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DISTRICT II

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Case No. 2016AP1398-CR

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STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

DORIAN M. TORRES,

Defendant-Appellant.

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ON APPEAL FROM AN ORDER DENYING A MOTION TO  
SUPPRESS EVIDENCE AND A JUDGMENT OF  
CONVICTION, BOTH ENTERED IN THE SHEBOYGAN  
COUNTY CIRCUIT COURT, THE HONORABLE  
TERENCE T. BOURKE, PRESIDING

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**BRIEF AND SUPPLEMENTAL APPENDIX OF  
PLAINTIFF-RESPONDENT**

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## **ISSUES PRESENTED**

1. Did police officers lawfully discover the victim's body because they were acting as community caretakers at the time?

The circuit court said yes.

2. Alternatively, did police officers lawfully discover the victim's body because they had third-party consent to enter the victim's apartment?

The circuit court did not reach this issue.

## **STATEMENT ON PUBLICATION AND ORAL ARGUMENT**

The State requests neither oral argument nor publication because the briefs should adequately set forth the facts and applicable precedent, and because resolution of this appeal requires only the application of well-established precedent to the facts of the case.

## **INTRODUCTION**

Dorian Torres wants this Court to reverse his conviction for first-degree intentional homicide and order the circuit court to grant his motion to suppress evidence. He was convicted of killing his father, Emilio Torres, with whom he lived. His mother, Shelly Torres, became concerned when she did not hear from Emilio, her ex-husband, for several days. She called the police to report Emilio missing. She told the police that she would go to Emilio's apartment to investigate the situation. Two officers accompanied Shelly to Emilio's apartment for safety reasons. Shelly let the officers into the apartment by using a key that Emilio had given to

her. They found Emilio's body in his bedroom, wrapped in a nylon-like material and hidden behind a bed mattress. Torres argues that the evidence that the officers found while searching Emilio's apartment should be suppressed because the search was illegal.

The circuit court correctly denied Torres' suppression motion because the officers lawfully entered Emilio's apartment and found his body, for two reasons. First, the officers were acting as community caretakers at the time and thus did not need a search warrant. Second, the officers did not need a warrant because they had Shelly's consent to enter and search Emilio's apartment, and Shelly had actual or apparent authority to consent.

### **STATEMENT OF THE CASE**

In February 2014, the State charged Dorian Torres with first-degree intentional homicide for the death of his father, Emilio Torres, which occurred in late January 2014. (R. 3.)

Torres lived with Emilio in an apartment. (R. 134:8, R-App. 108.) Torres' mother, Shelly Torres, divorced Emilio in 2009. (R. 134:5, 14, R-App. 105, 114.) Shelly and Emilio were "co-parenting" Torres. (R. 134:20, R-App. 120.)

Emilio gave a key for his apartment to Shelly sometime in 2013, about six months before January 2014. (R. 134:9, 14–15, R-App. 109, 114–15.) Shelly testified that Emilio had told her that "he wanted [her] to hang on to the key in case [she] needed to furthermore do anything that he needed or that [Torres] needed or just to check on [Torres]." (R. 134:15, R-App. 115.) Shelly testified that "there would be times where [Emilio] would want [Shelly] to pick up mail, pick up cereal or whatever it might be, or come in and just

check on [Torres]; do some errands in the house or clean up and stuff.” (R. 134:9, R-App. 109.) “So [Emilio] had given [Shelly] a key. So this way if he was at work, he would call and [she] could do that.” (R. 134:9, R-App. 109.) Shelly had been in Emilio’s apartment “many times.” (R. 134:11, R-App. 111.)

Emilio and Shelly spoke to each other frequently. (R. 134:20; 135:6, R-App. 120, 144.) Emilio was supposed to call Shelly on Friday, January 24, 2014, but never did. (R. 134:5–6, R-App. 105–06.) She called his phone “quite a few times during the weekend with no response.” (R. 134:6, R-App. 106.) Shelly found Emilio’s non-responsiveness unusual. (R. 134:8, R-App. 108.)

Around Tuesday, January 28, Torres went to Shelly’s house, and she asked him where Emilio was. (R. 134:6, R-App. 106.) Torres told her that Emilio had gone to Texas. (R. 134:6, R-App. 106.) It was out of character for Emilio to leave without telling Shelly where he was going. (R. 134:8, R-App. 108.) Torres told Shelly that Emilio had left his bank card with Torres and had said that Torres could have the money in the bank account. (R. 134:7, R-App. 107.) Torres asked Shelly for Emilio’s Social Security number and the personal identification number for Emilio’s bank card. (R. 134:8, R-App. 108.) Shelly thought that Torres’ requests did not “seem right.” (R. 134:8, R-App. 108.)

Shelly called the police around 10:00 p.m. on January 29, 2014 (R. 134:30, R-App. 130), “to file a missing person report and check welfare kind of report” (R. 134:19, R-App. 119). Officer Inger went to Shelly’s home to get more information from her. (R. 134:7–8, 19–20, R-App. 107–08, 119–20.) Shelly told him that she was concerned because she had not heard from Emilio for almost a week and because of her interactions with Torres. (R. 134:7–8, 19–21, R-App.



