APPENDIX

APPENDIX A

SUPREME COURT OF ALABAMA

1200764
OCTOBER TERM
2021-2022

IN RE: NANCY CATHERINE POWERS,

v.

STATE OF ALABAMA,

Ex parte Nancy Catherine Powers
Mobile Circuit Court, CC-19-2058;
Court of Criminal Appeals, CR-18-1196)
Rel: January 21, 2022

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS

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.'

"(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.

"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.)

"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 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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[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.

[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.

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,

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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 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.

and it obviously protects similar, if not identical, 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.

"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.

". ...

"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 con-

duct 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 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 po-

[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*.

lice 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]

The Court of Criminal Appeals embraced the relationship test because, the court concluded, it " 'best balances citizens' reasonable expectations of privacy

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[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 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.

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:

> "[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]

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.' In-

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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. 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*.").

> deed, 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 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 expec-

tations 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 defend-

ant'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 pre-

> sented, 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

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

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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)."

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 per-

son 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.

APPENDIX B

ALABAMA COURT OF CRIMINAL APPEALS

CR-18-1196
OCTOBER TERM
2020-2021

NANCY CATHERINE POWERS,

v.

STATE OF ALABAMA,

Appeal from Mobile Circuit Court
(CC-19-2058)
Rel: February 5, 2021

COLE, Judge.

Nancy Catherine Powers pleaded guilty to unlawful possession of methamphetamine with the intent to distribute, a violation of § 13A-12-211(c)(6), Ala. Code 1975. The Mobile Circuit Court sentenced Powers to three years' imprisonment but suspended that sentence and placed her on two years' probation. Before she pleaded guilty, Powers preserved and reserved for appellate review the following issue: Does a warrant to search a house for certain items also allow law-enforcement officers to search the belongings of a person who is present at the house during the execution of that warrant when that person does not own or occupy the house and is not otherwise identified in the search warrant.

In her brief on appeal, Powers argues that the trial court should have granted her motion to suppress the drug evidence found in her purse because, she says, a premises search warrant does not permit law-enforcement officers to search a person's personal belongings when that person is not reasonably associated with the premises, absent some additional "probable cause to exceed the parameters of the search warrant." (Powers's brief, p. 10.) The State, on the other hand, argues that "the search of [Powers's] purse was pursuant to a validly-issued warrant to search the premises for methamphetamine and anything related to the sale of methamphetamine" and that Powers's "purse was clearly a container on the premises that could conceal an item of the kind described in the [search] warrant."[1] (State's brief, p. 8.) The dispute between Powers and the State presents this Court with an issue of first impression that has not been uniformly and authoritatively decided by the courts that have addressed it.

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[1] The State also argues on appeal that Powers lacks standing to challenge the search warrant. But, in making that argument, the State concedes that it "did not assert below that Powers lacks standing to object to the search." (State's brief, p. 5.) "[B]ecause the [S]tate did not raise the issue of standing at trial, [that issue] is waived." *Drake v. State*, 668 So. 2d 877, 879 (Ala. Crim. App. 1995). *See also Washington v. State*, 922 So. 2d 145, 163 (Ala. Crim. App. 2005) ("Initially, we point out that the State argues, for the first time on appeal, that Washington lacked standing to challenge the search of the Jetta. However, the State did not present this argument to the trial court; the prosecutor did not argue a lack of standing at the suppression hearing or at any other time during the trial. Therefore, the State's argument is deemed to be waived."). Thus, we assume that Powers has standing to challenge the search and answer only the question whether the search was proper.

Facts and Procedural History

On November 16, 2018, Officer Shaun Wood of the Mobile Police Department secured a warrant to search Joshua Moyers's house and to seize

> "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."

(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.

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 *Miranda*[2] rights, and, after she waived

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[2] *Miranda v. Arizona*, 384 U.S. 436 (1966).

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 con-

trol[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.)

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. 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. (R. 21-22.) This appeal follows.

