

COMMONWEALTH OF MASSACHUSETTS.
SUPREME JUDICIAL COURT.

S.J.C. No. 10383
SUFFOLK COUNTY

COMMONWEALTH OF MASSACHUSETTS,
Plaintiff-Appellant.

v.

Porter P.,
Defendant-Appellee.

ON APPEAL FROM A JUDGMENT OF THE JUVENILE COURT.

Brief of Amicus Curiae.

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STATEMENT OF THE FACTS AND STATEMENT OF THE CASE

Amicus relies on the Statement of Facts and the Statement of the Case submitted by the Defendant-Appellee.

STATEMENT OF AMICUS INTEREST

Suffolk Lawyers for Justice, Inc. ("SLJ") was incorporated on March 31, 2000 as a Massachusetts non-profit corporation for the purpose of administering the delivery of criminal defense services to indigent persons accused of crimes in Suffolk County, Massachusetts. SLJ manages over 400 private attorneys who handle approximately ninety percent of the indigent criminal defense cases in 11 Boston area courts, including the Superior Court and the Juvenile Court. SLJ is under contract to manage this program with the Committee for Public Counsel Services, the state agency that oversees the assignment of all indigent criminal defense services in Massachusetts.

QUESTIONS PRESENTED

(1) Whether a warrantless search conducted under the doctrine of apparent authority satisfies the requirements of art. 14 of the Massachusetts Declaration of Rights. Contrast *Illinois v. Rodriguez*, 497 U.S. 177 (1990) (accepting doctrine of apparent authority for purposes of Fourth Amendment to the United States Constitution). If so, whether the contours of the doctrine should be the same under art. 14 as they are under the Fourth Amendment.

(2) Whether the doctrine of apparent authority under the Fourth Amendment includes apparent authority based on a reasonable mistake of law, see 4 W.R. LaFare, *Search and Seizure* § 8.3(g), at 175-176 (4th ed. 2004); and

(3) Whether a doctrine of apparent authority under art. 14 should include apparent authority based on a reasonable mistake of law.

ARGUMENT

I. THE PROTECTION OF PRIVACY FROM GOVERNMENT INTRUSION IS THE CARDINAL CONCERN OF ARTICLE 14.

In providing that "Every subject has a right to be secure from all unreasonable searches and seizures," Mass. Const., Pt. I, Art. 14, the Declaration of Rights creates a right of personal privacy as against the government. It provides citizens the security of knowing they may go about their lives without fear that the government upon a whim will intrude upon their persons, houses, papers, or possessions. The citizenry of the Commonwealth in 1780 understood the protection of privacy to be the central concern of Article 14. Leaders of the colonial bench and bar in Massachusetts famously deplored British writs of assistance - general warrants - as "the worst instrument of arbitrary power, the most destructive of English liberty, and the fundamental principles of the constitution, that ever was found in an English law-book... It is a power that places the liberty of every man in the hands of every petty officer." 2 Legal Papers of John Adams 524 (L. Kinvin Wroth & Hiller Zobel, eds. 1965). See Commonwealth v. Pope, 354 Mass. 625, 629 (1968) (Article 14 designed

to protect "individuals from general searches, which were the vice of the pre-Revolution writs of assistance").

Long before the United States Supreme Court set forth the concept of a "reasonable expectation of privacy," this Court accorded a high degree of protection from government intrusion to the home and those legitimately in it, regardless of their ownership interest or property rights in it. See Oystead v. Shed, 13 Mass. 520 (1816) (sheriff who unlawfully entered home to serve civil process on lodger or boarder could be liable in trespass as if he had entered to serve process on owner, his children or servants). As this court recently stated, "[t]he right of police officers to enter into a home, for whatever purpose, represents a serious governmental intrusion into one's privacy." Commonwealth v. Peters, 453 Mass. 818, 819 (2009) (internal quotations omitted). "Nowhere are expectations of privacy greater than in the home." Commonwealth v. Balicki, 436 Mass. 1, 12 n. 14 (2002). Thus this Court has interpreted Article 14 to provide greater protection against warrantless electronic surveillance in the home than

