

No. 21-_____

IN THE
SUPREME COURT OF THE UNITED STATES

COMMONWEALTH OF PENNSYLVANIA

Respondent,

v.

KEITH ANTHONY ROSARIO

Petitioner.

On Petition for Writ of Certiorari
to the Superior Court of Pennsylvania

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Does the apparent authority exception to the Fourth Amendment's warrant requirement permit a police officer to reasonably believe a seventeen-year-old, self-proclaimed house and dog sitter can consent to the search of a residence for the resident when that police officer believes the resident is not out of town, but inside the residence?

RELATED PROCEEDINGS

- *Commonwealth of Pennsylvania v. Keith Anthony Rosario*, No. 137 WAL 2021 Supreme Court of Pennsylvania. Order denying Petition for Allowance of Appeal entered September 8, 2021.
- *Commonwealth of Pennsylvania v. Keith Anthony Rosario*, No. 1700 WDA 2019, Superior Court of Pennsylvania. Judgment entered March 23, 2021.
- *Commonwealth of Pennsylvania v. Keith Anthony Rosario*, No. CP-63-CR-2611-2017, Court of Common Pleas of Washington County, Pennsylvania. Judgment of Sentence entered June 3, 2019 and post-sentence motions denied by operation of law on October 17, 2019.

TABLE OF CONTENTS

TABLE OF AUTHORITIES.....	v
PETITION FOR WRIT OF CERTIORARI.....	1
OPINIONS BELOW.....	1
JURISDICTION.....	1
RELEVANT CONSTITUTIONAL PROVISION.....	1
STATEMENT OF THE CASE.....	2
A. Legal background.....	2
B. Facts and procedural history.....	3
REASONS FOR GRANTING THE PETITION.....	8
I. The circuits are divided over the duty of law enforcement to seek further information to establish the reasonableness of apparent authority.....	9
A. In ambiguous scenarios, five circuits require further inquiry by law enforcement.....	9
B. The Eighth Circuit stands alone permitting reliance on context and inference, not inquiry when determining apparent authority.....	16
C. The Seventh Circuit presents a conflicting stance as to the reasonableness of a search and the need for further inquiry to resolve ambiguities depending on what is being searched.....	19
D. This matter is ripe for resolution.....	21
II. Rosario's case presents an appropriate vehicle for review of this essential question.....	22
III. The lower court's decision is wrong.....	26

CONCLUSION.....	29
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APPENDIX

	Volume	Page
Appendix A, Opinion (precedential) of the Superior Court of Pennsylvania, March 23, 2021	I	1a
Appendix B, Opinion of the Court of Common Pleas of Washington County, Pennsylvania, February 24, 2020	I	37a
Appendix C, Opinion of the Court of Common Pleas of Washington County, Pennsylvania, September 18, 2019	II	107a
Appendix D, Order of the Supreme Court of Pennsylvania, September 8, 2021	II	136a

TABLE OF AUTHORITIES

	Page(s)
Constitutional Amendment	
U.S. Const. amend. IV.....	1, 22
Cases	
<u>Commonwealth v. Rosario</u> , 248 A.3d 599 (Pa. Super. 2021).....	1
<u>Commonwealth v. Strader</u> , 931 A.2d 630 (Pa. 2007).....	5, 7, 8,
<u>Georgia v. Randolph</u> , 547 U.S. 103 (2006).....	12, 18
<u>Illinois v. Rodriguez</u> , 497 U.S. 177 (1990).....	<i>passim</i>
<u>State v. Jackson</u> , 878 N.W.2d 422 (Iowa 2016).....	23, 25
<u>United States v. Almeida-Perez</u> , 549 F.3d 1161 (8 th Cir. 2008).....	16-18
<u>United States v. Arreguin</u> , 735 F.3d 1168 (9 th Cir. 2013).....	13-14
<u>United States v. Cos</u> , 498 F.3d 1115 (10 th Cir. 2007).....	11-12, 17
<u>United States v. Lindsey</u> , 702 F.3d 1092 (8 th Cir. 2013).....	16, 18-19
<u>United States v. Melgar</u> , 227 F.3d 1038 (7 th Cir. 2000).....	20-21
<u>United States v. Moran</u> , 944 F.3d 1(1 st Cir. 2019).....	14-15

<u>United States v. Peyton,</u> 745 F.3d 546 (D.C.Cir. 2014).....	12-13
<u>United States v. Purcell,</u> 526 F.3d 953 (6 th Cir. 2008).....	11
<u>United States v. Salinas-Cano,</u> 959 F.2d 861 (10 th Cir. 1991).....	10
<u>United States v. Terry,</u> 915 F.3d 1141 (7 th Cir. 2019).....	19-20, 21
<u>United States v. Waller,</u> 426 F.3d 838 (6 th Cir. 2005).....	9-11
<u>United States v. Whitfield,</u> 939 F.2d 1071 (D.C.Cir. 1991).....	17
Statute	
28 U.S.C. § 1257(a).....	1
Rule of Court	
Pa. Rule of Appellate Procedure 1925.....	6
Other Authorities	
Grimaldi, Christopher, <u>Resolving the Circuit Split Over Consent-based Searches in Shared Living Spaces</u> , 1 Cardozo Int'l & Comp. L.Rev. 365 (2018).....	25
Hobbie, Jr., Norman, <u>Fourth Amendment Consent Searches and the Duty of Further Inquiry</u> , 54 Creighton L. Rev. 227 (2021).....	25
LaFave, Wayne R., <u>Search and Seizure, A Treatise on the Fourth Amendment</u> (6 th ed 2020).....	24

PETITION FOR A WRIT OF CERTIORARI

Petitioner Keith Anthony Rosario respectfully petitions for a writ of certiorari to review the judgment of the Superior Court of Pennsylvania in this case.