Discussion

Powers argues that, although law-enforcement officers had a warrant to search Moyers's house, because she did not either own or occupy Moyers's house and because she was not named or otherwise identified in the search warrant, she had an expectation of privacy in her purse and that law enforcement could not search her purse unless they had "separate and independent probable cause at the time of the search." (Powers's brief, p. 21.) In short, Powers argues that a warrant to search the premises of another person does not also authorize the search of the belongings of a person who is not an occupant of those premises unless they are identified in the warrant or unless there is some additional probable cause to conduct a search of that person's belongings.

The State, on the other hand, argues that "the search of [Powers's] purse was pursuant to a validly-issued warrant to search the premises for methamphetamine and anything related to the sale of methamphetamine," explaining that this Court has held that "'any container situated within residential premises which is the subject of a validly-issued warrant may be searched if it is reasonable to believe that the container could conceal an item 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))." (State's brief, pp. 5, 8.) In short, the State contends that a validly issued warrant to search a house for certain items permits law-enforcement officers to search every container in that house that could possibly conceal those items, regardless of whether the container they want to search belongs to a person who does not own or occupy that house or belongs to a person who is not identified in the search warrant.

The Fourth Amendment to the United States Constitution ensures that people have the right "to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures" and guarantees 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." The Alabama Constitution provides the same protections. *See* Article I, § 5, Ala. Const. of 1901 (Off. Recomp.). Absent some exigent circumstance, both the Fourth Amendment and Alabama law require law-enforcement officers to obtain a search warrant to enter someone's house to search it. *See* § 15-5-3, Ala. Code 1975 ("A search warrant can only be issued on probable cause, supported by an affidavit naming or describing the person and particularly

describing the property and the place to be searched."); *see also* Rule 3.9(a), Ala. R. Crim. P.

Here, Officer Wood certainly complied with the Fourth Amendment and Alabama law when he secured a warrant to search Moyers's house for "illegal drugs" and items related to the sale of illegal drugs. But when Officer Wood and other law-enforcement officers went into Moyers's house to execute that warrant, they encountered Powers, who they knew frequented Moyers's house but apparently did not expect to be present at Moyers's house when they executed that warrant. Despite not expecting Powers to be in Moyers's house during the execution of the search warrant, Officer Wood saw Powers's purse (which was nearby where she was sleeping), confirmed with Powers that it was her purse, and searched Powers's purse.

To start, it is well settled that law-enforcement officers do not have carte blanche to search every person they encounter during the execution of a validly issued search warrant, especially when they do not expect that person to be at the place being searched and when they do not identify that person in the search warrant. "'Alabama courts, following the dictates of *Ybarra*[*v. Illinois*, 444 U.S. 85 (1979)], have held that a warrant to search designated premises *will not* authorize the search of every individual who happens to be on the premises. *Travis v. State*, 381 So. 2d 97, 101 (Ala. Cr. App. 1979), *cert. denied*, 381 So. 2d 102 (Ala. 1980).'" *Brooks v. State*, 593 So. 2d 97, 99 (Ala. Crim. App. 1991) (quoting *Helms v. State*, 549 So. 2d 598, 600-01 (Ala. Crim. App. 1989)) (emphasis added). In fact, most legal precedent acknowledges 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"; rather, "the law

requires that there be probable cause to believe that such persons are themselves participants in criminal activity." *Smith v. State*, 292 Ala. 120, 121, 289 So. 2d 816, 817 (1974). So, as Powers correctly points out, a validly issued search warrant does not permit law enforcement to search the "person" of individuals who are merely present at the place being searched, absent some independent probable cause or exigent circumstance.[3]

But the law-enforcement officers in this case did not search Powers's person; rather, they executed a validly issued search warrant, encountered someone who they do not identify in the warrant, and searched her possessions. From what we can tell, Alabama appellate courts have never been asked to resolve this question. And although several of the United States Circuit Courts of Appeals have been asked to resolve this question, those courts are divided on how they do so. That division has resulted in the formation of two different tests:

