IN THE SUPREME COURT OF THE STATE OF OREGON

STATE OF OREGON, Plaintiff-Respondent, Petitioner on Review, v. LINDA JEAN BONILLA, Defendant-Appellant, Respondent on Review.	Douglas County Circuit Court No. 11CR2221FE CA A153808 SC S062962

BRIEF ON THE MERITS OF PETITIONER ON REVIEW, STATE OF OREGON

Review of the Decision of the Court of Appeals
on Appeal from a Judgment
of the Circuit Court for Douglas County
Honorable RONALD POOLE, Judge

Opinion Filed: December 3, 2014
Before: Duncan, Presiding Judge, and Haselton, Chief Judge, and Lagesen, Judge.

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STATEMENT OF THE CASE

This case presents the question whether a warrantless search is constitutional when the search is based on the consent of a third party with "apparent authority" to consent to that search, *i.e.*, a person whom police reasonably but mistakenly believe has authority to consent. This court has never addressed whether the apparent authority doctrine is cognizable under Article I, section 9. But Article I, section 9, proscribes only those searches that are "unreasonable." In other search- and seizure-related contexts, this court has held that reasonableness under Article I, section 9, does not equate to absolute certainty about the factual circumstances surrounding the encounter. Rather, the officer's actions need to be reasonable based on the facts known to the officer at the time. As the United States Supreme Court has recognized under the Fourth Amendment's similar prohibition on unreasonable searches, the same should hold true in the consent search context. Thus, so long as an officer reasonably believes that the person granting consent to search has the right to do so, even if that belief later turns out to be wrong, the ensuing search is constitutional.

Question Presented

Where a person consents to a search and an officer reasonably believes that the person has authority to grant that consent, is the ensuing search constitutional under Article I, section 9, if it later turns out that the person did not actually have authority?

Proposed Rule of Law

Yes. Article I, section 9—which prohibits only those searches that are "unreasonable"—permits consent-based searches where the officer reasonably believes that the person has actual authority to grant that consent, even if it later turns out that the person had no such authority.

Statement of Facts

The events giving rise to the charges in this case stem from a search of a converted garage where several people were living. Officer Sparks, a probation officer, came to the garage to investigate a report of drug activity. Deputy Scriven accompanied him. (Tr 5). The converted garage contained a storage area and an interior apartment. (Tr 7). In the living room of the apartment, the officers found defendant and another individual, .[1] The officers also smelled marijuana. (Tr 6, 8-9, 21). said that the odor of marijuana was probably coming from the bedroom of her 88-year-old grandmother, Lulu

[1] Defendant's brother, lived in the main house and gave the officers consent to enter the garage. (Tr 30-31, 40).

(defendant's mother). (Tr 23, 32, 52). Deputy Scriven asked if he could go there. (Tr 23). said that he could, and she accompanied him to a bedroom in the back of the apartment. (Tr 23). When they reached the bedroom door, told the deputy, "This is [bedroom." (Tr 53).

The deputy saw "a little makeshift room with one single bed and one recliner and then a TV and * * * some sort of place to hang some clothes." (Tr 23). The room was about ten feet by ten feet. (Tr 33). sat in the recliner with some marijuana pipes next to her. (Tr 23, 33). Deputy Scriven introduced himself to and asked her about the marijuana. (Tr 23). admitted that she had marijuana and that she did not have a medical marijuana card and gave a baggie of marijuana to the deputy. (Tr 23). He asked if he could check the room to make sure there were no more drugs, and replied, "[S]ure." (Tr 24).

Early in the search, Deputy Scriven opened a small brown box and found three baggies containing a white crystal residue. (Tr 24). He asked if the substance belonged to her and said that it must belong to her daughter (defendant). (Tr 24). Deputy Scriven asked why defendant's belongings would be in the bedroom, and said that she and defendant "share[d] a bed together." (Tr 24). Before that point, the deputy did not know that anyone else

shared the room with (Tr 33). identified her daughter as the woman who was seated in the living area. (Tr 24-25).

Deputy Scriven stopped the search, approached defendant in the living room, and told her that he had found the baggies; defendant admitted that the baggies belonged to her. (Tr 25, 35). He asked defendant for permission to continue the search, and she provided it. (Tr 25). Deputy Scriven then resumed the search and found "snort tubes" in another container in the bedroom. (Tr 26).