OPINIONS BELOW

The opinion of the Superior Court of Pennsylvania (Pet. App. 1a-36a) is published at 248 A.3d 599 (Pa. Super. 2021). The opinions and orders of the Court of Common Pleas of Washington County, Pennsylvania issued on February 24, 2020 (Pet. App. 37a-106a) and September 11, 2018 (Pet. App. 107a-135a) are unpublished. The order of the Supreme Court of Pennsylvania denying the petition for allowance of appeal is also unpublished. Pet. App. 136a.

JURISDICTION

The judgment of the Superior Court of Pennsylvania was entered on March 23, 2021. A timely Petition for Allowance of Appeal was filed with the Supreme Court of Pennsylvania, which denied review pursuant to an order of September 8, 2021. This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

RELEVANT CONSTITUTIONAL PROVISION

The Fourth Amendment states in pertinent part that “The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated.”

STATEMENT OF THE CASE

A. Legal Background

In Illinois v. Rodriguez, 497 U.S 177 (1990), this Court first recognized that the Fourth Amendment permitted a search of a premises based upon the consent of a third party when law enforcement reasonably believed the third party had the apparent authority to consent. This Court cautioned that it “[did] not suggest that law enforcement officers may always accept a person’s invitation to enter premises” even with that person’s assertion that he lives at the residence, because the facts may cause “a reasonable person [to] doubt its truth and not act upon it without further inquiry.” Id. at 188.

In applying the apparent authority exception, courts have given different interpretations of when a sufficient factual basis exists for law enforcement to reasonably conclude apparent authority exists. This case presents an instance of circular logic that runs afoul of Rodriguez. It is a situation that should have caused law enforcement to not accept the statements and invitation of the third-party minor and self-proclaimed house and dog sitter to search Rosario’s residence. This is because the State Trooper disbelieved the basis of the house and dog sitter’s apparent authority: the Trooper believed Rosario was not out of town, but inside his residence. Still, the Trooper relied upon the apparent authority of the house and dog sitter to obtain consent to search the residence.

B. Factual and Procedural Background

1. In the late hours of September 5, 2017, Pennsylvania State Police Troopers were investigating the attempted homicide of Marcus Stancik. Pet. App. 59a-60a. They suspected Petitioner, Keith Rosario, of attempting to murder Stancik and “related” to the City of Washington Police to look out for Rosario. Pet. App. 9a. Later the Troopers were contacted by the City of Washington Police and told “We’re here at 449 Ewing Street. We need you to get down here.” Superior Court Reproduced Record, Vol. I, p. 170a.

Trooper Scott and Trooper Herrera responded to 449 Ewing which was Rosario’s residence. Pet. App. 9a. Upon arrival, the two Troopers found other police personnel present, along with three individuals that were identified to the Troopers as coming from inside the house. Pet. App. 9a-10a. The three individuals were directed to come out of the house and were the only persons present in the residence according to the City of Washington Police. Pet. App. 9a-10a. Among these three individuals was seventeen-year-old, Tyree King. Pet App. 10a. King expressed to the Troopers that he was house and dog sitting for Rosario. Pet. App. 10a. King stated Rosario was not inside the residence. Superior Court Reproduced Record, Vol. I, p. 180a; Pet App. 114a. Trooper Scott specifically stated he “had no reason not to believe [] King,” but “did not believe [Rosario] was out of town,” and “wanted

to make sure [Rosario] wasn't currently inside the house." Pet. App. 10a. Trooper Scott obtained King's consent to search Rosario's residence for Rosario. Pet. App. 11a, 82a, 114a. Before the search of the residence began, but after consent to search was granted by King, another individual, Richard Lacks (who was later charged as Rosario's co-defendant), exited to residence voluntarily. Superior Court Reproduced Record, Vol. I, p. 174a, 177a-179a, 187a. This occurred despite King's assertion that no one else was in the residence. Superior Court Reproduced Record, Vol. I, p. 182a.

A search of the residence uncovered a .40 caliber handgun in the basement hidden behind a piece of furniture, but within plain view in which it could be seen without movement of the furniture according to the Trooper who found it. Pet. App. 60a. Rosario was not found inside. Rosario was arrested the following day at a different address.

2. The Commonwealth charged Rosario under the Pennsylvania Crimes Code with attempted criminal homicide, two counts of aggravated assault, two counts of kidnapping and one count of criminal conspiracy to commit criminal homicide.¹ Rosario pled not guilty and eventually filed an omnibus pretrial motion.

