IN THE

Supreme Court of New Jersey

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No. A-68-14 (073925)

STATE OF NEW JERSEY, *Plaintiff-Petitioner,* *v.* **MICHAEL CUSHING,** *Defendant-Respondent.*	:	**CRIMINAL ACTION** ON APPEAL FROM THE APPELLATE DIVISION, SUPERIOR COURT, DOCKET NO. A-0856-12T1. *Before*: MESSANO, P.J.A.D., HAYDEN, J.A.D., *and* ROTHSTADT, J.A.D. ON APPEAL FROM THE SUPERIOR COURT OF NEW JERSEY, LAW DIVISION, SOMERSET COUNTY, INDICTMENT NO. 11-08-0545. *Before:* ROBERT REED, J.S.C. (motion to suppress); JULIE MARINO, J.S.C. (sentencing).

BRIEF OF AMICUS CURIAE AMERICAN CIVIL LIBERTIES UNION OF NEW JERSEY

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INTRODUCTION

Amicus Curiae American Civil Liberties Union of New Jersey respectfully submits this brief in support of Defendant—Respondent Michael Cushing in the above captioned matter.

This case again tests the limit of the extent to which the "'basic principle of Fourth Amendment law' that searches and seizures inside a home requirement without a warrant are presumptively unreasonable," can be overcome due to the consent or intervention of a third party. *State v. Bolte*, 115 N.J. 579, 585 (1989)(quoting *Payton v. New York*, 445 U.S. 573, 586 (1980)). Recently, this Court has had frequent opportunity to elaborate on this issue. *See*, *State v. Coles*, 218 N.J. 322 (2014) (consent search invalid when reasonableness of a search was manufactured through defendant's unlawful detention); *State v. Wright*, 221 N.J. 456 (2015) (private search doctrine does not permit warrantless search of dwelling); *State v. Vargas*, 213 N.J. 301 (2013) (absent an objective emergency, community-caretaking doctrine does not permit warrantless search of dwelling to check on the welfare of a resident at behest of landlord). Amicus ACLU-NJ urges this Court to continue its very narrow construction of the consent search doctrine to the extent that it derogates from the ancient and fundamental norm that——absent exigent circumstances not present here——search of a residence must be authorized by a warrant.

PROCEDURAL HISTORY

Amicus relies on the procedural history contained in the Brief of Appellant-Defendant Michael Cushing in the Appellate Division in this matter. The Appellate Division thereafter rendered a judgment on January 23, 2014, reversing the trial court's order denying Cushing's motion to suppress evidence.[1] The Appellate Division remanded the matter for resentencing, and also for a further hearing in order to determine whether the State can demonstrate application of the "independent source" doctrine. The State filed a petition for certification on February 6, 2014, which was granted by this Court on July 20, 2015.

STATEMENT OF FACTS

Amicus relies on the comprehensive statement of facts provided by the Appellate Division in its opinion.[2] Da4-8. Amicus merely highlights the following particular facts, taken exclusively from the testimony of the responding police officer,

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[1] The Appellate Division affirmed the denial of the motion to suppress with regard to evidence found in a backyard shed, since Betty Cushing had common authority over the shed and she consented to the search. Amicus ACLU-NJ likewise does not address that aspect of the search.

[2] References to the Appendix of Defendant—Respondent Richard Cushing in the Appellate Division are cited in this brief as "Da__."

Michael Ziarnowski:[3]

- When Officer Ziarnowski first responded to 51 Fairmount Ave. and was met by Lisa Mylroie, he knew that Ms. Mylroie did not herself live there. T19-23 to T20-1.
- Before he engaged in any search, Officer Ziarnowski was informed that the owner of the house, Betty Cushing, was at a neighbor's house. T10-2 to T-10-3.
- The only basis by which Officer Ziarnowski might believe that Ms. Mylroie had "power of attorney" with regard to Betty Cushing's affairs was her own oral pronouncement. T9-8 to T9-9. In Officer Ziarnowski's words, "she just said she had it." T14-8 to T13.
- When Officer Ziarnowski responded to 51 Fairmount Ave. and before he engaged in any search, he was informed that the reason why Ms. Mylroie wished to evict Michael Cushing from the residence was allowing his girlfriend to move into his bedroom, and his non-payment of rent. T9-12 to T9-15.