107–08, 119–21.) Officer Inger told Shelly that police would investigate by contacting Emilio’s employer and would get back to her. (R. 134:9, R-App. 109.) Shelly told him that she was going to go to Emilio’s apartment to check on the situation. (R. 134:9–10, R-App. 109–10.) Officer Inger told her that police should accompany her for safety reasons. (R. 134:10, R-App. 110.) Officer Inger went to the police station to talk to a sergeant and then returned to Shelly’s home. (R. 134:15–16, R-App. 115–16.) He said that he and the sergeant would accompany Shelly to Emilio’s apartment. (R. 134:16, R-App. 116.)

Officer Inger drove Shelly to Emilio’s apartment. (R. 134:17, 18, R-App. 117, 118.) Sergeant Timothy Patton met them outside of the apartment. (R. 134:18–19, R-App. 118–19.) Shelly testified that she and the officers had arrived at Emilio’s apartment around 10:30 or 11:00 p.m. that night. (R. 134:15, R-App. 115.) Sergeant Patton testified that they had arrived between 11:00 p.m. and 12:45 a.m. (R. 134:18, R-App. 118.)

Shelly used her key from Emilio to unlock the door to his apartment. (R. 134:10, R-App. 110.) She did not knock first, and there was no doorbell. (R. 134:16, R-App. 116.) She allowed the officers to enter the apartment behind her. (R. 134:10, 16, 19, R-App. 110, 116, 119.) Torres was sitting on a couch in the living room. (R. 134:19, 22, R-App. 119, 122.)

Shelly went to inspect Emilio’s bedroom, and Sergeant Patton followed her. (R. 134:11, R-App. 111.) When Shelly opened the door to Emilio’s bedroom, the room felt very cold because its window was open all the way. (R. 134:23, R-App. 123.) Shelly testified that “it was all tipped upside-down,” the room “was just a disarray,” and clothes were scattered everywhere. (R. 134:11–12, R-App. 111–12.) A mattress was leaning against a wall. (R. 134:13, 24, R-App. 113, 124.)

Sergeant Patton initially stood in the doorway to the bedroom and monitored Shelly but later entered to help her move the mattress. (R. 134:13, 22–24, R-App. 113, 122–24.) Behind the mattress, Sergeant Patton saw what appeared to be a body wrapped in “some sort of material” like nylon. (R. 134:24, R-App. 124.) The body turned out to be Emilio. (R. 134:13, R-App. 113.)

While Sergeant Patton and Shelly inspected Emilio’s bedroom, Officer Inger talked to Torres in the living room about Emilio’s whereabouts. (R. 134:35; 135:7; R-App. 135, 145.) Torres was not handcuffed while he was sitting on the couch. (R. 134:26, R-App. 126.)

Sergeant Patton called Torres to Emilio’s bedroom and asked him what the object wrapped in the nylon material was. (R. 134:25, R-App. 125.) Torres answered something to the effect of, “What’s that?” (R. 134:25, R-App. 125.) Sergeant Patton then handcuffed Torres. (R. 134:26–27, R-App. 126–27.)

Before Torres was handcuffed, he did not ask for permission to leave and Sergeant Patton did not tell him that he could not leave. (R. 134:31, R-App. 131.) The officers did not read Torres his *Miranda*<sup>1</sup> rights. (R. 134:27, R-App. 127.) There is no evidence that either of the officers frisked Torres. The officers did not draw their guns. (R. 135:13–14, R-App. 113–14.)

In April 2015, Torres filed a motion to suppress the evidence stemming from the search of Emilio’s apartment.

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<sup>1</sup> *Miranda v. Arizona*, 384 U.S. 436 (1966).

(R. 70.)<sup>2</sup> The State filed a response. (R. 78.) The circuit court held a hearing on Torres’ suppression motion in May 2015. (R. 134, R-App. 101–38.) Shelly and Sergeant Patton testified. (R. 134:5–38, R-App. 105–38.)

The circuit court denied Torres’ suppression motion in an oral ruling in June 2015. (R. 135, R-App. 139–52.) The circuit court concluded that the officers had lawfully entered Emilio’s apartment and found his body because they were acting as community caretakers at the time. (R. 135:13, R-App. 151.) The court said that the officers had an objective basis to think that Emilio was in jeopardy, and the public has a high interest in finding missing people. (R. 135:10–11, R-App. 148–49.) The court thought that the situation became more exigent when Shelly and Sergeant Patton discovered that Emilio’s bedroom was in disarray. (R. 135:11, R-App. 149.) The court highlighted that Shelly had used her key to peacefully allow the officers into the apartment. (R. 135:11–12, R-App. 149–50.) When they entered the apartment, Shelly was acting “within the scope of [her] authority given to her by Emilio in that Emilio wanted her to assist in parenting [Torres].” (R. 135:12, R-App. 150.) The court noted that Torres was age 17 when the search occurred, and Shelly and Emilio had an interest in seeing that Torres had parental supervision. (R. 135:12, R-App. 150.) The court said that the officers could not have obtained a search warrant before they entered Emilio’s apartment because they did not have probable cause. (R. 135:12, R-App. 150.) It further said that the officers did not have to ask Torres for permission to look in Emilio’s bedroom because Torres did not “have an interest in Emilio’s bedroom.” (R. 135:12–13, R-App. 150–51.)