¹ A seventh charge of possession of a firearm prohibited was filed, but later severed from the other charges for trial and nolle prossed at the time of sentencing.

On May 4, 2018, an evidentiary hearing was held on Rosario's omnibus pretrial motion that sought to suppress the firearm recovered from his residence as being obtained pursuant to a warrantless search that violated his rights under the Fourth Amendment. Pet. App. 109a. By order dated September 11, 2018, the Court of Common Pleas denied the suppression motion. Pet. App. 109a-115a, 134a. Relying on the Supreme Court of Pennsylvania's decision in Commonwealth v. Strader, 931 A.2d 630, 634 (Pa. 2007) (apply Illinois v. Rodriguez), the Court of Common Pleas found that King's consent valid under the apparent authority exception to the Fourth Amendment. Pet. App. 109a-115a. Based upon the totality of the circumstances, the Court of Common Pleas concluded that King, despite being a teenager, had apparent authority to consent to search for Rosario in Rosario's residence. Pet. App. 112a-115a. Among the court's factual findings were that King and the two younger females were present outside when Trooper Scott arrived on the scene. Pet. App. 9a-10a, 112a-113a. King and the females were previously in Rosario's residence. Pet. App. 9a-10a, 112a-113a. King told Scott "he was house-sitting for [Rosario] and he was watching his dog as well[,] and "[h]e gave the impression [Rosario] was out of town." Pet. App. 10a. When asked for consent to search the residence for King granted it. Pet. App. 11a, 114a. The court also found King acted as if he "controlled access" to the residence. Pet. App. 14a, 114a. In conclusion,

the court found that Trooper Scott acted reasonably by believing King had the apparent authority to consent to his request to search for Rosario in Rosario's residence. Pet App. 14a, 115a.

The matter proceeded to a jury trial on February 4, 2019. Pet. App. 4a. Rosario was alleged to have shot Stancik with a .22 caliber handgun. Pet. App. 51a, 53a-54a, 56a. The basis for Rosario's alleged desire to shoot Stancik stemmed from an alleged belief by Rosario that Stancik had stolen a .9 millimeter handgun from his house. Pet. App. 55a-56a. The .40 caliber handgun was the only weapon introduced into evidence at trial. Neither the attempted murder weapon, *i.e.* the .22 caliber nor the .9 millimeter handgun whose disappearance allegedly caused a dispute between the Rosario and Stancik were located or introduced into evidence. On February 7, 2019, the jury found Rosario guilty on Counts One through Six of the criminal information. Pet. App. 4a-5a. Rosario was sentenced and after denial of post-sentence motions, he filed an appeal to the Superior Court of Pennsylvania.

Pursuant to Pennsylvania Rule of Appellate Procedure 1925,² Petitioner's counsel filed a concise statement of matters complained of on appeal. Among the issues identified in this statement was that the trial court committed error in denying Rosario's motion to suppress when it

² This rule provides that the trial court may order an appellant's counsel to list errors complained of on appeal for clarification so that the trial court may then issue an opinion explaining the reasons for its appealed order(s) if they do not already appear of record.

concluded that King had apparent authority to consent to the search of the Petitioner's residence. Superior Court Appellant's Brief, p. 157. By an Opinion dated February 24, 2020, the trial court re-affirmed its analysis and conclusion denying the Rosario's motion to suppress while also concluding that the introduction of the firearm was harmless. Pet. App. 80a-86a.

3. On appeal, the Superior Court of Pennsylvania affirmed the denial of suppression motion.³ The court rejected Rosario's argument that the apparent authority exception to the Fourth Amendment warrant requirement could not validate Trooper Scott's circular logic in both believing Rosario was not out of town but inside his residence while also believing a minor had authority to consent to the search based upon Rosario's absence from the house. Superior Court Reproduced Record, Appellant's Brief pp. 50-57; Pet. App. 8a-14a. Relying on Rodriguez, Rosario argued that Trooper Scott's belief that King was Rosario's house and dog sitter because he was out of town could not co-exist with his belief that Rosario was present in the residence and a search for him inside was appropriate. Accepting the trial court's totality of the circumstances analysis based upon Commonwealth v. Strader, 931 A.2d 630, 634 (Pa. 2007)(relying on the Fourth Amendment and Rodriguez), the Superior Court affirmed and rejected Rosario's

³ The Superior Court did not conduct a harmless error analysis concerning the introduction of the .40 caliber handgun into evidence at trial. The Superior Court did sustain Rosario's appeal on two issues related to sentencing, vacating his sentences for criminal conspiracy and for the two counts of kidnapping.

argument. The court rejected the idea that the record did not reveal Scott disbelieved King, and in support cited the record wherein Trooper Scott “stated he ‘had no reason not to believe [King]’” but “did not believe [Rosario] was out of town,” and “wanted to make sure [Rosario] wasn’t currently in the house.” Pet. App. 10a. Then citing the Fourth Amendment apparent authority analysis conducted in Strader, the court concluded that the Court of Common Pleas analysis and conclusion based upon Strader was correct as King, aside from his age, was temporarily in charge of the residence like the individual who consented in Strader and apparent authority existed. Pet App. 12a-14a.