ARGUMENT

The requirement of a warrant that presumptively attaches to any search is a fundamental protection against government

[3] References to the testimony of Officer Michael Ziarnowski taken on February 7, 2012, are cited in this brief as "T__-__."

intrusion into individual liberties. "The warrant requirement safeguards citizens by placing the determination of probable cause in the hands of a neutral magistrate before an arrest or search is authorized." *State v. Henry*, 133 N.J. 104, 110 (1993). "The requirement for [a] search warrant is not a mere formality but is a great constitutional principle embraced by free men." *State v. Chippero*, 201 N.J. 14, 26 (2009) (quoting *State v. Novembrino*, 105 N.J. 95, 107 (1987)). Thus, warrantless searches are presumptively unreasonable and are prohibited unless they fall within a recognized exception to the warrant requirement. *State v. Johnson*, 193 N.J. 528, 552 (2008); State v. Wilson, 178 N.J. 7, 12 (2003).

While one of the specifically established exceptions to the requirements of both a warrant and probable cause is a search that is conducted pursuant to a valid consent, *Schneckloth v. Bustamonte*, 412 U.S. 218, 219 (1973), it is also well-established that "[w]hen a prosecutor seeks to rely upon consent to justify the lawfulness of a search, he has the burden of proving that the consent was, in fact, freely and voluntarily given." *Schneckloth*, 412 U.S. at 222; *Bumper v. North Carolina*, 391 U.S. 543, 548 (1968). *See also*, *State v. Johnson*, 68 N.J. 349 (1975) (establishing heightened standards to determine voluntariness of consent under Article I, ¶7 of N.J. Constitution). As discussed further below, the Appellate

Division's legal conclusion that the State has not sustained its heavy burden in this case was amply supported and should be affirmed.

I. CONSENT SEARCHES MUST BE A DISFAVORED BASIS BY WHICH TO EXCUSE THE ABSENCE OF A WARRANT.

There are a number of reasons why this Court should continue to impose strict limitations on the ability of a third party to consent to a warrantless search, lest it become too convenient a tool to evade the warrant requirement.

A. The Consent Search Exception May Invite Evasion of the Warrant Requirement.

This Court, in a number of contexts, has exhibited some skepticism about the general utility of consent searches as an alternative to the traditional requirement of a search warrant. Thus, under Article I, Paragraph 7, of our State Constitution, it has imposed heightened requirements to ensure that the waiver of the right to refuse a consent search is voluntarily and knowingly exercised. *State v. Johnson,* 68 N.J. 349, 353-54 (1975) (State has the burden of showing that the consent was voluntary, an essential element of which is knowledge of the right to refuse consent). Indeed, New Jersey is one of a small minority of jurisdictions in the country requiring the State to prove, as a precondition to the validity of a consent search, that a person have knowledge of his right to refuse to give

consent. *State v. Domicz*, 188 N.J. 285, 307 (2006).

In the context of automobile searches, this Court has imposed under our State Constitution a requirement that, due to "the widespread abuse of our existing law that allows law enforcement officers to obtain consent searches of every motor vehicle stopped for even the most minor traffic violation," any consent to search an automobile is deemed invalid "unless there is a reasonable and articulable basis" by which to continue the detention after completion of the valid traffic stop. *State v. Carty*, 170 N.J. 632, 646-47 (2002). While the Court has not extended this requirement outside the context of the automobile search, it nevertheless has recognized that an individual, even in his own home, may feel "some degree of compulsion whenever a police officer makes a request" for consent to search. *State v. Domicz*, 188 N.J. at 307.

