STATE OF WISCONSIN

IN SUPREME COURT

No. 2010AP3034-CR

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

KENNETH M. SOBCZAK,

DEFENDANT-APPELLANT-PETITIONER.

REVIEW OF A DECISION OF THE COURT OF APPEALS, DISTRICT II, AFFIRMING A JUDGMENT OF CONVICTION ENTERED IN THE CIRCUIT COURT FOR WASHINGTON COUNTY, THE HONORABLE PATRICK J. FARAGHER, PRESIDING

BRIEF OF THE PLAINTIFF-RESPONDENT

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STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Oral argument and publication are warranted in cases before this Court.

SUPPLEMENTAL STATEMENT OF FACTS

The facts set forth in Kenneth M. Sobczak's opening brief are accurate. The State offers the following additional facts.

Later the same evening, Dorn obtained a search warrant for the Chestnut Court residence (8:20, 26). Dorn also met and spoke to Sobczak (8:20). Sobczak confirmed that he and Podella had been in a dating relationship for a few months; he had invited Podella to stay with him for the weekend; the laptop computer was his alone; and he gave Podella permission to use his computer when he left for work (8:21).

On cross-examination, Dorn indicated Podella had arrived at the Chestnut Court residence on Friday, September 4, 2009, the day before the incident (8:23). Dorn indicated he believed Podella had authority to allow him entry into the house (8:24). He based his belief on the fact Podella was at the residence legally, had been invited to the house by a resident, and had unrestricted access to all parts of the house (8:24).

The circuit court found that Podella had the right to be in the house (8:42). She had the right to use the property for the weekend (8:40). According to the circuit court, that right extended to use of the common areas including the living room (8:40). The laptop computer was in that common living room area (8:40).

STANDARD OF REVIEW

In reviewing the denial of a motion to suppress evidence, appellate courts will uphold a circuit court's findings of historical fact unless

they are clearly erroneous. *State v. Sykes*, 2005 WI 48, ¶ 12, 279 Wis. 2d 742, 695 N.W.2d 277 citing *State v. Vorburger*, 2002 WI 105, ¶ 32, 255 Wis. 2d 537, 648 N.W.2d 829. However, the court reviews *de novo* the circuit court's application of constitutional principles to those facts. *Id.*

ARGUMENT

I. PODELLA HAD ACTUAL AUTHORITY TO CONSENT TO DORN'S ENTRY INTO SOBCZAK'S RESIDENCE.

In the Court of Appeals, Sobczak argued the police committed two separate Fourth Amendment violations in acquiring the illegal videos. First, he contended Podella did not have actual or apparent authority to consent to Dorn's entry into the Chestnut Court residence without a warrant. Second, he contended Podella did not have actual or apparent authority to consent to Dorn's search of Sobczak's computer without a warrant. In this Court, he challenges only Podella's consent to Dorn's entry into the Chestnut Court residence without a warrant.

Warrantless searches are "per se" unreasonable and are subject to only a few limited exceptions. *State v. Kieffer*, 217 Wis. 2d 531, 541, 577 N.W.2d 352 (1998) citing *Katz v. United States*, 389 U.S. 347, 357 (1967). So too are warrantless entries into a person's residence. *See State v. Ferguson*, 2009 WI 50, ¶ 17, 317 Wis. 2d 586, 767 N.W.2d 187; *Payton v. New York*, 445 U.S. 573, 586 (1980). One well-established exception to the Fourth Amendment's warrant requirement is a search conducted pursuant to

voluntary consent.[1] *State v. Artic*, 2010 WI 83, ¶ 29, 327 Wis. 2d 392, 786 N.W.2d 430; *Schneckloth v. Bustamonte*, 412 U.S. 218, 219 (1973).

The consent exception is not limited to consent by the defendant. The State may show consent from a third party under appropriate circumstances. *Kieffer,* 217 Wis. 2d at 541; *United States v. Matlock,* 415 U.S. 164 (1974).

> [W]hen the prosecution seeks to justify a warrantless search by proof of voluntary consent, it is not limited to proof that consent was given by the defendant, but may show that permission to search was obtained from a third party who possessed common authority over or other sufficient relationship to the premises or effects sought to be inspected.

Matlock, 415 U.S. at 171.

In a footnote, the *Matlock* Court went on to observe that:

> 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.

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[1] Sobczak does not question the voluntary nature of Podella's consent.

Kieffer, 217 Wis. 2d at 542 quoting *Matlock,* 415 U.S. at 171 n.7 (citations omitted).