does the Fourth Amendment. Commonwealth v. Blood, 400 Mass. 61, 76-77 (1987) (Citing United States v. White, 401 U.S. 745, 789-790, 91 S.Ct. 1122, 1145, 28 L.Ed.2d 453 (1971) (Harlan, J., dissenting) “[I]t is too easy to forget-and, hence, too often forgotten-that the issue here is whether to interpose a search warrant procedure between law enforcement agencies engaging in electronic eavesdropping and the public generally.... Interposition of a warrant requirement is designed not to shield ‘wrongdoers,’ but to secure a measure of privacy and a sense of personal security throughout our society.”)

II. THE FRAMERS’ MEANS FOR PROTECTING PRIVACY IS THE WARRANT REQUIREMENT.

Article 14 “does not prohibit all searches and seizures of a man’s person, his papers, and possessions; but such only as are ‘unreasonable,’ and the foundation of which is ‘not previously supported by oath or affirmation.’”. This protection has been interpreted as requiring that government agents have some “foundation” for a search, and that this foundation be supportable. Commonwealth v. Dana, 43 Mass. 329, 336 (1841) (quoting Mass. Const., Pt. I, Art. 14). The basis for this foundation must be

assessed by a neutral and detached magistrate. See Commonwealth v. Peters, supra, 453 Mass. at 819 (judicial determination of probable cause designed to circumscribe arbitrary government invasions of privacy). The requisites of the warrant requirement, in short, serve as the critical check upon the government's power to search. See Commonwealth v. Bishop, 402 Mass. 449, 451 (1988) (warrant requirement serves to discourage arbitrary government conduct).

Perhaps the best example of this Court's regard for the gatekeeping function of Article 14's warrant requirement, that also shows the centrality of privacy in its interpretation of Article 14, is Commonwealth v. LaFrance, 402 Mass. 789 (1988), in which this Court accepted "the principle that a reduced level of suspicion, such as 'reasonable suspicion,' will justify a search of a probationer and her premises," id. at 792, yet concluded there was no sound reason "to eliminate the usual requirement imposed by art.14 that a search warrant be obtained" in the case of a probationer. Id. at 794. As the court noted, "[r]equiring an officer to articulate reasons for the search is a deterrent to impulsive or arbitrary

governmental conduct.” Id. at 794-95 (Quoting State v. Griffin, 131 Wis.2d 41, 65 (1986) (Abrahamson, J., dissenting)). This Court has also refused to weaken the warrant issuing process as a method of pressing law enforcement to investigate and develop a cause or foundation for a search in advance of actually searching. Commonwealth v. Upton, 394 Mass. 363, 373-74 (1985) (rejecting totality of circumstances test for warrant based upon confidential informant in favor of more protective test providing more explicit guidance because “[c]lear lines defining constitutionally permissible conduct are most desirable to guide the police, magistrates, prosecutors, defense counsel, and judges”).

III. THE DOCTRINE OF APPARENT AUTHORITY DEVALUES PRIVACY BY ENCOURAGING POLICE TO CIRCUMVENT THE WARRANT REQUIREMENT WITHOUT GIVING THE PERSON WHOSE PRIVACY IS INTRUDED UPON ANY SAY IN THE MATTER.

The doctrine of apparent authority undermines the high value this Court has placed on the privacy of residences. The doctrine encourages police to seek third party consent, rather than a warrant or consent from one with actual authority, whenever a third party could reasonably be believed to have actual authority.

The doctrine thus creates an incentive for the police not to undertake the investigation required to either establish probable cause or actual authority.

A. Police do not need an incentive to avoid Article 14's warrant requirement for residential intrusions.

The warrant requirement is the default rule under Article 14: the framers expressed a preference for search warrants based upon probable cause, as determined by a neutral and detached magistrate. This court has recognized exceptions to the warrant requirement that enable police to make warrantless residential intrusions in "exigent circumstances with probable cause, or consent." Commonwealth v. Rogers, 444 Mass. 234, 236 (2005). The doctrine of apparent authority provides police with an alternative route around the warrant requirement: find someone willing to consent that might reasonably be believed to have authority to do so, if for no other reason than that she is on the premises. See, e.g., Commonwealth v. Lopez, 74 Mass.App.Ct. 815 (2009), *rev. granted* 10/29/2009 (police relied on apparent authority of woman who answered a knock on a motel room door,

despite knowing nothing about her or her relationship to the motel room).

