STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2016AP001609-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

FAITH N. REED,

Defendant-Appellant-Petitioner.

Appeal from the Judgment of Conviction Entered
in the Monroe County Circuit Court,
the Honorable David J. Rice, Presiding

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT-PETITIONER

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1. Did Officer Keller's warrantless entry into and search of Ms. Reed's apartment violate Ms. Reed's Fourth Amendment right to be free from an unreasonable governmental search?

The circuit court ruled: The search did not violate the Fourth Amendment because Officer Keller had implied consent from Kirk Sullivan to accompany Sullivan to the apartment and entry was justified because Keller needed to make sure he knew what was going on right in front of him.

The court of appeals affirmed, ruling Mr. Sullivan granted Keller "uncoerced, unequivocal, and specific consent to enter" Ms. Reed's apartment, thereby obviating the need for a warrant as the Fourth Amendment otherwise requires.

2. Did Mr. Sullivan withdraw implied consent for Officer Keller to enter Ms. Reed's apartment by attempting to close the door prior to Keller's entry?

The circuit court ruled that consent was not withdrawn because the court thought it ambiguous as to exactly who tried to close the door. The court of appeals concluded Sullivan closing the door may have shown a "last-second concern about agreeing to allow Keller to enter," but ruled it merely a "nuanced possible delaying tactic" and thus not an unequivocal withdrawal of implied consent.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

This court's decision to grant review suggests both oral argument and publication are warranted.

STATEMENT OF CASE AND OF FACTS

On December 13, 2015, police conducted a warrantless search of Ms. Reed's home as police looked to speak with a person who police had reason to believe may have been involved in a verbal argument over a pair of shoes. Based on evidence found as a result of the warrantless entry, the state on December 15, 2015, charged Ms. Reed with one count each of possession of a dextroamphetamine sulfate (Adderall) pill, possession of a illegally obtained prescription drug (the Adderall pill), possession of THC, and bail jumping; all misdemeanor offenses. (1:1-4).

On February 9, 2016, Ms. Reed filed a motion to suppress evidence on the basis the warrantless search violated her rights under the 4th, 5th and 14th Amendments to the U.S. Constitution and Article I, §§ 8 and 11 of the Wisconsin Constitution. (16; 17). Specifically, the motion alleged the entry and search occurred without police first obtaining a warrant or consent, and therefore the evidence obtained from the unlawful search must be suppressed. *Id.*

The court conducted a hearing on March 15, 2016. (20). To meet its burden of proof the District Attorney presented the testimony of Tomah Police Officer Steven Keller and played the video/audio recording of events captured by Officer Keller's body camera, which included the

actions and all conversation relevant to the warrantless entry and suppression issue.

Officer Keller testified that at 1:20 p.m. on Sunday, December 13, 2015, he was "dispatched to the area of 308 Murdock" in Tomah "in reference to an altercation between a couple of subjects in the street." (20:7). Upon his arrival at that address Keller observed two individuals, a bearded white man and a black man, standing in the street talking. (20:7-11; 19 at :29).[1] When Officer Keller asked "What's going on," both men walked toward Keller. (19 at :30). The bearded white man, later identified as witness Daniel Cannon, replied "They were fighting over stupid shit." (19 at :33). Keller testified the "they" were two brothers, Jerome Harris and Brandon Harris, who Keller learned from Cannon had been arguing over a pair of shoes. (20:8; 19 at 1:46-1:50).

When Officer Keller asked "Were you guys involved" Cannon responded "Ah…we were trying to break it up." (20:9; 19 at :39-:41). Cannon informed Keller the brothers left, going in opposite directions to different residences. (20:8; 19 at :34, :42-1:08). One brother went to 308 Murdock Street, Apartment 11 and the other went to 940 Grandview Avenue, Apartment 204. (20:8).

