STATE OF MICHIGAN

IN THE MICHIGAN SUPREME COURT

APPEAL FROM THE MICHIGAN COURT OF APPEALS
MICHAEL J. TALBOT, C.J., PETER D. O'CONNELL and KIRSTEN FRANK KELLY, JJ.

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v.

LARRY GERALD MEAD,

Defendant-Appellant.

Michigan Supreme
Court No.: 156376

Court of Appeals
No.: 327881

Jackson County Circuit
Court No.: 14-004482-FH

JACKSON COUNTY PROSECUTOR
Attorney for the Plaintiff-Appellee

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DEFENDANT-APPELLANT'S SUPPLEMENTAL BRIEF ON APPEAL

*****APPENDIX*****

*****FILED VIA TRUEFILING*****

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STATEMENT OF JURISDICTION

Defendant-Appellant filed an application in this Court for leave to appeal the published opinion of the Court of Appeals *People v. Mead* (Appellant's Appendix at 8a-17a) under MCR 7.305(B). In an order dated March 28, 2018 (Appellant's Appendix at 6a), the Court directed the Clerk to schedule oral argument on whether to grant the application or take other action. The Court directed Appellant to file a supplemental brief addressing:

> (1) [W]hether *Illinois v. Rodriguez* [], should control the resolution of the question whether the police officer had lawful consent to search the backpack found in the vehicle; (2) whether the record demonstrates that the officer reasonably believed that the driver had common authority over the backpack in order for the driver's consent to justify the search; and (3) whether there are any other grounds upon which the search may be justified or the evidence may be deemed admissible.

This Court has jurisdiction under MCR 7.303(B).

STATEMENT OF QUESTION

ISSUE ONE

I. THE FOURTH AMENDMENT WAS VIOLATED BY THE WARRANTLESS SEARCH OF DEFENDANT'S BACKPACK FOLLOWING THE STOP OF A VEHICLE IN WHICH HE WAS A PASSENGER. THE COURT OF APPEALS ERRED IN NOT APPLYING *ILLINOIS v. RODRIGUEZ* AND IN HOLDING THAT A DRIVER'S CONSENT TO SEARCH A VEHICLE NECESSARILY INCLUDES A CONTAINER FOUND THEREIN. THE COURT CORRECTLY FOUND THAT POLICE LACKED A REASONABLE BELIEF THAT THE DRIVER HAD COMMON AUTHORITY OVER THE BACKPACK AND THAT NO OTHER GROUNDS JUSTIFIED THE SEARCH.

The Court of Appeals answered: No.

The Circuit Court answered: No.

Defendant-Appellant answers: Yes.

INTRODUCTION

Under United States Supreme Court precedent, Mead is allowed to contest the search (the *Rakas* decision), and if the police relied upon a belief in apparent common authority to justify the search, that belief must be *reasonable* (the *Rodriguez* decision). Even where consent to search a vehicle is given, that consent does not necessarily extend to containers (like backpacks) found within the vehicle (the *Jimeno* decision).

The Court could reject *Rodriguez*, insofar as it held that a search may be valid even when police mistakenly relied upon the apparent authority of the person granting consent. The Court can apply a *higher* standard than required under *Rodriguez*. But, if the Court adopts the apparent authority doctrine from *Rodriguez*, it must require that the belief held by the police, that the person granting consent had authority to do so, was *reasonable*. The Court cannot apply a lesser, merely subjective, standard.

On the second and third questions posed by this Court in its March 28, 2018, Order, the Court of Appeals is correct. Officer Burkart did *not* have a reasonable belief that the driver of the vehicle had any authority over the backpack. Nothing in the record indicates that any such belief existed. Officer Burkart only testified to his pre-search belief that the backpack belonged to Mead (29a). The Court of Appeals also correctly found no other ground upon which the search could be justified or the evidence deemed admissible.

STATEMENT OF FACTS

Defendant-Appellant, Larry Gerald Mead, appeared before the Jackson County Circuit Court on a controlled substance possession charge,[1] arising from the stop of a car in which Mead was a passenger and the search of Mead's backpack. A motion to suppress the evidence found in the backpack on Fourth Amendment grounds was denied. Mead was thereafter found guilty at trial and sentenced. On October 27, 2015, a motion for a directed verdict of acquittal brought on Fourth Amendment grounds was denied and Mead appealed.

On September 13, 2016, the Court of Appeals affirmed in an unpublished opinion.[2] This Court thereafter vacated that opinion and remanded for the Court of Appeals to address three questions (7a). On August 8, 2017, the Court of Appeals again affirmed, now in a published opinion.[3] Mead filed a second application with this Court. On March 28, 2018, this Court directed counsel to file a supplemental brief addressing three question (6a).

The Preliminary Exam and the Motion to Suppress

Officer Burkart and his partner stopped a car driven by Ms. Taylor (23a). An audio/video recording of the stop was made.[4] No traffic infraction was observed, but the car's plate had expired 12 days earlier (26a). Mead, the only other occupant of the car, was seen in the front seat with a backpack on his lap (23a). Burkart knew the backpack belonged to Mead because of how Mead was holding it (29a).

Officer Burkart testified:

> Q. You knew or believed it was his having seen where it was and how he was holding it, correct?
> A. I believed it was his because it was sitting on his lap, yes.
> Q. And how he was holding it, correct?
> A. Correct [29a; Exam at 19-20].

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[1] MCL 333.7403(2)(b)(i)
[2] *People v. Mead*, Unpublished Opinion of Court of Appeals (18a-19a).
[3] *People v. Mead*, 320 Mich App 613; __ NW2d __ (2017) (8a-17a).
[4] The recording was later admitted into the record as the trial concluded (TT I 108).

Taylor and Mead had no warrants; Taylor had no driver license or proof of insurance but was not arrested (23a, 26a).

Officer Burkart testified that Taylor and Mead admitted to using narcotics in the past, which caused him to suspect that drugs might be found inside the car. He decided to issue Taylor a ticket and, "Attempt to obtain consent to search the vehicle" (Exam 26a, 28a-29a). The DVD recording indicates that the officers, in a conversation they had inside their patrol car, decided to search the backpack before said admissions were made by Taylor or Mead.

