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SUPREME COURT STATE OF COLORADO 2 East 14th Avenue Denver, CO 80203	
On Certiorari to the Colorado Court of Appeals Court of Appeals Case No. 2011CA1271	
Petitioner, THE PEOPLE OF THE STATE OF COLORADO, v. Respondent, SUSAN LEIGH STOCK.	▲ **COURT USE ONLY** ▲ Case No. 2014SC870
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PEOPLE'S REPLY BRIEF

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all requirements of C.A.R. 28 or C.A.R. 28.1, and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

The brief complies with the word limits set forth in C.A.R. 28(g) or C.A.R. 28.1(g).

☒It contains **2,247** words (principal brief does not exceed 9500 words; reply brief does not exceed 5700 words).

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I acknowledge that my brief may be stricken if it fails to comply with any of the requirements of C.A.R. 28 or 28.1, and C.A.R. 32.

/s/ Carmen Moraleda

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Pursuant to C.A.R. 28(c), the People respectfully submit the reply brief in this case.

INTRODUCTION

The issue before this Court is not whether defendant's father could legally consent to a search of defendant's hotel room under any doctrine, but whether he could consent to the officer's limited entry into defendant's hotel room, under the particular facts and circumstances of this case. The issue thus is a narrow one, and the underlying facts support both that the entry was consensual and the officer's conduct reasonable under the Fourth Amendment.

ARGUMENT

I. This Court should conclude that defendant's father had authority to consent to the officer's limited entry into defendant's room, and that it was reasonable for the officer to believe the father had that authority.

Honoring the clearly stated language of the Fourth Amendment, the United States Supreme Court has repeatedly recognized that only unreasonable searches are proscribed. Illustrative are *Illinois v.*

McArthur, 531 U.S. 326, 330 (2001) (the Fourth Amendment's "central requirement" is one of reasonableness), and *Florida v. Jimeno*, 500 U.S. 248, 250 (1991) ("The touchstone of the Fourth Amendment is reasonableness."). In other cases the Court has said the home is entitled to the greatest Fourth Amendment protection. Illustrative are *Payton v. New York*, 445 U.S. 573, 585 (1980) (the "physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed") (internal citation omitted), and *Kyllo v. United States*, 533 U.S. 27, 31 (2001) ("At the very core of the Fourth Amendment stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion.") (internal citation omitted).

But while searches and seizures inside a home without a warrant are presumptively unreasonable, that presumption is overcome where consent is given, rendering the entry reasonable under the Fourth Amendment. *See Kentucky v. King*, 563 U.S. 452, 459 (2011) ("[W]e have also recognized that this presumption may be overcome in some circumstances because "the ultimate touchstone of the Fourth

Amendment is 'reasonableness.'"); *Jimeno,* 500 U.S. at 250-51 ("we have long approved consensual searches because it is no doubt reasonable for the police to conduct a search once they have been permitted to do so"); *Petersen v. People*, 939 P.2d 824, 827 (Colo. 1997) ("An exception to the warrant requirement exists where police have obtained voluntary consent to the search."). In explaining the role of a person's consent, the United States Supreme Court has emphasized that:

> In a society based on law, the concept of agreement and consent should be given a weight and dignity of its own. Police officers act in full accord with the law when they ask citizens for consent. It reinforces the rule of law for the citizen to advise the police of his or her wishes and for the police to act in reliance on that understanding. When this exchange takes place, it dispels inferences of coercion.

United States v. Drayton, 536 U.S. 194, 207 (2002).

Contrary to defendant's contention, consent may be valid under an agency theory of authority. In *Stoner v. California*, 376 U.S. 483, 488-89 (1964), the Supreme Court recognized that an agent could consent to a search, *id.*, but also warned against "strained applications of the law of agency or [] unrealistic doctrines of apparent authority." *Id.* at 488.

There, the court held that a warrantless search of a hotel room without the consent of the absent guest was unlawful, even though the hotel clerk had consented to the search, implicitly recognizing that applying an agency or apparent authority in that scenario would indeed be strained and unrealistic. *Id.* at 487-90.