The state charged defendant with unlawful possession of methamphetamine. Before trial, defendant filed a motion to suppress the evidence discovered in the bedroom. The trial court denied the motion, finding that gave the deputy consent to search the bedroom, that she had the right to do so, and that there was no indication that defendant shared the bedroom with until said so. (Tr 82-83).

On appeal, defendant challenged the denial of her motion to suppress evidence.[2] The Court of Appeals reversed the trial court's denial of the motion to suppress. *State v. Bonilla*, 267 Or App 337, 341 P3d 751 (2014). The court

[2] Defendant raised two arguments: one, that did not have authority to consent to the search of the box and two, that the individual who first consented to the officers' entry of the garage—defendant's brother, —did not have authority to so consent. The Court of Appeals did not address that second issue because it agreed with defendant's first claim.

concluded that, because the box did not belong to she lacked "actual authority" under Article I, section 9, to consent to the search of her daughter's personal belongings.[3] *Id*. at 346. The court "fully appreciate[d]" that the deputy acted in good faith in searching the box. *Id*. But it held that the deputy's good faith was of no moment because the state bears the burden of proving actual authority and it presented no evidence to show that used, or had access to, the wooden box. *Id*. at 344-52. The Court of Appeals noted that, had the issue been resolved under the Fourth Amendment, the outcome may well have been different. *Id*. at 347 n 7.

Summary of Argument

In this case, the occupant of a bedroom gave the officer consent to search the bedroom. The room contained one single-sized bed, one chair, and one dresser. The officer received information that the bedroom belonged to the person who gave consent to search it. No mention was made of another person inhabiting the space, nor was there any evidence that another person was doing so. The officer learned only later that defendant also occupied the bedroom, and that a box that he searched belonged to her. The question that this court must resolve is whether the search, based upon a third-party's apparent authority to consent, is constitutional under Article I, section 9. It is.

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[3] The state does not challenge that conclusion on review.

Article I, section 9 axiomatically prohibits only those searches that are "unreasonable." An officer who undertakes a search pursuant to an individual's consent is reasonable, even if the officer's belief that the individual had authority to consent to the search is mistaken. Article I, section 9—by its terms and under this court's caselaw—does not preclude police action that later turns out to be based on a factual mistake so long as the mistake was reasonable. Thus, where an individual gives consent to search, and an officer, in the totality of the circumstances, reasonably believes that the consenting individual has the right to consent to the search, the fact that the officer later learns that that person did not have actual authority to consent does not render the search unlawful. That is what the United States Supreme Court has held under the Fourth Amendment's similar prohibition on unreasonable searches and seizures, and it is what other state courts with constitutional provisions similar to Article I, section 9, have held as well. This court should thus explicitly adopt the apparent authority doctrine, and uphold the constitutionality of the search at issue here.

ARGUMENT

Article I, section 9, provides, "No law shall violate the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable search, or seizure[.]" As noted, the question presented here is whether a search

is constitutional under that provision where an officer obtains consent from an individual whom the officer reasonably believes has authority to consent to the search, but that reasonable belief later turns out to be mistaken. Because the fundamental principle that Article I, section 9, embodies is one of reasonableness, and because reasonableness does not mandate factual correctness, the answer to that question should be yes: so long as the officer has a reasonable belief that the consenting individual has the right to consent, the fact that that belief later turns out to be wrong is immaterial.

A. The development of the apparent authority doctrine in Oregon

Although this court has never before addressed whether the apparent authority doctrine is cognizable under Article I, section 9, this court is not writing on an entirely blank slate either. Over thirty years ago, this court addressed the question of apparent authority under the Fourth Amendment in *State v. Carsey*, 295 Or 32, 664 P2d 1085 (1983). In the intervening years, Oregon's lower courts have adopted *Carsey's* reasoning and applied it for Article I, section 9, purposes. Critically, however, it has since become clear as a matter of law that *Carsey* was wrong.

In *Carsey*, this court had to determine whether, under the Fourth Amendment, a consent search could be based on apparent authority. In deciding that such a consent search was unconstitutional, this court relied on

United States v. Matlock, 415 US 164, 94 S Ct 988, 39 L Ed 2d 242 (1974). In *Matlock*, the United States Supreme Court held that the Fourth Amendment permits third-party consent searches based on *actual* authority. *Id*. at 170-71. But the Court in *Matlock* specifically declined to address the question of apparent authority. *Id*. at 177 n 14. Nonetheless, this court in *Carsey* concluded that the Fourth Amendment does not permit consent searches based on apparent authority. 295 Or at 44-45. In so holding, this court noted that it could find "little or no federal authority" to support the doctrine of apparent authority. *Id*. at 45.

