STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2010AP3034-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

KENNETH M. SOBCZAK,

Defendant-Appellant-Petitioner

On Review of a Decision of the Court of Appeals, District II,
Affirming a Judgment of Conviction
Entered in Washington County,
the Honorable Patrick J. Faragher, Presiding

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT-PETITIONER

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ISSUE PRESENTED

May a police officer rely on a weekend houseguest's consent to enter her host's home and search items within?

The circuit court held that the houseguest had the authority to consent, and denied Mr. Sobczak's suppression motion. The court of appeals affirmed.

POSITION ON ORAL ARGUMENT AND PUBLICATION

Both oral argument and publication are customary for cases decided by this court.

STATEMENT OF THE CASE AND STATEMENT OF FACTS

The relevant facts are undisputed and come from the testimony of the sole witness at the suppression hearing, Hartford police officer Nathanial Dorn. (8:5; App. 114).

On September 5, 2009, a Saturday, Hartford police received a report of "disturbing images" found on a computer. (8:6-7; App. 115-16). Officer Dorn was dispatched to a single-family residence, where Kristina Podella met him on the porch. (8:7-8; App. 116-17). Ms. Podella explained that she did not live at the house but was staying there for the weekend with her boyfriend of three months, Kenneth Sobczak. (8:9-10; App. 118-19). The house belonged to Mr. Sobczak's parents, who were out of town on vacation; Mr. Sobczak lived there as well but was at work. (8:10-11; App. 119-20).

Before leaving for work, Mr. Sobczak had given Ms. Podella permission to use his laptop computer, as she did not know her way around Hartford and had nothing else to do. (8:11-12; App. 120-21). Ms. Podella had discovered what she believed to be child pornography on the computer, and so had called her grandmother, who called the police. (8:12-13; App. 121-22).

Officer Dorn told Ms. Podella that he needed to see the images and suggested that she either bring the computer out to the porch or allow him to enter the house. (8:14; App. 123). Ms. Podella allowed Officer Dorn into the house and led him to the computer, which was 20 or 30 feet away from the front door, on a couch. (8:14-15; App. 123-24). At Officer Dorn's request, Ms. Podella searched the computer and showed him one video; he played it and also played portions of two more. (8:15-18; App. 124-27). After determining that the videos were likely illegal, Officer Dorn seized the computer and removed it to the police department. (8:19-20; App. 128-29).

Mr. Sobczak moved to suppress the images found on the computer and any derivative evidence. (7). The circuit court denied the motion at the close of the evidentiary hearing. (8:46; App. 155). Mr. Sobczak pleaded no contest, was sentenced, and appealed the suppression ruling. (15:26, 30-31; 26). The court of appeals affirmed the trial court in a published decision, holding that Ms. Podella had the authority to consent to the officer's entry into the home and search of the computer. ***State v. Sobczak***, 2012 WI App 6, 338 Wis. 2d 410, 808 N.W.2d 730; (App. 101-109).

This court granted Mr. Sobczak's petition for review. (Order of June 13, 2012).

ARGUMENT

As a Weekend Houseguest, Ms. Podella Lacked Actual or Apparent Authority to Consent to a Police Entry and Search of Mr. Sobczak's Home.

A. Standard of Review and Summary of Argument

The state bears the burden to show a lawful search by clear and convincing evidence. ***State v. Kieffer***, 217 Wis. 2d 531, 541-42, 577 N.W.2d 352 (1998). Whether the police acted in violation of the Fourth Amendment is a question of constitutional fact. ***State v. Griffith***, 2000 WI 72, ¶23, 236 Wis. 2d 48, 613 N.W.2d 72. This court defers to the trial court's findings of historical fact but independently applies the law to those facts. ***Id.***, ¶¶23-24.

The question in this case is simply this: did Ms. Podella, as a weekend visitor, have the authority to subject Mr. Sobczak's home and its contents to a police search?

The answer is "no." While it is well-established that an *inhabitant* may consent to a search of his or her dwelling, neither the United States Supreme Court nor this one has ever held that a temporary *guest* has the actual authority to allow the police to search his or her host's home. In fact, several courts, including this one, in ***State v. McGovern***, have held to the contrary. 77 Wis. 2d 203, 252 N.W.2d 365 (1977).