In *United States v. Baswell*, 792 F.2d 755, 759 (8th Cir. 1986), relying on *Stoner*, the court held that a third party, a maintenance person, possessed implied authority to give the police consent to search the home cared for, under an agency theory. 792 F.2d at 759. There, the trial court found that an implied agency relationship existed between the maintenance person and the owner of the house, who paid him to perform maintenance and custodial work around the house. *Id.* at 756, 759. The owner of the house was the defendant's friend, and had allowed defendant to stay in the house and use it fully and freely. *Id.* at 759. The maintenance person discovered that the defendant had hidden cocaine in the house, without the owner's knowledge, so he informed police and allowed them to search the home. *Id.* at 757.

This Court in *Petersen*, 939 P.2d at 829-30, while it declined to uphold the legality of the search on an agency theory, it did it on the particular facts of the case, noting that the caretaker's functions there were limited to watering plants, feeding the dogs, and taking out the trash. *See* 939 P.2d at 828-29. It concluded that an agency doctrine did not support the authority by someone with limited specific duties to consent to a search of the property. *Id.* at 829. "This distinction between *Baswell* and the present case is significant because a homeowner does not generally confer broad authority to a housekeeper, handyman, or one given light caretaking duties." *Id.*

Here, applying a basic agency theory to the facts of this case would be neither strained nor unrealistic, emphasizing the narrow issue before this Court—whether the father had authority to consent to the officer's limited entry, as opposed to authority to consent to a search. *Cf. Stoner*, 376 U.S. at 488 (hotel clerk had no authority to consent to search of hotel room because "the rights protected by the Fourth Amendment are not to be eroded by strained applications of the law of agency"). In fact, the opposite conclusion—that the father did not have

authority to open the door and did not have authority to invite the officer to enter the room in defendant's presence—would be strained and unrealistic.

Defendant had already confessed to taking the money and was in her room. (R. Tr. 1/14/11, pp. 32-34, 78, 84) Defendant's hotel room was a typical hotel room with a small entry, the bathroom on the right-hand side, and a single room with a bed and some furniture. (*id.* at 36-37) Her father was with her in the room. (*id.* at 34, 83) The officer went to her room *knowing* that she was in her room and had confessed. (*id.* at 33-34) When the officer arrived, she was lying on her bed crying. (*id.* at 92-93) Defendant's father opened the door, and invited the officer in. (*id.* at 108, 111) The officer asked defendant if she wanted to talk with him, and she said "yes." (*id.* at 36, 38-39)

Given the facts and circumstances, this Court should conclude that defendant's father had authority to consent to the officer's limited entry into the room because the facts supported that defendant had implicitly delegated that authority; in other words, the father acted as an agent or instrument of defendant in opening the door. *Cf. Stoner,*

376 U.S. at 489 (noting that there was no indication that "the police had any basis whatsoever to believe that the night clerk had been authorized by the petitioner to permit the police to search the petitioner's room" in his absence).

Relatedly, this Court should conclude that it was reasonable for the officer to act upon the father's invitation and consent to enter, based on the facts known to the officer before arriving—including that defendant was in her room—and defendant's immediate confirmation of consent. *See, e.g., State v. Thompson*, 578 N.W.2d 734, 740 (Minn. 1998) (concluding that it was reasonable for the officers to believe that the young man who answered the door had the apparent authority to give them limited consent to enter the apartment for the purpose of talking with the occupants therein, even though the young man acknowledged he did not live there); *cf. People v. Nelson*, 2012 COA 37M, ¶ 41 (concluding that "the girlfriend's consent to search was invalid in light of [the defendant's] refusal to consent").

Indeed, the officer did not go to defendant's room in an attempt to extract a confession or to trick defendant, because she had already

confessed and was cooperating with the investigation. And it was reasonable for the officer to believe that the father invited him in and defendant had consented to his entry (because she was in the room) and immediately and unambiguously confirmed her consent. *Cf. People v. Clemens*, 2013 COA 162, ¶ 37 ("In ambiguous circumstances, police officers must make 'reasonable inquiries' into the third party's authority.").

Under the totality of the circumstances, nothing the officer did was unreasonable, abusive, or overreaching. *See United States v. Montoya De Hernandez*, 473 U.S. 531, 537 (1985) ("What is reasonable depends upon all of the circumstances surrounding the search or seizure and the nature of the search or seizure itself."); *Payton*, 445 U.S. at 608 (noting that the purpose of the Fourth Amendment is to curb abusive police practices by protecting against unreasonable searches and seizures) (White, J., dissenting). And because the ultimate measure of constitutionality under the Fourth Amendment is reasonableness, this Court should conclude that no violation occurred.