Indeed, the doctrine of apparent authority enables police to avoid not only the warrant requirement but also the probable cause requirement. While reliance upon consent through apparent authority may seem an administrative convenience to avoid locating someone with actual authority when the police already possess probable cause, consent through apparent authority is no mere convenience when police *lack* probable cause. If police expect one with actual authority will *refuse* consent, apparent authority is a means to circumvent the warrant and probable cause requirements (and the need to investigate and develop evidence) and intrude upon constitutionally protected privacy with no countervailing social benefit.

B. The law disfavors allowing third parties to waive the privacy of others.

Massachusetts law creates obligations in third parties not to reveal private information about another without permission. Commonwealth v. Source One Associates, Inc., 436 Mass. 118 (2002) (Defendant customer of credit reporting agency violated Ch. 93A

and Fair Credit Reporting Act by using credit reports to obtain financial information for disclosure to third parties); In Re Grand Jury Subpoena, 454 Mass. 685, 693 (2009) (Marshall, C.J., dissenting) (Art. 14 privacy protection demands Commonwealth make ex parte showing of need to subpoena recordings of jail calls by pretrial detainees for grand jury investigation).

Even when the Fourth Amendment imposes no restriction on third party waiver of the privacy rights of another, this Court has recognized “[i]t may be that under art. 14 exposure of information to another party might not compel the rejection of a claim of a reasonable expectation of privacy, particularly in light of the fact that the third party here ... considered the telephone message records to be confidential.” Commonwealth v. Cote, 407 Mass. 827, 835 (1990) (rejecting the “closer question” under art. 14 “in the circumstances of this case”).

This notion applies even when the entity to which information is disclosed is the government. “It would appear reasonable to expect that a government agency, to which a citizen is required to submit certain materials, will use those materials solely for the

purposes intended and not disclose them to others in ways that are unconnected with those intended purposes." Commonwealth v. Buccella, 434 Mass. 473 (2001). Three members of the Court have specifically recognized that this interest in privacy, under art. 14, prevents additional disclosure of private information *already in the government's possession*. See In Re Grand Jury Subpoena, *supra*, 454 Mass. at 699 (Marshall, C.J., dissenting) (distinguishing privacy interest in whether jail inmates' calls are recorded from "privacy interest in the *dissemination* of the recordings of those calls") (emphasis in original) and 454 Mass. at 705 (Cordy, J., dissenting) ("[P]retrial detainees ... retain a privacy interest, protected by Article 14, ... [that] includes an interest in the dissemination of the substance of those conversations to persons and government agencies beyond what is necessary to further the limited purpose (institutional security) that justified their interception.").

- C. **Consent by one with actual authority allows the person whose privacy is intruded upon to weigh the costs of this intrusion, but consent by one with apparent authority allows a third party who does not bear the**

costs of the intrusion to make this judgment.

While the warrant requirement and consent for a residential intrusion both protect privacy, there is no logical relationship between having (or lacking) a warrant and obtaining consent. Commonwealth v. Ware, 75 Mass.App.Ct. 220 (2009) (police who made initial warrantless entry, questioned codefendant, and later entered with consent of codefendant's spouse were found nevertheless to have had probable cause). The warrant requirement's demands of probable cause and specificity limit the circumstances under which police may make residential intrusions and the scope of these intrusions. The alternative of valid consent, though an exception to the warrant requirement, nevertheless also protects privacy by allowing the person subject to the residential intrusion to weigh the value of his or her privacy and to limit the scope of his consent. Commonwealth v. Cantalupo, 380 Mass. 173, 178 (1980) ("a search with consent is reasonable and legal only to the extent that the individual has consented").