But after this court's decision in *Carsey*, the federal landscape shifted. It is now well settled under federal law that apparent authority *can* serve as the basis for a valid search. After this court's decision in *Carsey*, the United States Supreme Court answered the question that it left unanswered in *Matlock*, holding that the Fourth Amendment allows for searches based on apparent authority. *Illinois v. Rodriguez*, 497 US 177, 110 S Ct 2793, 111 L Ed 2d 148 (1990). The Court premised that decision on the Fourth Amendment's requirement that searches be "reasonable." *Id*. at 185-87. The Court noted that the Fourth Amendment "does not demand that the government be factually correct in its assessment," only that the government be "reasonable." *Id*. at 184. For instance, the Fourth Amendment "is no more violated when officers enter

without a warrant because they reasonably (though erroneously) believe that the person who has consented to their entry is a resident of the premises, than it is violated when they enter without a warrant because they reasonably (though erroneously) believe they are in pursuit of a violent felon who is about to escape." *Id*. at 186.

Thus, to satisfy the Fourth Amendment's "reasonableness" requirement, "what is generally demanded of the many factual determinations that must regularly be made by agents of the government—whether the magistrate issuing a warrant, the police officer executing a warrant, or the police officer conducting a search or seizure under one of the exceptions to the warrant requirement—is not that they always be correct, but that they always be reasonable." *Id*. at 185. The Court concluded that a grant of consent to search must "be judged against an objective standard: would the facts available to the officer at the moment * * * warrant a man [or woman] of reasonable caution in the belief that the consenting party had authority over the premises?" *Id*. at 188 (quoting *Terry v. Ohio*, 392 US 1, 21-22, 88 S Ct 1868, 20 L Ed 2d 889 (1968)) (omission in *Rodriguez*).

As noted, the Oregon Court of Appeals long ago adopted *Carsey*—and its Fourth Amendment analysis under *Matlock* —for purposes of Article I, section 9. *See, e.g.*, *State v. Lynch*, 94 Or App 168, 172, 764 P2d 957 (1988). The

Court of Appeals has since decided that the above-described shift in the federal landscape marked by *Rodriguez* did not alter the Article I, section 9, analysis. *See, e.g.*, *State v. Arnold*, 115 Or App 258, 262 n 2, 838 P2d 74 (1992), *rev den*, 315 Or 312 (1993) (finding *Carsey* to be persuasive authority for purposes of Article I, section 9, analysis and declining to apply the subsequent developments from *Rodriguez*). This case is exemplary. *See Bonilla*, 267 Or App at 347 n 7 (noting that the outcome under the Fourth Amendment "might well be different").

Thus, it is against that backdrop that this court must resolve the question presented. More precisely, this court must decide whether it, like the United States Supreme Court, will uphold the constitutionality of a search conducted by an officer who has a reasonable, yet mistaken belief, that the person granting consent had actual authority to do so, or whether Article I, section 9, compels a result different from the Fourth Amendment. As explained below, Article I, section 9—like the Fourth Amendment—embodies "reasonableness" at its core. Thus, where an officer reasonably believes the consenting party has actual authority to do so, the ensuring search is reasonable.

B. Under Article I, section 9, an officer's reasonable but mistaken belief that a third-party may consent to a search does not render the search unconstitutional.

1. Article I, section 9, prohibits only those searches that are "unreasonable" and a search performed with the consent of a person with apparent authority to provide that consent is not unreasonable.

As noted above, Article I, section 9, shields citizens "against *unreasonable search, or seizure*[.]" (Emphasis added.) That constitutional mandate imposes limitations on searches and seizures "to prevent arbitrary and oppressive interference by [law] enforcement officials with the privacy and personal security of individuals." *State v. Tourtillott*, 289 Or 845, 853, 618 P2d 423 (1980) (discussing state and federal law principles); *see also State v. Watson*, 353 Or 768, 773, 305 P3d 94 (2013) (noting that the goal of Article I, section 9, is to protect citizens against "arbitrary and oppressive interference" by the police). Article I, section 9, like the Fourth Amendment, thus does not provide a literal protection against *every* invasion of privacy. *State v. Fair*, 353 Or 588, 602, 302 P3d 417 (2013) (noting that, although the wording of the two provisions is different, the guarantees are "substantively the same."). Nor does it provide a shield against *all* mistakes by the government. Rather, Article I, section 9's plain terms make reasonableness its touchstone. *State v. Guggenmos*, 350 Or 243, 257 n 6, 253 P3d 1042 (2011).