Burkart observed nothing indicating the presence of a weapon or controlled substance in the car (28a). Taylor, by then outside the car, consented to a search of her person and nothing was found (24a). She consented to a search of her car and Burkart then told Mead to step out and away from the car *Id*. Mead consented to a search of his person and, again, nothing was found (24a, 29a). Mead was cooperative and compliant at the scene *Id*.

Burkart noticed that Mead left the backpack on the front passenger floorboard (24a). He never asked Mead who owned the backpack and he did not request consent to search the backpack (30a). He had no particularized suspicion regarding the backpack (28a). Asked why he searched it, he said, "[B]ecause the backpack was inside the vehicle" (32a).

In the backpack, in a large pouch, inside tobacco packaging Burkart found suspected marijuana (24a-25a). In a different pouch, inside a tobacco tin, he found, "Several individual baggies of narcotics" *Id*. When Burkart asked Mead about the tin, Burkart testified, Mead turned around, put his hands behind his back and stated, "Meth" *Id*. The suspected meth weighed 4.03 grams and it was sent to a lab (30a).

On September 30, 2014, a motion to suppress the evidence found in the backpack was denied (40a-44a). On February 20, 2015, Mead, who represented himself at trial, reargued the issue before the circuit court and it was again denied (45a-54a).

The Trial

Officer Burkart again testified that he stopped the car for a bad plate and observed the backpack on Mead's lap (82a, 84a). Burkart again conceded that he had no probable cause to search the backpack; he referenced the consent given by Taylor to search the car (101a-102a). At the time of the search, Mead was about 15 feet from both the car and officers, pursuant to their instruction (93a). The defense does not dispute that methamphetamine was found.[5]

Mead testified that the backpack belonged to him (107a). He did not dispute that methamphetamine was found in the backpack. Rather, he attempted to challenge the legality of the police search of the backpack (E.g., 107a-108a). He denied granting consent to police for the search – something the prosecution has not argued. On appeal, the defense has *not* argued that the legality of the search of the backpack was a jury question.[6]

Verdict and Appeal

Mead was found guilty by jury as charged. On May 21, 2015, he was sentenced to 2 to 10 years in prison. Mead requested an appointment of appellate counsel and the undersigned was appointed. On October 27, 2015, the defense moved for a directed verdict of acquittal, rearguing the Fourth Amendment issue. The motion was denied. (*See* 55a-73a).

On September 13, 2016, the Court of Appeals issued a per curiam unpublished opinion that affirmed the conviction.[7] The Court found that a 2007 peremptory order entered by this Court in *People v. LaBelle*,[8] "controls the outcome of this case." The Court found that the facts in *LaBelle* are "closely analogous" to the present case and held that "[t]he driver's consent included the entire

[5] The suspected marijuana was not tested and that charge was dismissed.
[6] Regarding FN 1 of the prosecution's *Answer to the Application*, which mildly complains that a reviewing court is not allowed to consider the trial transcript; We disagree. See *People v. Kaufman*, 457 Mich 266 (1998) (giving reviewing courts wide discretion over which parts of the record to consider in the context of a suppression motion).
[7] *See* FN 2, supra., *People v*. *Mead*, Unpublished Opinion of Court of Appeals.
[8] *People v*. *LaBelle*, 478 Mich 891; 732 NW2d 114 (2007)

passenger compartment … including the backpack."[9] The Court wrote, "this Court is not free to overrule decisions of the Michigan Supreme Court." (*See* 18a-19a).

Mead filed an application with this Court seeking leave to appeal. On April 14, 2017, this Court entered an order vacating the Court of Appeals judgment, and stating:

> In lieu of granting leave to appeal, we VACATE the judgment of the Court of Appeals, and we REMAND this case to that court for consideration of: (1) whether this Court's peremptory order in *People v. LaBelle*[] is distinguishable; (2) whether the record demonstrates that the police officer reasonably believed that the driver had common authority over the backpack in order for the driver's consent to justify the search, see *Illinois v. Rodriguez*, []; and (3) whether there are any other grounds upon which the search may be justified.[10]

The Court did not retain jurisdiction.

On August 8, 2017, the Court of Appeals published an opinion authored by Judge O'Connell, finding the facts in *LaBelle* were not distinguishable from the present case, seemingly refused to apply *Rodriguez*, and again affirmed.[11]

Mead filed an application with this Court seeking leave. On March 28, 2018, this Court issued an order directing the Clerk "to schedule oral argument on whether to grant the application or take other action," and directing Appellant to file a supplemental brief addressing:

> (1) [W]hether *Illinois v. Rodriguez* [], should control the resolution of the question whether the police officer had lawful consent to search the backpack found in the vehicle; (2) whether the record demonstrates that the officer reasonably believed that the driver had common authority over the backpack in order for the driver's consent to justify the search; and (3) whether there are any other grounds upon which the search may be justified or the evidence may be deemed admissible.[12]

Defendant-Appellant now responds to the three questions posed in this Court's March 28, 2018, Order and respectfully asks the Court to reverse the August 8, 2017, published opinion of the Michigan Court of Appeals.

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[9] *People v. Mead*, supra, Unpublished Opinion of Court of Appeals (18a-19a).
[10] *People v. Mead*, supra, Michigan Supreme Court Order of 2017 (7a).
[11] *People v. Mead*, supra, Published Opinion of Court of Appeals (8a-17a).
[12] *People v. Mead*, Michigan Supreme Court Order of 2018 (6a)

ARGUMENT

ISSUE ONE

I. THE FOURTH AMENDMENT WAS VIOLATED BY THE WARRANTLESS SEARCH OF DEFENDANT'S BACKPACK FOLLOWING THE STOP OF A VEHICLE IN WHICH HE WAS A PASSENGER. THE COURT OF APPEALS ERRED IN NOT APPLYING *ILLINOIS v. RODRIGUEZ* AND IN HOLDING THAT A DRIVER'S CONSENT TO SEARCH A VEHICLE NECESSARILY INCLUDES A CONTAINER FOUND THEREIN. THE COURT CORRECTLY FOUND THAT POLICE LACKED A REASONABLE BELIEF THAT THE DRIVER HAD COMMON AUTHORITY OVER THE BACKPACK AND THAT NO OTHER GROUNDS JUSTIFIED THE SEARCH.