Recognizing apparent authority will replace a magistrate's determination of probable cause or the consent of one with actual authority with a

determination by a third party, who may have no ownership or controlling stake in the property and interests antagonistic to those of the property owner, as to whether police may search. The third party's readiness to consent to residential intrusions would make him or her arbiter of how much privacy individuals have in their homes. Just as the requirement for an arrest warrant that is executed in a third party's residence provides no privacy protection for the third party, a third parties' readiness to consent to a warrantless residential entry provides no protection for the privacy of one with actual authority. Commonwealth v. Dejarnette, 75 Mass.App.Ct. 88, 93 (2009) ("Where, however, officers are seeking to execute the arrest warrant at a third party's residence, the rights of "persons not named in the warrant" who live at that residence are directly implicated." (Quoting and citing Steagald v. United States, 451 U.S. 204, 212 (1981))). Anyone who could have actual authority will become a potential source of apparent authority, but what possibly qualifies a friend, acquaintance, independent contractor, or relative to determine the degree of privacy another

person should have from warrantless residential intrusions?

D. Recognizing the doctrine of apparent authority promotes neither judicial efficiency nor certainty for law enforcement.

Consent by one with apparent authority does not eliminate questions concerning the scope of authority to consent. "Because entry based on consent is an exception to the constitutional warrant requirement, the Commonwealth must show consent unfettered by coercion, express or implied, and also something more than mere acquiescence to a claim of lawful authority." Commonwealth v. Rogers, 444 Mass. 234, 237 (2005) (internal quotations omitted). Lower court cases in Massachusetts involving the scope of apparent authority demonstrate that application of the doctrine gains law enforcement neither efficiency nor certainty. Compare Commonwealth v. Sardone, 1999 WL 1319236 (Mass. Super. March 30, 1999) (defendant's mother could consent to search of his room to which she and his brother had access, for which defendant paid no rent, but could not consent to search of closed knapsack in the room) with Commonwealth v. Dejarnette, 75 Mass.App.Ct. 88, 93 (2009) (apartment

tenant who was mother of school age children had apparent authority to consent to search of child's backpack, though it did not belong to her children). Recognizing apparent authority does not eliminate questions concerning the scope of consent but complicates them, because police (and reviewing courts) must then determine scope of consent without referring to how much consent the person could, in fact, have given.

IV. REJECTING THE DOCTRINE OF APPARENT AUTHORITY IS THE LOGICAL CORRELATE OF REJECTING THE GOOD FAITH EXCEPTION.

This court has rejected the good faith exception to the exclusionary rule because it is incompatible with the protection of privacy that lies at the core of Article 14. See Commonwealth v. Treadwell, 402 Mass. 355, 356 n. 3 (1988) (rejecting good faith exception). The good faith exception is not consonant with the values underlying Article 14: a privacy violation is no less real when police have a reasonable but erroneous belief they had legal authority to search. This Court's rejection of the good faith exception necessarily requires rejection of the doctrine of apparent authority: a privacy

violation is no less real though police have a reasonable but erroneous understanding of who may consent to a search.

Accepting apparent authority while rejecting the good faith exception will create a perverse incentive discouraging police from obtaining warrants for residential searches when the third party's authority to consent is uncertain. If police believe a third party has authority to consent, they will conduct the search under the doctrine of apparent authority. Yet if, in an abundance of caution, police obtain a search warrant, and the search warrant is defective in some way, the search will be invalid. As a result, police will *avoid* obtaining a search warrant if they can possibly obtain consent from a third party, especially in cases where a magistrate's neutral determination would be most important. In this case, the police apparently considered seeking a search warrant, which would have avoided the unlawful intrusion.