While Officer Keller was speaking with Cannon and directing other officers over his radio to where he believed the Harris brothers were, the black man who had been standing near Cannon, later identified as Kirk Sullivan, walked away, heading back toward his apartment. (20:10; 19

[1] The video recording is imprinted with a running clock. References to particular portions of the recording will begin with the document number "19" followed by the time at which the particular event referenced appears in the recording.

at 1:01-1:16). Keller testified this "behavior appeared to be suspicious to me." (20:10). Keller directed Sullivan to return, stating "Hey, why don't you come back here. Don't just leave." (19 at 1:16). Sullivan complied. (19 at 1:16-1:22). When Sullivan walked the 15 steps back to where Officer Keller and Cannon were standing Keller directed Sullivan to "Keep your hands out of your pockets for me, ok." (19 at 1:24) Sullivan complied, raising his hands and presenting his open palms to Keller. (19 at 1:25).

When asked at the hearing if Sullivan "would have been free to go about his business" had he ignored Keller's directive to return, Officer Keller responded "No, because I needed to take—I was conducting an investigation and needed to gather more information regarding the altercation." (20:20).

On the video, as Cannon explained to Officer Keller that he and Sullivan were "both trying to defuse the situation," Sullivan uttered his first word, stating "Yup." (19 at 1:39). As Cannon further explained to Keller that they were supposed to be watching football, Officer Keller asked Sullivan "Ok, so you were involved in this?" (19 at 1:56). Mr. Sullivan responded "I was just trying to break it up. That's it." (19 at 1:59).

After obtaining identification and running warrant checks, Keller questioned Cannon further confirming there was no physical fight, but just a verbal argument over a pair of shoes. (19 at 2:02-4:25) Keller then asked "Can you guys stick around this area for a moment," to which Cannon responded "Oh, yeah" and Sullivan "You mean outside?" (20:10; 19 at 4:46-4:50). Keller asked "Well, do you want to hang out in this building," which prompted laughter and Sullivan saying "I was going to watch the game." (19 at 4:51-

4:57). Keller replied "I know, until we can get everything straightened out." (19 at 4:58).

At that point Cannon turned to Mr. Sullivan and said "Well, cuz he went to your house, is at your apartment…" and Sullivan responded "Yeah, he supposed to go to my, my apartment to watch football." (19 at 5:00-5:04). Cannon then suggested to Officer Keller "So, I mean if you want to go with him and I can stand by where I live." (19 at 5:08). When Keller asked Sullivan "Who's at your house right now, one of the guys involved" Cannon, not Sullivan, answered "Yes." (19 at 5:11-5:13). Keller asked Sullivan "Alright, and he's over there right now?" and Sullivan replied "I don't know, I don't know, he's supposed to though." (19 at 5:17-5:19). Cannon then chimed in stating "No, I saw him walk that way (gesturing toward Faith Reed's apartment where Sullivan was staying), he might be there already…so…," which prompted Sullivan to shrug. (19 at 5:21-5:25).

Officer Keller learned from the dispatcher that Sullivan was on probation for crimes involving Faith Reed. (19 at 5:36) There was some question about whether a no-contact order was in place, and it was resolved there was not. (19 at 6:05-6:29). Keller then asked Sullivan "Who is over at your house right now that was involved in this, what's his name?" (19 at 6:35). Sullivan replied "Ah, Jerome. He's supposed to, he supposed to go over there. I stood out here and me and him was talking about it." (19 at 6:38).

At that point Keller spoke over his radio with other officers who were at the door of the apartment where the other brother, Brandon, was supposed to be. (19 at 6:44-7:16). Keller confirmed from Cannon and Sullivan that there was nothing physical, it was "just a verbal argument," and Keller reported that to the other officers. (19 at 7:17-7:34).

While another officer on the radio was asking for a "wanted check" for Jerome Harris and Brandon Harris, Officer Keller gestured or pointed and said to Sullivan: "Alright, let's go…ah…let's go look over…see if he's over there. If anything we could just all kind of talk to him." (19 at 7:48). As Keller gestured and started to walk past him, Sullivan complied with Keller's "let's go" directive by turning around to follow. (19 at 7:52). Cannon then asked Keller "Do you mind if I go…" and Keller responded telling Cannon "You're good to go," as Keller started walking with Sullivan. (19 at 7:55-7:59). Keller's bodycam video shows Keller walking toward the apartment with Sullivan not in view (i.e. not directly in front of him). (19 at 7:58). However, as Officer Keller walked and pivoted his body left the video shows Sullivan walking next to Keller, on Keller's left. (19 at 8:07, 8:19).