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<sup>2</sup> Torres also filed several suppression motions that are not relevant on appeal. (R. 68; 69; 71; 72.)

In June 2015, the circuit court convicted Torres as charged after a bench trial. (R. 104; 110.) Torres appeals his judgment of conviction and the circuit court's order denying his suppression motion. (R. 118.)

## STANDARD OF REVIEW

When reviewing a decision on a motion to suppress evidence, this Court upholds the circuit court's factual findings unless they are clearly erroneous, but it independently applies constitutional principles to the facts. *State v. Matalonis*, 2016 WI 7, ¶ 28, 366 Wis. 2d 443, 875 N.W.2d 567, *reconsideration denied*, 2016 WI 78, 371 Wis. 2d 609, 885 N.W.2d 380, *cert. denied*, 137 S. Ct. 296 (2016).

## ARGUMENT

### **I. Officers lawfully discovered the victim's body because they were reasonably performing a community caretaker function.**

The police officers did not need a search warrant when they entered Emilio's home and found his body because they were acting as community caretakers at the time.

#### **A. Controlling legal principles.**

The Fourth Amendment to the U.S. Constitution and Article I, Section 11 of the Wisconsin Constitution protect people from unreasonable searches. *State v. Rome*, 2000 WI App 243, ¶ 10, 239 Wis. 2d 491, 620 N.W.2d 225. A warrantless search is unreasonable unless an exception to the warrant requirement applies. *Id.* One exception is the community caretaker doctrine. *Id.* ¶ 11.

“[A] police officer serving as a community caretaker to protect persons and property may be constitutionally permitted to perform warrantless searches and seizures.” *Matalonis*, 366 Wis. 2d 443, ¶ 30 (citation omitted). A court thus “need not invalidate a warrantless search of a residence if the search was conducted pursuant to a police officer’s reasonable exercise of a bona fide community caretaker function.” *Id.* (citation omitted). The State has the burden of showing that an officer’s conduct was a reasonable community caretaker function. *Id.* ¶ 31.

When the State relies on the community caretaker doctrine to justify a search, a court must consider (1) whether a search occurred, (2) if so, whether the police conduct was a bona fide community caretaker function, and (3) if so, whether the public interest outweighs the intrusion on the individual’s privacy. *Id.*

Under the second prong, a court considers the totality of the circumstances as they existed at the time of the police conduct at issue. *State v. Kramer*, 2009 WI 14, ¶ 36, 315 Wis. 2d 414, 759 N.W.2d 598. A court may consider a police officer’s subjective intent when evaluating whether the officer acted as a bona fide community caretaker. *Id.* But the officer has met the standard for acting as a bona fide community caretaker if he has provided an objectively reasonable basis for a community caretaker function. *Id.* An officer’s community caretaking function and law enforcement function are not mutually exclusive. *Id.* ¶ 39. An officer may serve both roles simultaneously. *Id.* ¶ 32. Accordingly, an officer’s subjective law enforcement concern does not negate a reasonable exercise of the community caretaker function. *State v. Gracia*, 2013 WI 15, ¶ 19, 345 Wis. 2d 488, 826 N.W.2d 87.

Under the third prong, a court considers four factors: (1) “the degree of the public interest and the exigency of the situation”; (2) “the attendant circumstances surrounding the seizure, including time, location, the degree of overt authority and force displayed”; (3) “whether an automobile is involved”; and (4) “the availability, feasibility and effectiveness of alternatives to the type of intrusion actually accomplished.” *Kramer*, 315 Wis.2d 414, ¶ 41 (citation omitted).

**B. The officers acted lawfully as community caretakers.**

**1. Under the first prong, the officers presumably performed a search.**

Under the first prong of the community caretaker analysis, the State assumes for the sake of argument that the officers performed a search when they entered Emilio’s apartment and found his body behind a mattress.

**2. Under the second prong, the officers performed a bona fide community caretaker function.**

Under the second prong of the analysis, the officers were performing a bona fide community caretaker function when they entered Emilio’s apartment and found his body. Law enforcement officers perform many tasks besides investigating possible crimes, such as peacekeeping and searching for missing persons. *Matalonis*, 366 Wis. 2d 443, ¶ 29. Police also perform a community caretaking function by checking on people’s welfare, even by entering a home where a person in need of help might not be present. *Id.* ¶¶ 43–48. Here, the officers were performing those community caretaking roles when they went to Emilio’s apartment. Sergeant Patton testified that the officers’

purpose of being there “was [Shelly] had called to file a missing person report and check welfare kind of report.” (R. 134:19, R-App. 119.) Further, they accompanied Shelly to Emilio’s apartment for her safety. (R. 134:10, R-App. 110.) Accordingly, they exercised a bona fide community caretaker function.

Torres’ contrary arguments are not persuasive. He first argues that the record has no evidence that Emilio was at “home, hurt and in need of assistance.” (Torres Br. 10.) His argument fails for three reasons.