I. Grounds and Issue Preservation.

The issues before this Court were preserved before trial (September 30, 2014) and re-argued after trial (October 27, 2015). The Opinion on appeal regards principles often applied in police searches and will impact thousands of citizens for years into the future.

II. Introduction

This appeal has always invoked the Fourth Amendment to the United States Constitution. This Court has held that, absent "compelling reasons," the Michigan Constitution at art. 1, §11 provides the same protection as the Fourth Amendment.[13] Both prohibit unreasonable searches and seizures.[14] Searches conducted outside the judicial process are *per se* unreasonable, "subject only to a few specifically established and well-delineated exceptions."[15]

The Court of Appeals held that a driver's consent to search her car includes containers found therein, even where police had no *reasonable belief* in the authority of the driver over the container that is searched, and where no other exception to the warrant requirement applies. We respectfully disagree. The Court of Appeals erred in concluding that *Rodriguez* does not require such a belief before a lawful search may occur.

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[13] *People v. Levine*, 461 Mich 172, 178; 600 NW2d 622 (1999)
[14] US Const., Am. IV; Const. 1963, art. 1, § 11. See *Illinois v. McArthur*, 531 US 326; 121 SCt 946; 148 LEd 2d 838 (2001)
[15] *Katz v. United States*, 389 US 347, 357; 88 SCt 507; 19 LEd 2d 576 (1967)

III. On the First Question Posed by This Court: The Court of Appeals Misapplied *Rakas v. Illinois* and Failed to Apply the Controlling Case, *Illinois v. Rodriguez.*

In *Mead,* the Court of Appeals held, "Michigan law provides that a passenger in a motor vehicle does not have standing to contest the search of a third party's vehicle."[16] That holding cited to and mirrors the holding in this Court's peremptory order in *LaBelle.* Citing *Rakas v. Illinois*,[17] a 1978 decision of the United States Supreme Court, this Court in *LaBelle* wrote, "Because the stop of the vehicle was legal, the defendant, a passenger, lacked standing to challenge the subsequent search of the vehicle."

The *Rakas* opinion, however, does not support either holding and, as shown below, has been a source of widespread confusion.

Rakas v. Illinois

In *Rakas*, the United States Supreme Court found that passengers *can* challenge a search of a vehicle, its interior, or containers found therein, if they demonstrate, "a legitimate expectation of privacy in the invaded place."[18] The expectation cannot be merely subjective, it must be objectively reasonable based upon society's willingness to recognize the expectation.[19] Factors to consider include whether the person owns the seized property, whether the person may exclude others, and control over the property.[20]

Contrary to the holding in *Mead* and in the *LaBelle* order, *Rakas* recognized passenger standing and definitively rejected only the concepts of "automatic standing" or "vicarious standing." The

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[16] *People v. Mead*, supra., 320 Mich App at 618. This reading of *Mead* reappears in a subsequent decision, *People v. Wood*, 321 Mich App 415; 910 NW2d 364 (2017) (In *Mead*, "this Court ultimately concluded that defendant lacked standing to challenge the validity of the search).

[17] *Rakas v. Illinois*, 439 US 128; 99 SCt 421; 58 LEd2d 387 (1978)

[18] *Id.* at 143.

[19] *Id.* at 143 n.12. This standard was enunciated in *Katz v. United States*, supra., 389 US at 348, where the Court held that the Fourth Amendment protects individuals from government intrusions where a reasonable "expectation of privacy" exists. There, a private phone conversation in a phone booth which the FBI listened to using an electronic listening device.

[20] *Rakas*, 439 US at 143 n.12.

defendants in *Rakas* had no legitimate expectation of privacy in the evidence at issue during their trial because, *unlike Mead*, the *Rakas* defendants expressly *denied* that the evidence in question belonged to them.

Lower courts and state courts throughout the United States have, over time, weakened the holding in *Rakas* to the point where it has come to be cited for a holding that appears nowhere in the opinion – that where a vehicle stop is legal, and the driver consents to the search, the passenger lacks standing to object.

Byrd v. United States

Rakas is at the center of a unanimous 2018 decision of the Supreme Court, *Byrd v. United States*,[21] which discusses said misunderstanding. The specific holding in *Byrd* – that the mere fact that a driver in lawful possession or control of a rental car is not listed on the rental agreement will not defeat his or her otherwise reasonable expectation of privacy in the vehicle – is inapplicable to the case *sub judice*.

But in reaching its holding, the Court addressed two subjects which are applicable to this case. One, although no, "single metric or exhaustive list of relevant considerations" exists, a legitimate expectation of privacy, "must have a source outside of the Fourth Amendment, either by reference to concepts of real or personal property law or to understandings that are recognized and permitted by society."[22]

Relevant to our discussion of *Rakas*, the *Byrd* Court wrote:

> The Government bases its claim that an unauthorized driver has no privacy interest in the vehicle on a misreading of *Rakas*. There, the Court disclaimed any intent to hold that passengers cannot have an expectation of privacy in automobiles, but found that the passengers there had not claimed "any legitimate expectation of privacy in the areas of the car which were searched." [Emphasis added].[23]

The same misreading of *Rakas* underlies the Court of Appeals' opinion in *Mead*.

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[21] *Byrd v. United States*, __US__, No. 16-1371, 2018 WL 2186175, at *3 (U.S. May 14, 2018)
[22] *Id*., citing *Rakas v. Illinois,* 439 US at 144, n. 12
[23] *Id*., citing *Rakas v. Illinois,* 439 US at 150, n. 17

Illinois v. Rodriguez

Twelve years after *Rakas*, the Court addressed the concept of apparent authority in *Illinois v. Rodriguez*.[24] In *Rodriguez*, a woman told police that her boyfriend hit her at their apartment where she lived and kept her possessions. The police accompanied her to the apartment and watched her use a key to enter it. Inside, drugs were in plain view and the boyfriend was arrested. Later, police learned that the woman had no possessory interest in the apartment.