> (1) The "proximity test/physical-possession test," which is used by the United States Courts of Appeals for the Seventh Circuit and the District of Columbia Circuit, *see United*

[3] This, of course, does not mean that law-enforcement officers cannot detain those people during the execution of the search warrant. *See Bragg v. State*, 536 So. 2d 965, 968-69 (Ala. Crim. App. 1988) (recognizing that "police officers executing a valid search warrant do have the authority to detain persons found on the premises subject to the warrant"). Nor does it mean that law-enforcement officers cannot conduct a pat-down search of those people under *Terry v. Ohio*, 392 U.S. 1 (1968). Rather, this simply means that a person's presence alone at a place being searched pursuant to a validly issued search warrant does not justify a search of that person under the Fourth Amendment.

> *States v. Teller*, 397 F.2d 494 (7th Cir. 1968); *United States v. Branch*, 545 F.2d 177 (D.C. Cir. 1976); and
>
> (2) The "relationship test," which is used by the United States Courts of Appeal for the First Circuit and Fifth Circuit, *see United States v. Micheli*, 487 F.2d 429 (1st Cir. 1973); and *United States v. Giwa*, 831 F.2d 538 (5th Cir. 1987).

Although the United States Court of Appeals for the Tenth Circuit has not decided which of these two tests it would apply,[4] it has examined the two tests and discussed the pros and cons of each test:

> "The first approach is a 'physical possession' analysis. Under this inquiry, the reviewing court 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. *See United States v. Johnson*, 475 F.2d 977, 979 (D.C. Cir. 1973). For example, in *United States v. Teller*, the Seventh Circuit held the search of a purse was within the scope of the premises search warrant where the woman had placed her purse on a bed and left the room during the search. 397 F.2d 494, 497-98 (7th Cir.), *cert. de-*

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[4] The Tenth Circuit Court of Appeals was presented with the opportunity to choose between the two tests, but it concluded that, in the particular case before it, under either test, suppression of the evidence was proper; thus, it did not express an opinion as to which test it believed to be more appropriate. *See United States v. Vogl*, 7 F. App'x 810, 815-16 (10th Cir. 2001) (not selected for publication in the Federal Reporter).

nied, 393 U.S. 937, 89 S. Ct. 299, 21 L. Ed. 2d 273 (1968). The court concluded a purse that is temporarily put down cannot be considered an 'extension of her person,' and its search did not constitute a search of the person. *Id.* It logically follows that a purse within the individual's physical possession is considered an appendage of the body and, therefore, a search of the person. *See Johnson*, 475 F.2d at 979 (noting the purse was not worn by defendant 'and thus did not constitute an extension of her person so as to make the search one of her person'); *but see United States v. Branch*, 545 F.2d 177, 182 (D.C. Cir. 1976) (ruling the search of a bag worn by the defendant upon entering the premises was not permissible where the owner was unknown to police, entered the premises during the course of the premises search, and was not given an opportunity to leave).

"Critics suggest this approach is both too broad and too narrow. The rule provides blanket protection to those seeking to hide incriminating evidence because those individuals could avoid detection from lawful searches 'through the simple act of stuffing it in one's purse or pockets.' *See United States v. Young*, 909 F.2d 442, 445 (11th Cir. 1990), *cert. denied*, 502 U.S. 825, 112 S. Ct. 90, 116 L. Ed. 2d 62 (1991). Similarly, the approach is too constrictive because 'it would leave vulnerable many personal effects, such as wallets, purses, cases, or overcoats, which are often set down upon chairs or counters, hung on racks, or checked for convenient storage.' [*United States v.*] *Micheli*, 487 F.2d [429] at 431 [(1st Cir. 1973)].