And recently——and most notably at the fervent suggestion of the Attorney General himself——this Court found the prospect of increased automobile consent searches so alarming that it thereby found a special justification for overruling its own precedent in *State v. Pena-Flores*, 198 N.J. 6 (2009). While, with respect, Amicus ACLU-NJ does not agree with the majority in *State v. Witt*, 2015 N.J. LEXIS 890 (2015), that the marginally greater number of consent searches warranted overruling *Pena-Flores*, nevertheless it is a matter of objective observation

that concern over abuse of consent searches was a significant factor in both the Attorney General's advocacy and this Court's disposition. While this case does not involve an automobile search, but rather search of a residence which this Court has found is a less coercive venue than the roadside, nevertheless the general concern over the possible misuse of consent searches as too convenient an avoidance of the warrant requirement remains. And it is the context of a search of a home that the warrant requirement is at its strongest. "The privacy interests of the home are entitled to the highest degree of respect and protection in the framework of our constitutional system." *State v. Evers,* 175 N.J. 355, 384 (2003). The point is that there is no reason for this Court to embrace the consent search doctrine with any enthusiasm, nor expand its scope beyond narrow contours.

In this case, Officer Ziarnowski candidly admitted that before he actually observed what he believed to be marijuana in Michael Cushing's bedroom, he did not believe he had any basis even to apply for a search warrant.

> I had no reason to apply for a search warrant. I never came into contact with——I never seen this lady in my life before, I've never dealt with Michael Cushing before, I've never been at the house before. You know, I'm not——realistically I'm not going to call a Judge and say, hey, can I have a search warrant for something I think might be based on what somebody that I have no idea said.

T16-20 to T17-8. Whether or not he was ultimately correct in the conclusion that there was no probable cause for a warrant based on the information provided by Mylroie, the fact remains that but for Ms. Mylroie's consent, Officer Ziarnowski believed that he would not be authorized to conduct a search. Absent exigent circumstances not even arguably present here, it does not promote sound police practice to permit the use of a consent search to excuse the absence of a warrant that the officer himself is unwilling to seek, simply because he believes his application will be denied. Such a result would turn the warrant requirement on its head.

B. The Warrant Requirement Should Not Depend upon Often Inaccurate Preconceptions About Social Relationships that Imply Consent.

The predicate issue in determining the validity of a consent is whether the third party "possessed common authority over or other sufficient relationship to the premises or effects to be inspected." *United States v. Matlock*, 415 U.S. 164, 171 (1974). But as *Matlock* further explained:

> Common authority is, of course, not to be implied from the mere property interest a third party has in the property. The authority which justifies the third-party consent does not rest upon the law of property, with its attendant historical and legal refinements, but rests rather on mutual use of the property by persons generally having joint access or control for most purposes, so that it is reasonable to recognize that any of the co-habitants has a right to permit the inspection in his [or her] own right and that the others have assumed the risk that one of their number

might permit the common area to be searched.

Id. at n.7. As the United States Supreme Court acknowledged, such determinations often depend upon a court's assessment of "widely shared social expectations" or "customary social understanding." *Georgia v. Randolph*, 547 U.S. 103, 111, 121 (2006). *See*, Renee E. Williams, *Third Party Consent Searches After* Georgia v. Randolph: *Dueling Approaches to the Dueling Roommates*, 87 B.U.L. Rev. 937, 967-68 (2007). Whether the owner of the premises who is also a relative of the defendant is merely a landlord who does not have authority to consent to the search of a tenant's premises, or rather the head of household who is deemed *in loco parentis* over the defendant such that the owner has "mutual use" of such an intimate space as a bedroom, can therefore be a fact intensive inquiry that may be swayed by preconceived notions of traditional family relationships.