Under *Kieffer* and *Matlock*, then, if Podella had joint access or control for most purposes, she had actual authority to consent to Dorn's entry into the house. The evidence establishes when Sobczak left for work, he left Podella as the sole adult occupant of the house and she had the run of the house. There is no evidence he placed any restrictions on her use of the premises, nor that he told her not to admit anyone. At least during the time that Sobczak was at work, she had joint access and control of the house for most purposes.

The distinction between a consent to search and a consent to enter is an important one in analyzing cases such as the one before the Court. A guest has a lesser interest in the premises than the host. 4 WAYNE R. LAFAVE, SEARCH AND SEIZURE, § 8.5(e), (4th ed. 2004) at 233-34. But entry is a lesser intrusion on the host's privacy interest than a search. And where the guest is more than casual, *i.e.*, the guest either by frequency of visits or a relationship, has a connection with the host beyond a casual one, it makes sense to conclude the host "assumed the risk that [the guest] might permit [another entry to] the common area [where guest might be received]." *See Kieffer*, 217 Wis. 2d at 542 (brackets added). So under an objective reasonableness standard, a guest left in charge of a premises could be found to have authority to consent to a visitor's entry into an area where a visitor would be received.

The Court of Appeals has upheld a house-sitter's consent to police entry in *State v. Harrell*, 2010 WI App 132, 329 Wis. 2d 480, 791 N.W.2d 677. The trial court found Harrell's house-sitting status gave him sufficient authority to permit police to enter the house. The *Harrell* court held that finding was not clearly erroneous and upheld the trial court's conclusion. *Id.* ¶ 11.

This Court drew a distinction between consent to enter and consent to search in *State v. Tomlinson*, 2002 WI 91, ¶ 33, 254 Wis. 2d 502, 648 N.W.2d 367. Officers sought to arrest Tomlinson at his house. *Id.* ¶ 20. The *Tomlinson* Court found reasonable the police officer's belief that a high school-aged girl had given a valid consent to enter. Since the Court found apparent authority, the State will further address the case in Section II.

The *Tomlinson* Court made the following observation which is instructive on the issue of actual authority:

> A minor child who lives in the same home with his or her parents or guardians obviously shares use of the property with the parents or guardians to some extent. However, it should also be obvious that a child generally does not share mutual use of the property with a parent to the same extent that such use might be shared between spouses or between cohabitating adults. In general, a parent's interest in the property will be superior to that of the child, and the child will generally not have the equivalent authority of a parent or guardian to consent to a search of the premises.

Id. ¶ 30.

Tomlinson cites four cases, three of which recognized a valid consent to entry: *Doyle v. State,* 633 P.2d 306, 309 (Alaska Ct. App. 1981) (teenager could allow police to enter living room to talk with father); *Mears v. State*, 533 N.E.2d 140, 142 (Ind. 1989) (fourteen-year-old can consent to police entry when police asked if defendant at home); *State v. Griffin*, 756 S.W.2d 475, 484 (Mo. 1988) (thirteen-year-old could consent to police entry of common areas of house for purpose of speaking to her mother). (The fourth case, *State v. Folkens*, 281 N.W.2d 1, 4 (Iowa 1979), found consent to search.) T*omlinson,* 254 Wis. 2d 502, ¶ 33,

The same considerations that apply to the child consent in *Tomlinson*, apply to an overnight guest such as Podella. An overnight guest has some use of the property during the time the guest actually occupies the premises. But a guest has a lesser interest than the host just as a child has a lesser interest than the parent. The extent of control a guest possesses varies and may depend on the relationship between the guest and the host or specific instructions the host has or has not given. Here Podella's lesser interest may make a complete search of the house unreasonable, but since Sobczak left her in charge of the house, she could consent to the police entry to an area where guests would be received and in which she had a privacy interest. *See Minnesota v. Olson*, 495 U.S. 91, 99-100 (1990) (Overnight guest has a reasonable expectation of privacy in host's premises.).

Professor LaFave observes:

> [W]here 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[,] [t]here 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, SEARCH AND SEIZURE, § 8.5(e) at 235.

In *Commonwealth v. Netting*, 461 A.2d 1259 (Pa. Super. Ct. 1983), the court made the same distinction between a search and an entry:

> [W]e see a distinction between the situation where the police receive permission from a third party to conduct a warrantless search of another person's premises and the situation where the police are provided limited access to a person's premises, by a guest of that person, into an area of the premises where a visitor would normally be received ....

Id. at 1260-61.