"The second approach to determine whether the individual's container may be searched pursuant to a premises search warrant focuses on the officers' knowledge or understanding of the person's 'relationship' to the premises searched at the time the officers executed the search warrant. *See United States v. Giwa*, 831 F.2d 538, 544 (5th Cir. 1987). In *United States v. Micheli*, the First Circuit rejected the 'physical possession' test in favor of examining the relationship between the person and the place being searched. *Id.* at 431-32. Using this principle, the court concluded the usual occupant or owner of a premises being searched loses her privacy interest in the belongings located there; however, a 'mere visitor' retains her legitimate expectation of privacy regardless of whether the visitor is currently holding or has temporarily put down her belongings. *Id.* at 432. Thus, the court upheld the search of the defendant's briefcase found under a desk because, as the co-owner of the business premises subject to the search warrant, he was not a mere visitor. *Id.* As a co-owner the defendant bore

> "'a special relation to the place, which meant that it could reasonably be expected that some of his personal belongings would be there. Thus, the showing of probable cause and necessity which was required prior to the initial intrusion into his office reasonably comprehended within its scope those personal articles, such as his briefcase, which might be lying about the office.

> The search of the briefcase, under these circumstances, was properly carried out within the scope of the warrant.'

"*Id.*

"In *United States v. Giwa*, the Fifth Circuit focused its inquiry on the officers' perception of the defendant's relationship to the place being searched. 831 F.2d at 544-45. Under this analysis the officers' search of the flight bag was upheld because the defendant was an overnight visitor, he answered the door clad only in pants and a bathrobe, and was alone in the residence. *Id.* at 545. According to the court, these facts suggested defendant had 'more than just a temporary presence in the apartment,' and 'the agents could reasonably believe his flight bag contained evidence' of the kind portrayed in the warrant. *Id.* at 544-45.

"Critics suggest the 'relationship' inquiry promotes inefficiency and uncertainty because it requires law enforcement officers to know the status of the individual and who owns the container. *See Micheli*, 487 F.2d at 434 (Campbell, J., concurring). Such an approach obligates a court to inquire into the officer's subjective knowledge at the time of the search. *See id.* Additionally, because 'the nature and quantum of "relationship" cannot readily be defined, officers and courts may be bedeviled with uncertainty in a field where certainty is especially desirable.' *Id.*"

United States v. Vogl, 7 F. App'x 810, 815-16 (10th Cir. 2001) (footnote omitted) (not selected for publication in the Federal Reporter).

In *United States v. Young*, 909 F.2d 442 (11th Cir. 1990), the Eleventh Circuit Court of Appeals expressed agreement, albeit in dicta, with applying the "relationship test" to situations like the one presented here:

> "[W]e disagree with the district court's implicit conclusion that any search of a purse, or similar personal effects, in the physical possession of a person necessarily violates the Fourth Amendment where a valid search warrant covers only 'the premises.' We agree instead with the position taken by the First Circuit Court of Appeals in *United States v. Micheli*, 487 F.2d 429 (1st Cir. 1973), and *United States v. Gray*, 814 F.2d 49, 51 (1st Cir. 1987). In *Micheli*, while noting that no bright line rule exists, the First Circuit held that in determining whether a search of personal effects violates the scope of a 'premises' warrant, one must consider the relationship between the object, the person and the place being searched. *Id.* at 431. Using this formula the First Circuit reasoned that *the usual occupant of a building being searched would lose a privacy interest in his belongings located there; however, a transient visitor would retain his expectation of privacy, whether or not his belongings are being held by him or have been temporarily put down.* Thus, the court held that a briefcase belonging to an employee could be searched pursuant to a premises warrant, whether found in his possession or under his desk. *Id.* at 431-2. The First Circuit again adhered to this test in

> *Gray*, upholding the search of a visitor's jacket pursuant to a premises warrant covering a residence where a drug deal had just taken place. 814 F.2d at 51.
>
> "We find this approach more reasonable than the physical proximity approach used by the district court. Indeed, a mere physical proximity rule would facilitate the insulation of incriminating evidence from lawful searches through the simple act of stuffing it in one's purse or pockets. We do not wish to condone such a blanket rule."