The Court upheld the search after determining that three forms of consent can support a search: (1) If police obtain "voluntary consent" from the *actual owner* of the property, (2) If police obtain consent from a third party who in fact possesses "*common authority*" over the property, or (3) If police obtain consent from a third party whom police *reasonably believed* possessed authority over the property even if mistaken in that belief.[25]

"Common authority" is defined in ***Rodriguez*** as "mutual use of the property [among persons] generally having joint access or control for most purposes."[26] In analyzing the issue, *Rodriguez* states that reviewing courts should ask, "would the facts available to the officer at the moment … warrant a man of reasonable caution in the belief that the consenting party had authority over the premises?"[27]

Florida v. Jimeno

One year later, in *Florida v. Jimeno*, the Court held that consent to search a vehicle does *not* necessarily extend to closed containers found in the vehicle.[28] In *Jimeno*, the defendant consented to a police search of *his car* for drugs. The issue on appeal addressed the scope of that consent.

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[24] *Illinois v. Rodriguez,* 497 US 177, 183-189; 110 SCt 2793; 111 LEd2d 148 (1990)
[25] *Id.* at 181–182, 186–189. *See also United States v. Purcell*, 526 F3d 953, 962-963 (6th Cir., 2008), *People v. Goforth,* 222 Mich App 306, 311-312; 564 NW2d 526 (1997)
[26] *Id*. at 181, 110 SCt 2793
[27] *Id*. (quotations and citations omitted).
[28] *Florida v. Jimeno,* 500 US 248, 251-252; 111 S Ct 1801; 114 LEd2d 297 (1991)

Nothing in the record indicated that the evidence, a paper bag found on the ground, belonged to anyone but the driver, the defendant.[29]

The Court phrased the inquiry as, "what would the typical reasonable person have understood by the exchange between the officer and the suspect?"[30] The Court contrasted the facts in *Jimeno* with a hypothetical:

> It is very likely unreasonable to think that a suspect, by consenting to the search of his trunk, has agreed to the breaking open of a locked briefcase within the trunk, but it is otherwise with respect to a closed paper bag.[31]

In *Jimeno*, the *defendant* consented to the search of his own car. In the case *sub judice*, the officer testified that Mead had his arms around the backpack, he was never asked to give consent to any search, and the officer did not describe the driver as showing any interest in, or awareness of, the backpack.

***Rodriguez* Must Be Applied or a Higher Standard Adopted**

Mead raised a Fourth Amendment claim in the trial court and a supplemental state law claim. This Court is not required to adopt the third form of consent from *Rodriguez* – an inaccurate but reasonable belief of common authority– the Court may choose to provide *more protection* than required under the United States Constitution.

This Court is, however, required to provide *no less* protection than exists under the Fourth Amendment as interpreted by the United States Supreme Court. That means:

- Passengers in vehicle searches may have reasonable expectations of privacy ("standing") which society recognizes (*Rakas* and *Byrd*);
- If the consent exception to the warrant requirement is relied upon, the state must show that police obtained consent from a person who *in fact* had authority (sole or common)

[29] *Id*.
[30] *Id.*
[31] *Id.*

over the item searched *or*, if apparent authority is relied upon, police belief in the apparent authority must be fact-driven and *reasonable* (*Rodriguez*), and

- Driver consent to search a vehicle does not necessarily extend to containers found in the vehicle (*Jimeno*).

If this Court adopts the third form of consent from *Rodriguez* – apparent common authority – the belief is required to be *reasonable*.

The Framers included the Supremacy Clause in the Constitution and ordained that there be "one Supreme Court" to harmonize what Justice Story termed "jarring and discordant judgments" of lower courts, giving rise to "public mischiefs."[32]

State courts and lower federal courts share in the obligation to interpret the U.S. Constitution.[33] State courts are *not* required to defer to constitutional positions adopted by federal circuit courts, including those in which they are geographically situated.[34] But *Illinois v. Rodriguez* is a United States Supreme Court decision and, on all issues addressed by the Supreme Court, state and lower courts are obligated to follow.[35]

In 2004, in *Abela v. Gen. Motors Corp.*,[36] this Court correctly recognized that Michigan courts

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[32] 4 U.S. Const. art. VI, cl. 2 (stating that "[t]his Constitution . . . shall be the supreme Law of the Land"). *See Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 416 (1821) (Mar (1 Wheat.) at 347–48 (Story, J.) (stressing need for uniformity "throughout the whole United States, upon all subjects within the purview of the constitution" and condemning disuniformity as "truly deplorable")

[33] *See Arizona v. Evans*, 514 US 1, 8 (1995) ("State courts . . . are not merely free to— they are bound to—interpret the United States Constitution")

[34] *United States ex rel. Lawrence v. Woods*, 432 F.2d 1072, 1076 (7th Cir. 1970) ("because lower federal courts exercise no appellate jurisdiction over state tribunals, decisions of lower federal courts are not conclusive on state courts")

[35] *James v. City of Boise, Idaho*, 136 SCt 685, 685-687; 193 LEd2d 694 (2016) (on Supremacy Clause), *Elmendorf v. Taylor*, 23 US (10 Wheat.) 152, 160 (1825) ("[T]he construction given by this Court to the constitution and laws of the United States is received by all as the true construction"), See also, Randy J. Kozel, *The Scope of Precedent*, 113 Mich. L. Rev. 179, 203 (2014) (noting that "the American federal system" is one that "treat[s] vertical precedent as absolutely binding" and that "[w]here a Supreme Court holding applies to a pending dispute, an inferior court has only one available course of action").

[36] *Abela v. Gen. Motors Corp.*, 469 Mich 603, 606–07; 677 NW2d 325, 327 (2004)

are bound to follow a decision of the United States Supreme Court construing the United States Constitution.[37]

Applying *Rodriguez* – the Court of Appeals Erred in Extending the Scope of the Driver's Consent to Include the Backpack Found in the Car and In Not Requiring that the Officer Possess a Reasonable Belief that the Driver Had Apparent Authority Over the Backpack.