Rosario sought discretionary review of this Fourth Amendment issue in the Supreme Court of Pennsylvania, but was denied by order dated September 8, 2021.

REASONS FOR GRANTING THE PETITION

Review is required to determine the proper interpretation of the Court’s decision in Illinois v. Rodriguez, 497 U.S. 177 (1990), specifically, the character of information necessary to establish apparent authority and to what extent law enforcement is required to continue its inquiry to establish apparent authority and evaluate the information obtained. This case presents a recurrent question among the courts of appeals: what is the extent of a police officer’s duty to make further inquiry such that the to

satisfy him or herself that a third party has apparent authority? Five circuits require police officers make further inquiry in ambiguous situations. However, the Eighth Circuit does not require further inquiry while the Seventh Circuit in ambiguous situations does not require further inquiry for containers within a place subject to a consent search, but does require further inquiry for residences. This Court should adopt the reasoning of the majority of circuits that require further inquiry in ambiguous situations. Furthermore, this Court should grant review to provide clear guidance for law enforcement who seek to conduct a search based upon the apparent authority of third parties to consent to the search.

I. The circuits are divided over the duty of law enforcement to seek further information to establish the reasonableness of apparent authority.

A. In ambiguous scenarios, five circuits require further inquiry by law enforcement.

Consistent with *Rodriguez*, five circuits require law enforcement to conduct further inquiry in ambiguous scenarios.

The Sixth Circuit recognizes, consistent with *Rodriguez*, that further inquiry is required for ambiguous scenarios. In *United States v. Waller*, 426 F.3d 838 (6th Cir. 2005), Waller stored his suitcases in an apartment of a third party named Howard. *Id.* at 842. After Waller was arrested outside of

the apartment, police officers obtained Howard's verbal and then written permission to search the apartment, which was initially a search for a potential kidnap victim. Id. When the alleged victim was not present, the search continued for Waller's personal items and resulted in the search of a suitcase that was found to contain two firearms. Id. Waller's motion to suppress the firearms was denied. Id. at 842-842. Waller was later convicted of being a felon in possession of these firearms. Id. at 843.

The Court of Appeals reversed and vacated Waller's conviction. Relying on the Tenth Circuit's decision in United States v. Salinas-Cano, 959 F.2d 861 (10th Cir. 1991), the court found that being a suitcase, it was an item that traditionally is recognized as maintaining privacy of its contents. Waller at 847-848. Further, the police officers were aware that Waller had just left his previous residence and was not a permanent resident at Howard's apartment, but stored personal items there. Id. at 848. Police were also aware of the fact that Howard was present with two other individuals and someone like Howard, who is a resident would not typically keep a packed piece of luggage in their own apartment. Id. at 848, 849. For the court, these circumstances along with the fact Waller was in custody outside of the apartment and Howard was present, but police never inquired of them about the ownership, control or consent to search the bag they found, but could have asked for permission to search the luggage, presented an ambiguity as

to whose luggage it was. Id. at 849.

In United States v. Purcell, 526 F.3d 953 (6th Cir. 2008), the Sixth Circuit reinforced its earlier ruling in Waller that when an ambiguity presents itself, an individual's apparent authority is lost. In Purcell, a woman named Crist consented to the search of a duffel bag and other bags within a hotel room. Purcell at 958. Upon inspection of the duffel bag, men's clothing was found and no personal objects of Crist's was present. Id. at 958, 964. Law enforcement continued the search despite this ambiguity and located a firearm in a backpack separate from other bags within the room. Id. at 958, 964. Purcell was charged with possession of the firearm, but the district court suppressed the firearm and the Court of Appeals affirmed finding the location of men's clothing in the duffel bag created an ambiguity that erased Crist's apparent authority to consent to search in other bags. Id. at 958, 965.

Similarly, in United States v. Cos, 498 F.3d 1115, 1129 (10th Cir. 2007), the Tenth Circuit concluded that apparent authority to consent to search for Cos (who had an active arrest warrant) in his own apartment was lacking in a female individual named Ricker, who answered the door and was present with three children. Ricker's consent led to the discovery of a firearm in Cos's apartment and the filing of the charge of being a felon in possession of a firearm against Cos. Id. at 1117. The Tenth Circuit found further

information other than an individual's presence within the apartment is necessary to establish apparent authority, especially in ambiguous circumstances. Id. at 1130. The third party's access to the home by key or otherwise, the presence of their personal belongings within the residence, the frequency of time spent at the residence and relationship to the resident were noted as considerations for law enforcement. Id. Finding that police did not know Ricker's relationship to Cos or the residence, that it was 3:00 p.m. in the afternoon when she answered the door stating she was present with her "kids" provided only ambiguity as to Ricker's ability to access or control Cos's residence. Id. at 1130-1131. Contrary to the Eighth Circuit decisions below, the Tenth Circuit went on to conclude that Georgia v. Randolph, 547 U.S. 103 (2006), had no role in apparent authority analysis because that opinion did not address that exception, but instead the authority between co-inhabitants. Id. at 1131.