But contemporary family relationships, particularly relations between generations, do not necessarily fit neatly into the traditional notions of parent and child that animate those cases finding parental authority to consent. *See*, *State v. Douglas*, 204 N.J. Super. 265, 278-79 (App. Div. 1985) (noting cases upholding parent's authority to consent to search of child's bedroom). There has been a growing increase in the number of multi-generational adult households, and a 2009 AARP survey found that 33% of survey participants between the ages of

18-49 lived with their parents or parents in-law. Jason C. Miller, *When Is A Parent's Authority Apparent? Reconsidering Third-Party Consent Searches of an Adult Child's Private Bedroom and Property*, 24 Crim. Just. 34 (2010).

Moreover, Asian, Blacks and Hispanics are much more likely than Whites to live in a multi-generational household. Hillary B. Farber, *A Parent's "Apparent" Authority: Why Intergenerational Coresidence Requires A Reassessment of Parental Consent to Search Adult Children's Bedrooms*, 21 Cornell J.L. & Pub. Pol'y 39, 62 (2011). [R]acial minorities are more likely than others to view police requests for a search as commands because, due to the racial biases in law enforcement, failing to acquiesce can lead to violent consequences." Peter Voorheis, Fernandez v. California: *Co-Occupant Consent Searches and the Continued Erosion of the Fourth Amendment*, 92 Denv. U.L. Rev. 399, 421 (2015). Families with higher socioeconomic status are more likely to exchange financial support, whereas those with fewer financial resources tend to exchange practical help—— such as residency. Farber, 21 Cornell J.L. & Pub. Pol'y at 65-66.

The cases finding that a parent had joint use over a child's bedroom were based on common assumptions about the the prevailing household structure of a nuclear household consisting of a mother and a father and their children. While such

households are of course still common, this model may not adequately take into account the growing number of adults who reside with a roommate or in multi-generational households. *Id.* Adult expectation of privacy should not be eroded simply because they reside with other family members.

Amicus acknowledges that it is often impractical to expect a police officer to make the complex and fact-intensive determination of what sociological template, if any, best describes the residential situation with which he is confronted *in situ*. For that very reason, however, this Court should be wary of consent searches in which the relationship between the consenting third party and the defendant does not clearly bestow actual authority, and where that determination cannot be made by through facts readily and reliably determined by an investigating officer through reasonable inquiry. There should be no incentive to train police officers to become experts in alternative sociological structures, simply to use the consent doctrine in order to avoid the warrant requirement.

II. SINCE MICHAEL CUSHING WAS A TENANT IN POSSESSION, HIS LANDLORD COULD NOT LAWFULLY CONSENT TO A WARRANTLESS SEARCH.

In order to establish the validity of a third party consent to the search of Michael Cushing's bedroom, the State must first discharge its burden of showing that the officer had a "reasonable belief" that Betty Cushing, the owner of the

residence, had "common authority" over the bedroom.

> It is the government's burden to establish that a third party had authority to consent to a search. The burden cannot be met if agents, faced with an ambiguous situation, nevertheless proceed without making further inquiry. If the agents do not learn enough, if the circumstances make it unclear whether the property about to be searched is subject to "mutual use" by the person giving consent, "then warrantless entry is unlawful without further inquiry."

United States v. Whitfield, 939 F.2d 1071, 1075 (D.C. Cir. 1991) (quoting *Rodriguez*, 497 U.S. at 188-89) ("sparse questioning" by FBI agents did not acquire enough information to determine whether the mother had common authority over her 29-year-'old son's bedroom). As the Supreme Judicial Court of Massachusetts aptly phrased the duty of a police officer to inquire into authority to consent:

> The police officer owes a duty to explore, rather than ignore, contrary facts tending to suggest that the person consenting to the search lacks actual authority. Police must not only thoroughly question the individual consenting to the search with respect to his or her actual authority, but also pay close attention to whether the surrounding circumstances indicate that the consenting individual is truthful and accurate in asserting common authority over the premises."