Under United States Supreme Court precedent, Mead had standing to contest the search (*Rakas*), if apparent authority had been relied upon it must be reasonable (*Rodriguez*), and consent to search, even from the owner and driver of a vehicle, does not necessarily extend to containers found therein (*Jimeno*).

This Court can reject the third form of consent from *Rodriguez* – reliance on an inaccurate but reasonable belief of authority – and apply a *higher* standard before a consent search may be based upon apparent authority. In the case *sub judice*, the record does not support a finding that police had any *reasonable belief* that the driver shared common authority over the backpack. On this, the Court of Appeals indicates it would have *agreed* with Mead, if it had concluded that *Rodriguez* applied to the search of the container.[38]

No one has claimed, and the record does not support, finding either of the first two forms of consent articulated in *Rodriguez*: Police did not obtain consent from the owner of the backpack (Mead) and the driver possessed no authority over the backpack.

Because not one of the three forms of consent articulated in *Rodriguez* is present, the consent exception to the warrant requirement is inapplicable. This application of *Rodriguez* is consistent with United States Supreme Court precedent that defines an object that conceals its contents from

[37] Indisputably, the Fourth Amendment was made applicable to the states through the Fourteenth Amendment in *Mapp v. Ohio,* 367 US 643; 81 SCt 1684; 6 LEd2d 1081 (1961)

[38] *People v. Mead*, supra., 320 Mich App at 619–20. The Court of Appeals has applied the *Rodriguez* framework in earlier decision. *See People v. Grady*, 193 Mich App 721; 484 NW2d 417 (1992) (discussed below) and *People v. Mims*, 688 NW2d 79 (Mich 2004) (prosecuting attorney directed to apply the *Rodriguez v. Illinois* framework)

plain view a "container," which can be endowed with protection under the Fourth Amendment.[39] Here, containers within a container. It is also consistent with caselaw the Court of Appeals has developed on the consent exception, requiring consent to be, "unequivocal, *specific*, and freely and intelligently given."[40] Not even the prosecution, in the present case, claims the driver gave specific consent to search the backpack.

The *Rodriguez* decision has been cited by the Michigan Court of Appeals in multiple cases involving the search of a premises.[41] But few reported Michigan decisions address the search of containers belonging to a defendant but located in vehicles driven by a third-party. In one, a 1976 opinion of the Court of Appeals, the reasoning is consistent with the defense argument in the case *sub judice*.[42]

Cases Which are On-Point

Several non-binding but persuasive cases from other jurisdictions can be found.

United States v. Jaras, 86 F.3d 383 (5th Cir. 1996) is on-point and offers a detailed analysis. In 1994, Officer Mitchell stopped a swerving car driven by Ramon Salazar. Appellant, Jose Jaras, was the passenger. The officer had Salazar exit the car and questioned him. He became suspicious

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[39] *United States v. Ross,* 456 US 798, 822-823 (1982), *New York v. Belton, supra.,* 453 US at 460 n.4 (1981) ("'Container' here denotes any object capable of holding another object[, such as] closed or open glove compartments, consoles, or other receptacles located anywhere within the passenger compartment, as well as luggage, boxes, bags, clothing, and the like.")

[40] *People v. Mahdi,* 317 Mich App 446, 460-461; 894 NW2d 732, 742 (2016) (emphasis added), citing *Lavigne v. Forshee,* 307 Mich App 530, 538; 861 NW2d 635 (2014) citing *People v. Frohriep,* 247 Mich App 692, 702; 637 NW2d 562 (2001)

[41] *Westland v. Kodlowski*, 298 Mich App 647, 667; 828 NW2d 67, 77 (2012), rev'd in part, appeal denied in part sub nom 495 Mich 871 (2013) (*Rodriguez* applied to withdrawal of consent to search a home on domestic violence call), *People v. Brown*, 279 Mich App 116, 132; 755 NW2d 664, 678 (2008) (*Rodriguez* applied to a search of a computer not located in defendant's home but the separate home of a co-owner), *People v. Goforth*, 222 Mich App 306, 316; 564 NW2d 526, 531 (1997) (*Rodriguez* applied to parent's consent to search child's bedroom) (Opinion by J. Marman), *People v*. *Grady*, 193 Mich App 721; 484 NW2d 417 (1992) (*Rodriguez* applied to search of garage)

[42] *People v. Mazzulla*, 71 Mich App 418, 420–22; 248 NW2d 567, 568 (1976)

that Salazar and Jaras were transporting narcotics. Salazar consented to a search of the car. No evidence was found in the car's interior. In the car's trunk the officer found a garment bag and two suitcases.

The opinion states:

> Salazar claimed ownership of the garment bag and stated that the suitcases belonged to Jaras. Jaras, who had come to the rear of the vehicle at Officer Mitchell's instruction, did not respond, and Officer Mitchell informed him that Salazar had given him permission to search the car. The officer searched the garment bag and found no incriminating evidence. He then picked up the suitcases, noted that they were heavy, and asked Jaras what was inside them. Jaras said that he didn't know. The officer opened the suitcases and discovered a large quantity of what he believed was marijuana. He arrested both Salazar and Jaras, and seized the suitcases.

Jaras moved to suppress the marijuana found in his suitcases. The Court held that a consent to search could not be inferred from Jaras' silence because the officer did not expressly or implicitly request Jaras' consent prior to the search. Eighteen years later, in *United States v. Iraheta*, 764 F.3d 455 (5th Cir. 2014), the Fifth Circuit, citing *Jaras*, suppressed another search very similar to the search now before this Court, again with a helpful analysis.

In *United States v. Munoz,* 590 F.3d 916 (8th Cir.2010), a driver consented to a search of his vehicle and the officer found a passenger's backpack. The passenger was present but did not independently consent to search his backpack. The Eighth Circuit held the search of the backpack was invalid because the driver had no common authority over the backpack and his consent to search did not include the backpack. *Id.* at 923.