Approximately 30 seconds into the walk Officer Keller said "Hey, do you want to step over here with me. I am going to see if this other party is over here." (19 at 8:27) The video then shows Sullivan for the first time walking in camera view in front and entering a common area of the apartment building through an unlocked door. (19 at 8:28-8:42). Keller entered behind Sullivan and continued following Sullivan upstairs through another unlocked hallway door. (19 at 8:42-9:00). While walking down the second floor hallway, Keller said into his radio "Andy, I'll be in apartment number 206." (19 at 9:13).

Officer Keller testified that when Sullivan arrived at the apartment door Sullivan "just briefly knocked, opened the door and started walking in." (20:12). The video shows Sullivan opened the door just wide enough to let himself in. (19 at 9:17). Sullivan then attempted to close the door behind him while calling out inside for Jerome. (20:17; 19 at 9:15-

9:20). Keller testified "The door was not fully closed, but was closing in the process." (20:26). As Sullivan attempted to close the door Keller called out "Hey, don't just walk in like that." (1:2; 19 at 9:21).

Officer Keller then put his hand on the door to stop it from closing. (20:12). Keller testified that when "he placed [his] hand on the door to keep the door open," he could see "there was another male subject inside." (20:12). After reaching out (and therefore "in") to stop the door from closing, Keller testified he then "pushed it further to—to see who that other subject was that was standing in there." (20:26-27). Keller stated he then "could see at that time from the doorway that there was another male subject inside…standing at the counter appearing to conceal something in front of him." (20:12).

The video confirms that as Keller pushed the door back open a person later identified as Jerome Harris was in the kitchen area standing with his back to the front door. (19 at 9:22). At that point Keller walked fully into the apartment, discovered a bag of what appeared to be marijuana on the counter near where Jerome had been standing, and observed Sullivan appearing to conceal something that turned out to be a joint Jerome had just given to him. (20:18; 19 at 9:24-9:50).

When asked at the hearing "Did Mr. Sullivan give you permission to go into the apartment?" Officer Keller responded "He did not." (20:25). Keller added "He did not tell me that I had to stay out of the apartment nor did he tell me to just come right in, either." *Id.* Keller stated "[a]t no point did he (Sullivan) tell me that I could not follow him into the residence." (20:12). Officer Keller testified that he placed

his hand on the door and opened it "[f]or safety concerns," explaining:

> I was looking for a subject with a possible warrant and as well as being involved in an altercation. I was concerned about possibly being weapons involved, so for my safety and the destruction of any type of evidence, I kept the door open to visually see inside the residence as he was entering.

(20:13).

The video shows that at the time Sullivan entered the apartment and tried to close the door, Faith Reed was sitting on the couch in the living room area and she walked to the door to meet Officer Keller as Keller walked in. (19 at 9:19, 9:24). Keller arrested Ms. Reed for possession of the marijuana. (1:5). Ms. Reed was transported to the jail where another officer during booking discovered the Adderall pill in Reed's sock. (1:5-6).

The court in ruling on Ms. Reed's motion began by stating "the facts here come from the video." (20:40; App. 120). The court ruled that when Mr. Sullivan attempted to leave and Officer Keller "yelled …something to the effect of, 'Hey, why don't you come back, don't just leave,'" because there was "no indication…Mr. Sullivan was any kind of a suspect in this matter or was trying to escape…the officer was not ordering him to come back." (20:41; App. 121) The court added it did not think "that this placed [Mr. Sullivan] under any particular compulsion since he was not a suspect and not suspected of doing anything wrong." (20:42; App. 122)

The court stated because Sullivan "did come back" and answered Officer Keller's questions, Mr. Sullivan's actions "in walking to that location and leading the officers to—the

officer to that location…would indicate that he was freely and voluntarily by his conduct implying his consent to the officer going there with him to find [Jerome Harris]." (20:42, 45; App. 122, 125). The court reiterated, "I conclude that by his conduct Mr. Sullivan freely and voluntarily implied that the officer could follow him to this location and that he was going to locate and identify Mr. Harris who was one of the suspects in connection with this altercation so that the officer could talk with him." (20:46; App. 126).