First, because the officers went to Emilio’s home as part of their missing-person investigation and for Shelly’s safety, they were acting as bona fide community caretakers. Those two purposes serve community caretaking functions, distinct from the role of criminal investigator. *See Matalonis*, 366 Wis. 2d 443, ¶ 29.

Second, police need not have evidence that a specific individual in need of help is present somewhere (e.g., in a home or vehicle) before performing a welfare check. *Id.* ¶¶ 43, 46–47. Accordingly, the officers here did not need to have evidence that Emilio was at home in order to be acting as bona fide community caretakers.

Third, Shelly’s concerns showed that Emilio might have needed help—either at home or somewhere else. Emilio and Shelly spoke to each other frequently. (R. 134:20; 135:6; R-App. 120, 144.) Emilio was supposed to call Shelly on Friday, January 24, 2014, but never did. (R. 134:5–6, R-App. 105–06.) She called his phone “quite a few times during the weekend with no response.” (R. 134:6, R-App. 106.) Shelly found Emilio’s non-responsiveness unusual. (R. 134:8, R-App. 108.) Around Tuesday, January 28, Torres went to Shelly’s house, and she asked him where Emilio was. (R.

134:6, R-App. 106.) Torres told her that Emilio had gone to Texas. (R. 134:6, R-App. 106.) But it was out of character for Emilio to leave without telling Shelly where he was going. (R. 134:8, R-App. 108.) Torres told Shelly that Emilio had left his bank card with Torres and had said that Torres could have the money in the bank account. (R. 134:7, R-App. 107.) Torres asked Shelly for Emilio's Social Security number and the personal identification number for Emilio's bank card. (R. 134:8, R-App. 108.) Shelly thought that Torres' requests did not "seem right." (R. 134:8, R-App. 108.)

Torres next argues that the officers did not act in a bona fide community caretaking role because they did not act with haste but instead investigated his apartment. (Torres Br. 11.) His argument is unpersuasive. He tries to have it both ways: he faults the officers for not acting hastily enough, but he also faults them for not waiting until the next day or at least waiting for Torres to let them into Emilio's home. (*Id.*) Further, the officers *did* act with urgency. Shelly called the police around 10:00 p.m. on January 29, 2014. (R. 134:30, R-App. 130.) Shelly testified that she and the officers had arrived at Emilio's apartment around 10:30 or 11:00 p.m. that night. (R. 134:15, R-App. 115.) Sergeant Patton thought that they had arrived between 11:00 p.m. and 12:45 a.m. (R. 134:18, R-App. 118.) Either way, they went to Emilio's apartment not long after Shelly told the officers her concerns with Emilio's wellbeing.

Torres also faults Shelly for looking in Emilio's bedroom for his suitcase, which, according to Torres, shows that Shelly and the officers were "performing an investigation." (Torres Br. 11.) But Shelly and the officers went to Emilio's home to investigate whether he was missing. (R. 134:19, R-App. 119.) Shelly checked for Emilio's suitcase because if it was missing, Shelly would have known that Emilio had packed and left. (R. 134:11, R-App. 111.)



That the officers were performing a missing-person investigation *supports* the conclusion that they were acting as community caretakers. Any possible law enforcement concern that the officers may have had would not negate that conclusion.

Torres argues that the officers and Shelly were not concerned with Emilio's wellbeing because they did not search for him in each room of his apartment but instead went straight to his bedroom. (Torres Br. 11.) But Torres does not cite the record to support that assertion. In any event, it does not matter whether Shelly searched other rooms before looking in Emilio's bedroom. Emilio's bedroom was a reasonable first place to look for him. Once Shelly found Emilio's body in that room, there was no reason to look for him elsewhere.

In sum, the officers were performing a bona fide community caretaking function when they entered Emilio's home and found his body.

**3. Under the third prong, the public interests outweighed Torres' privacy interests.**

Under the third prong of the analysis, the officers reasonably exercised their community caretaking function.

**a. The first factor supports the officers' conduct.**

Turning to the first reasonableness factor, the public's substantial interest in ensuring Emilio's safety supported the officers' conduct. "The public has a significant interest in ensuring the safety of a home's occupants when officers cannot ascertain the occupants' physical condition and

reasonably conclude that assistance is needed.” *Matalonis*, 366 Wis. 2d 443, ¶ 59 (citation omitted). As Torres and the circuit court correctly recognized, the public also has a substantial interest in finding missing people. (Torres Br. 13, 17; R. 135:11; R-App. 149.) Here, as explained above, the officers reasonably thought that Emilio might have been in danger in his home or missing.

The public interest in ensuring Torres’ welfare further supported the officers’ conduct. A child’s welfare is an important public interest. *See State v. Kelsey C.R.*, 2001 WI 54, ¶ 46, 243 Wis. 2d 422, 626 N.W.2d 777 (lead opinion); *see also id.* ¶ 52 (Sykes, J., concurring) (joining lead opinion’s community caretaker analysis). Here, the purported search involved Shelly going to Emilio’s home partly to ensure that Torres—who was age 17 at the time—had parental supervision. (R. 135:12, R-App. 150.)