A variety of state courts have reached similar conclusions in cases involving facts which are analogous to those found in the case *sub judice*.[43]

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[43] *State v*. *Caulfield*, 2013 Ohio 3029; 995 N.E.2d 941, 947 (driver's consent to search vehicle did not extend to passenger's purse), *United States v. Botchway*, 433 F. Supp. 2d 163, 171 (D. Mass. 2006) (passenger who gave valid consent to search an automobile in which defendant was also a passenger, did not have actual or apparent authority to consent to a search of defendant's closed briefcase. The court rejected the government's "theory of assumption of risk"), *State v*. *Frank*, 650 N.W.2d 213 (Minn. Ct. App. 2002) (driver consent to search vehicle did not extend to passenger's bag found in the trunk).

IV. On the Second Question Posed by This Court: The Officer Did Not Reasonably Believe that the Driver Had Any Authority Over the Backpack.

The Court of Appeals wrote that if *Rodriguez v. Illinois* were the law in Michigan, the defense claim, that Officer Burkart had no reasonable belief that Taylor (the driver) had common authority over the backpack, had merit. That is the only finding that could be made consistent with the law of consent searches. In short, the only plausible answer to the second question posed by this Court in its March 28, 2018, order is "no."

Moreover, the prosecution has not argued that Officer Burkart had any belief that the driver had any authority over the backpack. Nor did Officer Burkart claim that belief when he testified at any hearing held in this matter.

People v. Mead (On Remand)

The Court of Appeals opinion appears to have been designed to invite review by this Court, as it found its result dictated by *LaBelle*, but then carefully set out that on facts like those found in the present case:

> Multiple federal circuit courts and other state courts have applied *Rodriguez*'s common-authority framework to evaluate a third party's consent to search a container inside a vehicle. Those foreign courts have determined that officers violate person's Fourth Amendment rights when searching a bag in a car when officers could not have a reasonable belief that a third party had common authority to consent to the search.
>
> ***
>
> If *Rodriguez* and its extension to searches of containers in automobiles as applied in foreign courts were the law in Michigan, an argument that Officer Burkart lacked a reasonable belief that Taylor had common authority over the backpack would have some merit. A backpack is a container used to store personal items, which suggests individual, rather than common, ownership.[44]

The Court found, "The relationship between Mead and Taylor suggests that Taylor would not have had authority over Mead's personal items." (14a). Both said they met for the first time that night. *Id*. Officer Burkart testified that Mead, "had the backpack on his lap with his arms resting

[44] *People v. Mead*, supra., 320 Mich App 613 (Citations omitted) (13a-14a).

on either side at the time of the stop." *Id*. The video shows the backpack on the passenger side of the vehicle. *Id*. Burkart testified that he believed the backpack belonged to Mead. Burkart did he obtain anyone's consent to search the backpack. *Id*. We would add that Burkhart testified that he had no "particularized suspicion" regarding the backpack (28a, 32a).

Under the *Rodriguez* framework, the person granting consent must possess actual authority over the container when granting consent (either solely or in common), or the officer conducting the search must reasonably believe that the person granting consent had authority over the container, i.e., they possessed apparent authority.[45] As discussed earlier in this brief, common authority rests on mutual use of the property by persons who generally have joint access or control over the property for most purposes.

From the record, it is not clear whether Taylor had taken any notice of the backpack. The burden of establishing common authority rests upon the State. On the basis of this record, that cannot be done.

Mere Acquiescence Does Not Equal Consent

Instead, both the prosecution and the Court of Appeals have stood on language in the *LaBelle* order which they interpret to mean that Mead had no "standing" to challenge the search.

The *LaBelle* order cites a case in which the defendant tried to assert a Fourth Amendment claim over contraband he tossed onto the ground while fleeing police.[46] Reading this language in *LaBelle* to mean that Mead was required to assert Fourth Amendment claims with the police at the side of a road in the middle of the night, upon penalty of otherwise waiving or forfeiting the claim, ignores precedent and would be bad public policy. The defense does not believe that this Court intended to convey that meaning in *LaBelle*.

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[45] *Illinois v. Rodriguez,* 497 US at 183-189, *United States v. Purcell*, supra., 526 F3d at 962-963, *People v. Goforth,* supra., 222 Mich App at 311-312 (doctrine applied to search of a premises)
[46] *People v. Mamon,* 435 Mich 1, 6-7; 457 NW2d 623 (1990)

Fourth Amendment jurisprudence requires the *police* to obtain consent and the burden is on the *state* to show consent by clear and convincing evidence.[47] The burden is never on the defendant to show that he objected to, obstructed, or tried to prevent the search. It would invert the protections of the Fourth Amendment to require a person to affirmatively deny consent in order to enjoy their right to be free from unconstitutional searches.[48] The United States Supreme Court has held that a mere showing that the defendant submitted to a claim of lawful authority by police does not meet the prosecution's burden of proof.[49]

As an issue of public policy, requiring citizens to assert legal claims with police at the side of a road will, in some of those interactions, become potentially dangerous for the citizen and police. Citizens should be encouraged to cooperate with police when pulled over and reserve their legal claims for an appropriate time. The fact that the defendant in the case *sub judice* left his backpack in the car is consistent with Officer Burkart's testimony that he ordered Mead out of and away from the car. For reasons of safety, police typically want the hands of citizens free of objects during traffic stops.

V. On the Third Question Posed by This Court: No Other Grounds Exist Upon Which the Search May Be Justified or the Evidence May Be Deemed Admissible.

We agree with the Court of Appeals as it wrote:

> Finally, the Michigan Supreme Court directed us to consider whether other grounds justified the search of the backpack. We conclude that, under the facts of the case presented to this panel, no other grounds justified the search. (Opinion at 14a).

The Court then discussed exceptions to the warrant requirement, finding none applied. The defense will adopt or supplement their findings and holdings.