In conjunction, this Court should also conclude that the holding in *People v. White*, 64 P.3d 864, 872 (Colo. App. 2002), relied upon by the trial court—that the family friend had authority to consent to the police officers' limited entry into the living room area, and that it was reasonable for the police to believe that they had authority to enter based on the family friend's invitation—is not contrary to Fourth Amendment law.

II. This Court should defer to the trial court's factual finding that defendant's father implicitly invited the officer to enter the room.

Defendant argues that even if the father could legally consent, he in fact did not, because his "silent acquiesce to the officer's presence did not constitute valid consent." *But see People v. Berow*, 688 P.2d 1123, 1127 (Colo. 1984) ("[C]onsent need not be explicit, but can be implied from the 'totality of the circumstances.'") (citing *Schneckloth v. Bustamonte*, 412 U.S. 218, 226 (1973)); *cf. People v. Prescott*, 205 P.3d 416, 421 (Colo. App. 2008) ("[It] is one thing to infer consent from actions responding to a police request. It is quite another to sanction the police walking in to a person's home without stopping at the door to

ask permission.") (internal citation omitted); *People v. Bostic*, 148 P.3d 250, 254 (Colo. App. 2006) (consent voluntary where "the trial court found, with record support, that when the officer knocked on the door, defendant answered it; that defendant started to step outside the room to talk; and that, when asked by the officer whether they could speak with her inside, she stepped back, held the door open, and allowed the officers into the room").

Because this is a factual finding supported by the record, this Court should defer to it. *People v. Davis*, 187 P.3d 562, 563-64 (Colo. 2008). Contrary to defendant's contention, the fact that the officer and the father testified to different accounts, does not render the trial court's ruling erroneous. *See People v. Mendoza-Balderama,* 981 P.2d 150, 157 (Colo. 1999) ("It is the function of the trial court and not the reviewing court to weigh the evidence and determine the credibility of the witness."); *see also People v. Thomas,* 853 P.2d 1147, 1149 (Colo. 1993) ("Deference is given to the trial court's findings of fact and, as long as there is support for them, we will not overturn such findings. This is true even though a contrary position may find support in the

record and even though we might have reached a different result had we been acting as the finder of fact.").

Based on the officer's testimony, the court found that the father implicitly invited the officer to enter the room by stepping back from the door. (R. CF, pp. 83-84; R. Tr. 1/14/11, pp. 34, 108, 111) *See, e.g., Anderson v. Bessemer City*, 470 U.S. 564, 574 (1985) ("Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous"); *United States v. Carter*, 378 F.3d 584, 589 (6th Cir. 2004) (noting that "because testimony often becomes more ambiguous when reduced to toneless words on a page, we defer to the district court's factual finding").

Therefore, this Court should defer to the trial court's finding that the father implicitly invited the officer to enter the room.

III. This Court should use its discretion to conclude that defendant's voluntary consent to the officer's entry and her statements were not obtained through exploitation of any prior illegality.

Were this Court to conclude that the entry was illegal, it should nonetheless use its discretion to conclude that defendant's consent and

statements were not obtained through exploitation of any prior illegality, because the record supports that they were acts of her free will, particularly considering she had previously confessed. *See People v. Lowe*, 616 P.2d 118, 123 (Colo. 1980) ("If the evidence to which the objection is made has been produced by exploitation of the initial illegal police action, the evidence is tainted and inadmissible.").

CONCLUSION

For the foregoing reasons and authorities, this Court should reverse the court of appeals' decision because, under the totality of the circumstances, defendant's father had authority to consent to the officer's limited entry, it was reasonable for the officer to so believe, and no infringement of defendant's Fourth Amendment rights occurred.

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CERTIFICATE OF SERVICE

This is to certify that I have duly served the within **PEOPLE'S REPLY BRIEF** upon **KIELLY DUNN**, via Integrated Colorado Courts E-filing System (ICCES) on December 19, 2016.

/s/ Tiffiny Kallina