The situation was fairly exigent, too. Shelly had not heard from Emilio for almost a week. (R. 134:19–20, R-App. 119–20.) Every minute that passed could have put him into more danger or brought him closer to death. Further, Torres’ lack of parental supervision increased the urgency of locating Emilio.

Torres argues that the situation was not exigent because nothing indicated that police had to immediately enter Emilio’s home to save him. (Torres Br. 14.) Torres is conflating two distinct legal doctrines. The exigent circumstances doctrine and community caretaker doctrine are two separate exceptions to the Fourth Amendment’s warrant requirement. *Rome*, 239 Wis. 2d 491, ¶ 11. Under the exigent circumstances doctrine, police may perform a warrantless search to protect a person from imminent danger. *State v. Robinson*, 2010 WI 80, ¶ 30, 327 Wis. 2d 302, 786 N.W.2d 463. Here, although the exigent

circumstances doctrine did not justify the officers' entry into Emilio's apartment, the situation was urgent enough under the first community caretaker reasonableness factor to support the officers' conduct. Because of the significant public interests involved and the exigency of the situation, the first factor supports the officers' conduct.

**b. The second factor supports the officers' conduct.**

Moving onto the second reasonableness factor, the attendant circumstances supported the officers' conduct. When officers respond to a concerned citizen's phone call regarding a person's welfare, they do not have control over the time or location of the search. *See Matalonis*, 366 Wis. 2d 443, ¶ 61. Here, the officers did not control the time or location of the search. Shelly called the police around 10:00 p.m. (R. 134:30, R-App. 130.) She said that she would go to Emilio's apartment by herself to check on his whereabouts, and police told her that they would go with her for safety reasons. (R. 134:9–10, R-App. 109–10.) Although Shelly and the officers encountered Torres after 10:00 p.m., there is no evidence that he was asleep. Rather, Torres was sitting on a couch in the living room. (R. 134:19, 22, R-App. 119, 122.) Further, it was reasonable for Shelly to verify whether Torres—who was age 17 at the time—had parental supervision at night.

Another important circumstance here is that the officers did not enter or search Emilio's home on their own. When a civilian allows police to enter a home and a bedroom during a welfare check, those facts support the reasonableness of the police's conduct. *See Gracia*, 345 Wis. 2d 488, ¶ 26 (concluding that police reasonably exercised a community caretaker function partly because Gracia's brother let the police into their home and Gracia's

bedroom). Here, Shelly used her key from Emilio to enter his apartment and let the officers enter behind her. (R. 134:10, 16, 19, R-App. 110, 116, 119.) Shelly went to inspect Emilio's bedroom, and Sergeant Patton followed her. (R. 134:11, R-App. 111.) Sergeant Patton initially stood in the doorway to the bedroom and monitored Shelly, and he later entered to help her move a mattress that was leaning against a wall. (R. 134:13, 22–24, R-App. 113, 122–24.)

Another circumstance supporting the reasonableness of the officers' conduct is that they did not use overt force or authority. The officers did not draw their guns. (R. 135:13–14, R-App. 113–14.) While Sergeant Patton and Shelly inspected Emilio's bedroom, Officer Inger talked to Torres in the living room about Emilio's whereabouts. (R. 134:35; 135:7; R-App. 135, 145.) Torres was not handcuffed while he was sitting on the couch. (R. 134:26, R-App. 126.) Sergeant Patton handcuffed Torres *after* he found Emilio's body. (R. 134:26–27, R-App. 126–27.) Before Torres was handcuffed, he did not ask for permission to leave and Sergeant Patton did not tell him that he could not leave. (R. 134:31, R-App. 131.) The officers did not read Torres his *Miranda* rights. (R. 134:27, R-App. 127.) There is no evidence that either of the officers frisked Torres.

Torres argues that Officer Inger engaged in a “show of authority” by staying with Torres while Shelly and Sergeant Patton inspected Emilio's bedroom. (Torres Br. 14–15.) But mere police questioning does not constitute a show of authority. *See Florida v. Bostick*, 501 U.S. 429, 434 (1991). In any event, Officer Inger was reasonable, and the relevant consideration is whether an officer's alleged use of authority was reasonable. *See Matalonis*, 366 Wis. 2d 443, ¶ 62. In *Matalonis*, an officer detained Matalonis on a living room couch in his home while another officer searched the rooms in the house for a possibly injured person. *Id.* An officer

threatened to “break down” a locked door in Matalonis’s house if he did not provide a key to the officer. *Id.* The supreme court concluded that the officers’ use of authority was reasonable under the circumstances. *Id.* It emphasized that Matalonis was neither handcuffed nor placed under arrest and that there was no evidence that officers frisked Matalonis or pointed weapons at him. *Id.* Here, the officers were less forceful than the officers in *Matalonis* were. Unlike in *Matalonis*, the officers here did not threaten Torres or detain him in the living room. Because the officers were trying to locate Emilio, it was reasonable for Officer Inger to ask Torres about Emilio’s whereabouts while Shelly and Sergeant Patton inspected Emilio’s bedroom.