Commonwealth v. Lopez, 937 N.E.2d 949, 958 (Mass. 2010). The failure to inquire properly weighs against the government, [] because the police are simply 'not allowed to proceed on the theory that ignorance is bliss.'" *United States v. Arreguin*, 735 F.3d 1168, 1177 (9th Cir. 2013) (quoting *United States v.*

Dearing, 9 F.3d 1428, 1430 (9th Cir. 1993) and 3 Wayne R. LaFave, Search & Seizure, § 8.3(g) (2d ed. 1987)).[4]

Moreover, the government "'has the burden of establishing' apparent authority 'to consent to [each] specific area[] searched, not just authority to consent to a generalized search of [a] residence.'" *Arreguin*, 735 F.3d at 1175. In this case, Officer Ziarnowski's uncritical acceptance of Ms. Mylroie's *ipse dixit* assertion that she had Betty Cushing's "power of attorney" is insufficient to give him the reasonable belief that either Ms. Mylroie or Betty Cushing had the authority to consent to a search of Richard Cushing's bedroom.

A. <u>The Facts as Known to Officer Ziarnowski Clearly Indicated that Betty Cushing Was the Landlord of Michael Cushing and Not in Loco Parentis.</u>

With regard to Ms. Mylroie, Officer Ziarnowski knew that

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[4] *See also*, *United States v. Waller*, 426 F.3d 838, 846 (6th Cir. 2005)(where circumstances were sufficiently ambiguous to place a reasonable officer on notice of his obligation to make further inquiry prior to conducting a search of luggage stored in friend's apartment, officers' warrantless entry into defendant's luggage without further inquiry was unlawful); *United States v. Kimoana*, 383 F.3d 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"); *United States v. Rosario*, 962 F.2d 733, 738 (7th Cir. 1992) (language from *Rodriguez* "suggests that in the absence of sufficient facts, officers have a duty to seek further information in order to determine whether they may reasonably infer that the inviter has the necessary authority to consent to an entry or search of the premises[]"); *United States v. Salinas-Cano*, 959 F.2d 861, 864 (10th Cir. 1992)(police officer could not rely without further inquiry on girlfriend's consent to search luggage stored in her apartment).

she lived elsewhere and did not reside at 51 Fairmount Ave. Thus, since she was not a co-resident, there was no colorable basis for Officer Ziarnowski to believe that Ms. Mylroie had mutual use of Michael Cushing's bedroom in her own right. (See Part III below for discussion of Ms. Mylroie's role as the apparent agent of Betty Cushing).

With regard to the owner, Betty Cushing, the facts known to Officer Ziarnowski at the time of the search established that the relationship between Betty Cushing and Michael Cushing was one of landlord and tenant. Indeed, Ms. Mylroie explained that her purpose was to "evict" (apparently her chosen word) Mr. Cushing for non-payment of rent. Whether or not he could have been evicted after appropriate process for non-payment of rent, this statement clearly put Officer Ziarnowski on notice that Mr. Cushing was a tenant, and not a family member over whom Betty Cushing was acting in loco parentis.

It is well established that a landlord generally cannot consent to the search of the premises rented to a tenant. *State v. Scrotsky*, 39 N.J. 410 (1963). To do so "would reduce the [Fourth] Amendment to a nullity and leave [tenants'] homes secure only in the discretion of [landlords]." *Chapman v. United States*, 365 U.S. 610, 617 (1961).

The other stated basis for Ms. Mylroie's desire to evict Mr. Cushing was the fact that he had let his girlfriend move

into the bedroom with him. This statement also would have given Officer Ziarnowski clear reason to know that Betty Cushing did not enjoy common authority or mutual use of the bedroom occupied by the couple. Ms. Mylroie's obvious implication was that the relationship was not merely platonic and thus contravened her sense of propriety. The fact that a couple in an intimate relationship were cohabiting a bedroom, however, was a clear signal to Officer Ziarnowski that neither Betty Cushing, nor anyone else, had free access to that bedroom.