In *United States v. Turbyfill*, 525 F.2d 57 (8th Cir. 1975), the court was presented with the question of whether Church, the person who answered the door and permitted officers to enter Turbyfill's residence, had authority to permit or invite the officers into the house. Church had been staying in the house for several weeks and had the run of the house. *Id.* at 58-59. The court characterized him as an occupant of indefinite duration rather than a casual visitor. *Id.* at 59. The court concluded he "was authorized under the principles stated [in *Matlock*] to allow others to enter the premises." *Id.*

Likewise, in *People v. Shaffer*, 444 N.E.2d 1096 (Ill. App. Ct. 1982), Shaffer's brother, Scott, who was a frequent visitor, permitted police into Shaffer's house. *Id.* at 1097. After citing *Turbyfill,* the court observed:

> [a]lthough Scott Shaffer was not "an occupant of indefinite duration," as was the guest in *Turbyfill*, neither was he merely a "casual visitor." He was the brother of defendant Richard Shaffer and a frequent visitor who had never been prevented from inviting friends into defendant's home. Under the circumstances we think that Scott Shaffer had sufficient relationship to the premises to allow others to enter and, hence, had actual authority to permit police to enter an area where a visitor would normally be received.

Id. at 1099.

In *Morrison v. State*, 508 S.W.2d 827 (Tex. Crim. App. 1974), Morrison had given Edgar Heard permission to use Morrison's apartment while Morrison was out-of-town. Heard did not have a key. The landlady unlocked the door and police entered with Heard's consent. *Id.* at 828. The court held "third persons can consent to searches of premises which they exercise control over and have authority to use." *Id.* The trial court had found:

> Heard previously had been to appellant's apartment on at least one occasion and that he had permission to use the apartment during appellant's absence; that Heard returned on the day of the seizure to retrieve personal belongings he had left there earlier, and that McCourt was present at Heard's invitation.

Id. at 829. The appellate court found evidentiary support for those findings and upheld the "search." Although the *Morrison* Court did not distinguish between consent to enter and consent to search, the case is best explained as addressing consent to enter because the items were in plain view once the officer entered the apartment. *Id.*

In *Hilbish v. State*, 891 P.2d 841 (Alaska Ct. App. 1995), the court affirmed a first-degree murder conviction upholding a search in which police received consent from the victim's daughter.

The victim, Dalby, lived in Ketchikan with the defendant, Hilbish. He disappeared on June 3, 1991. *Id.* at 844. The victim's daughter, Sonja Powers, lived with her husband and children in Kasaan. *Id.* at 845. Sonja, her husband and children would stay at Dalby's house when they came to Ketchikan. *Id.* Late in the day on August 12, 1991, Sonja and her family stopped at Ketchikan. Hilbish agreed they could camp in the yard. *Id.* at 846. The following day, Sonja, after looking under a tarp in the yard, became convinced that the tarp concealed Dalby's body. When she confronted Hilbish about the tarp, the two got into a scuffle. Police arrived about 8:00 p.m. in response to a 911 call. Sonja took an officer to the tarp and lifted the edge. The officer saw what appeared to be a cloth of some sort. *Id.* at 846. A second officer recognized human remains under the tarp. *Id.* at 847.

The court upheld the trial court's finding that Sonja, as a temporary occupant of Hilbish's residence, had actual authority over that portion of the yard subject to a police search. *Id.* at 848. The court relied on *Nix v. State*, 621 P.2d 1347

(Alaska 1981), which held "when a 'guest is more than a casual visitor and "ha[s] the run of the house," [the guest's] lesser interest in the premises is sufficient to render that limited consent effective.'" *Id.* at 1350 (quoting 2 WAYNE R. LAFAVE, SEARCH AND SEIZURE, § 8.5(e), at 759 (1978)).

In *People v. Brown*, 515 N.E.2d 1285 (Ill. App. Ct. 1987), police followed fresh tracks in the snow from the scene of an armed robbery to the front door of a house. While police waited for back-up, a black female teenager wearing pajamas and a robe exited the door and started walking down the sidewalk. One of the officers identified himself as a police officer and asked her if he could enter the residence. She gave the officer permission to enter the house. *Id.* at 1286.

The Court considered whether the teenager exiting the residence in her bedclothes may be deemed to have authority to permit the *entry* of police to the premises. *Id.* at 1290 (emphasis the Court's). The Court concluded the police officer was entitled to assume without specific inquiry that the teenager exiting the house in bed-clothes had the authority to permit him to enter. But the Court did not equate this permission with consent to search the premises in its entirety. *Id.* at 1291.

In *People v. White*, 64 P.3d 864 (Colo. App. 2002), White appealed from his murder conviction of an elderly woman. At the crime scene, police found emptied boxes of single serving packets of coffee and oatmeal on the kitchen floor. *Id.* at 868. Based on their investigation, police contacted White at his father's house at 1:30 a.m. on the morning after the murder. A family friend had

invited the police to enter. While police interviewed defendant and his father, a detective noticed more packets of oatmeal. The detective also noticed that defendant had blood splattered on his jeans. *Id.* at 869. White contended that the family friend lacked common authority to consent to the police entry of his father's home. *Id.* at 871.