In United States v. Peyton, 745 F.3d 546 (D.C. Cir. 2014), Peyton resided in an apartment with his great-great-grandmother Martha Mae Hicks, where he slept in the living room. Peyton at 549. Hicks consented to the search of the apartment for drugs in the absence of Peyton who was arrested previously. Id. Hicks told officers that Peyton kept his "personal property" around the bed. Id. An officer picked up a closed shoebox next to Peyton's bed and found within it marijuana, crack cocaine and cash. Id. at

549-550. Peyton was eventually indicted, and then subject to a superseding indictment after a subsequent search of the apartment yielded further drugs and a firearm. Peyton at 550. Peyton's motion to suppress the evidence from the shoebox was denied. Id. On appeal, the D.C. Circuit reversed finding that Hicks did not possess apparent authority over the shoebox noting that she explicitly told police Peyton's personal property was kept around his bed, the same place where the shoebox was found. Id. at 554. The court found Hicks's comment suggested her lack of apparent authority and further inquiry after her comment was necessary to establish if she possessed authority. Id.

The First and the Ninth Circuits have also found the need for further inquiry in the context of searches of items. In United States v. Arreguin, 735 F.3d 1168 (9th Cir. 2013), a woman named Valencia consented to the entry of DEA agents into Arreguin's residence after a "knock and talk" encounter at the front door. Arreguin at 1171-1173. During the encounter at the door, an agent saw Arreguin in the background possessing a shoebox and disappearing with it. Id. at 1172. Upon entry, agents verbally directed Arreguin to come out of the master bedroom and into the foyer and thereafter one agent proceeded to search the master bedroom, its bathroom and adjacent garage and this resulted in the observation of a white powdery substance in the aforementioned shoebox and a bag containing several

bundles of cash. Id. at 1172-1173. These discoveries and the promise that his wife's case (concerning her illegal immigration) would not be referred to "Immigration" led to Arreguin's consent to search the house which uncovered quantities of methamphetamine within a vehicle in the garage. Id. at 1173. Subsequent to Arreguin's consent, law enforcement made further inquiry of Valencia and only then learned she was a house guest. Id. at 1173.

After a prior appeal and remand, the Ninth Circuit took up the matter again concerning the issue of the house guest's authority to consent to a search of certain areas of the residence. The court found that the guest's answering of the door did not establish authority to consent to search the master bedroom and bathroom (Arreguin at 1176), and that Arreguin's disappearance from view and reluctance to return to view of the agents once they were permitted inside indicate his control over the areas that were eventually searched. Id. at 1177-1178. The court concluded that the search of the bedroom, bathroom and garage was concluded without necessary further inquiry since nothing tied the house guest to these areas of the residence. Id. at 1177-1178.

In United States v. Moran, 944 F.3d 1 (1st Cir. 2019), the First Circuit held that consent to search a storage unit by its lessee did not include apparent authority to consent to search bags of the lessee's brother kept within the storage unit. After being alerted to the presence of garbage bags

in Moran's sister's storage unit that Moran wanted moved, police obtained his sister's consent to search her residence, car and storage unit. Moran at 3. Moran's sister noted the garbage bags in the unit were Moran's, not hers. Id. at 3. A canine officer did not alert to the bags, but law enforcement later opened the bags without a warrant and discovered fentanyl. Id. at 4. The district court concluded that apparent authority to consent to a search of the bags rested with Moran's sister and denied Moran's motion to reconsider his motion to suppress. Id. at 4. On appeal, the First Circuit reversed finding neither actual nor apparent authority existed in Moran's sister. Specifically, on the issue of apparent authority, the court noted that the sister's explicit statement that the bags in the storage unit belonged to her brother created an "uncertainty" as to her ability to consent to a search of their contents. Id. at 8. The court concluded that the government failed to meet its burden of demonstrating apparent authority as law enforcement failed to inquire further as to the sister's authority after she identified the bags as Moran's property. Id. at 8.

In these five circuits, Trooper Scott's decision to accept King's consent to search would not have been found reasonable under the Fourth Amendment as an ambiguity existed as to his apparent authority.

B. The Eighth Circuit stands alone permitting reliance on context and inference, not inquiry.

The Eighth Circuit has taken a more law enforcement friendly approach to apparent authority. It has explicitly noted that “[This] circuit...has been more liberal about allowing police to form their impressions from context.” United States v. Lindsey, 702 F.3d 1092, 1096 (8th Cir. 2013)(citing United States v. Almeida-Perez, 549 F.3d 1161, 1171 (8th Cir. 2008)).