While the record does not expressly indicate when Officer Ziarnowski learned that Michael Cushing was a 26-year-old adult at the time of the search, under these circumstances he was clearly under a duty to ask, in order to determine the likely authority of Ms. Mylroie or Ms. Cushing to consent. Given the stated complaints that he was cohabiting with his girlfriend and not paying expected rent, Officer Ziarnowski clearly would have had ample reason to suspect that Mr. Cushing was not a minor still under parental authority, and thus much more likely to have exclusive use and control of his bedroom.

B. Absent a Judgment of Possession and Warrant of Removal, Michael Cushing Was a Lawful Tenant in Possession.

Once it is established that Michael Cushing was a tenant in possession of his bedroom at 51 Fairmount Ave., it also quickly follows that Officer Ziarnowski could not have reasonably

believed that Michael Cushing was not entitled to exclusive possession of the bedroom, even he was delinquent in his rent or had engaged in other activities justifying eviction. New Jersey landlord-tenant law provides remarkable clarity regarding the exact moment when a tenant loses his right to possession. Under the New Jersey Summary Dispossess Act, N.J.S.A. §§ 2A:42-7 et seq., only a Warrant for Possession signed by a judge and executed by a court officer can authorize the involuntary eviction of a tenant. N.J.S.A. § 2A:42-10.16. In particular, "self-help" evictions are expressly prohibited by law, regardless of the justification.[5] Indeed, pursuant to N.J.S.A. § 2C:33-11.1, a person commits a disorderly persons offense if,[6] after being warned by a law enforcement or other public official of the illegality of that action, the person takes possession of residential real property or effectuates a forcible entry or detainer of residential real property without lawful execution of a Warrant for Possession in accordance with the provisions of section 2 of P.L.1974, c.47 [N.J.S.A. § 2A:42-10.16] or without

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[5] Although it appears that Michael Cushing would not be entitled to a lifetime tenancy under the terms of New Jersey's Anti-Eviction Act, N.J.S.A. §§ 2A:18-61.1 et seq., since the premises were apparently owner-occupied with two or fewer rental units, the procedural protections of the Summary Dispossess Act apply to all residential tenancies.

[6] A person who is convicted of an offense under this section more than once within a five-year period is guilty of a crime of the fourth degree. N.J.S.A. § 2C:33-11.1(b).

the consent of the occupant solely in possession of the residential real property. Indeed, it is the duty of a law enforcement officer "to prevent the landlord or any other persons from obstructing or hindering the reentry and reoccupancy of the dwelling by the displaced occupant." N.J.S.A. § 2C:33-11.1(a).

Since Ms. Mylroie did not present any Warrant of Possession to Officer Ziarnowski, as a law enforcement officer he presumably was aware that, not only could he not evict Mr. Cushing, but indeed he was legally bound to assist Michael Cushing to reenter the premises. A fortiori, he could not have entertained a reasonable belief that Michael Cushing had abandoned the premises or that Betty Cushing had otherwise reclaimed exclusive possession of the bedroom.

III. THERE WAS NO REASONABLE BASIS FOR OFFICER ZIARNOWSKI TO BELIEVE THAT LISA MYLROIE HAD AUTHORITY TO CONSENT TO A SEARCH.

Even if we assume, arguendo, that Betty Cushing had common authority over Michael Cushing's bedroom sufficient to consent to a search (but see Part II above), as Officer Ziarnowski quickly learned when Ms. Cushing returned to the house, she in fact did *not* consent to such a search. The validity of the consent, therefore, depends upon the reasonableness of Officer Ziarnowski's belief that Lisa Mylroie had the authority to act on Betty Cushing's behalf in granting such consent. The record

establishes that Officer Ziarnowski could not have had such a reasonable belief.[7]

The only evidence that Lisa Mylroie had the authority to act on Betty Cushing's behalf was her own unilateral assertion that she had a "power of attorney" granted by her mother. Officer Ziarnowski did not ask to see any documentation of that authority, and simply took her at her word. T14-11 to T14-21. As the Appellate Division noted, "No power of attorney was produced or introduced at the hearing, and there is none in the appellate record." *Cushing*, at 3 n.2.