The *White* Court noted that two courts had upheld consent to enter in similar circumstances albeit on differing theories. One was *Shaffer*, 444 N.E.2d 1096, discussed above. *White*, 64 P.3d at 872. The other was *Nix*, 621 P.2d 1347, a case the *Hilbish* Court relied upon. *Hilbish*, 891 P.2d at 848.[2] The Court then held:

> We conclude that under these circumstances, the family friend had authority to consent to the police officers' entry into that area. Further, we conclude that it was reasonable for the police to believe that they had authority to enter based on the family friend's invitation. In reaching this conclusion, we do not address whether the family friend could have consented to a search of the entry area because this issue is not before us.

White, 64 P.3d at 872.

Sobczak argues Podella could not give consent here because she was merely a weekend guest in the Chestnut Court house. But the evidence establishes she had complete access to the house for that weekend. And she had sole control of the house after Sobczak left to go to

[2] The State will discuss *Nix v. State,* 621 P.2d 1347 (Alaska 1981), in the apparent authority section of this brief.

work. And the circuit court found she did have mutual use of at least the living room at the time she gave Dorn permission to enter.

Sobczak seizes on the *Matlock* Court's term "co-inhabitant," *Matlock*, 415 U.S. at 171 n.7, to claim that Podella lacked the necessary authority to permit Dorn into the living room to search the laptop computer which was within twenty to thirty feet of the front door (8:15). Sobczak's emphasis is misplaced. The "Fourth Amendment protects people, not places." *Katz,* 389 U.S. at 351; *State v. McGovern*, 77 Wis. 2d 203, 213, 252 N.W.2d 365 (1977). The Amendment's focus on personal rights explains *Matlock's* underlying rational for focusing the inquiry on the consenting individual's right to permit the inspection in his/her own right. The thrust of *Matlock* is "mutual use" by someone who has "access" and "control." That part of the inquiry stems from the consenting individual's personal privacy interest. *See Olson*, 495 U.S. at 99-100.

The term "co-inhabitant" in the footnote does not limit those who can consent. It acts as a descriptive term for those non-consenting individuals who have a personal privacy interest but have "assumed the risk" that another individual will consent based on mutual "access" or "control" of the place or thing to be searched.

As the *Tomlinson* Court observed, there may be a difference in the extent to which someone like Podella shares mutual use with her host, Sobczak. *See Tomlinson*, 254 Wis. 2d 502, ¶ 30. But that difference may not prevent a valid consent. *Id.* ¶ 31. That is especially true where the consent is to mere entry rather than a full blown search.

Each case must be examined carefully to determine whether the consent is valid under the totality of the circumstances. *See Id.* ¶¶ 31-32.

Sobczak claims that the Court of Appeals decision here conflicts with *McGovern*. In his view, *McGovern* stands for the proposition that an overnight guest does not have joint access or control for most purposes. Sobczak's Br. at 8-9. He doubts "that a houseguest ever has the actual authority to permit the police into the home, even just a few feet." Sobczak's Br. at 12 (emphasis omitted).

The facts in *McGovern* present a different picture than the facts here. There police responded to a loud noise complaint. Officers proceeded to the front door of a house which was through a partially enclosed porch. *McGovern,* 77 Wis. 2d at 206. When they knocked on the door, Mardirosian "who was living in a tent in the yard, opened the door." *Id.* at 206-07. Mardirosian testified, "I told him to come on in and he stepped into the doorway, and as soon as he stepped into the light where I could see him, that's the first time I recognized him as a police officer." *Id.* at 207. A second officer smelled an odor which he thought to be the smell of marijuana. The officers proceeded directly into John Abernathy's room where they encountered McGovern. In the course of their interaction with McGovern, the officers seized a cigarette and a prescription bottle. *Id.* at 207-08.

It is true that the State argued that "Mardirosian had implied authority even though he was a visitor, to admit the police." *Id.* at 212. The *McGovern* Court rejected that claim because it was based in part on cases relying on property

law. The Court made no distinction between a consent to search and a consent to enter. Likewise, it did not distinguish between actual and apparent authority.[3]

Finally, the trial court found Mardirosian had no authority to consent to police entry because he was not the owner, or tenant, or occupant of the house, or of any rooms and had no authority from any of the occupants, or tenants, or owners to consent for any of them. *Id.* at 214. The Court initially characterized its holding "under the facts as found by the trial court ...." *Id.* at 206. The Court reiterated that Mardirosian was living in a tent on the side yard of the house and had been present only for a few minutes. There was no evidence that Mardirosian had mutual use of the property, that he had joint access or control for most purposes, or that the room's occupants assumed the risk one of their number might permit the common area to be searched. *Id.* at 214-15. The circuit court's findings here are to the contrary.