To that end, Article I, section 9, does not preclude police action that later turns out to be based on a factual mistake so long as the mistake was reasonable. For instance, an officer may lawfully stop an individual upon reasonable suspicion that that individual has committed a crime. The fact that the officer's investigation determines that the individual has not committed a crime does not render the seizure unlawful. *See State v. Holdorf*, 355 Or 812, 823, 333 P3d 982 (2014) (a stop is lawful so long as "it meets an objective test of reasonableness based on observable facts."). Similarly, probable cause for a traffic stop does not require absolute factual correctness. Rather, "the officer must believe that the infraction occurred, and that belief must be objectively reasonable under the circumstances." *State v. Matthews*, 320 Or 398, 403, 884 P2d 1224 (1994). If the events "probably" constituted an infraction, the officer's belief is objectively reasonable. *Id*. at 404. That is, whether an officer acted reasonably under Article I, section 9, is judged based on the information that the officer had available at the time that she or he acted.[4]

[4] It remains an open question whether a mistake of law—rather than a mistake of fact—renders the officer's actions unreasonable. The Court of Appeals has concluded that probable cause cannot be based on an officer's mistake of law. *See e.g., State v. Chilson*, 219 Or App 136, 139-40, 182 P3d 241 (2008) (noting that "probable cause may be based on a mistake of fact, but not a mistake of law"); *but see Heien v. North Carolina*, __US__, 135 S Ct 530, 190 L Ed 2d 475 (2014) (holding that a reasonable mistake of law on the part of an officer does not render a seizure unconstitutional).

The same principle extends to warrantless searches. On several occasions and in several different contexts, this court has held that the reasonableness of an officer's actions is based on the information that the officer had at the time that she or he conducted a warrantless search:

- The emergency-aid exception to the warrant requirement applies "when police officers have an objectively reasonable belief, based on articulable facts, that a warrantless entry is necessary to either render immediate aid to persons, or to assist persons who have suffered, or who are imminently threatened with suffering, serious physical injury or harm." *State v. Baker*, 350 Or 641, 649, 260 P3d 476 (2011).

- The exigent circumstances exception allows intervention when an officer has an objectively reasonable belief that it is necessary to prevent danger to life or damage to property. *State v. Stevens*, 311 Or 119, 127-32, 806 P2d 92 (1991).

- The officer-safety exception to the warrant requirement permits officers to take measures based on a reasonable suspicion that the individual might pose an immediate threat of harm to the officer. *State v. Bates*, 304 Or 519, 524, 747 P2d 991 (1987).

- The school-safety exception permits a public school official who reasonably suspects, based on specific and articulable facts, that the student poses a risk of harm, to take reasonable steps to mitigate that threat. *State v. M. A. D.*, 348 Or 381, 392-93, 233 P3d 437 (2010).

- The automobile exception applies where officers have probable cause to believe the vehicle contains contraband or other evidence of a crime. *State v. Kurokawa-Lasciak*, 351 Or 179, 187, 263 P3d 336 (2011).

In each of those instances, the reasonableness of the officer's actions is determined at the time that the officer made the decision; that the officer's

belief about the state of the facts later turned out to incorrect is immaterial to whether, at the time she or he acted, the officer's actions were reasonable. Whether the person in fact needed immediate aid does not determine whether, at the time the officer acted in response to an emergency, she or he was acting reasonably. Similarly, whether the vehicle searched pursuant to the automobile exception in fact contains evidence is not determinative of the legality of the officer's decision to search the vehicle. Rather, the focus is on whether, at the time the officer pursued a course of action, those actions were reasonable in light of the totality of the circumstances.