In the leading case of United States v. Almeida-Perez, 549 F.3d 1161 (8th Cir. 2008), the Eight Circuit concluded that law enforcement could infer from an individual’s actions, without inquiry, that the individual had apparent authority over a residence. In that case, law enforcement officers named Ortiz and Raggs approached Sergio Almeida, who was on the porch of a residence, and indicated they were investigating drug dealing and “asked if they could ‘talk about it inside.’” Almeida-Perez at 1164. Ortiz and Raggs had been surveilling the residence and observed Almeida go “in and out of the house.” Id. at 1164. Ortiz testified that Almeida invited them inside the residence and that Almeida entered the residence without knocking. Id. at 1165. Once inside, Ortiz encountered three or four people in the living room and questioned if others were in the house. Id. at 1165. In response, the wife of Porfirio Almeida-Perez indicated by pointing that he was in a bedroom.

Almeida-Perez at 1165. The others in the living room gestured to that bedroom as well. Id. Ortiz requested and was given permission to go to the bedrooms by Porfirio's wife and the others. Id. Ortiz "knocked on the door, identified himself as police, and then opened the door." Ortiz discovered a shotgun next to the bed where Porfirio was sleeping and ordered him to come out of the room. Id. After receiving back-up, Ortiz went to a second bedroom and discovered Porfirio's sister on a bed and his brother, Jose, on the floor with a rifle next to him. Id. With all occupants brought together in the living room, Jose, Porfirio and their sister were identified as those people responsible for the house; and all three gave permission to search for narcotics and weapons and currency and signed a consent form. Id. The search eventually produced another shotgun, less than a gram of cocaine and \$19,353.00. Almeida-Perez at 1166.

A motion to suppress filed by Porfirio and Jose was denied by a magistrate judge and that ruling was upheld by the trial court. Id. at 1167-1169. They entered into a plea agreement to plead guilty to being illegal aliens in possession of a firearm, but reserved the right to appeal the suppression ruling and sentencing issues. Id. at 1169.

On appeal, the Eighth Circuit affirmed the suppression ruling. The Court rejected the views of the Tenth and D.C. Circuits in Cos and United States v. Whitfield, 939 F.2d 1071 (D.C.Cir. 1991) that require questioning of

the authority being claimed and instead recognized its more law enforcement leaning interpretation of the precedents of Rodriguez and Georgia v. Randolph, 547 U.S. 103 (2006) stating: “Our circuit precedent, however, has been more liberal about allowing police to form their impressions from context.” Almeida-Perez at 1171. Surveying its prior decisions, the Eighth Circuit concluded: “Our cases suggest that where a person exercises privileges that would only be proper for an occupant of the house, the police may draw the inference that the person is indeed an occupant unless there are other circumstances that would cause a reasonable man to doubt the validity of that inference.” Id. The Court found this conclusion consistent with Randolph and Rodriguez. Id.

Applying its precedent, the Eighth Circuit concluded that Sergio Almeida’s action provided sufficient facts upon which Ortiz could rely on his apparent authority to let law enforcement inside the residence as he sat on the porch, went back and forth inside and back out of the house, and invited Ortiz and Raggs inside without seeking permission of a third party or knocking. Id. at 1171. Likewise, once inside, the Court concluded that Ortiz could rely on the gestures of Porfirio’s wife to enter into the bedrooms. Id. at 1172.

Five years later in United States v. Lindsey, 702 F.3d 1092 (8th Cir. 2013), the Eighth Circuit held that a search of defendant’s cell phone was

valid because it was found on Lindsey (who had an outstanding warrant) as a result of a consensual search of the residence for a different suspect based upon the consent provided by a woman who answered its door. Lindsey at 1095. The Court of Appeals concluded that the woman answering the door had authority to consent to a search because of her familiarity with the premises stemming from the fact she answered “no” when asked if the suspect sought by the police was present. Id. at 1096-1097. The court concluded the woman’s answering of the door and familiarity with its occupants demonstrated more authority than Sergio Almeida did in Almeida-Perez by sitting on the porch and walking into the house to speak with Ortiz and Raggs. Id. at 1097.

Under the Eighth Circuit interpretation of Rodriguez, there is no doubt, it would have affirmed the denial of Rosario’s suppression motion.

C. The Seventh Circuit presents a conflicting stance as to the reasonableness of a search and the need for further inquiry to resolve ambiguities depending on what is being searched.

On the issue of apparent authority to consent to search a dwelling, the Seventh Circuit requires further inquiry in ambiguous circumstances. In United States v. Terry, 915 F.3d 1141, 1143 (7th Cir. 2019), the court found a woman that answered a door in a bathrobe with a “sleepy” appearance, who signed a consent to search form granting DEA agents access to a suspect’s

home without knowing who she was, her relation to the suspect and if she resided at the home, did not have apparent authority to consent to a search. Writing for the court, Judge (now Justice) Barrett concluded that the woman's presence could be for a number of possibilities from a one-time guest to a relative staying multiple nights to some other relationship to Terry and because of these various possibilities, apparent authority did not exist. Id. at 1145. The Court concluded that "the existence of so many other equally plausible possibilities should have prompted the agents to 'inquire further.'" Id. (citation omitted).