Powers of attorney can encompass a wide variety of scopes and durations. The effectiveness of a power of attorney and the required form by which it is memorialized are regulated by New Jersey statute. N.J.S.A. §§ 46:2B-8.2 et seq. In particular, pursuant to N.J.S.A. § 46:2B-8.9, a power of attorney must be in writing, signed by the principal and notarized, thus minimizing the uncertainty both as to its existence, and the identities of the principal and the agent.

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[7] Since it conclude that Betty Cushing did not have common authority over the bedroom and thus could not have given consent, the Appellate Division did not consider whether Ms. Mylroie could have provided valid third-party consent, either pursuant to the power of attorney or based upon the concept of apparent authority. Type. Op. at 13. Nevertheless, an appellate court is free to affirm a judgment on any basis supported by the record. *United States v. Yousef*, 327 F.3d 56, 156 (2d Cir. 2003).

We are simply left to speculate in this case whether any power of attorney that Betty Cushing might have executed authorized Ms. Mylroie to consent to a search. Speculation cannot provide the basis of a reasonable belief. The legislative requirements designed to remove doubt about the authenticity of a power of attorney cannot be thwarted by the unilateral pronouncement of the alleged agent. As a matter of law, such an ipse dixit claim to have the power to act on behalf of another is insufficient to provide a reasonable belief that Ms. Mylroie had authority to consent on Betty Cushing's behalf.

A. Betty Cushing Gave No Indication that She Gave Lisa Mylroie Authority to Consent to the Search.

It is a basic axiom of agency law that under the doctrine of apparent authority:

> [t]he principal is bound by the acts of his agent within the apparent authority which he knowingly permits the agent to assume, or which he holds the agent out to the public as possessing. The question in every case depending upon the apparent authority of the agent is whether the principal has by his voluntary act placed the agent in such a situation that a person of ordinary prudence, conversant with business usages and the nature of the particular business, is justified in presuming that such agent has authority to perform the particular act in question . . . .

Lobiondo v. O'Callaghan, 357 N.J. Super. 488, 497 (App. Div. 2003) (quoting *Legge, Indus. v. Kushner Hebrew Acad.*, 333 N.J. Super. 537, 560 (App. Div.2000)). Thus, "a conclusion that a party has acted with apparent authority must rest upon the

actions of the principal, not the alleged agent." *Lobiondo*, 357 N.J. Super. at 497 (emphasis added); *Wilzig v. Sisselman*, 209 N.J. Super. 25, 35 (App. Div. 1986)("the liability of the alleged principal must flow from the act of the principal").

On this record, there is absolutely no word or deed by the alleged principal, Betty Cushing, by which she could have given any impression that she was bestowing any power of attorney on Ms. Mylroie. Officer Ziarnowski admitted that he was "not too familiar" with the concept of a power of attorney.[8] T29-18. As a matter of law, Officer Ziarnowski lacked a reasonable belief, or indeed any scintilla of relevant evidence, that Ms. Mylroie was so empowered by Ms. Cushing.

It is not difficult to predict the consequences if a purported agent had the ability to create out of whole cloth a reasonable belief in her own apparent authority, simply by her own pronouncement. Such a rule would wreak havoc on agency law generally, and upon the doctrine of third party consent searches in particular. The purported agent would be free to define the scope of the apparent authority at will, unencumbered by any limitations that the principal (here Ms. Cushing) could or would

[8] In his investigation report, Officer Ziarnowski states that Ms. Mylroie "has power of attorney *over* [Betty Cushing]." Da34a (emphasis added). While this simply may be inartful wording by a layperson, it raises the possibility that he might have confused a power of attorney with the very different legal status of guardian or conservator.

have imposed. It is not necessary to impute any mendacity upon Ms. Mylroie to note that her lay understanding of the legal scope of her “power of attorney” and her limited powers of perception, recollection and understanding regarding the meaning of the technical legal term and any document that might exist, would seriously undermine her ability to credibly convey to Officer Ziarnowski a reasonable understanding of that power, which Officer Ziarnowski, himself a layperson with regard to agency law, would then have to interpret.