The same should hold equally true in the consent-search context. Thus, where an individual gives consent to search, and an officer, in the totality of the circumstances, reasonably believes that the consenting individual has the right to consent to the search, the fact that that person did not have actual authority to consent does not render the search unlawful. The constitutionality of an officer's action in such circumstances cannot, and should not, be judged based on information that the officer did not reasonably have at the time that she or he obtained consent to search. As in the contexts described above, determinations of the validity of consent should be judged "against an objective standard: would the facts available to the officer at the moment * * * warrant a man [or woman] of reasonable caution in the belief that the consenting party had

authority over the premises?" *Rodriguez*, 497 US at 188 (quoting *Terry*, 392 US at 21-22) (omission in *Rodriguez*). Thus, in the absence of any ambiguity regarding the consenting individual's authority over the item or area searched, undertaking a search pursuant to that consent comports with Article I, section 9's reasonableness mandate. *See Fair*, 353 Or at 602-03 (giving "due regard" to the practical necessities of effective law enforcement).

To be sure, consent searches, unlike many of the warrantless search examples discussed above, are not based on the need to act quickly in response to an exigency of some kind. Rather, consent searches are generally deemed constitutional because "it is no doubt reasonable for the police to conduct a search" once the officer receives permission to do so. *Florida v. Jimeno*, 500 US 248, 250-51 (1991).[5] But that justification for recognizing consent searches simply reinforces the point just made: if a consent search is constitutional because it is "reasonable," and an officer believes that she or he has valid consent, then the search is equally reasonable if the consent is real or apparent.

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[5] Notably, the constitutionality of consent searches is *not* based on the idea that a consenting individual has waived the right to be free of a search or seizure. *Schneckloth v. Bustamonte*, 412 US 218, 235-46, 93 S Ct 2041, 36 L Ed 2d 854 (1973); *State v. Flores*, 280 Or 273, 570 P2d 965 (1977) (adopting the *Schneckloth* analysis over a dissent by Justice Linde suggesting that the waiver analysis is the operative analysis); *see also Rodriguez*, 497 US at 187 ("what is at issue when a claim of apparent consent is raised is not whether the right to be free of searches has been *waived*, but whether the right to be free of *unreasonable* searches has been *violated*") (emphasis in original).

See also Daniel R. Williams, *Misplaced Angst: Another Look at Consent-Search Juriprudence*, 82 Ind. L. J. 76 (2007) ("[t]he act of consenting (or, at least, the reasonable expression of consent) is itself an act that justifies. It renders a state of affairs legitimate and justifiable.").

Yet at the same time, the apparent authority doctrine should not be applied in a "loose and uncritical fashion." 4 LaFave, *Search and Seizure: A Treatise on the Fourth Amendment* § 8.3(g) (5th ed 2014). When this court first addressed apparent authority under the Fourth Amendment, it expressed concern that recognizing apparent authority as a basis for a lawful search would create an "ignorance is bliss exception" to the warrant requirement. *Carsey*, 295 Or at 44. But rather than countenancing deliberate ignorance when officers are confronted with facts suggesting that someone other than the consenting individual has authority over the place or item being searched, officers instead should make reasonable inquiries to further determine whether the individual has authority. *E.g.*, *United States v. Kimoana*, 383 F3d 1215, 1222 (10th Cir 2004) ("[W]here an officer is presented with ambiguous facts related to authority, he or she has a duty to investigate further before relying on the consent.").

Likewise, officers should not rely on apparent authority when they "know what the consenting party's *actual* authority is." 4 LaFave, *supra* at

§ 8.3(g) (quoting *United States v. James*, 353 F3d 606, 615 (8th Cir 2003)). Thus, where "the surrounding circumstances could conceivably be such that a reasonable person would doubt its truth and not act upon it without further inquiry[,]" such further inquiry should be required. *Rodriguez*, 497 US at 188. What is more, the officer's obligations continue throughout the search: if something comes to light during the search that causes the officer to believe that someone else might have authority over the item or place searched, the officer should take actions to verify or dispel that fact.

In sum, a search is lawful when an officer believes that the consenting individual in fact has authority to consent, and that belief is reasonable based on the totality of the circumstances. To hold otherwise would place a burden on police that is irreconcilable with Article I, section 9's mandate that the government not undertake "unreasonable" searches. Absent a prescient ability to discern—in the absence of any evidence—that a third party has control over the item or area being searched, an officer's actions, and a determination as to their reasonableness, can only be based on the information that the officer had at the time that she or he acted.

2. States having constitutions with language similar to Article I, section 9, have adopted the apparent authority doctrine.

Other states have addressed whether their constitutions permit consent searches that are based on apparent authority. As explained in greater detail

below, those states with constitutions containing language similar to Article I, section 9, have largely adopted the apparent authority concept. This court would thus not stand alone in recognizing the apparent authority doctrine.