The disarray of Emilio’s bedroom justified Shelly and Sergeant Patton in looking behind the mattress where Emilio’s body was lying. When police are looking for a possibly injured person and find a bedroom in “disarray,” they may search the bedroom as part of their community caretaking function. *See State v. Ferguson*, 2001 WI App 102, ¶ 22, 244 Wis. 2d 17, 629 N.W.2d 788 (concluding that officers who were acting as community caretakers lawfully searched a bedroom closet for a possibly injured person because the bedroom was in “disarray”). When Shelly opened the door to Emilio’s bedroom, the room felt very cold because its window was open all the way. (R. 134:23, R-App. 123.) Shelly testified that “it was all tipped upside-down,” the room “was just a disarray,” and clothes were scattered everywhere. (R. 134:11–12, R-App. 11–12.) A mattress was leaning against a wall. (R. 134:13, 24, R-App. 113, 124.) Under these circumstances, Sergeant Patton lawfully looked behind the mattress as part of his community caretaking function.

In short, the attendance circumstances supported the reasonableness of the officers’ conduct.

**c. The third factor is irrelevant.**

The third reasonableness factor is irrelevant here because no automobile was involved. When no automobile is involved, this factor is “not a relevant factor . . . except to recognize that one has a heightened privacy interest in preventing intrusions into one’s home.” *Matalonis*, 366 Wis. 2d 443, ¶ 63 (quoting *State v. Pinkard*, 2010 WI 81, ¶ 56, 327 Wis. 2d 346, 785 N.W.2d 592); see also *Gracia*, 345 Wis. 2d 488, ¶ 27 (“The third factor is irrelevant because the search was not of an automobile . . .”).

**d. The fourth factor supports the officers’ conduct.**

Turning to the fourth reasonableness factor, there were no feasible or effective alternatives. The police could not have obtained a warrant to search Emilio’s home. The circuit court correctly noted that there was no probable cause for a search warrant when the officers entered Emilio’s home. (R. 135:12, R-App. 150.)

Asking for Torres’ permission to enter and search Emilio’s apartment would not have been an effective alternative. If Torres and Emilio were in danger or hurt in their apartment, Torres may have been unable to answer the door. If Torres had been involved in Emilio’s disappearance—which turned out to be the case—Torres likely would have refused to allow the officers inside. Had someone abducted Emilio or been holding him captive in his apartment, the perpetrator may have ordered Torres not to let anyone inside. Asking Torres for permission to search Emilio’s bedroom would have been ineffective because, as the circuit court noted, Torres had no interest in Emilio’s bedroom. (R. 135:12–13, R-App. 150–51.)

Significantly, the officers did not enter Emilio's apartment or bedroom on their own. Shelly used her key and let them into the apartment. (R. 134:10, R-App. 110.) Shelly led Sergeant Patton to Emilio's bedroom, and he initially did not enter it. (R. 134:11, 13, 22–24, R-App. 111, 113, 122–24.) Under these circumstances, it was reasonable for the officers to follow Shelly into Emilio's apartment and bedroom without first seeking a warrant or asking for Torres' permission.

Torres argues, without citing any authority, that the officers had a "duty" to ask for his "consent" to enter his home. (Torres Br. 15.) Torres is conflating two distinct legal doctrines again. Officers may perform warrantless searches and seizures if they have consent *or* if they are acting as community caretakers. *Rome*, 239 Wis. 2d 491, ¶ 11. The lack of Torres' consent does not mean that the community caretaker doctrine is inapplicable. Had Torres allowed the officers to enter his home, his consent would have provided an additional basis for denying his suppression motion.

In short, the third prong of the community caretaker analysis has been met where, as here, three of the four factors weigh in favor of the officers' conduct. *Pinkard*, 327 Wis. 2d 346, ¶ 60.

**C. Public policy supports the conclusion that the officers lawfully performed a community caretaker function.**

Public policy considerations further show that the police officers here acted lawfully as community caretakers. A contrary conclusion would discourage officers from acting as community caretakers, which would be harmful to society. "An officer less willing to discharge community caretaking functions implicates seriously undesirable

consequences for society at large . . . .” *Pinkard*, 327 Wis. 2d 346, ¶ 33 (citations omitted). Police would tell “concerned citizens, ‘Sorry. We can’t help you. We need a warrant and can’t get one.’” *Id.* (citations omitted).

Those concerns ring especially true where, like here, police find evidence of a crime while escorting a private citizen into a potentially dangerous environment. “Private searches are not subject to the Fourth Amendment’s protections because the Fourth Amendment applies only to government action.” *State v. Payano-Roman*, 2006 WI 47, ¶ 17, 290 Wis. 2d 380, 714 N.W.2d 548 (citations omitted). The private-search doctrine may discourage police from acting as peacekeepers because their presence could result in suppression of evidence. But the law should encourage police to accompany concerned citizens like Shelly when they walk into potentially dangerous situations. The community caretaker doctrine achieves that goal by minimizing the risk that police presence would result in suppression of evidence.