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[47] *People v. Roberts*, 292 Mich App 492, 503; 808 NW2d 290 (2011) (burden is on the prosecution to prove by clear and positive evidence that the consent was unequivocal and specific, freely and intelligently given), *See also People v. Kaigler*, 368 Mich 281; 118 NW2d 406 (1962), *Lavigne v. Forshee,* 307 Mich App at 538 (2014) (mere non-verbal acquiescence does not convey consent to search)

[48] *See United States v. Perez*, 37 F.3d 510, 516 (9th Cir. 1994)

[49] *Florida v. Royer*, 460 US 491; 103 SCt 1319; 75 LEd2d 229 (1983)

Abandoned Property

A warrantless search of abandoned property does not violate the Fourth Amendment.[50] By definition, a person lacks an expectation of privacy in abandoned property. A person is considered to have abandoned property when, "he voluntarily discarded, left behind, or otherwise relinquished his interest in the property so that he could no longer retain a reasonable expectation of privacy in the property at the time of the search."[51]

The Court found, "Mead demonstrated a possessory interest in the backpack by holding it on his lap while in the vehicle. He did not abandon the backpack by leaving it inside the vehicle because leaving a bag inside the vehicle in which you are riding does not equate to discarding, leaving behind, or relinquishing ownership in the item." (Opinion at 15a).

A Protective or Terry Search

A police officer may conduct a protective or *Terry* search of the passenger compartment of a vehicle without a warrant, "if the police officer possesses a reasonable belief based on 'specific and articulable facts which, taken together with the rational inferences from those facts, reasonably warrant' the officer in believing that the suspect is dangerous and the suspect may gain immediate control of weapons," … "limited to those areas in which a weapon may be placed or hidden."[52]

As the Court of Appeals found, "The protective or *Terry* search exception does not apply here. At no point did Officer Burkart testify that he had a reasonable belief that Taylor or Mead could gain immediate control of a weapon inside the vehicle or testify that he believed his safety or the safety of others was in danger, and the prosecution did not cite this exception as a basis for the search." (Opinion at 15a).

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[50] *People v. Rasmussen*, 191 Mich App 721 at 725; 478 NW2d 752 (1991), See Opinion at 15a.
[51] *Id.* at 726–727, 478 NW2d 752
[52] *Michigan v. Long*, 463 US 1032, 1049; 103 SCt 3469; 77 LEd2d 1201 (1983), quoting *Terry v. Ohio*, 392 US 1, 21; 88 SCt 1868; 20 LEd2d 889 (1968)

Searches Incident to Arrest

A warrantless search incident to arrest may be conducted, "whenever there is probable cause to arrest," defined as, "information demonstrating" "'a probability or substantial chance' … that an offense has occurred and that the defendant has committed it."[53] An officer "may search a vehicle incident to a recent occupant's arrest only if the arrestee is within reaching distance of the passenger compartment at the time of the search or it is reasonable to believe the vehicle contains evidence of the offense of arrest."[54]

There is no reason to believe that evidence relevant to the crime of arrest will be found in a vehicle in the case of civil infractions or driving without a license.[55] And, "[J]ustifying the arrest by the search and at the same time the search by the arrest, just will not do."[56] For example, a "search of a container cannot be justified as being incident to an arrest if probable cause for the contemporaneous arrest was provided by the fruits of that search."[57]

As the Court of Appeals found:

> …Officer Burkart stopped the vehicle because of an expired license plate. It is unclear how the vehicle could contain evidence of an expired license plate. Officer Burkart repeatedly testified that he had no intent to arrest Taylor for the infraction. Additionally, Officer Burkart testified that Mead and Taylor admitted using narcotics. But he did not testify that drug use was the basis for the stop of the vehicle, that either admitted possessing drugs that night, that either admitted using drugs that night, or that either exhibited signs of being under the influence of narcotics. Upon viewing the video of the traffic stop, it does not appear that Taylor or Mead are within reaching distance of the backpack or passenger compartment of the vehicle at the time of the search. Therefore, Officer Burkart lacked probable cause for a lawful arrest as is required to permit a search incident to arrest. [Opinion at 15a].

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[53] *Id*. at 751, 752; 854 NW2d 223

[54] *People v*. *ier*, 295 Mich App 582, 584; 815 NW2d 154 (2012), quoting *Arizona v*. *Gant*, 556 US 332, 351; 129 SCt 1710; 173 LEd2d 485 (2009)

[55] *Tavernier*, 295 Mich App at 586

[56] "'[I]t is axiomatic that an incident search may not precede an arrest and serve as part of its justification,'" *Smith v. Ohio,* 494 US 541, 543; 110 SCt 1288; 108 LEd2d 464 (1990)

[57] *People v*. *Champion*, 452 Mich 92, 116–117; 549 NW2d 849 (1996)

In the *LaBelle* order, this Court found that the search incident to arrest exception applied.[58] But the Order relied upon an interpretation of the old "*Belton* rule," and the *Belton* decision has been reversed.[59]

The Automobile Exception

Police may also search a vehicle or a container within a vehicle without a warrant if they have probable cause to believe that the vehicle or container, "contains articles that the officers are entitled to seize."[60] Probable cause exists if the totality of the circumstances demonstrates, "a substantial basis for concluding that a search would uncover evidence of wrongdoing" and, "a fair probability that contraband or evidence of a crime will be found in a particular place."[61]

As the Court of Appeals found:

> The record in Mead's case does not contain evidence that Officer Burkart had probable cause to search the backpack. Again, Officer Burkart testified that Mead and Taylor admitted to using narcotics. But he did not testify that drug use was the basis for the stop of the vehicle, that either admitted possessing or using drugs that night, that he believed the backpack would contain narcotics, or that either exhibited signs of being under the influence of narcotics. And again, the prosecution did not cite this exception as a basis for the search. [Opinion at 16a].

And as we noted in briefing below, this Court has rejected the idea that a history of drug use is sufficient to provide law enforcement with probable cause to conduct a warrantless search[62] as

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[58] *LaBell,* supra., 732 NW2d at 114-115

[59] *Arizona v. Gant,* supra., 556 US at 351, reversing *New York v. Belton,* 453 US 454, 540; 101 SCt 2860; 69 LEd2d 768 (1981). *Gant* applies retroactively under *Griffith v. Kentucky,* 479 US 314, 328; 107 SCt 708, 93 LEd2d 649 (1987)

[60] *People v. Garvin*, 235 Mich App 90, 101; 597 NW2d 194 (1999), quoting *People v. Armendarez*, 188 Mich App 61, 71–72; 468 NW2d 893 (1991). See also *People v. Bullock*, 440 Mich 15, 24; 485 NW2d 866 (1992)

[61] *Garvin*, 235 Mich App at 102; 597 NW2d 194 (quotation marks, citations, brackets and ellipses omitted). *See also Maryland v. Dyson,* 527 US 465, 466; 119 S Ct 2013; 144 LEd2d 442 (1999), *People v. Kazmierczak,* 461 Mich 411, 418; 605 NW2d 667 (2000), and *People v. Beuschlein,* 245 Mich App 744, 750; 630 NW2d 921 (2001) (defining the term "probable cause.")