At least twelve states have affirmatively adopted the apparent authority doctrine. *See People v. Hopkins*, 870 P2d 478, 483 (Colo 1994); *State v. Buie*, 129 Conn App 777, 787-806, 21 A3d 550, 557–67 (2011), *aff'd*, 312 Conn 574, 94 A3d 608 (2014); *State v. McCaughey*, 127 Idaho 669, 671-74, 904 P2d 939, 941–44 (1995); *People v. Burton*, 409 Ill App 3d 321, 330, 947 NE2d 843, 852 (2011); *Lee v. State*, 849 NE2d 602, 610 (Ind 2006); *State v. Chilson*, 38 Kan App 2d 338, 341, 165 P3d 304, 307 (2007); *Commonwealth v. Porter P.*, 456 Mass 254, 269-74, 923 NE2d 36, 50–54 (2010); *State v. Licari*, 659 NW2d 243, 252–54 (Minn 2003); *State v. Reinpold*, 284 Neb 950, 956, 824 NW2d 713, 720 (2013); *State v. Sawyer*, 147 NH 191, 194-96, 784 A2d 1208, 1211-12 (2001); *State v. Maristany*, 133 NJ 299, 305-08, 627 A2d 1066 (1993); *Commonwealth v. Basking*, 970 A2d 1181, 1192-1200 (Pa Super Ct 2009).

Each of those states' constitutions prohibits unreasonable searches using language identical or similar to Article I, section 9.[6] And each state has held

[6] Colo. Const. art. II, § 7 ("The people shall be secure in their persons, papers, homes and effects, from unreasonable searches and seizures"); Conn. Const. art. I, § 7 ("The people shall be secure in their persons, houses, papers and possessions from unreasonable searches or seizures"); Idaho Const. art. I, §

Footnote continued…

that an officer's reasonable but mistaken belief that the third party has the authority to consent to search does not render the search unlawful. Most courts have grounded their analyses in the notion that the reasonableness of police conduct has to be judged based on the information that was available to him or her at the time the officer acted, and not what was later revealed to be true. *E.g.*, *Porter P.*, 456 Mass at 270, 923 NE2d at 51 (so stating).

Only four state supreme courts have rejected the apparent authority doctrine. Three of those states—Hawaii, Montana, and Washington—have

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(…continued)
17 ("The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated"); Ill. Const. art. 1, § 6 ("The people shall have the right to be secure in their persons, houses, papers and other possessions against unreasonable searches"); Ind. Const. art. I, § 11 ("The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable search or seizure, shall not be violated"); Kan. Const. B. of R. § 15 ("The right of the people to be secure in their persons and property against unreasonable searches and seizures, shall be inviolate"); Mass. Const. Pt. 1, art. XIV ("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"); Minn. Const. art. I, § 10 ("The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures shall not be violated"); Neb. Const. art. I, § 7 ("The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures shall not be violated"); N.H. Const. Pt. 1, art. XIX ("Every subject hath a right to be secure from all unreasonable searches and seizures of his person, his houses, his papers, and all his possessions"); N.J. Const. art. I, ¶ 7 ("The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated"); Pa. Const. art. I, § 8 ("The people shall be secure in their persons, houses, papers and possessions from unreasonable searches and seizures").

constitutional privacy provisions that differ from Oregon's, and their decisions not to adopt the apparent authority doctrine have been based on those provisions.[7] For instance, Hawaiian courts have rejected the doctrine of apparent authority in part because the Hawaii constitution requires that government intrusions be no greater than is necessary and because the Hawaiian constitution has a separate provision protecting individuals against "invasions of privacy." *State v. Lopez*, 78 Hawai'i 433, 445-47, 896 P2d 889, 901-03 (1995). Montana has an even more restrictive privacy provision, and Washington's constitution does not contain the term "reasonable" at all. S*tate v. McLees*, 298 Mont 15, 23-27, 994 P2d 683, 688-91 (2000) (reaching result under Montana's "unique constitutional scheme" that generally affords greater protection than the Fourth Amendment and provides, "The right of individual privacy is essential to the well-being of a free society and shall not be infringed without the showing of a compelling state interest."); *State v. Morse*, 156 Wash 2d 1, 9-12, 123 P3d 832, 837-38 (2005) (noting that the word "reasonable" does not appear in Washington's constitutional privacy provision). Given Article I, section 9's focus on the reasonableness of government action,

[7] As discussed more below, a fourth state, New Mexico, has rejected the doctrine on the ground hat New Mexico does not recognize a good-faith exception to the warrant requirement.

those states' decisions provide no basis for declining to recognize the apparent authority doctrine.