The court of appeals nevertheless concluded that Ms. Podella, as a guest, had the authority to allow Officer Dorn's search. The court cited a single authority for this proposition: a passage from Professor LaFave's famous Fourth Amendment treatise. The passage states that, while a guest may not ordinarily consent to a search of his or her host's home, a guest who is "more than a casual visitor and [has] the

run of the house," may consent "merely to a police entry of the premises into an area where a visitor would normally be received." 4 WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 8.5(e) at 235 (4th ed. 2004).

Whether the LaFave passage correctly states the law is arguable. It is thinly sourced and, as Mr. Sobczak argued in his petition for review, contrary to ***McGovern***. It is also inconsistent with the United States Supreme Court's view that "the Fourth Amendment has drawn a firm line at the entrance to the house." ***Payton v. New York***, 445 U.S. 573, 590 (1980). But even if LaFave's statement is sound, the facts of this case fall well outside the rule he lays out. Ms. Podella was nothing more than a "casual visitor." Further, she consented to a great deal more than simply allowing Officer Dorn in the front door. She led Officer Dorn 20 or 30 feet inside the house, where she then allowed him to search Mr. Sobczak's computer. No decision from any jurisdiction has ever sanctioned such a substantial intrusion on the authority of a houseguest.

Nor does the doctrine of "apparent authority" excuse the actual authority that Ms. Podella lacked. That doctrine is simply a specific application of a general Fourth Amendment rule: that the legality of an officer's actions is judged not against the actual facts of the situation, but against the facts as they reasonably appeared to the officer. Thus, an officer may, for example, lawfully rely on the consent of a person who the officer reasonably believes is a resident of the home, even if it later turns out that this belief was factually incorrect. Here, there is no indication that Officer Dorn believed Ms. Podella to be anything other than she was – a weekend guest of Mr. Sobczak. In fact, all of relevant facts in this case come directly from Officer Dorn's testimony. Because Officer

Dorn knew the actual facts of the situation, his actions are judged against those facts, and the apparent authority doctrine does nothing to broaden Ms. Podella's power to consent.

B. Ms. Podella's status as a weekend houseguest did not give her the actual authority to allow Officer Dorn to enter Mr. Sobczak's house and search his computer.

"[T]he physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed." ***Welsh v. Wisconsin***, 466 U.S. 740, 748 (1984) (internal quotation omitted). It is thus a "basic principle of Fourth Amendment law … that searches and seizures inside a home without a warrant are presumptively unreasonable." ***Id.*** at 749. Exceptions to the warrant requirement are "few in number and carefully delineated." ***Id.***

One of the "carefully delineated" exceptions occurs when the police enter the home on the consent of the dweller. *See* ***Georgia v. Randolph***, 547 U.S. 103, 109 (2006). Often it is the defendant who gives consent to search his or her home. ***Id.*** However, in ***United States v. Matlock***, the Supreme Court was presented with a case in which another occupant, who shared a bedroom with the defendant, was the consenting party. 415 U.S. 164, 166 (1974). The Court held that a co-occupant's consent "is valid as against the absent, nonconsenting person with whom that authority is shared." ***Id.*** at 170. The co-occupant's "common authority" is

> 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-inhabitants has the right to permit the inspection in his 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 171 n.7.

It is important to note that the consenting party in ***Matlock*** was a woman who lived in the home at issue, and further that the court referred to those who might consent as "joint occupants" and "co-inhabitants." ***Id.*** at 166, 169, 171 n.7. In ***Randolph***, decided in 2006, the court referred to ***Matlock***'s holding as its "co-occupant consent rule" and restated it thus: "that a solitary co-inhabitant may sometimes consent to a search of shared premises." 547 U.S. at 109, 111. And in ***Illinois v. Rodriguez***, the Court described as "obviously correct" the lower court's ruling that the consenting party – who held a key to the apartment, kept furniture and household effects within, and sometimes spent the night there, but did not actually live there – lacked common authority over the apartment. 497 U.S. 177, 181-82 (1990).