Other courts considering whether the doctrine of apparent authority should be adopted have recognized the doctrine's relationship to the good faith exception. See Delaware v. Devonshire, 2004 WL 94724,

*7 (Del. Super. 1/20/2004) (unreported) (“Although Rodriguez does not mention Leon and the cases reason differently, they are bookends. Leon provides a way around the warrant requirement, while Rodriguez provides a way around the consent exception to the warrant requirement.”).¹ While the good faith exception to the operation of the exclusionary rule and the apparent authority doctrine for consent may be analytically separated,² the effect of each doctrine is

¹ Few states’ courts have tested the doctrine of apparent authority under their own constitutions, and there is no clear pattern to their treatment of it. Eleven states’ courts have ruled on the viability of “apparent authority” under their own state’s constitutions, with six rejecting the doctrine and five accepting it. Those that have accepted the doctrine of apparent authority include: Commonwealth v. Basking, 970 A.2d 1181, 2009 PA Super 67 (2009) (distinguishing application of exclusionary rule under good faith exception from apparent authority). Several have accepted the doctrine under their own state’s constitution with little or no discussion. See, e.g., State v. Lee, 849 N.E.2d 602, 610 (Indiana 2006) (Entire discussion of doctrine’s application to Indiana’s constitution: “We think the focus of the exclusionary rule is the reasonableness of police conduct, and find the police reliance on [the third party’s] apparent authority over the tapes to be reasonable.”); People v. Hopkins, 870 P.2d 478 (Colo.1994) (no discussion of state constitution), State v. Licari, 659 N.W.2d 243 (Minn. 2003) (same); State v. Maristany, 133 N.J. 299, 627 A.2d 1066 (1993) (same). Those states that have rejected the apparent authority doctrine include: State v. Morse, 156 Wash.2d 1, 123 P.3d 832 (2005); State v. McLees, 298 Mont. 15, 994 P.2d 683 (2000); State v. Lopez, 78 Hawaii 433, 896 P.2d 889, 901 (1995); State v. Devonshire, 2004 WL 94724, 2004 Del.Super. LEXIS 9 (Del.Super.Ct.2004); State v. Wright, 119 N.M. 559, 893 P.2d 455 (App.1995); State v. Arnold, 115 Or.App. 258, 838 P.2d 74 (Or.App. 1992); State v. Lynch, 94 Or.App. 168, 764 P.2d 957 (1988).

² 4 W.R. LaFave, SEARCH AND SEIZURE § 8.3(g), at 175–176 n. 113 (4th ed. 2004).

the same: a diminution of privacy. See State v. Lopez, 78 Hawai'i 433, 446, 896 P.2d 889 (1995) ("an invasion of privacy is no less of an 'invasion' if the governmental officials are 'reasonable' in their mistaken belief that the third party possesses the authority to consent"); State v. McLees, 298 Mont. 15, 994 P.2d 683 (2000) (same). Whether this occurs because otherwise invalid consent to search is made valid or because the fruits of an unlawful search are nevertheless admissible may be of academic interest, but it should not be a basis for this Court to distinguish these rules.

V. IF THIS COURT RECOGNIZES A DOCTRINE OF APPARENT AUTHORITY, IT SHOULD BE APPARENT AUTHORITY BASED UPON REPRESENTATIONS OR ACTIONS OF A THIRD PARTY THAT WOULD LEAVE A PERSON OF REASONABLE PRUDENCE CERTAIN THAT THE THIRD PARTY HAD AUTHORITY TO PERMIT ENTRY OF POLICE FOR LAW ENFORCEMENT PURPOSES.

The question facing police in circumstances in which they seek a third party's consent to a search is whether this third party has the authority to consent to a search. In this situation (absent exigent circumstances), police should be given the incentive to obtain a warrant or, at a minimum, undertake the

investigation necessary to determine the basis for a third party's assertion of authority to consent.

Indeed, rejecting the doctrine of apparent authority imposes few costs on law enforcement beyond basic investigative steps police would, and should, ordinarily take. If a person meets the police at the front door of a residence, and holds themselves out as a cohabitant or guest, shows identification reflecting their residence or means of access (e.g., a key), it would not be a burden to require the police to ask for the lawful owner, the person named on the lease, or the permanent resident. Certain categories of persons, whose entry is for a defined and narrow purpose (babysitters, repair persons) or whose authority is known to be different from that of a resident (such as a landlord or a hotel desk clerk), should not, without specific facts and circumstances, and adequate inquiry by police, be able to exercise apparent authority.