Sobczak also relies on *United States v. Cos*, 498 F.3d 1115 (10th Cir. 2007). Police had obtained consent to enter from a girl friend who had arrived with her four-year-old nephew and two other children in order to serve an arrest warrant. The girl had arrived earlier on that day. She had sought Cos's permission to use the swimming pool. *Id.* at 1117-18.

[3] The State agrees the reason is that *State v. McGovern,* 77 Wis. 2d 203, 252 N.W.2d 365 (1977), pre-dated *Illinois v. Rodriguez*, 497 U.S. 177 (1990).

In declining to find actual authority to consent to the entry, the Tenth Circuit used a more restrictive test than this Court used in *Tomlinson* or the Court of Appeals used in *Harrell*. *Cos*, 498 F.3d at 1125-26. The *Cos* Court refused to rely on *Matlock's* language, *Matlock*, 415 U.S. at 171 n.7, "the others [having joint access] have assumed the risk that one of their number might permit the common area to be searched." *Compare Tomlinson*, 254 Wis. 2d 504, ¶ 29, *with Cos*, 498 F.3d at 1127-28. *See also Harrell*, 329 Wis. 2d 480, ¶ 11, relying on *Tomlinson* through *State v. Pickens*, 2010 WI App 5, ¶ 39, 323 Wis. 2d 226, 779 N.W.2d 1. Ignoring language which underlies the rational of *Matlock* renders the *Cos* Court's reasoning suspect. But the State notes that the Tenth Circuit treated the consent as a factual question which the district court had resolved against a finding of actual authority. *Cos*, 498 F.3d at 1120.

In this case the circuit court found Podella was in the house by Sobczak's specific invitation; Sobczak had left her alone (and therefore in charge) while he was at work that Saturday; and she had mutual use and access to the living room. Further, the testimony establishes she was aware of Dorn's status as a police officer, having called to report what she believed was a crime. And Dorn entered only an area where a casual visitor might be expected.

II. PODELLA HAD APPARENT AUTHORITY TO CONSENT TO DORN'S ENTRY INTO SOBCZAK'S RESIDENCE.

The Court of Appeals did not address apparent authority because it found that Podella had actual authority to permit Dorn's entry. As noted above, Dorn indicated he believed Podella had authority to allow him entry into the Chestnut Court residence (8:24). He based his belief on the fact Podella had been invited to the house by a resident; she was at the residence legally. She had unrestricted access to all parts of the house (8:24).

In *Matlock*, the Supreme Court did not address the question of whether police could obtain a valid consent to search from one they believed had authority to consent but who, in fact, did not. *Matlock*, 415 U.S. at 177 n.14.

In *Illinois v. Rodriguez*, 497 U.S. 177 (1990), the Court addressed "[w]hether a warrantless entry is valid when based upon the consent of a third party whom the police, at the time of the entry, reasonably believe to possess common authority over the premises, but who in fact does not do so." *Id.* at 179. Illinois state courts suppressed drugs police discovered in Rodriguez's apartment. *Id.* at 180. The police gained entry with the consent of Gail Fisher. *Id.* at 179. Fisher, who showed signs of a severe beating, told the officers that she had been assaulted by Rodriguez earlier that day in an apartment she repeatedly referred to as "our" apartment. She said that she

had clothes and furniture there. *Id.* Fischer unlocked the door with her key and gave the officers permission to enter without a warrant. *Id.* at 180.

The Cook County Circuit Court granted a suppression motion. The Court held:

> that at the time she consented to the entry Fischer did not have common authority over the apartment. The Court concluded that Fischer was not a "usual resident" but rather an "infrequent visitor" at the apartment ... based upon its findings that Fischer's name was not on the lease, that she did not contribute to the rent, that she was not allowed to invite others to the apartment on her own, that she did not have access to the apartment when respondent was away, and that she had moved some of her possessions from the apartment.

Id.

The *Rodriguez* Court concluded that:

> in order to satisfy the "reasonableness" requirement of the Fourth Amendment, 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 "determination of consent to enter must be judged against an objective standard: would the facts available to the officer at the

moment ... warrant a man of reasonable caution in the belief that the consenting party had authority over the premises?" *Id.* at 188 (internal citation and quotation marks omitted).

This Court recognized the *Rodriguez* Court's holding in *Kieffer*. *Kieffer*, 217 Wis. 2d at 548-49. The *Kieffer* court held the police had not made a sufficient inquiry there to render reasonable, their belief that Kieffer's father-in-law, the property owner, had authority to consent. *Id.* at 550-55.