And that is as far as the United States Supreme Court has extended the doctrine of common authority over a dwelling: to co-inhabitants. When two or more people live together, one may allow the government to search the common areas of the home.

This narrow rule is not a surprising one. As the Court pointed out in ***Randolph***, the Fourth Amendment's protection of a dwelling's privacy depends upon "widely shared social expectations." 547 U.S. at 111. Rather than being governed by property law's "historical and legal refinements," the common authority doctrine is grounded in a commonsensical

understanding about who has the right to invite others into – or exclude others from – a particular home. ***Id.*** at 110-111.

Thus, when tenants share an abode, the usual social expectation is that "any one of them may admit visitors, with the consequence that a guest obnoxious to one may nevertheless be admitted in his absence by another." ***Id.*** at 111. But there is no similar "widely-shared social expectation[]" with respect to a weekend visitor. In fact, the expectation is the opposite. A houseguest is not generally regarded as having the right to subject his or her host's home to entry by third parties – still less to permit third parties to examine the contents of the home. *See* 4 LAFAVE § 8.5(e), at 233-34 ("[A] host and guest cannot be said to have 'common authority' over the premises, in the sense in which that phrase is used in ***Matlock***. Generally, it must be concluded that the host's interest in the premises and authority to permit a search of them is superior to that of the guest. This being so, it may be said that ordinarily a mere guest in premises may not give consent to search of those premises which will be effective against the superior interest and authority of the host.").

Nor does a host relinquish the right to exclude government agents from his or her home simply by leaving a chosen guest temporarily alone within. In ***United States v. Cos***, the police secured an arrest warrant for the defendant and arrived at his door. 498 F.3d 1115, 1117 (10th Cir. 2007). He was not home, but a friend of his, Feather Ricker, was. ***Id.*** Ricker did not have a key to Cos' apartment, and was not living there. ***Id.*** She had previously been alone in the apartment once or twice, when Cos went to the store, and she had spent the night there on two or three occasions. ***Id.*** at 1117-18. Ricker and her three young children had come over with Cos' permission in order to use the pool in his apartment complex. ***Id.*** at 1118. Cos had left them alone in his

apartment for about forty minutes when the police arrived. ***Id.*** Ricker allowed the police to search the apartment, and they found incriminating items. ***Id.***

The government claimed that Ricker had the authority to consent to the search in Cos' absence. ***Id.*** at 1126. The court disagreed, calling the government's claim

> untethered to any persuasive account of 'widely shared social expectations' or reasonable expectations of privacy that would support the view that, in the absence of a valid warrant or exigent circumstances, Mr. Cos somehow forfeited his right to exclude the government's entry into his home by leaving Ms. Ricker alone there for forty minutes before the officers arrived.

Id. at 1128 (citing ***Randolph***, 547 U.S. at 111). The appellate court agreed with the district court, which had concluded that Ricker "was more like an occasional visitor whom Mr. Cos allowed to visit, rather than one who asserted a right to access the property jointly with Mr. Cos." ***Id.*** at 1127.

Similarly, in ***People v. Wagner***, the police sought and received the consent of a man who was present in the home when they arrived and who had spent the night there. 304 N.W.2d 517, 519 (Mich. Ct. App. 1981). The court rejected the state's claim that the man had common authority, concluding that "[w]e cannot say that an overnight guest has 'joint access or control for most purposes.'" ***Id.*** at 520. *See also* ***United States v. Harris***, 534 F.2d 95, 97 (7th Cir. 1976) (guest who had visited the apartment more than once and had previously been inside alone could not consent to search of apartment).

This court reached the same conclusion in ***McGovern***. In that case the state claimed that Mardirosian, who lived in a tent in the yard but was a "visitor" in the house, had the

authority to allow the police to enter. 77 Wis. 2d at 212, 214. The court noted that Mardirosian "was not the owner, or tenant, or occupant of the house, or of any rooms therein" and rejected the state's argument. ***Id.***, 214.