The court stated it was not clear who attempted to close the door, whether "it was Mr. Sullivan or it was one of the individuals in the apartment." (20:43-44; App.123-24). The court added "There is no indication that—from Mr. Sullivan that he had—had objected to the officer opening the door." (20:44; App. 124). The court stated "there was nothing about his entry into the room that revoked—revoked that consent that the officer follow him." (20:46; App. 126). The court ruled that "because it was not clear to me who closed the door," the circumstances surrounding the door closing were too "ambiguous" to be interpreted as a revocation of the consent the court believed Sullivan had given Keller by allowing Keller to accompany him to the apartment after being directed by Keller to do so. (20:46-47; App. 126-27).

Although the court stated "there was nothing about this incident or about the individuals that indicated that there was an immediate threat to the officer," the court nevertheless also ruled the entry justified because "the officer's concerns for his safety under the circumstances were legitimate." (20:45; App. 125). The court noted Keller was "in a narrow hallway… all alone" and stated:

> I think that when an officer's in a location like that alone and they're isolated and there are other people who are

> wanted, there's a warrant for their arrest, it's a legitimate concern that the officer makes sure he knows who's doing what right in front of him.

(20:45-46; App. 125-26).

The court denied Ms. Reed's motion. (20:47; App. 127).

Thereafter, Ms. Reed pled no contest to the possession of the pill and to bail jumping.

Ms. Reed appealed.

On March 23, 2017, the court of appeals issued a decision affirming the judgment. (App. 102-118). The court ruled Officer Keller's warrantless entry into Ms. Reed's apartment was lawful because in the court's view Keller received "uncoerced, unequivocal and specific consent to enter from someone with actual or apparent authority to give consent." (App. 103, ¶ 1).

Ms. Reed filed a petition for review. The Attorney General responded setting forth a detailed argument, agreeing that the lower courts erred in concluding Mr. Sullivan consented to Officer Keller's entry into Ms. Reed's apartment. Accordingly, the Attorney General asked this court to accept review, reverse, and remand with directions to suppress the evidence. (AG's Aug. 1, 2017, response, p. 1)

This court granted review and remanded the case to the court of appeals for reconsideration. On October 19, 2017, District IV Court of Appeals Judge Blanchard issued a ruling that did not engage the issue, but stated simply: "I am not persuaded by the State's new legal argument on appeal and therefore do not accept the State's new concession."

(App. 101) The court concluded: "reconsideration is denied." *Id.*

Ms. Reed again with the Attorney General petitioned this court for review, which the court granted.

ARGUMENT

I. Because Officer Keller Entered Ms. Reed's Apartment without First Obtaining a Warrant or Consent, and No Other Exigency Justified the Entry, the Entry and Subsequent Search Violated Ms. Reed's Constitutional Right to be Free from the Government's Unreasonable Search.

It is beyond dispute that Officer Keller never specifically requested and that Mr. Sullivan never expressly granted Keller permission to enter Ms. Reed's apartment. Nor was consent to enter implied by Mr. Sullivan's compliance with Keller's directive that they go to the apartment. Mr. Sullivan unambiguously tried to terminate his contact with Officer Keller first by walking away, and later by trying to close his apartment door while Keller was still outside. From the time Officer Keller seized Mr. Sullivan for questioning as a witness to the alleged verbal argument between two brothers over a pair of shoes, Keller dictated or directed Sullivan's actions or movements. A person seized by police who complies with a police directive to go to a place does not by the act of compliance imply his free and voluntary consent for police to go to and enter that place. Under these circumstances Keller's warrantless entry into Ms. Reed's apartment violated Ms. Reed's Fourth Amendment right to be free from an unreasonable

governmental search.[2] Consequently, the lower courts' orders denying Ms. Reed's suppression motion and upholding the judgment must be reversed.