For example, imagine a woman who moves out of her abusive partner’s home. She needs to return to his home to retrieve some belongings that she had left behind. The law should encourage a police officer to accompany the woman to her abuser’s home for safety reasons. If the officer’s peacekeeping conduct did not constitute a community caretaking function, the officer would be discouraged to help the woman. The officer would justifiably be concerned that, if the community caretaker doctrine were inapplicable, a court might suppress any evidence of a crime that he might find at the abuser’s home. The community caretaker doctrine appropriately encourages police to escort people like this hypothetical woman or Shelly when they enter a potentially dangerous environment.



Torres argues that public policy supports the conclusion that the officers here did not act as bona fide community caretakers. (Torres Br. 11–13.) He contends that a contrary conclusion would allow police to search a person’s house based on a lie by his or her jealous ex-lover. (*Id.*) But Torres’ own reasoning shows that his argument does not work. He claims that a jealous ex-lover could falsely tell police that his or her ex-spouse needs help in a “ruse” to “harass” the ex-spouse “in his or her home, particularly if the caller knows that something illegal would be seen by the police in the home.” (Torres Br. 12.) As an example, Torres says that police could find marijuana in the ex-spouse’s home during their purported welfare check. (*Id.*) But if the jealous ex-lover knows that his or her ex-spouse has marijuana, he or she could simply tell the police about the marijuana. The police could then get a search warrant, search the ex-spouse’s house, and find the marijuana. If Torres’ “jealous ex-lover” concern ruled the day, it could upend not only the community caretaker doctrine but also searches conducted pursuant to warrants.

Further, Torres’ concern is misplaced. Police act as bona fide community caretakers when they act on a *reliable* tip about a person’s welfare, even an anonymous tip. See *Pinkard*, 327 Wis. 2d 346, ¶¶ 35–37 (concluding that officers acted as bona fide community caretakers when, based in part on a reliable anonymous tip, they entered Pinkard’s home to see if he had overdosed on drugs). Here, the police had no reason to think that Shelly was untruthful and not genuinely concerned about Emilio. That she had a key to Emilio’s apartment suggested that she was genuine. Indeed, Torres concedes that “of course, Shelly was an honest and caring person.” (Torres Br. 12.) Applying the community caretaker doctrine here would not require it to be applied in a case involving an unreliable tip by a jealous ex-spouse.

In sum, the circuit court correctly denied Torres' suppression motion because the officers were lawfully acting as community caretakers when they entered Emilio's apartment and found his body.

**II. Alternatively, the officers acted lawfully because they relied on Shelly's actual or apparent authority to consent to a search of Emilio's apartment.**

Regardless of whether the police officers were acting as community caretakers, they lawfully found Emilio's body because Shelly had actual or apparent authority to give them consent to search Emilio's home.

**A. Controlling legal principles.**

Police may perform a warrantless search when they have consent. *Rome*, 239 Wis. 2d 491, ¶ 11. Under certain circumstances, police may rely on consent from a third party, i.e. someone besides the subject of the search. *State v. Tomlinson*, 2002 WI 91, ¶ 22, 254 Wis. 2d 502, 648 N.W.2d 367. A third party with actual or apparent authority over premises may consent to their search. *Id.* ¶ 25. "[E]ven if a third party lacks the actual authority to consent to a search, police may rely upon the third party's apparent common authority, if such reliance is reasonable." *Id.* (citation omitted).

"The State bears the burden of proving by a preponderance of the evidence that the search and seizure falls within the third-party consent exception." *State v. St. Germaine*, 2007 WI App 214, ¶ 16, 305 Wis. 2d 511, 740 N.W.2d 148 (citation omitted).

**B. Shelly had actual or apparent authority to give the officers consent to search Emilio's and Torres' apartment.**

Shelly had actual or apparent authority to allow the officers to search Emilio's and Torres' apartment, for three reasons.

First, Shelly had a close familial relationship with Emilio and Torres. In determining whether a person had authority to allow law enforcement to enter someone else's home, "the relationship of the consenter to the defendant is important, not only in the familial sense, but also in terms of the social ties between the two." *State v. Sobczak*, 2013 WI 52, ¶ 20, 347 Wis. 2d 724, 833 N.W.2d 59 (citation omitted). Shelly was married to Emilio until they got divorced in 2009. (R. 134:5, 14, R-App. 105, 114.) Emilio and Shelly spoke to each other regularly. (R. 134:20; 135:6; R-App. 120, 144.) Torres is Shelly's son. (R. 134:5, R-App. 105.) Torres lived with Emilio in an apartment. (R. 134:8, R-App. 108.) Shelly had been in Emilio's apartment "many times." (R. 134:11, R-App. 111.) Shelly and Emilio were "co-parenting" Torres. (R. 134:20, R-App. 120.) Shelly's close familial connection to Emilio and Torres supported the conclusion that she had actual or apparent authority to allow law enforcement to enter their apartment.