In this case, the court of appeals nevertheless concluded that Ms. Podella's status as a houseguest gave her the authority to allow Officer Dorn to enter Mr. Sobczak's house and search the computer inside. The court's sole citation for the proposition that a houseguest may have such authority was to a passage of LaFave. ***Sobczak***, 338 Wis. 2d 410, ¶12; (App. 106).

That passage comes at the conclusion of a section which explains, as noted in the quotation above, that in general a guest may not consent to the search of the host's dwelling. It goes on:

> Finally, note must be taken of a case which is quite different from ***Harris***, namely, where the guest is actually present inside the premises at the time of the giving of the consent and the consent is merely to a police entry of the premises into an area where a visitor would normally be received. There is sound authority that, at least when the guest is more than a casual visitor and "had the run of the house," his lesser interest in the premises is sufficient to render that limited consent effective.

4 LAFAVE § 8.5(e) at 235 (4th ed. 2004).

To understand the meaning of the passage – who is a "casual visitor"? What is meant by "an area where a visitor would normally be received"? – as well as to determine whether it is correct, a look at its sources is necessary.

Though the present edition of the treatise cites several cases as "sound authority" for its assertion, the original edition cited just one: ***United States v. Turbyfill***, 525 F.2d 57 (8th Cir. 1975). 2 WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 8.5 at 759 (1st ed. 1978).

In that case, two police officers went to Elmer Turbyfill's house to question him about a counterfeiting operation. ***Turbyfill***, 525 F.2d at 58. When the officers knocked on the front door, Billy Joe Church, rather than Turbyfill, answered and allowed them to enter. ***Id.*** Immediately upon coming in the front door, the police discovered marijuana in plain view, which provided the legal justification for their further actions inside the house. ***Id.*** at 58-59. Turbyfill contended, however, that Church lacked the authority to let the police in the front door. The court disagreed, saying: "Church had been staying in the house for several weeks and had the run of the house. He was an occupant of indefinite duration rather than a casual visitor." ***Id.*** Under these circumstances, the court concluded that Church had the authority to allow the police to cross the threshold. ***Id.***

Three years after ***Turbyfill*** was decided, Professor LaFave published the first edition of his treatise and cited the case as the sole authority for the proposition that one who is "more than a casual visitor and 'ha[s] the run of the house'" may allow the police into "an area where a visitor would normally be received." 2 LAFAVE § 8.5 at 759 (1st ed. 1978). LaFave's assertion, in turn, was soon cited by other cases: ***Nix v. State***, 621 P.2d 1347 (Alaska 1981); ***People v. Shaffer***, 444 N.E.2d 1096 (Ill. App. Ct. 1982); ***Commonwealth v. Netting***, 461 A.2d 1259 (Pa. Super. Ct. 1983); and ***State v. Thompson***, 578 N.W.2d 734 (Minn. 1998). LaFave's treatise

now incorporates each of these cases as "sound authority" for the proposition that the cases cited the treatise for. 4 LAFAVE § 8.5(e), at 235 n.117 (4th ed. 2004).

Is LaFave's view correct? The ***Turbyfill*** court noted that Turbyfill was the "sole tenant" of the house but also called Church "an occupant of indefinite duration." 525 F.2d at 58, 59. Because ***Matlock*** makes clear that authority over a dwelling "does not rest upon the law of property, with its attendant historical and legal refinements," it might reasonably be said that Church was simply a "co-inhabitant" under ***Matlock***, even though not a tenant. 415 U.S. at 171 n.7. That is, ***Turbyfill*** may simply stand for the proposition that, for Fourth Amendment purposes, someone who lives in a particular dwelling for a substantial time and has no plan to leave is an occupant, not a guest, whether or not he or she holds a lease. In fact, the opinion does not use the word "guest" and only uses the word "visitor" to denote what Church was *not*. 525 F.2d at 59. It may be a stretch, then, to rely on ***Turbyfill*** for a rule allowing a guest to consent to the search of a home.