Sobczak argues that apparent authority has no place in the analysis here because Dorn knew all of the facts. Podella had explained to him when he talked to her on the porch that she had arrived at the Chestnut Court residence on Friday, September 4, 2009, the previous evening (8:23). Podella explained that she had been dating Sobczak for about three months (8:9-10); Sobczak invited her to stay with him for the weekend (8:10); Sobczak's parents, who owned the house, were gone on vacation (8:11); Sobczak was at work and Podella was alone in the house (8:11). Sobczak claims that Dorn made a mistake of law here so apparent authority should not be a basis to justify his entry. Sobczak's Br. at 17-18.

What Sobczak's argument ignores is that consent itself is a question of fact. "[W]hether the consenting party has the right to use and occupy a particular area to justify his permitting officers to search that area [is a question of fact]." *Morrison*, 508 S.W.2d at 828. *See also McGovern,* 77 Wis. 2d at 214-15; *Tomlinson,* 254 Wis. 2d 502, ¶ 20; *Harrell*, 329 Wis. 2d 480, ¶ 11; *United States v. Morgan*, 435 F.3d 660, 663 (6th Cir. 2006).

Sobczak also ignores this underlying policy behind apparent authority. The exclusionary rule operates to deter the police from unreasonable search and seizures. *Nix*, 621 P.2d at 1349. There can be no deterrent effect where the police believe they are acting reasonably and lawfully and it is only with hindsight that actual authority to consent to a search is missing. *Id.* at 1349-50.

> The rational for [apparent authority] derives from the fact that the Fourth Amendment protects against unreasonable searches and seizures and, therefore, if the police officers act in a reasonable manner in response to the situation with which they are confronted, an error in judgment regarding the actual authority of a person to consent to a search would not give rise to an unreasonable search.

Commonwealth v. Hughes, 836 A.2d 893, 904 (Pa. 2003).

Given the principles underlying *Rodriguez*, cases making a distinction between a "mistake of fact" and the ultimate legal conclusion of actual authority to consent make no sense. A police officer's mistake about the ultimate question of whether a person had actual authority to consent is no more unreasonable than a mistake about whether the person is actually on a lease when she refers to "our apartment." *Rodgriguez*, 497 U.S. at 179.

> The purpose of the exclusionary rule is not to redress the injury to the privacy of the search victim .... Instead, the rule's prime purpose is to deter future unlawful police conduct and thereby effectuate the guarantee of the Fourth Amendment against unreasonable search and seizures.

United States v. Calandra, 414 U.S. 338, 347 (1974).

This purpose would not be served by suppressing evidence obtained in cases, like this one, where law enforcement officers reasonably believe that they are acting lawfully.)

> Effective law enforcement must be balanced against an individual's right to be let alone. By holding that a reasonable mistake regarding actual authority to consent does not invoke the exclusionary rule, the police are deterred from undertaking unreasonable searches and seizures. Effective law enforcement is also promoted since fortuitous findings of evidence are not excluded. In fact, where an officer reasonably believes that his search is a legitimate third-party consent search, excluding evidence seized would not further the goal of deterring illegal searches since the officer believed his search was legal.

Commonwealth v. Blair, 575 A.2d 593, 597 (Pa. Super. Ct. 1990).

It is not surprising, therefore, that the Supreme Court's announced test for apparent authority presents the straight forward question: "would the facts available to the officer at the moment ... warrant a man of reasonable caution in the belief that the consenting party had authority over the premises?" *Rodriguez,* 497 U.S. at 188 (internal quotation marks omitted). Stated a slightly different way, did the police believe that the person giving consent have the authority to do so? The answer must be judged against a reasonableness standard. *Id.*

In *Tomlinson*, this Court found apparent authority based on the police officers' reasonable belief that the young girl answering the door had authority to permit entry. *Tomlinson*, 254 Wis. 2d 502, ¶ 33-34. Before coming to the house, the police officers knew that Tomlinson had two teenage daughters. The police had descriptions of the two daughters from witnesses to the crime. A fifteen or sixteen-year-old African-American girl answered the door. Tomlinson was standing near the door and he did not object to the girl's letting the officers into the house. Police arrested Tomlinson and seized evidence from his bedroom. *Id.* ¶¶ 6-8. Tomlinson did not challenge the seizure of evidence; he only challenged the authority of the third-party consent. *Id.* ¶ 21.

The Court concluded:

> In the present case, given the age of the girl who answered the door, the limited scope of the entry, and the surrounding circumstances, the officers could have reasonably concluded that the consent to enter the house was valid. A high school-aged child will likely have at least some authority to allow limited entry into the home.
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> * * *
>
> The scope of the entry and the surrounding circumstances in this case bolster our conclusion that the officers reasonably relied on the third-party consent. The officers were only allowed into the entryway and the kitchen. They did not search or enter into the rest of the house on the basis of the initial consent.