Allowing the mere assertion of a “power of attorney” by the purported agent to create a reasonable belief by the police officer in the validity of a consent on behalf of the principal would either force police officers in the field to become experts in agency law, or else create a gaping loophole in the law of third party consent searches that could not be closed with any degree of certainty or predictability.

In this case, the imprudence of establishing such a loophole is magnified by the fact that Officer Ziarnowski knew that Betty Cushing was nearby at a neighbor’s house, but yet made no effort to contact her. T20-16 to T20-19. Officer Ziarnowski thereby essentially placed himself in a position of conscious ignorance as to whether the actual owner of the residence in fact voluntarily consented to the search. Such conscious ignorance cannot provide the basis to conclude that

the State has discharged its burden of proving that a valid and voluntary consent was given.

B. The Unilateral Assertion By An Agent That She Has the Authority of the Principal Cannot Provide a Reasonable Belief of Authority to Consent.

There is another compelling reason why this Court should not accept a unilateral assertion by a third party of a "power of attorney" to consent to a search. Such a doctrinal device would seriously undermine this Court's recent decision in *State v. Wright*, 221 N.J. 456 (2015), which held that the so-called "third-party intervention" or "private search" doctrine cannot apply to private dwellings, and does not exempt law enforcement's initial search of a defendant's home from the warrant requirement. In *Wright*, this Court held that absent exigency or some other exception to the warrant requirement, the police must obtain a warrant to enter a private home and conduct a search, even if a private actor has already searched the area and notified law enforcement of contraband. This Court noted:

> A landlord, like any other guest, may tell the police about contraband he or she has observed. And the police, in turn, can use that information to apply for a search warrant. But that course of events does not create an exception to the warrant requirement.
>
> To hold otherwise would result in a sizeable exception to the warrant requirement and expand the private search doctrine beyond the minimal intrusion it originally sanctioned. It would also ignore the special status of the home under federal and state constitutional law and allow a more substantial invasion of privacy. In short, a private home is not

like a package in transit.

221 N.J. at 476-77.

Absent the assertion of a "power of attorney," Ms. Mylroie's intrusion into Mr. Cushing's bedroom and subsequent call to Bedminster police is exactly the type of third party intervention described in *Wright*. Law enforcement officers in New Jersey received clear direction from this Court on how to deal with such situations:

> The proper course under the State and Federal Constitutions is the simplest and most direct one. If private parties tell the police about unlawful activities inside a person's home, the police can use that information to establish probable cause and seek a search warrant. In the time it takes to get the warrant, police officers can secure the apartment or home from the outside, for a reasonable period of time, if reasonably necessary to avoid any tampering with or destruction of evidence. But law enforcement cannot accept a landlord's invitation to enter a home without a warrant unless an exception to the warrant requirement applies.

Id. at 478. If, however, the mere unilateral assertion of an agency relationship with an absent owner——whether given the technical label of "power of attorney" or some other term more accessible in the common vernacular——is sufficient to effectively revive the "private search" doctrine for private dwellings, then one can easily envision a large swath of situations in which *Wright* will be effectively superseded. Subtle inquiries into a possible principal——agent relationship (with the principal conveniently absent) will replace the

straightforward procedure of obtaining a warrant. The need for stability and predictability in training law enforcement officers is, standing alone, sufficient reason to reject such a result.

CONCLUSION

Consent searches in the home should not be an end unto themselves for purposes of avoiding the warrant requirement, but simply an occasional and unscripted occurrence. For the reasons set forth herein, Amicus ACLU of New Jersey respectfully urges this Court to affirm the judgment of the Appellate Division below.

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