Apart from the specific constitutional language that underlies those decisions, several of those states (and two others) have rejected the apparent authority doctrine on the ground that they do not recognize a good-faith exception to the exclusionary rule. *E.g.*, *Lopez*, 78 Hawai'i at 446, 896 P2d at 902; *Morse*, 156 Wash 2d at 9-10, 123 P3d at 837; *State v. Wright*, 119 NM 559, 564-65, 893 P2d 455, 460-61 (1995) (relying on fact that the court had previously rejected the good faith exception to the exclusionary rule and that recognizing the apparent authority exception would be "contrary to the rationale underlying" its decision in that case); *State v. Devonshire*, 2004 WL 94724, at *5-7 (Del Super Ct Jan 20, 2004) (same).

Like those states, Oregon does not presently recognize a good-faith exception to the exclusionary rule. But that Oregon does not recognize that exception is immaterial to whether this court should adopt the apparent authority doctrine. The apparent authority doctrine and the good-faith exception embrace two fundamentally different legal concepts. The apparent authority doctrine "articulates the standard in which to achieve a valid search." *Basking*, 970 A2d at 1198. In contrast, the good-faith exception "concedes an illegal search * * * but effectively excuses that illegality by holding that the

resulting evidence is nonetheless admissible in court." *Id.* Thus, the consent doctrine, and the authority upon which consent is based, is an exception to the warrant requirement, whereas the good-faith exception is an exception to the exclusionary rule. If consent is established, the search is lawful and no basis exists for the evidence to be excluded. Thus, the fact that Oregon does not have a good-faith exception to the exclusionary rule does not bear on the question whether a search conducted based on apparent authority is lawful. *See also Carsey*, 295 Or at 44-45 (framing consent not as an exception to the exclusionary rule but to the warrant requirement).

C. The officer's search in this case was constitutional, because he had a reasonable belief that the person who gave consent had authority to do so.

As applied here, the officer's search of the room was constitutional. Deputy Scriven learned that the odor of marijuana was most likely coming from bedroom. The bedroom was small, about ten by ten feet. (Tr 33). The room contained one chair, one bed, and one person, told the officers, "This is [bedroom." (Tr 53). When Deputy Scriven asked if he could search, replied, "[S]ure." (Tr 24). She did not intimate or suggest that she shared the small room and single bed with another person, nor was there any evidence that another person was doing so. When gave consent, she did not limit or preface it in any way, even when the officer was searching

the box that belonged to defendant. Those facts led the trial court to conclude that "there wasn't any prior indication that anyone else lived in that room besides Miss until Miss herself said to the deputy that she shared that room with" defendant. (Tr 83). In short, the officer reasonably believed that had authority to consent to a search of the room and the items contained within it.

CONCLUSION

For the foregoing reasons, this court should reverse the Court of Appeals' holding that the consent was invalid because did not in fact have authority to consent and remand the case for further proceedings.[8]

Respectfully submitted,

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[8]Those further proceedings may include addressing the issue that the Court of Appeals did not reach, namely, whether the individual who allowed the officers' entry into the garage, defendant's brother had authority to do so. However, if the court agrees that apparent authority is cognizable under Article I, section 9, that holding should also resolve the question whether the officers' entry into the garage was reasonable.

NOTICE OF FILING AND PROOF OF SERVICE

I certify that on June 10, 2015, I directed the original Brief on the Merits of Petitioner on Review, State of Oregon to be electronically filed with the Appellate Court Administrator, Appellate Records Section, and electronically served upon Ernest Lannet, attorney for appellant, by using the court's electronic filing system.

CERTIFICATE OF COMPLIANCE WITH ORAP 5.05(2)(d)

I certify that (1) this brief complies with the word-count limitation in ORAP 5.05(2)(b) and (2) the word-count of this brief (as described in ORAP 5.05(2)(a)) is 5,693 words. I further certify that the size of the type in this brief is not smaller than 14 point for both the text of the brief and footnotes as required by ORAP 5.05(2)(b).

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