STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT II

Appeal No. 2016AP1398- CR

Sheboygan County Case No. 2014CF67

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STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

DORIAN M. TORRES,

Defendant-Appellant.

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ON REVIEW OF THE DENIAL OF MOTION TO SUPPRESS FRUITS OF UNLAWFUL SEARCH, DECIDED JUNE 10, 2015; THE JUDGMENT OF CONVICTION FOR FIRST DEGREE INTENTIONAL HOMICIDE, ENTERED JULY 27, 2015, HON. TERENCE BOURKE PRESIDING, AND THE AMENDED JUDGEMENT OF CONVICTION ENTERED MARCH 17, 2017.

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# REPLY BRIEF OF DEFENDANT-APPELLANT

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**Cases**

## ARGUMENT

### I. The State's reliance on State v. Matalonis to uphold a warrantless search in this case is misplaced. Warrantless search of Dorian Torres' home was not valid as a community caretaker exception.

Mr. Torres reiterates the arguments made in the Brief of Defendant-Appellant. Mr. Torres further informs this court that the State has misstated the law contained in State v. Matalonis, 2016 WI 7, 366 Wis. 2d 443, 875 N.W.2d 567. The State asserts that Matalonis stands for the proposition that police perform a community caretaking function by checking on people's welfare, even by entering a home where a person in need of help may not be present. (State Br. 9, citing Matalonis ¶¶ 43-48.) In fact, the cited paragraphs of Matalonis mention nothing about police entering a home.

In the paragraphs of Matalonis cited by the State, the Court stated that "the Fourth Amendment does not inflexibly require that officers be concerned about specific, 'known' individuals in order to be acting as community caretakers," a proposition that Mr. Torres has never disputed. Mr. Torres never argued that specific known individuals need to be present in order to invoke the community caretaker function. However, it is Mr. Torres' position, as stated in his brief-in-chief, that police should have articulable reasons to believe (not just suspect that it might be so) that someone is in need of assistance in a home, before entering without consent or a warrant. They need not be a "specific known" individual, though.

In Mr. Torres' case, however, police had no specific or articulable reason to believe that anyone at all was in need of assistance inside the home at the time the police entered

without a warrant. This is in stark contrast to the Matalonis case relied upon by the state, because there, a search was ultimately upheld when police searched a locked room in a home where there was substantial blood. The police were not looking for a specific individual, but instead looking for anyone who might be in need of assistance, and they had particular reasons to believe such a person existed, given the blood splatters in the home. In the case at bar, by contrast, police were searching for a specific individual in a place where there was no particularized reason to believe that he would be in need of assistance at the time. There was no blood, no concerning sounds, and no 911 call.

The cited paragraphs of Matalonis do offer several examples of cases in which a search was upheld as a community caretaker function, but in relevant contrast with the instant case, none of those cases involved a search of a home. Specifically, one involved the search of a trunk of an abandoned car. Matalonis, ¶ 44, citing Cady v. Dombrowski, 413 U.S. 433, 93 S.Ct. 2523, 37 L.Ed.2d 706 (1973). In Cady, not only was it not a search of a home, but the officer was searching because of a particular concern involving that specific trunk, which had to do with public safety. The next case referenced in the cited Matalonis paragraphs involved police entry into a garage while investigating a noise complaint. Matalonis, ¶ 44, citing Bies v. State, 76 Wis. 2d 457, 251 N.W.2d 461 (1977). In Bies, not only was it not a search of a home, but officers were responding to a particularized concern in that location at that time. The last case referenced in the cited Matalonis paragraphs was State v. Kramer, 2009 WI 14, ¶ 32, 315 Wis. 2d 414, 759 N.W.2d 598. There, police had pulled up behind a vehicle that had activated its hazard lights. Like the other cases referenced there, this was not a home, and officers were responding to a particular situation in progress.

