably have believed that items sought and described in the warrant had been concealed in the purse, and, notwithstanding [the defendant's] status as a visitor on the premises, could have searched the purse in pursuit of items for which the warrant issued."

475 F.2d at 978-79, 154 U.S. App. D.C. at 394-95 (footnotes omitted). The court in Johnson also noted that, because the premises warrant had been issued based on allegations that narcotics were being sold in the apartment, police could have reasonably believed that the defendant was a customer of the owner of the apartment, that she had purchased narcotics, and that she had placed them in her purse. 475 F.2d at 979 n.3, 154 U.S. App. D.C. at 395. See also United States v. Simmermaker, 998 F.3d 1008 (8th Cir. 2021) (holding that a "lock box" owned by a nonoccupant of a house frequented by drug users came within the scope of a premises warrant, noting that the nonoccupant was a suspected drug user and was found asleep on a couch in the house); State v. Wenzel, 162 Idaho 474, 476, 399 P.3d 145, 147 (Idaho Ct. App. 2017) (holding that the search of an overnight guest's purse at a premises where there was cause

to believe controlled substances were located was valid under a premises warrant); State v. Bulgin, 120 Idaho 878, 880-81, 820 P.2d 1235, 1237-38 (Idaho Ct. App. 1991) (holding that the search of the defendant's purse was valid under a premises warrant because the defendant was an overnight guest at the premises and a suspected methamphetamine user); United States v. Gray, 814 F.2d at 51 (holding that police properly searched a jacket owned by the defendant, which had been draped over a chair, noting that the defendant was more than "a casual afternoon visitor" and instead "was discovered in a private residence, outside of which a drug deal had just 'gone down,' at the unusual hour of 3:45 a.m.").

The present case involves circumstances similar to the above-cited authorities. Powers was known to usually have methamphetamine, was an overnight guest in a house known to be involved in the sale of methamphetamine, and was known to have stayed at the house on more than one occasion. She was discovered asleep on a couch. She was certainly more than a mere "patron" of a legitimate business or a "passing

visitor" of a residence. And, she chose to set her purse down on a table before she went to sleep.[6]

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[6]During oral argument, Powers's counsel asserted that police officers did not know when they searched Powers's purse that she was the "Nancy" referred to by the confidential informant. Counsel asserted that the State has conceded that point. But the portion of the State's brief counsel cited does not go so far as to make that concession. Rather, the State acknowledged in its brief that it is not clear exactly when police learned that the woman sleeping on the couch was the person referred to by the confidential informant. Officer Wood testified that he "knew about" Powers before the search occurred because the confidential informant had told him that "Nancy" usually has methamphetamine, that she "doesn't stay [at Moyers's house] full time," and that she "bounces ... from different houses." Although Officer Wood testified that he did not specifically know that Powers was going to be in Moyers's house before the search began, he did answer in the affirmative when asked if he had "prior knowledge of this Defendant from [the confidential informant]." Moreover, the Court of Criminal Appeals' opinion, at the very least, strongly suggests that police did indeed positively identify Powers before the search of her purse occurred. Specifically, the Court of Criminal Appeals concluded that "Officer Wood could have reasonably believed that Powers's purse contained the 'illegal drugs' he was searching for as detailed in the search warrant" in part because the confidential informant had told him about Powers, that she usually has methamphetamine, and that she stays at Moyers's house on occasion. ___ So. 3d at ___. Powers did not submit with her petition for a writ of certiorari a statement of facts or a verification that such a statement had been submitted to the Court of Criminal Appeals on rehearing in that court. See Rule 39(d)(5), Ala. R. App. P. Under Rule 39(k), Ala. R. App. P., the scope of certiorari review "will ordinarily be limited to the facts stated in the opinion of the particular court of appeals, unless the petitioner has attempted to enlarge or modify the statement of facts as provided by Rule 39(d)(5)."

The United States Supreme Court's decision in Wyoming v. Houghton, 526 U.S. 295 (1999), is also helpful in resolving this case. In Houghton, police gained probable cause during a traffic stop to believe that narcotics were present in the subject vehicle. During the course of searching the vehicle, police opened and searched a passenger's purse that was found on the back seat. They found narcotics in the purse. Later, the passenger argued that the search of her purse was unconstitutional. As part of its analysis, the Court "evaluate[d] the search ... under traditional standards of reasonableness by assessing, on the one hand, the degree to which it intrude[d] upon an individual's privacy and, on the other, the degree to which it [was] needed for the promotion of legitimate governmental interests." Id. at 300. The Court upheld the validity of the search and concluded that it was immaterial that the purse was owned by a passenger and not the driver. Id. at 305 (declining to adopt a "passenger's property" rule in part because it would "dramatically reduce the ability to find and seize contraband and evidence of crime" and could result in "a bog of litigation" involving questions surrounding ownership of personal effects found in vehicles and what knowledge police officers

had, or should have had, regarding those effects). In distinguishing Ybarra, the Court pointed out that the search in Houghton, like the search in the present case, was not a body search involving a higher degree of intrusiveness. Id. at 303. The Court also noted that "a car passenger -- unlike the unwitting tavern patron in Ybarra -- will often be engaged in a common enterprise with the driver, and have the same interest in concealing the fruits or the evidence of their wrongdoing." Id. at 304-05. A similar conclusion might be reached with respect to Powers, who was discovered asleep on a couch in a place known to be involved in the buying and selling of methamphetamine. Although the Court in Houghton also relied in part on the diminished expectation of privacy that accompanies vehicle searches, there is some indication that Houghton could be extended to premises searches. Id. at 303 n.1 (suggesting that a search pursuant to a premises warrant could include the search of "property belonging to persons found in the house -- say a large standing safe or violin case belonging to the owner's visiting godfather"); State v. Reid, 190 Or. App. 49, 67, 77 P.3d 1134, 1143 (2003) (extending the reasoning of Houghton to a search under a premises warrant and upholding the

validity of the search of an overnight visitor's jacket, which the visitor was not wearing at the time and which was capable of containing the items identified in the search warrant). But see United States v. Vogl, 7 F. App'x 810, 814 (10th Cir. 2001) ("[W]e are unwilling to extend the Court's Houghton automobile search analysis to a premises search ....").

Conclusion

Powers, who was found sleeping on a couch at 8:50 a.m. with her purse set on a table, was more than a mere visitor who happened to be on the premises when the search warrant was executed. In addition, as a person known for possessing methamphetamine and given her multiple visits to a house known for its involvement in the selling of methamphetamine, Powers should have reasonably believed that her property could be subject to search and seizure. Furthermore, the search warrant at issue was specifically aimed at locating methamphetamine, which by its nature will fit in small containers such as purses. Thus, police reasonably believed that Powers's purse could contain the items listed in the premises warrant, and they acted reasonably in searching Powers's purse without a warrant that specifically identified her or her

property. Considering all the circumstances, arguments, and above-discussed authorities, we agree with the State that police reasonably concluded that Powers's purse was a container that came within the scope of the premises warrant and that Powers's right to privacy was not violated. Accordingly, we affirm the judgment of the Court of Criminal Appeals.

AFFIRMED.

Parker, C.J., and Bolin, Shaw, Wise, Bryan, Mendheim, Stewart, and Mitchell, JJ., concur.

CERTIFICATE OF SERVICE

I, Matthew T. Martens, a member of the bar of this Court, certify that on April 7, 2022, all parties required to be served were served copies of the foregoing via overnight courier at the address listed below:

Barrett Bowdre
Deputy Solicitor General
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/s/ Matthew T. Martens
MATTHEW T. MARTENS