However, in the realm of containers, the Seventh Circuit has taken a more liberal application of apparent authority. In United States v. Melgar, 227 F.3d 1038 (7th Cir. 2000), the Seventh Circuit addressed the question of whether a purse, found inside a hotel room rented to a woman named Vazquez could be searched based upon her apparent authority to consent. Velasquez was not present when police first arrived, but appeared thereafter with Melgar. Id. at 1039. Velasquez consented to the search of her room that resulted in the discovery of Melgar's purse between the mattress and box spring that contained fraudulent checks. Id. at 1039-1040. The Court of Appeals overturned the suppression of the purse concluding that unless law enforcement possessed information that the consenter does not have

authority over the container, apparent authority extends to the container. Id. at 1041-1042.

This differing application of apparent authority between the item to be searched is not consistent with the Fourth Amendment that explicitly requires reasonableness in the searches of houses as well as effects. Based upon the Terry and Melgar decisions, it is unclear if the Seventh Circuit would affirm the denial of Rosario's motion as police in the case sub judice knew King proclaimed to be the house and dog sitter for Rosario, but Trooper Scott also had independent information that disputed Rosario's absence from town, which in turn undercut the need for King to house and dog sit for Rosario.

D. This matter is ripe for resolution.

It has been thirty-one years since this Court recognized apparent authority in Rodriguez. Since then, the Courts of Appeals that have addressed this issue of when further inquiry is required to resolve ambiguity relative to apparent authority have settled in their positions. Likewise, the Eight Circuit has chosen a different path while the Seventh Circuit has taken separate positions depending upon the type of property to be searched. Issues of search and seizure and suppression occur daily in the federal and state courts and with them questions of consent. They are not episodic or remote issues. They are issues that have significant impact in many criminal

prosecutions for not only the prosecution and defense but the courts who must tackle weighty decisions that could turn the direction of a criminal prosecution in favor of one party over the other. Clarifying the need for when further inquiry is necessary will alleviate further confusion in the future. No further percolation of the question of when further inquiry in ambiguous circumstances will resolve the differences of the lower courts or assist this Court in addressing this issue.

II. Rosario's case presents an appropriate vehicle for review of this essential question.

No matter what is sought to be searched, the reasonableness of a warrantless search based upon apparent authority must be consistent under the Fourth Amendment. Therefore, the analysis required must focus on the inquiry required to establish apparent authority, not the item to be searched. The explicit language of the Fourth Amendment leaves no room to treat the place or item to be searched differently: “The right of the people to be secure *in their persons, houses, papers, and effects, against unreasonable searches and seizures,* shall not be violated.” U.S. Const. amend IV (emphasis added). The Supreme Court of Iowa, recognizing the need for further inquiry has aptly noted: “The lesson of Rodriguez is that a warrantless search is not authorized when the circumstances would cause a reasonable officer to doubt

whether the party consenting had authority to consent with respect to the location to be searched.” State v. Jackson, 878 N.W. 2d 422, 438 (Iowa 2016)

This case presents facts that address directly the knowledge of law enforcement at the time they seek to rely upon the apparent authority of a minor, who is a house and dog sitter.

Trooper Scott intended to enter Rosario’s residence to search for Rosario because he believed Rosario was involved in a dangerous crime. Pet. App. 10a-11a. Upon arrival at Rosario’s residence, King and two females were outside of the residence surrounded by law enforcement. Pet. App. 9a-10a, 10a-11a. King denied the Petitioner’s presence in the house. Superior Court Reproduced Record, Vol I, p. 180a. King stated he was a house and dog sitter for Rosario and led Trooper Scott to believe Rosario “was out of town.” Pet. App. 10a, 82a. Still, Trooper Scott wanted to search for Rosario in the residence because he did not believe King that he was out of town. Pet. App. 10a. Trooper Scott’s desire to look for Rosario in his residence because he did not believe him out of town undercuts his ability to rely upon King’s statement that he was acting as a house and dog sitter.

This matter presents a misapplication of Rodriguez that stretches it beyond its breaking point. Here Trooper Scott possessed facts that he admittedly did not believe Rosario was out of town and that he was motivated by a desire to search Rosario’s residence for Rosario. Still, to search the

residence without a warrant, the Trooper required an exception to the warrant requirement, i.e. King's consent based upon apparent authority. Relying solely upon King's representations, the circumstances presented to Trooper Scott presented him with contradictory beliefs, namely that Rosario was not out of town and he wanted to search for him in his residence while also relying on King's assertion of being a house and dog sitter for Rosario in his absence. King's status and self-proclaimed authority over Rosario's residence derives from the absence of Rosario that King asserted. This resulted in Trooper Scott not crediting King's assertion that Rosario was not present in the residence.

Had further inquiry been conducted, the apparent authority already questioned by Trooper Scott's belief that Rosario was still in town, would most likely been further undercut. To follow one commentator's observation: "But sometimes the facts known by the police cry out for further inquiry, and when this is the case it is not reasonable for the police to proceed on the theory that 'ignorance is bliss.'" LaFave 4 Search and Seizure, A Treatise on the Fourth Amendment § 8.3(g) (6th Ed.). Rosario's case is one of these cases.