Having reviewed the details of these cases, which were the only ones referenced as examples in the paragraphs of Matalonis cited in the State's brief, it is clear that the State's characterization of Matalonis is false, insofar as the State asserts that it stands for the proposition that police may enter a home to check on people's welfare even where there is no particularized reason to believe that a person in need of help is present. This is a slight paraphrase of the State's position, as the State specifically states that Matalonis stands for the proposition that police perform a community caretaking function by checking on people's welfare, even by entering a home where a person in need of help may not be present. (State Br. 9, attempting to cite Matalonis ¶¶ 43-48.) However, the word "may" creates some ambiguity of argument in this case: Mr. Torres has never claimed that police must know for absolute certain that someone is definitely in need of assistance in a home, in order to act as community caretakers. He does not argue that if there is any possibility that such a person "may" not be there, the community caretaker function does not apply. Torres' argument does not go so far. Torres' argument was simply that in his case, the community caretaker function does not apply, because there was no reason to believe that any person at all was in need of assistance in that place at that time. Certainly, it was reasonable to suspect that Emilio Torres had been the victim of foul play, given his uncharacteristic absence from work and his lack of normal communication with his ex-wife. It was also reasonable to suspect that Dorian Torres had something to do with his disappearance, given the suspicious statements he had made to Shelly. However, reasonable suspicion of criminal activity has never been enough to justify a warrantless entry to a private home. Instead, if police in such a circumstance wish to investigate, they should have to get a warrant. The community caretaker function does not apply under any case law known to the appellant or cited by the State. In fact, all cases relied upon

by the State in which the community caretaker function applied, involve situations in which there is some particularized reason to believe that a person is in need of assistance at that time in that place, or at minimum, that there was reason to be concerned for public safety at that time in that place, as discussed above.

For all of the reasons set forth above, as well as those set forth in the initial Brief of Defendant-Appellant, Mr. Torres maintains his position that there was no valid community caretaker function by police in this case. Therefore, the search should have been found to be invalid and the evidence suppressed.

## II. There is no authority for the State's proposition that police may enter a third-party's residence to accompany a non-resident for the non-resident's safety.

The State asserts that police were acting as community caretakers by accompanying the non-resident Shelly into someone else's home for her safety. (State Br. 10.) The State has offered no authority for this proposition, nor could it. Shelly was perfectly safe when she called police. She would have remained perfectly safe had she chosen to stay home and leave the investigation to the police. For police to take a perfectly safe person and bring them to a place where they believe the person will be in danger, is highly irresponsible, even if police accompany the person. Further, the community caretaker function should not cover situations that the police create themselves, which they did when they brought Shelly to the apartment. If there was danger in the home, Shelly should not have been encouraged to go there by police offering to accompany her; instead, police should have told her not to go, that it was dangerous, and she should leave it to

law enforcement. This poor judgement by police cannot be covered by the community caretaker function. It would be bad public policy, and an erosion of the Fourth Amendment right to be safe from unreasonable search and seizure, if police could simply go into people's homes when a non-resident plans to go in and believes they may endanger themselves by doing so.

This would erode the Fourth Amendment protections in many ways. Take, for example, a situation in which a person is suspected by a neighbor or family member of having an illegal marijuana grow. If police do not have probable cause to obtain a warrant, then under the State's reasoning, they could have the concerned citizen go into the home to check things out, and police could follow, for the safety of that person. This is not what the community caretake function should be used for, but this would be the result if this search is upheld under the community caretaker function for the safety of Shelly.

## III. The State engages in a straw-man argument, mischaracterizing Mr. Torres' position when the State asserts that Mr. Torres wants to "have it both ways."

The State complains that Mr. Torres "wants to have it both ways" because "he faults the officers for not acting hastily enough, but also faults them for not waiting until the next day or at least waiting for Torres to let them into [his] home. (State Br. 11.) There is nothing inconsistent about Mr. Torres' positions. It is completely reasonable to ask that police first request consent or get a warrant before barging into someone's home to search it. This is Mr. Torres' main position. This is what Mr. Torres asserts should have happened in this case.