909 F.2d at 444-45 (footnotes omitted; emphasis added).

After examining the physical-possession test and the relationship test and weighing the pros and cons of each, we hold that "mere physical possession should not be the sole criterion [that] should be used to determine whether a personal item may be searched pursuant to a premises warrant." *Giwa*, 831 F.2d at 544. Rather, in our view, the relationship test seems to be the better approach because it "best balances citizens' reasonable expectations of privacy with law enforcement needs." *Perino v. Slaughter*, No. Civ. 07-144 LH/WDS, Jan. 27, 2007 (D.N.M. 2009) (not reported in Federal Supplement). Indeed, the 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. As the First Circuit Court of Appeals explained in *Micheli*:

> "The Fourth Amendment's basic interest in protecting privacy, *Warden v. Hayden*, 387 U.S. 294, 87 S. Ct. 1642, 18 L. Ed. 2d 782 (1967), and avoiding unreasonable governmental intrusions, *Mancusi v. Deforte*, 392 U.S. 364, 88 S. Ct. 2120, 20 L. Ed. 2d 1154 (1968), is hardly furthered by making its applicability hinge upon whether the individual happens to be holding or wearing his personal belongings after he chances into a place where a search is underway. The rudest of governmental intrusions into someone's private domain may occur by way of a search of a personal belonging which had been entrusted to a nearby hook or shelf. The practical result of such a rule may be to encourage the government to obtain search warrants for places frequented by suspicious individuals, such as infamous bars, then lie in wait for those individuals to enter and make themselves comfortable."

Micheli, 487 F.2d at 431. 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. So, we now apply the relationship test to the facts in this case.

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 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.*, *Giwa*, 831 F.2d at 545 ("[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.").

Conclusion

Because Powers was more than a "transient visitor" at Moyers's house and had a known relationship to the premises, and because Powers's purse was a container that could conceivably conceal the "illegal drugs" that law-enforcement officers were looking for in Moyers's house, Powers's Fourth Amendment rights were not violated when the officers searched her purse. Thus, the trial court did not err when it denied Powers's motion to suppress.

Accordingly, the judgment of the trial court is affirmed.

AFFIRMED.

Windom, P.J., and Kellum, McCool, and Minor, JJ., concur.

APPENDIX C

IN THE CIRCUIT COURT OF MOBILE COUNTY, ALABAMA

Case No.: CC-2019-002058.00

STATE OF ALABAMA,

v.

POWERS NANCY CATHERINE,
Defendant.

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ORDER

Defendant and Defendant's attorney Pete Vallas in court for Motion to suppress hearing. Court denies Defendant's motion.

Defendant waived trial by jury, withdrew plea of not guilty and entered a plea of guilty to the charge of Possession with Intent to Distribute.

The Court, having ascertained that Defendant understands his constitutional rights, the nature of the crime charged and the consequences of the guilty plea, and the Defendant understandingly and voluntarily waives his constitutional rights and pleads guilty, hereby orders that the Defendant's waiver and plea of guilty be accepted and entered into the minutes of this Court.

It is further ordered that the Defendant be and is hereby adjudged guilty of Possession with Intent to Distribute and is now sentenced by the Court, within the sentencing guidelines, to the Alabama State Penitentiary for the term of **three (3) years**.

On recommendation of the State, execution of the sentence is hereby suspended pending the good behavior of the Defendant for a period of **two (2) years** and at the expiration of said two years, said suspension is hereby made permanent.

Suspension of sentence is further conditioned upon Defendant paying costs of court, $1,000 DDRA, $100 DFS, $150BBF, $200 fine and $50 VCA by the expiration of probation. Defendant is set for pay review 12/12/19 at 9:00am in courtroom 6100.

Defendant to be on formal supervision with State Probation.

Defendant's gave oral notice of an appeal for denial on motion to suppress and appeal notice for the plea. Court appoints Attorney Jim Vollmer for appeals purpose.

Defendant's attorney Pete Vallas, OCR Tania Marston and ADA Johana Bucci in Court.

DONE this 30th day of August, 2019.

/s/ JILL PARRISH PHILLIPS
CIRCUIT JUDGE