Further, the ***Turbyfill*** opinion does not say anything at all about the scope of Church's authority; the language about the "area where a visitor would normally be received" is apparently LaFave's gloss on the case, not the court's. This notion – that government agents may rely on something less than an actual occupant's consent to come *just a little way* into the house – is incongruous with the Supreme Court's view that nowhere

> is the zone of privacy more clearly defined than when bounded by the unambiguous physical dimensions of an individual's home …. The Fourth Amendment has drawn a firm line at the entrance to the house. Absent

> exigent circumstances, that threshold may not reasonably be crossed without a warrant.

Payton, 445 U.S. at 589-90. S*ee also* ***United States v. Berkowitz***, 927 F.2d 1376, 1388 (7th Cir. 1991) ("***Payton*** did not draw the line one or two feet into the home; it drew the line at the home's entrance."); ***Kyllo v. United States***, 533 U.S. 27, 37 (2001) ("any physical invasion of the structure of the home, 'by even a fraction of an inch,' [is] too much") (citation omitted).

In short, there is good reason to doubt that a houseguest *ever* has the actual authority to permit the police into the home, even just a few feet. In ***McGovern***, the state argued that the police action of merely entering the foyer of a house was something less than a "search," and could thus be justified by Mardirosian's consent. 77 Wis. 2d at 212. The court rejected this view, holding that the occupants' expectation of privacy behind their closed front door "was not unreasonable and therefore the full protection of the fourth and fourteenth amendments became operative at that threshold. To cross it a valid consent in the full constitutional sense was required." ***Id.*** at 214. As discussed above, Mardirosian, as a visitor, lacked the authority to give such consent. ***Id.***[1]

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[1] LaFave's treatise is critical of ***McGovern***, but not on the theory that Mardirosian had actual authority to consent to the entry. LaFave instead implies that this court "missed" the issue of whether Mardirosian had apparent authority, and suggests that "the police are entitled to assume without specific inquiry … that one who answers their knock on the door has the authority to let them enter." 4 LAFAVE § 8.5(e) at 235, 235 n.119 (4th ed. 2004). The fact that ***McGovern*** was decided in 1977, 13 years before the Supreme Court adopted the apparent authority doctrine in ***Rodriguez***, 497 U.S. 177, explains this court's "missing" the issue. At any rate, Officer Dorn was aware of Ms. Podella's houseguest

But even if one accepts LaFave's premise, it does not validate the search here. Ms. Podella was not "more than a casual visitor." Further, she did far more than allow Officer Dorn into an "area where a visitor would normally be received." To Mr. Sobczak's knowledge, no court has ever sanctioned an intrusion as extensive as Officer Dorn's on the consent of a houseguest like Ms. Podella.

For example, in ***Turbyfill***, as discussed above, Church had a much closer connection to the house in question than Ms. Podella had to Mr. Sobczak's: he had been staying there for weeks such that he was regarded as an "occupant of indefinite duration." 525 F.2d at 59. Ms. Podella, in contrast, was spending the weekend with Mr. Sobczak. (8:9-10; App. 118-19). The phrase "casual visitor" seems perfectly suited to her. Further, Church simply allowed the officers through the front door of Mr. Turbyfill's house. ***Id.*** at 58. Ms. Podella, in contrast, let Officer Dorn into the house, led him to a computer "20 or 30 feet" from the door, and assisted him in a search of that computer. (8:14-15, 16-18; App. 123-24, 25-27).

Further, in every single case cited by (and citing to) the LaFave passage, the consenting party's authority only justified the police's entry into the residence:

In ***Nix***, a friend of the occupant who occasionally stayed overnight allowed the occupant's sister to enter the house. 621 P.2d at 1348. The sister brought a companion who was, unbeknownst to the consenting friend, a police officer. ***Id.*** The officer observed incriminating evidence while standing near the front door of the apartment. ***Id.***

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status in this case, so LaFave's apparent authority critique of ***McGovern*** is not implicated.

In ***Shaffer***, police officers entered the defendant's front door, which opened into the living room of the home, at the invitation of defendant's brother, "a frequent visitor who had never been prevented from inviting friends into defendant's home." 444 N.E.2d at 1097, 1099. At this point, the resident defendant walked into the living room and consented to the officer's search of his home. ***Id.*** at 1097. Thus the question was only whether the brother could consent to allowing officers through the front door; the court held that he could. ***Id.*** at 1099.