However, police need not always request permission or get a warrant. If an exception such as community caretaker exists, then police may enter without consent or a warrant. However, the fact that police did not search the house hastily, looking for someone who is in need of assistance, and instead watched as Shelly searched the bedroom, is one piece of evidence that they were not acting as community caretakers.

## IV. In all other ways, the facts of this case do not support an exception to the warrant requirement under the three-step test set forth in Pinkard.

In the Brief of Defendant-Appellant, Mr. Torres showed that the requirements of State v. Pinkard, 2010 WI 81, 327 Wis. 2d 346, 785 N.W.2d 592. That case allows for an exception to the warrant requirement under a three-step test to determine whether the community caretaker exception applies, were not met in this case. The State has argued that the requirements were met. Mr. Torres continues to rely on the arguments set forth in his brief-in-chief.

## V. Shelly did not have actual or apparent authority to give officers consent to search the apartment.

### A. Shelly did not have actual authority.

Torres' brief-in-chief argued against third-party consent, citing State v. Sobczak, 2013 WI 52, 347 Wis. 2d 724, 833 N.W.2d 59. (Torres Br. 17-21.) The Sobczak Court refers to this as "actual authority," Id, at ¶ 10., presumably because in that case the consenter actually had authority by virtue of her relationship with the resident and the circumstances surrounding her presence there. There was no

mistake of fact on the part of police. Thus, Sobczak is an "actual authority" case as opposed to one implicating "apparent authority."

Reasons and legal rationale showing that Shelly did not have actual authority over the premises and therefore could not give police consent to search it were set out in Mr. Torres' brief-in-chief.. Mr. Torres continues to rely on that reasoning and on those arguments. Additionally, the arguments set forth by the State, relating to Sobczak, in its Respondent's Brief are not persuasive or on point because essential underlying foundational context found in that case is missing in the present case.

Specifically, the State argues that under Sobczak, the close relationship between Shelly and Emilio and Dorian supports the conclusion that she had authority to consent to a police search, as does the fact that she had a key. (State Br. 22.) However, these relationships, and the fact that Shelly had a key, are irrelevant under Sobczak because that case does not apply here in the way the State attempts to use it. The consideration of the relationship between Sobczak and his girlfriend was relevant, while the relationship between Shelly and Emilio and Dorian is not, because the entire premise of the Sobczak case was that *the consenter was staying at his home while he was not there, with his permission*. That court asks, then, in that context, what factors make a difference as to whether or not such a person has authority to consent to a search? There is no such context in the case of Shelly, because she was not a houseguest who opened the door to police from the inside; she was a friend who happened to have a key, who led police to the home and let them in. This is not even close to the situation of Sobczak and should not be controlled by it. The same argument applies to the fact that Shelly happened to have a key to the residence.

It is clear that the Sobczak court intended these factors to be considered in the context of a houseguest, since the second factor mentioned is "the duration of the consenter's stay in the premises." Sobczak, ¶ 20. Further, a holding that a person who is not staying or residing at the premises may invite police to search simply by virtue of having a key and being a close friend or family member, would not be supported by sound public policy. This would implicate a great number of situations, in which a family member holds the key to a home in case of a lock out. It is very reasonable to believe that the average person who provides a family member with a key "in case I get locked out," would not expect said family member to allow police to search the residence, nor would an average person support a policy that this be allowed. While Shelly Torres had the key for other reasons besides Emilio accidentally locking himself out of his home, that is irrelevant because having a key and being a friend is not enough to give the person authority to allow police to search.

### B. The Rodriguez case does not stand for the proposition that having a key is sufficient to establish apparent authority, as the State asserts.

After arguing that Shelly had actual authority under Sobczak, the state then moves to an argument about apparent authority, citing United States v. Rodriguez, 888 F.2d 519 (1989.) (State Br. 23.) The State claims that the Rodriguez case stands for the proposition that "having a key was sufficient to establish apparent authority." (State Br. 23.) However, that is not true.