Second, Emilio had given a key for his apartment to Shelly. That a person "has been given a key" for someone else's residence supports the conclusion that he or she has authority to allow law enforcement to enter the residence. *Sobczak*, 347 Wis. 2d 724, ¶ 20 (citation omitted). Emilio gave the key to Shelly sometime in 2013, about six months before he was killed. (R. 134:9, 14–15, R-App. 109, 114–15.) He wanted her to have the key so that she could go to his apartment for various reasons, including to "check on"

Torres. (R. 134:9, 15, R-App. 109, 115.) Shelly used the key to let Sergeant Patton and Officer Inger into Emilio's apartment. (R. 134:10, R-App. 110.) Her possession of the key at Emilio's insistence strongly supports the conclusion that she had authority to allow the officers into his apartment.

Indeed, courts have held that being given a key was sufficient to establish apparent authority. In *United States v. Rodriguez*, 888 F.2d 519, 520, 522 (7th Cir. 1989), Rodriguez both lived and worked as a janitor at a union hall. His wife, from whom he had separated, lived in an apartment on the third floor of the union hall. *Id.* at 522. Rodriguez sometimes slept in a janitors' room in the basement. *Id.* His wife used a key to the janitors' room to allow police to enter and search it. *Id.* The Seventh Circuit concluded that "Mrs. Rodriguez's possession of the key gave her apparent authority to consent." *Id.* at 523. Here, similarly, Shelly and Emilio had been married, separated, and lived apart, but Shelly kept a key to Emilio's apartment at his insistence. Like the defendant's wife in *Rodriguez*, Shelly had apparent authority to consent.

Third, there is no evidence that Torres indicated that Shelly was not allowed to let police officers into Emilio's apartment. When Shelly and the officers entered the apartment, Torres was sitting on a couch in the living room. (R. 134:19, 22, R-App. 119, 122.) There is no indication that he reacted in a way that would suggest that Shelly was not allowed to enter the apartment or bring the officers inside.

In similar cases, courts have found a defendant's lack of an objection significant. In *Tomlinson*, "Tomlinson was present and apparently said nothing" when a girl opened the door to his house and allowed police officers to enter. *Tomlinson*, 254 Wis. 2d 502, ¶ 37. In concluding that the girl

had apparent authority to let the officers enter, the supreme court gave “great weight” to the facts that Tomlinson was nearby, he said nothing, and the girl did not ask for his permission to let the officers enter. *Id.* ¶ 34. Similarly, in *St. Germaine*, an owner of a residence that St. Germaine was renting had apparent authority to consent to a search thereof because St. Germaine was present and said nothing when the owner consented. *St. Germaine*, 305 Wis. 2d 511, ¶¶ 19–23. The same conclusion applies here. Shelly apparently did not ask for Torres’ permission before she allowed the officers to enter his and Emilio’s apartment, and Torres apparently did not object to their presence.

Torres concedes that “the police did in fact have Shelly’s permission to enter Emilio’s residence,” but he argues that she lacked actual authority to give that consent. (Torres Br. 18.) He argues that his situation is distinguishable from *Sobczak*, where the supreme court held that Sobczak’s girlfriend who was spending the weekend at his home had actual authority to allow police to enter. (*Id.* at 18–19.) But the case for actual authority is stronger here than in *Sobczak*. Unlike Shelly, the girlfriend in *Sobczak* did not have a key to Sobczak’s house. *Sobczak*, 347 Wis. 2d 724, ¶ 25. Sobczak had been dating his girlfriend for only three months at the time of the search. *Id.* ¶ 2. Here, by contrast, Shelly was previously married to Emilio, had a child in common with him, and kept regular contact with him. Unlike Torres, Sobczak did not tacitly approve of the search by failing to object—Sobczak was not even home when the search occurred. *Id.* ¶¶ 2–5. In any event, because Sobczak’s girlfriend had *actual* authority to let police enter his home, the supreme court did not decide whether she had *apparent* authority. *Id.* ¶ 33. Here, even if Shelly lacked actual authority, she had apparent authority for the reasons stated above.

Torres seems to argue that Shelly was allowed to enter Emilio's home only when Emilio called her first. (Torres Br. 20.) But Shelly's testimony merely indicated that she would sometimes go to Emilio's house when he called her and asked for her help with something, not that she could go there *only if* he called her first. (R. 134:9, 15, R-App. 109, 115.)

Torres argues that Shelly did not have actual authority because she was not a guest at Emilio's home. (Torres Br. 20.) But a person's status as a guest merely "helps support an inference that the individual has been given some choice in excluding some visitors and opening the door to others." *Sobczak*, 347 Wis. 2d 724, ¶ 20. Shelly's status as a guest at Emilio's home would have supported the conclusion that she had actual authority. But the fact that she was not Emilio's guest does *not* mean that she lacked actual authority.

Torres also seems to argue that Shelly lacked authority to consent because he was present during the search. (Torres Br. 21.) But as explained above, Torres' presence and failure to object to the search *support* the conclusion that Shelly had apparent authority.

In sum, because Shelly had actual or apparent authority to allow the officers to enter and search Emilio's apartment, the circuit court correctly denied Torres' suppression motion.

## CONCLUSION

The State respectfully requests that this Court affirm Torres' judgment of conviction and the circuit court's order denying his motion to suppress evidence.

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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 6930 words.

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## **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: May 3, 2017.

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