Further, whatever inquiry is required of police for tangible personal property or vehicles, the high degree of privacy accorded residences should require at least as much inquiry. Residences necessarily have

a category of persons whose authority is relatively easy for police to identify; most significantly they have residents, whether owners, lessors, tenants or occupants, who most reasonably could be consulted. Relatively few questions are necessary to establish whether such a person is reasonably in a position to consent to entry. For example, police could after ascertaining a person's age, residence, possessory interest, etc., make such a determination. Accordingly, it should not take much police investigation to determine whether cohabitants, roommates, sublessors and guests have authority to consent to a search.

VI. THE DECISION TO RECOGNIZE THE DOCTRINE OF APPARENT AUTHORITY SHOULD IN ANY EVENT BE RESTRICTED, AS UNDER THE FOURTH AMENDMENT, TO MISTAKES OF FACT RATHER THAN MISTAKES OF LAW.

Under the Fourth Amendment, the doctrine of apparent authority applies only to mistakes of fact, not mistakes of law. See State v. Porting, 281 Kan. 320, 130 P.3d 1173, 1179 (Kan. 2006). In other words, the apparent authority doctrine will save a consent-based search when a police officer would have had valid consent "if the facts were as he reasonably believed them to be." United States v. Salinas-Cano,

959 F.2d 861, 865-66 (10th Cir. 1992). To immunize mistakes of law would discourage police *both* from investigating the relevant facts and knowing the applicable law, which would be fundamentally contradictory to the Massachusetts Declaration of Rights – the rights possessed of all people “born free and equal” and designed to allow citizens to seek and obtain “their safety and happiness.” Mass. Const., Pt. I, Art. 1.

Respectfully submitted,

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ADDENDUM

U.S. Const., Amend. IV:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Mass. Const., Pt. I, Art. 1 (as original):

All men are born free and equal, and have certain natural, essential, and unalienable rights; among which may be reckoned the right of enjoying and defending their lives and liberties; that of acquiring, possessing, and protecting property; in fine, that of seeking and obtaining their safety and happiness.

Mass. Const., Pt. I, Art. 1 (as annulled and replaced by Article CVI):

All people are born free and equal and have certain natural, essential and unalienable rights; among which may be reckoned the right of enjoying and defending their lives and liberties; that of acquiring, possessing and protecting property; in fine, that of seeking and obtaining their safety and happiness. Equality under the law shall not be denied or abridged because of sex, race, color, creed or national origin.

Mass. Const., Pt. I, Art. 14:

Every subject has a right to be secure from all unreasonable searches, and seizures, of his person, his houses, his papers, and all his possessions. All warrants, therefore, are contrary to this right, if the cause or foundation of them be not previously supported by oath or affirmation; and if the order in the warrant to a civil officer, to make search in suspected places, or to arrest one or more suspected persons, or to seize their property, be not accompanied with a special designation of the persons

or objects of search, arrest, or seizure: and no warrant ought to be issued but in cases, and with the formalities prescribed by the laws.

CERTIFICATE OF COMPLIANCE

I, David M. Siegel, hereby certify, in accordance with Mass. R.A.P. 16(k), 445 Mass. 1601 (2005), that this brief complies with the rules of court that pertain to the filing of briefs, including but not limited to: Mass. R.A.P. 16(a)(6)(pertinent findings or memorandum of decision); Mass. R.A.P. 16(f)(reproduction of statutes, rules, regulations); Mass. R.A.P. 16(h)(length of briefs); Mass. R.A.P. 18 (appendix to the briefs); and Mass. R.A.P. 20 (form of briefs, appendices, and other papers).

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CERTIFICATE OF SERVICE

I hereby certify that on this date I have today mailed two copies each of the brief, first class prepaid postage, to Kathleen Celio, Assistant District Attorney, Office of the District Attorney/Suffolk, One Bulfinch Place, Boston, MA 02114; James Corbo, Esq., 400 Washington Street, Suite LL-3, Braintree, MA 02184; Beth L. Eisenberg, Committee for Public Counsel

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