Trooper Scott, despite believing Rosario was still in town, did not inquire of King further to see what he would say as to when Rosario left, when he would return, where Rosario went, for what purpose, if Rosario could be contacted by our society's ever-ubiquitous cell phone and if Rosario permitted

King as a minor to have his two female houseguests over. Police by their nature are investigators. They must assess facts. The minimal questioning of King appears to be a tactic in avoidance of the reality that would have undercut Trooper Scott's ability to say he reasonably relied on King's assertion of authority and consent to search for Rosario. Trooper Scott, after receiving the consent he sought from King, ignores the independent knowledge he had from earlier in the evening at the crime scene when Stancik identified Rosario as having shot him and foregoes pressing King's assertion that Rosario asked him to house and dog sit for him because Rosario was out of town.

The decision warrants review. The need of lower courts to evaluate the reasonableness of warrantless searches will no doubt persist for the life of our Constitution. See State v. Jackson, 878 N.W.2d 422 (Iowa 2016)(recognizing circuit split and adopting the reasoning of Sixth and Tenth Circuits, instead of the Seventh Circuit). Commentators also have recently criticized this Court's analyses on apparent authority offering resolutions to the inconsistencies in the opinions of the Courts of Appeals. See Norman Hobbie, Jr. Fourth Amendment Consent Searches and the Duty of Further Inquiry, 54 Creighton L. Rev. 227 (2021); Christopher Grimaldi, Resolving the Circuit Split Over Consent-based Searches in Shared Living Spaces, 1 Cardozo Int'l & Comp. L. Rev. 365 (2018).

III. The lower court's decision is wrong.

The Superior Court of Pennsylvania's decision to affirm the Court of Common Pleas's denial of the motion to suppress is wrong in light of this Honorable Court's decision in Rodriguez that defined the constitutional parameters of reasonableness necessary for apparent authority to exist.

The trial court and appellate court below recognized Trooper Scott's ability to search Rosario's residence under the doctrine of apparent authority. The Superior Court acknowledged Trooper Scott's testimony that he "did not believe [Rosario] was out of town." Pet. App. 10a, 11a. The Superior Court also noted that Trooper Scott did not disbelieve his claim of being a house and dog sitter. Further, the Superior Court failed to consider the fact that the trial court found that King told Trooper Scott that Rosario was out of town; instead the Superior Court relies on only that part of the trial court's reasoning that notes King "gave the impression [Rosario] was out of town." Compare Pet. App. 10a with 84a. The Superior Court's reliance on Scott's subjective belief is also disturbing as it has no bearing on the objective reasonableness standard applicable to judge apparent authority under Rodriguez. The ambiguity at issue in an apparent authority analysis is that of the facts known to law enforcement, not how ambiguous one responds when asked to consent to search. Trooper Scott's belief that Rosario is not out of town and likely inside his own residence is obvious not only from his

statement, but his actions and intent to enter the residence to look for Rosario, despite King's statement to the contrary and the fact that the police first at the residence directed the occupants out of the house. Yet, King's apparent authority over Rosario's residence rested with the fact he claimed to be Rosario's house and dog sitter. The erroneous decision of the trial court and the Superior Court resulted in the introduction of a firearm into evidence at trial that was not the alleged murder weapon and was not the alleged missing weapon that Stancik supposedly was blamed for stealing and that allegedly caused enmity between himself and Rosario. The introduction of the .40 caliber handgun was highly prejudicial to Rosario as it was not relevant to the alleged crimes. The introduction of that weapon is fruit of the poisonous tree and tainted by the primary illegality-the search of Rosario's residence without proper consent.

The recognition of apparent authority in Rodriguez was based upon the reasonableness of the search. Apparent authority does not require correctness on the part of law enforcement. Here, no matter how unambiguous King spoke of his authority and granted Trooper Scott consent to search, Trooper Scott knew that Stancik alleged that Rosario shot him earlier that night and accordingly did not believe Rosario to be out of town. Trooper Scott knew these facts undercut the authority asserted by King that he relied upon. Trooper Scott thus benefited from the mindset of "ignorance

is bliss" when faced with ambiguity in these circumstances. And even before commencing the search, the exit of Lacks from Rosario's residence provided further grounds to disbelieve King's authority. Trooper Scott stated that he believed Lacks was hiding in the residence, but as to King's knowledge of Lack's presence, he testified "I assumed it to be reasonable if you were in the house you would know who was in the residence." Superior Court Reproduced Record Vol. I, p. 182a. The exit of Lacks from the residence served to reinforce Trooper Scott's belief that another, i.e. Rosario, was inside the residence. Additionally, it served to question whether King had unrestrained authority that extended throughout the residence or was limited to areas that did not include where the handgun was found.

This Court's decision in Rodriguez requires more of Trooper Scott than just accepting King's invitation. Rodriguez requires an assessment of all facts known to Trooper Scott and the facts known to him created an ambiguity that went unresolved prior to law enforcement acting upon King's invitation. And for that reason, apparent authority did not exist here.

CONCLUSION

For the foregoing reasons, Mr. Rosario respectfully submits that the Petition for the Writ of Certiorari should be granted.

Respectfully submitted,

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