As a preliminary matter, Ms. Reed acknowledges that Officer Keller reasonably believed Mr. Sullivan had authority or apparent authority to consent to entry of Reed's apartment. But, as will be demonstrated below, there was no consent.

A. Relevant law and standard of review.

The Fourth Amendment protects the "right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures." U.S. Const., amend. IV. The Court declares it "axiomatic that the physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed." ***Welsh v. Wisconsin***, 466 U.S. 740, 748 (1984). That is, at the "very core [of the Fourth Amendment] stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusions." ***Payton v. New York***, 445 U.S. 573, 589-90 (1980). To that end, "[i]t is well settled under the Fourth and Fourteenth Amendments that a search conducted without a warrant…is per se unreasonable subject only to a few specifically established and well-delineated exceptions." ***Schneckloth v. Bustamonte***, 412 U.S. 218, 219 (1973).

The "specifically established and well-delineated exceptions" for a warrantless governmental entry into a private home are two—"exigent circumstances or consent." ***Steagald v. United States***, 451 U.S. 204, 206 (1981). For an

[2] Although Ms. Reed challenges the warrantless search on the basis of rights conferred by both the U.S. Constitution and Wisconsin Constitutions, for short-hand purposes Ms. Reed in her brief will refer to the Fourth Amendment only.

appropriately reined-in consent exception to be valid, consent must be freely and voluntarily given. ***Schneckloth***, 412 U.S. at 222. Consent that is the product of duress or coercion is not voluntary. *Id.* at 227, ***State v.*** (Gary) ***Johnson***, 2007 WI 32, ¶ 60, 299 Wis. 2d 675, 729 N.W.2d 182, (J. Roggensack dissenting). Consent also is not voluntary if based on "no more than acquiescence to a claim of lawful authority." ***State v. Brar***, 2017 WI 73, ¶ 24, 376 Wis. 2d 685, 898 N.W.2d 499, quoting ***Bumper v. North Carolina***, 391 U.S. 543, 548-49 (1968).

Consent to search does not have to be expressed verbally, but rather can be given or inferred in a non-verbal form through "gestures or conduct."***Brar***, *Id.* at ¶ 17; ***State v. Tomlinson***, 2002 WI 91, ¶ 37, 254 Wis. 2d 502, 648 N.W.2d 367. However, consent should not be lightly inferred; consent justifying a warrantless constitutionally protected search must be unequivocal and specific. ***Gautreaux v. State***, 52 Wis. 2d 489, 492, 190 N.W.2d 542 (1971); ***State v.*** (Donnell) ***Johnson***, 177 Wis. 2d 224, 233, 501 N.W.2d 876 (Ct. App. 1993).

The U.S. Supreme Court in its "Fourth Amendment jurisprudence… [has] 'repeatedly rejected' a subjective approach, asking only whether 'the circumstances viewed *objectively*, justify the action.'" ***Kentucky v. King***, 563 U.S. 452, 464 (2011) (emphasis in original). This is true not just for the issue of consent, but also for whether a person has been seized. ***United Stated v. Mendenhall***, 446 U.S. 544, 554 (1980). The underlying rationale is that "evenhanded law enforcement is best achieved by the application of objective standards of conduct, rather than standards that depend on the subjective state of mind of the officer." *Id.*

Whether a person has consented to a search or has been seized are questions of constitutional fact. ***Brar***, *Id.* at ¶ 13; ***State v. Williams***, 2002 WI 94, ¶ 17, 255 Wis. 2d 1, 646 N.W.2d 834. Such questions are determined from the totality of all of the circumstances. ***Schneckloth***, 412 U.S. at 226; ***Mendenhall***, 446 U.S. at 554. This court treats "questions of constitutional fact as mixed questions of fact and law." ***State v. Phillips***, 218 Wis. 2d 180, 189, 577 N.W.2d 794 (1998). The court thus:

> …engages in a two-step inquiry. First, we review the circuit court's findings of historical fact under a deferential standard, upholding them unless they are clearly erroneous. Second, we independently apply constitutional principles to those facts.