To claim that this case holds that having a key to someone's home is enough to give a person authority to allow

police to enter it, is preposterous for many reasons. First, in Rodriguez, the claim was not about someone's home, where a person has a reasonable expectation of privacy; rather, the situation involved a janitor's closet at the Union Hall where Mr. Rodriguez and his wife lived. Specifically,

> The union hall contains living quarters on the third floor that Rodriguez was entitled to occupy. He had separated from his wife, however, and while Mrs. Rodriguez continued to occupy the apartment Rodriguez sometimes camped out on a cot in the janitors' room in the basement. This room contained boxes full of union records, cleaning equipment, and office supplies as well as Rodriguez's cot and a "desk" made by placing plywood across wooden braces. Another janitor uses the room when Rodriguez is not on duty, and although the room is ordinarily locked, employees of the union may enter it to obtain supplies.

Rodriguez, ¶ 7.

Second, the Rodriguez court relied on apparent authority of Mrs. Rodriguez, in her own right, not as a third-party consenter. While it is not stated explicitly, it appears from that case as though Mrs. Rodriguez had her own key to this janitor's closet, as did a limited number of other individuals, independent of Mr. Rodriguez. This seems evident in that there is no mention of Mr. Rodriguez having given her the key, and there is mention that other people have keys and enter the closet. Id. Thus, this is not a case about alleged third-party consent to another person's residence at all, unlike in the present Torres case. Instead, it is a case about "apparent consent" – police believed Mrs. Rodriguez had her own authority to the closet – probably by having been given a key by the owners or managers of the building in the same way the other employees got their keys. Thus, unlike in the present Torres case, Mrs. Rodriguez would not be

claiming authority to give police consent to search someone else's residence; she would be giving them permission to search a closet that she had as much control over, and as much right to, as her husband. If this is not perfectly accurate, police at least thought it was, thus giving rise to apparent authority. The State's attempt to extend the holding of that case to say that having a key to someone else's home, in itself, is enough to give police consent to search it, falls extremely short.

### C. Dorian's failure to indicate that Shelly was not allowed to let police into the apartment is irrelevant.

The State attempts to liken this case to State v. Tomlinson, in which a defendant's teenaged daughter allowed police in and the defendant, who was near, did not object. State v. Tomlinson, 2002 WI 91, 254 Wis.2d 502, 648 N.W.2d 367. (State Br. 23.) However, that case is far different from this one, because the consenter was the defendant's teenaged daughter who lived in the home and opened the door from the inside. The court in Tomlinson was concerned with whether or not a minor child has authority to consent to entry. Id., at ¶ 29. In taking up that question, the court found that in some cases, including that of Tomlinson, a minor child could consent. The court stated:

> 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. Additionally, the officers came to the house on a Saturday evening, rather than extremely late at night or early in the morning. We also give weight to the fact that Tomlinson was nearby when the door was opened. Tomlinson did not object to the police coming in, and the daughter did not hesitate or turn to ask Tomlinson's permission to the

> officers in. Under these circumstances, the officers reasonably could have believed that Tomlinson entrusted the girl with at least some authority to give consent to enter, and certainly with enough authority to allow the limited entry that occurred in this case.

Id., at ¶ 34.

Because the Tomlinson court was addressing the issue of a minor child's ability to consent to entry, the same reasoning does not apply in the instant case. The Court in Tomlinson was trying to ascertain or estimate how much authority it appeared that the defendant had given or would give his daughter, given her age, intelligence, maturity, and other circumstances. Id., at ¶ 32. It was in that context that the Court considered the factor that Tomlinson himself was nearby and did not object to his daughter's giving police permission to enter. Id., at ¶ 34. The State in the present case compares this case to Tomlinson, because Dorian Torres also did not object. (State Br. 23-24.) However, the question asked by the Tomlinson Court was how much authority a minor child can be thought to have when the parent is standing by and does not object. In the present case, the consenter was the defendant's mother, who did not live in the home, so the same question is not being asked as in Tomlinson. It also bears noting that it was Emilio who gave Shelly the key, not Dorian. Therefore, in the present case, the question of how much authority the person sitting by and not objecting gave the consenter, is zero. It also bears noting that it is undisputed that Dorian was a minor at the time, so the fact that he did not stand up and demand that his mother and the police not search the home, should be weighted less than if he were an adult.