Id. ¶¶ 33-34 (citations omitted).

Cases from other jurisdictions support a finding of apparent authority here. In *Nix*, a plain clothed police officer went with Miller to Miller's brother's (Long's) apartment where police believed items of a burglary might be. Lawyer, one of Long's friends who occasionally spent the night at the apartment, allowed Miller and the police officer in. Long was asleep. Miller explained to Lawyer that she had come to leave some money for her brother. While in the apartment, the officer observed the stolen items. *Nix*, 621 P.2d at 1348. The Court concluded, "[w]e think that there can be little question that apparent authority existed here. The [o]fficer ... reasonably believed that Lawyer had the authority to allow Miller, the sister of his host, and her companion, to enter the premises." *Id.* at 1350.

In *State v. Thompson*, 578 N.W.2d 734 (Minn. 1998), the Minnesota Supreme Court also found apparent authority for a valid limited consent to entry. Police observed Thompson with one DiLaura. When officers made eye contact, Thompson ran from them. DiLaura told officers Thompson ran because of outstanding warrants. *Id.* at 736. DiLaura also told officers that he, his girlfriend and Thompson were staying together in an apartment. *Id.* at 736-37.

> When [the officers and DiLaura] arrived at [the apartment], the officers knocked on the exterior door to the stairway leading to the upstairs apartment unit and a young man of approximately 18 years of age answered. To the officer's question whether the young man lived there, he replied that he did not. The officer told him that he needed to speak to the renter and to Kerry Cronin. The young man let the officers in and led them up the stairs.

Id. at 737. Police arrested Thompson and eventually obtained a search warrant for the apartment which uncovered evidence tying Thompson to a double homicide. *Id.*

In concluding that there was a sufficient objective basis for the officers to believe the person admitting them to the apartment had authority to consent to their entry, the court observed:

> The officers did not ask the young man if they could enter the apartment to search for or arrest appellant, or to search for evidence of a crime; they simply stated that they needed to speak to the renter, Lopez, and to a guest of the renter, Cronin. With no words spoken they were led inside up the stairs and into the kitchen of the Lopez apartment. When the police inquired as to where they could find Lopez, the young man directed them to her bedroom. Even though the young man acknowledged he did not live there, he obviously was there in the early hours of the morning with the permission of someone in the building, he knew that Lopez was the renter and where she lived, and he appeared to be of sufficient age to appreciate the seriousness of the officers' presence and their request. Under the totality of the circumstances 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.

Id. at 740.

In *People v. Ledesma*, 140 P.3d 657 (Cal. 2006), Ledesma was convicted of first-degree murder and other crimes arising out of the robbery and later death of Gabriel Flores. During a robbery in which Flores was the victim, Flores

obtained a license number of a motorcycle used in the robbery. The motorcycle was registered to Ledesma so police went to the address listed. When the officers arrived at Ledesma's apartment, two visitors, one of whom was Millie Dominguez, let them in. While the officers were in the apartment, the phone rang. One of the officers answered and identified herself as Dominguez. The caller was Ledesma, who told the officer that he was "hot," that the police were looking for him, and that she should lock the apartment and Ledesma's car and take a walk. *Id.* at 672. Flores later disappeared; his body was discovered three days after his disappearance with gunshot and stab wounds. *Id.* at 673.

The State used the intercepted phone call in his murder trial. Ledesma challenged the authority of the two visitors to allow the police into the apartment. *Id.* at 703. The California Supreme Court recited the facts as:

> The door was answered by Lawrence Santiago, who stated when asked that he was not defendant and that defendant was not in the house. Officer Webster asked Santiago whether he would mind if the officers entered and looked around. Santiago said he was just visiting but that he did not mind, and stepped back to let the officers in. Millie Dominguez also was present.

Id. at 702.

The court found apparent authority:

> Although Santiago was just visiting, he and Dominguez were present in the apartment in the early evening when defendant was not at home. Cases from a number of jurisdictions have recognized that a guest who has the run

> of the house in the occupant's absence has the apparent authority to give consent to enter an area where a visitor normally would be received.

Id. at 704.

In *Blair*, police traced the license plate of a car leaving the scene of an accident to Steven Blair. The officers knew a woman had been driving an observed a damaged car still hot and steaming at Blair's address. An officer knocked on the door and inquired of a woman answering whether she was Mrs. Blair. The woman indicated she was not, so the officer inquired whether the driver of the automobile was there. The woman stated that she was there and then invited the police officer into the residence where he observed Ms. Blair. *Blair*, 575 A.2d at 596. Blair argued that evidence of her condition, which the officer observed, should have been suppressed because the individual authorizing the entry of the police did not have actual authority to consent to their entry. *Id.* The Court upheld the trial court's denial of Blair's suppression motion because the officer reasonably believed the woman who answered the door had the actual authority to admit him. *Id.* 598-99.