[62] In *People v. Hilber,* 403 Mich 312, 325-26; 269 NW2d 159 (1978), this Court held, "Evidence of a person's past use of marijuana would not alone furnish probable cause to stop him on the street and search him for marijuana. Nor would it alone justify issuance of a warrant to search him, his residence or automobile." This part of *Hilber* was not abrogated in *Kazmierczak, supra*.

have other jurisdictions.[63]

Inventory Searches

An inventory search is a, "well-defined exception to the warrant requirement."[64] "[A]n inventory search," however, "must not be a ruse for a general rummaging in order to discover incriminating evidence."[65] Rather, the search, "protect[s] an owner's property while it is in the custody of the police, to insure against claims of lost, stolen, or vandalized property" and "guard[s] the police from danger."[66] The search must be conducted reasonably,[67] in good faith,[68] and pursuant to standardized police procedures "designed to produce an inventory," including procedures that "regulate the opening of containers found during inventory searches."[69]

The Court of Appeals correctly found that the search of the backpack was a search for evidence of a crime, not an inventory search. Officer Burkart testified about inventory searches for the first time at trial, saying that he always searches vehicles to, "check for valuables or any damage to the vehicle, anything that may be in there" whenever he impounds a vehicle. However, as the Court of Appeals found:

> Burkart offered no further explanation of police department policies, did not explain department policy for the search of a container, and did not explain how his search complied with department policy. Therefore, we lack evidence to determine that he conducted a proper inventory search. [Opinion at 16a].

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[63] *State v. Swearingen*, 131 Ohio App 3d 124; 721 NE2d 1097, 1102 (1999) (calling "ludicrous" the inference that someone who used drugs in the past will still be using drugs because it would make the mere claim of past drug sufficient forevermore to satisfy the requirement of probable cause). *See also, State v. Barker*, 271 Or App 63, 69; 348 P3d 1138 (2015) (defendant's history of drug use does not provide police with reasonable suspicion to stop "let alone probable cause to search or arrest").

[64] *Colorado v. Bertine*, 479 US 367, 371; 107 SCt 738; 93 LEd2d 739 (1987)

[65] *Florida v. Wells*, 495 US 1, 4; 110 SCt 1632; 109 LEd2d 1 (1990). See also *People v. Green*, 260 Mich App 392; 677 NW2d 363 (2004)

[66] *Bertine*, supra., 479 US at 372

[67] *Id.* at 374

[68] *Id.*

[69] *Wells*, supra., 495 US at 4. See also *People v. Poole*, 199 Mich App 261, 266; 501 NW2d 265 (1993)

The Inevitable Discovery Doctrine

"The inevitable-discovery rule permits the admission of evidence obtained in violation of the Fourth Amendment if the prosecution establishes by a preponderance of the evidence that the information inevitably would have been discovered through lawful means."[70] The exception does not apply. The prosecution advanced no argument that the police would have inevitably discovered the contents of the backpack. (Opinion at 16a).

VI. *LaBelle* Is Distinguishable from the Case *Sub Judice*

The Court's March 28, 2018, order designates this a "supplemental brief" to the application. The order did not direct briefing on the subject of whether *LaBelle* is distinguishable from the case *sub judice*, but the topic consumes the lion's share of the application, blaming counsel for not distinguishing the two cases, and there is one respect in which Mr. Mead is correct – Mead had his arms wrapped-around the backpack and LaBelle did not.

In both cases, the investigating officer found the backpack on the floor near the front passenger seat. In both cases, the officer understood that the backpack belonged to the defendants who had sat in said seat. But Mead had been seen with his arms on the backpack, which further established his ownership or control of the backpack.

The materiality of said fact is arguable. In *LaBelle,* that the backpack belonged to the defendant does not appear to have been disputed, but passenger "standing" was denied. In both decisions, the search followed a lawful vehicle stop, and in both the reviewing court held, we believe erroneously, that the driver's consent to a search of the vehicle included the container. That was the context in which counsel described the two cases as "indistinguishable."

The defense agreed that *LaBelle* was "indistinguishable" from this case long before appellate counsel was appointed. Trial counsel agreed on the record that the cases are indistinguishable and

[70] *People v. Mahdi*, supra., 317 Mich App at 469

Mead, representing himself at trial, took that position (76a-78a, 107a-108a). Rather than changing the defense position on appeal, we argued that the *LaBelle* peremptory order was incorrect or had to be reevaluated in light of new law. The fact remains, there is a factual difference between the two cases.

VII. Conclusion

Because the warrantless search did not fit within any exception to the warrant requirement it was unreasonable. Any claim that it is unduly burdensome to expect warrant requests arising from roadside investigations was rejected by the United States Supreme Court in 2013.[71] "It is the duty of the courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon. Their motto should be *obsta principiis.*"[72] Defendant is entitled to reversal of the denial of his suppression motion.

SUMMARY AND RELIEF REQUESTED

WHEREFORE, Appellant, Larry Gerald Mead, through counsel, Michael A. Faraone, thanks this Court for its time and for the reasons set forth herein, and in Mr. Mead's in pro per application, asks the Court to grant leave to appeal.

Respectfully submitted,
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[71] *Missouri v. McNeely*, 569 US 141, 133 SCt 1552; 185 LEd2d 696 (2013)(Exigent circumstance exception to warrant requirement not allowed for blood tests where drunk driving is suspected).
[72] *Boyd v. United States*, 116 US 616, 635 (1886). The Latin phrase, *obsta principiis*, translates to "oppose beginnings" or "oppose first attempts."