In ***Thompson***, police looking for a murder suspect entered an apartment on the consent of a young man who answered the door at 6:00 a.m. but said that he did not live there. ***Id.*** at 736-37. The young man let the officers in via a door that led into the kitchen; eventually an officer saw the suspect in a bedroom through an open doorway. ***Id.*** at 737. The court held that the officers could lawfully rely on the young man's "apparent authority to give them limited consent to enter the apartment for the purpose of talking with the occupants therein." ***Id.*** at 740.

In ***Netting***, the guest only allowed the police to enter the defendant's apartment. 461 A.2d at 1259. The officers observed incriminating evidence in plain view, and the defendant himself then consented to a search which turned up further incriminating evidence. ***Id.*** at 1260.

Further, neither of the additional cases the state relied on below allowed the police to rely on a guest's consent to do any more than enter the door of the host's dwelling:

In ***People v. Ledesma***, police officers in the defendant's apartment answered a telephone call from the defendant. 140 P.3d 657, 672 (Cal. 2006). The defendant sought to suppress the statements he had made during that

phone call. ***Id.*** at 703. The officers had been allowed into the apartment by two visitors. ***Id.*** at 704. They had also searched the apartment by the consent of those guests, but since they found nothing during the search, the court did not address the search's legality. ***Id.*** It merely held that the officers could lawfully rely on the guests' consent to enter. ***Id.*** at 704-05. Answering the phone call was justified separately by probable cause and exigent circumstances. ***Id.*** at 705.

Finally, in ***Morrison v. State***, decided before ***Matlock***, the consenting party again simply allowed the police to enter the apartment, and "upon entering the apartment the stolen merchandise subsequently seized was observed … in plain view." 508 S.W.2d 827, 829 (Tex. Crim. App. 1974).

In fact, Mr. Sobczak has located no authority from any jurisdiction or commentator holding that the police may do more than cross the threshold of the premises on the consent of a social guest of brief duration. There is thus no precedent for the court of appeals' conclusion here: that a houseguest like Ms. Podella possesses "common authority" to consent to a search of any portion of the house, or any item within the house, that she herself has permission to access. *See* ***Sobczak***, 338 Wis. 2d 410, ¶13; (App. 107).

To summarize, it is arguable under United States Supreme Court precedent whether a temporary houseguest may consent to *any* government intrusion into his or her host's home. Professor LaFave and a few courts have held that a houseguest may allow the police merely to enter; other courts, including this one in ***McGovern***, have held to the contrary. But there is no need to revisit that dispute in this case, because merely crossing the threshold is not what happened here. Ms. Podella brought Officer Dorn 20 or 30 feet inside the home and assisted him in a search of Mr.

Sobczak's computer. In the absence of any authority validating a houseguest's consent for such an intrusion by the police, this court should hold that Ms. Podella lacked the authority to allow Officer Dorn's search.

C. Ms. Podella's apparent authority was no greater than her actual authority.

The state argued below that even if Ms. Podella lacked actual authority to allow Officer Dorn's search, the search was lawful under the doctrine of apparent authority. The state is in error. "Apparent authority" is simply a specific application of a general Fourth Amendment principal: a law enforcement officer's actions are judged against the facts available to, or reasonably believed by, the officer. If an officer makes a search or seizure based upon a reasonable, but mistaken, understanding of the facts, and the search or seizure would be lawful if the facts were as the officer believed, the Fourth Amendment is not violated. Here, there is nothing in the record to suggest that Officer Dorn held any reasonable but inaccurate beliefs about the factual situation confronting him. Accordingly, if Ms. Podella lacked actual authority to consent to Officer Dorn's search, she also lacked apparent authority.

Illinois v. Rodriguez is the seminal case for the actual authority doctrine. In that case, as discussed above, a woman who occasionally stayed in the defendant's apartment, but did not live there, allowed the police to enter. 497 U.S. at 181. The Court concluded that she lacked the authority to do so. ***Id.*** at 182.