In *Hughes*, when police arrived at Hughes parole residence, they noticed three teenage girls standing on the porch. They inquired whether Hughes was home and the girls responded that he was not. When one officer asked the girls whether the officers could enter the home and look for Hughes, they responded, "no problem," and opened the door for them. The Court upheld the consent to enter.

> The girls voluntarily gave the officers consent to enter the home; they did not hesitate in giving the officers their consent—they even opened the door to the residence for the officers. Additionally, the girls followed the officers into the house. The actions of the girls provided the officers with the reasonable belief that the girls possessed common authority over the premises permitting them to provide valid consent to enter the residence.

Hughes, 836 A.2d at 901.

Sobczak also relies on the Tenth Circuit's rejection of apparent authority in *Cos*. The *Cos* Court rejected apparent authority there because the government relied solely on the girl friend's presence on the premises. *Cos*, 498 F.3d at 1128-31.

Here, Podella, through her grandmother, called police (8:12-13). She met Dorn on the porch and described videos of minors "pleasuring each other" (8:8, 12). Dorn indicated he needed to see the videos and he gave Podella the choice of whether to bring the computer to the porch or go inside "whatever is more comfortable for you" (8:14). Podella responded: "[N]o, we can go inside and look at it" (8:14). Dorn asked if it was all right if he went inside the residence. Podella said: "sure" and took Dorn inside (8:14). Dorn knew that Podella was alone in the house; that Sobczak had left her there when he went to work; that she had access to the living room; and that Podella had Sobczak's permission to use the computer. He also entered only to view the video. Even if, in

hindsight Podella's actual authority to consent to Dorn's entry is missing, he acted in a reasonable manner in response to the situation with which he was presented.

III. A REMAND IS REQUIRED TO PERMIT THE STATE TO ESTABLISH THAT DORN OBTAINED A SEARCH WARRANT BASED ON PODELLA'S DESCRIPTION AND WHICH HE WOULD HAVE SOUGHT EVEN WITHOUT HIS ENTRY.

The police obtained a search warrant for Sobczak's residence at 1558 Chestnut Court the same evening as the warrantless entry and consent computer search (3:15-16; 8:20, 26).[4] According to Dorn's preliminary hearing testimony, Sobczak returned home from work during the execution of the search warrant (3:16). Sobczak's attorney had the affidavit in support of the warrant marked as an exhibit during his cross-examination at the preliminary hearing (3:26-27). The State believes that the "independent source" doctrine can save the conviction in this case, even if this court concludes Podella lacked actual or apparent authority to consent to police entry into Sobczak's residence.

Under the "independent source" doctrine, evidence discovered by an unlawful search should not be suppressed if untainted evidence is

[4] As noted in Section I, Sobczak does not contest in this Court that Podella had sufficient permission from him to consent to Dorn's search of his laptop computer.

sufficient to establish probable cause such that the magistrate would have granted a search warrant and the State establishes that the officer would have sought a warrant even without the tainted evidence. *See Murray v. United States*, 487 U.S. 533, 542 (1988); *State v. Lange*, 158 Wis. 2d 609, 626, 463 N.W.2d 390 (Ct. App. 1990).

Podella met Dorn on the porch of the Chestnut Court house and described videos of minors "pleasuring each other" (8:8, 12-13). At this point, Dorn had probable cause to believe Sobczak's computer contained child pornography. The circuit court implied as much (8:43). The search warrant for the house and its affidavit are not part of the record in this case. Perhaps that is because the circuit court found Podella had authority to consent to Dorn's entry (8:43). For this same reason, the State did not offer evidence on the independent source doctrine.

If this Court concludes that Podella lacked either actual or apparent authority to consent to Dorn's entry, this Court should remand this case to the circuit court to determine whether the independent source doctrine applies.

CONCLUSION

For the reasons stated above, this Court should affirm the decision of the Court of Appeals. In the alternative, this Court should affirm because Podella had apparent authority to consent to Dorn's entry. If this Court concludes that

Podella lacked either actual or apparent authority to consent to Dorn's entry, this Court should remand this case to the circuit court to determine whether the independent source doctrine applies.

Dated at Madison, Wisconsin, this 24th day of October, 2012.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 7,237 words.

Dated this 24th day of October, 2012.

_____
Warren D. Weinstein
Assistant Attorney General

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (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 Wis. Stat. § (Rule) 809.19(12).

I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of 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 24th day of October, 2012.

_____
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