Lastly, the State's brief misstated the wording in Tomlinson. Specifically, the State asserted that the Supreme Court in that case 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. (State Br. 24.) However, as quoted above, the Supreme Court considered multiple factors, including the fact that officers only went into the entryway and the kitchen, and that they came to the house on a Saturday evening, rather than extremely late at night or early in the morning. Id, at ¶ 34. Only after that, the Court stated, "We also give weight…" – not, as the state claims, "We give great weight," – to the fact that Tomlinson did not object. Id.

In arguing that it is relevant that Torres did not stand up and object to the search, the State also points to State v. St. Germaine, 2007 WI App 214, 305 Wis.2d 511, 740 N.W.2d 148. In that case, the owner of a residence that St. Germaine was renting had apparent authority to consent to a search thereof, because police reasonably believed that he had authority over the entire premises, a conclusion bolstered by the fact that St. Germaine himself was present and said nothing. Id, at ¶ 19. Notably, this case involves a landlord with actual authority over all but one room, and there was nothing in the record to indicate that the defendant's room was pointed out to police. Id., at ¶ 20.

In analyzing the St. Germaine case, the court gave an explanation of the third-party consent rule:

> In Illinois v. Rodriguez, 497 U.S. 177, 188-89, 110 S.Ct. 2793, 111 L.Ed.2d 148 (1990), the United States Supreme Court expanded the third-party consent exception to include situations where a warrantless entry is based upon the consent of a third party reasonably believed by the police, at the time of the entry, to possess apparent common authority over the premises, but who in fact does not. A determination as to whether reliance is reasonable under such circumstances rests on the following objective standard:
> [W]ould 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? If not, then warrantless entry without further inquiry is unlawful unless authority actually exists. But if so, the search is valid.
>
> *Id.* (citation and quotations omitted).

St. Germaine, at ¶ 16.

The Court in St. Germaine references the idea of common authority. Specifically, that if it appears there is common authority, even if that turns out not to be the case, then the police may rely on it – "apparent authority." Id. However, the context of St. Germaine renders it inapplicable to the present case, because in St. Germaine, the consenter was a landlord with actual authority over most of the premises, so it was reasonable for police to rely on that when searching the entire premises, in the absence of objection from St. Germaine, who was renting a single room. Police thought the landlord had authority over all rooms, since he had authority over the building itself, and St. Germaine did not give them reason to think otherwise. In the present case, though, there was no such mistake or misunderstanding. Everyone know that that Shelly did not have common authority over the place, as she did not live there or own the building. Therefore, there was no apparent authority for police to rely upon. Having a key, in itself, does not give a person common authority.

In St. Germaine, it was only because the consenter was the landlord and had authority over the building that he was thought to have authority over all rooms. This was a mistake in fact. In determining that police were right to rely on assumption, St. Germaine's non-objection was considered by the court. By contrast, in the present case there was no apparent authority to begin with – police were not under any illusion that Shelly lived in the apartment or owned the building – thus, Torres' non-objection holds no more weight than if police barged into anyone's home and searched, and

the person did not speak an objection aloud. That search would not be upheld, and this one should not be either.

## CONCLUSION

In sum, for all the reasons set forth in the Defendant-Appellant's Brief, as well as the reasons set forth in this Reply Brief, Dorian Torres hereby asks this Court to reverse and vacate his conviction in this case and to remand the case for a new trial, at which any evidence obtained in violation of his Fourth Amendment rights – the body of Emilio Torres and all subsequently obtained evidence – would be suppressed.

Respectfully submitted this ____day of _____, 2017.

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## CERTIFICATION AS TO FORM

I hereby certify that this brief conforms to the rules contained in § 809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of the brief is 4,199 words.

_____
Angela D. Henderson

## ELECTRONIC CERTIFICATION

I hereby certify that the text of the electronic copy of this brief is identical to the text of the paper copy of the brief.

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Angela D. Henderson