Nevertheless, the Court remanded for a determination as to whether the woman had apparent authority to consent to the police entry. ***Id.*** at 189. The woman had referred to the apartment as "our" apartment in earlier conversation with the

police, and had a key. ***Id.*** at 179. It was thus possible that the officers had misunderstood the woman's connection to the apartment at issue.

The Court surveyed a variety of Fourth Amendment cases and noted that "what is generally demanded of the many factual determinations that must regularly be made by agents of the government … is not that they always be correct, but that they always be reasonable." ***Id.*** at 185. Thus, there would be no illegality "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." ***Id.*** at 186.

The ***Rodriguez*** Court made quite clear that the apparent authority doctrine excuses only reasonable mistakes of *fact* by law enforcement officers. *See*, *e.g.*, ***id.*** at 184 (discussing government officers' "judgment regarding the facts," stating that reasonableness "does not demand that the government be factually correct in its assessment" of what a search will produce, and noting no violation where warrant issued on the basis of "seemingly reliable but factually inaccurate information"). Subsequent authorities confirm this view. *See*, *e.g.*, ***United States v. Reid***, 226 F.3d 1020, 1031 n.3 (9th Cir. 2000) ("The apparent authority doctrine validates a search only where the search would be valid if the facts believed by the officer were true."); ***People v. White***, 64 P.3d 864, 872 (Colo. Ct. App. 2002) ("The doctrine is premised on the points that whether a third party has consented is a question of fact and that mistakes of fact by the police can be reasonable under certain circumstances.").

Thus, in ***State v. Tomlinson***, the defendant argued that the teenage girl who allowed the police to enter his home lacked the authority to do so because it was not shown that

she was one of his daughters. 2002 WI 91, ¶27, 254 Wis. 2d 502, 648 N.W.2d 367. This court rejected the argument, explaining that given the facts known to the officers, "it was more than reasonable for [them] to conclude that the girl who answered the door was one of Tomlinson's daughters." ***Id.***, ¶¶27-28.

Here, the only relevant facts of record are the facts known to Officer Dorn. (8:5-27). There is no suggestion that Officer Dorn, in deciding to search Mr. Sobczak's house, relied on any conclusions that were not "factually correct" but were nevertheless "reasonable." ***Rodriguez***, 497 U.S. at 185. Because the actual facts are the same as those that Officer Dorn knew, the only question is whether, under those facts, Ms. Podella had the authority to consent to his actions. If she lacked actual authority, then she lacked apparent authority.

The state, however, seems to suggest that Officer Dorn's misapprehensions of *law* could validate his actions. This is not so. *See, e.g.*, 4 LAFAVE § 8.3(g) at 175 (4th ed. 2004) ("[T]he ***Rodriguez*** apparent authority rule applies to mistakes of fact but not mistakes of law."); *see also* ***State v. Longcore***, 226 Wis. 2d 1, 9, 594 N.W.2d 412 (Ct. App. 1999), *aff'd*, 2000 WI 23, 233 Wis. 2d 278, 607 N.W.2d 620. It is irrelevant, for example, if Officer Dorn erroneously believed that Ms. Podella's lawful presence in the home rendered her consent valid. (*See* Repondent's Brief at 18); ***Cos***, 498 F.3d at 1129 ("mere presence" is not enough for an apparent authority claim). The apparent authority doctrine excuses reasonable mistakes of *fact*; it does not serve as a sort of universal "fudge factor" for a police officer's actions.

CONCLUSION

Because Ms. Podella lacked the actual or apparent authority to consent to Officer Dorn's actions in Mr. Sobczak's house, Mr. Sobczak respectfully requests that this court vacate his conviction and remand to the circuit court with directions that all evidence derived from the search be suppressed.

Dated this 4th day of October, 2012.

Respectfully submitted,

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CERTIFICATION AS TO FORM/LENGTH

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is: proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line of body text. The length of the brief is 5,314 words.

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of § 809.19(12). I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed on or after this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 4th day of October, 2012.

Signed:

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CERTIFICATION AS TO APPENDIX

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with § 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; and (3) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated this 4th day of October, 2012.

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