State v. Wantland, 2014 WI 58, ¶ 19, 355 Wis. 2d 135, 848 N.W.2d 810. This independent appellate review of conclusions drawn from historical facts found by the circuit court or established from the record allows this court to maintain control of and clarify legal principles and unify precedent. ***State v. Martwick***, 2000 WI 5, ¶ 19, 231 Wis. 2d 801, 604 N.W.2d 552.

The deferential standard for testimonial facts makes sense as only the circuit court can observe nuances, as is necessary to resolve issues of conflict and credibility and which cannot be done from review of a transcribed record. However, it is well-established that when the reviewing court and circuit court are on equal footing, review of factual conclusions is de novo. This true for documentary facts, or facts derived exclusively from video. *See e.g.* ***Weinberger v. Bowen***, 2000 WI App 264, ¶ 7, 240 Wis. 2d 55, 622 N.W.2d 471 (documentary); and ***State v. Jimmie R.R.***, 2000 WI App 5, ¶ 39, 232 Wis. 2d 138, 606 N.W.2d 196 (video). However, when a video is ambiguous or conflicts with testimony, or

when credibility is at issue, deferential review applies. *E.g.* ***State v. Walli***, 2011 WI App 86, 334 Wis. 2d 402, 799 N.W.2d 898.

The circuit court here made few factual findings because as the court accurately noted, "the facts here come from the video." (20:40). But as will be developed in greater detail below, regardless of whether fact review here is deferential or de novo two key specific facts found by the lower courts are clearly erroneous. The first is the circuit court ruling it "ambiguous" as to who attempted to close the door as Mr. Sullivan entered the apartment. (20:43-44, 46-47). In addition to Officer Keller's testimony[3] and recorded real-time observation[4] that it was Mr. Sullivan who attempted to close the door, the video shows Sullivan's arm extending back toward the door knob as the door closed and shows Ms. Reed sitting on a couch in the living room area[5] and shows Jerome Harris standing at a counter in the kitchen area,[6] both well out of reach of the door at the time Mr. Sullivan walked in. No one else was in the apartment. Thus, the finding in regard to "ambiguity" is clearly erroneous—the record establishes beyond any doubt Mr. Sullivan tried to close the apartment door while Officer Keller was still outside in the hallway.

The second is the court of appeals' finding as fact that Jerome Harris, not Officer Keller, said "Hey, don't just walk in like that" as Mr. Sullivan attempted to close the door after entering Reed's apartment. (COA opinion, ¶ 12, n. 4 "I

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[3] (20:26)

[4] Keller, at the scene speaking with another officer in the hallway, stated: "We come here looking for Jerome, and Kirk (Sullivan) opens up the door, and goes in, tries to close it…." (19 at 12:37).

[5] *See* screenshot from video (19 at 9:19) (App. 129).

[6] *See* screenshot from video (19 at 9:22) (App. 131).

disagree on this point with Reed"). Aside from the recording clearly depicting Officer Keller's distinctive voice, and the door being nearly closed with Jerome on the other side as Keller made the statement,[7] Keller acknowledged in the complaint "I held the partially open door open and for my safety, requested Kirk to not just walk in." (1:3). Thus, the court's alternative fact is not merely clearly erroneous, but erroneous beyond a reasonable doubt.

B. No express consent to enter the apartment was asked for or given.

As the circuit court accurately noted, the historical facts here "come from the video." (20:40). Officer Keller's bodycam recorded all conversation and most actions relevant to the suppression issue. The record thus establishes as historical fact that when Officer Keller rolled up on Daniel Cannon and Kirk Sullivan to investigate an apparently finished "altercation," Keller engaged Cannon in conversation while Sullivan stood by silently. (19 at :30-1:35). It is historical fact that when Keller noticed Sullivan had walked away, Keller yelled "Hey, why don't you come back here. Don't just leave," and that when Sullivan complied Keller directed Sullivan to "Keep your hands out of your pockets for me, ok." (20:41) (19 at 1:16, 1:24).

It is historical fact that Cannon, not Sullivan, first volunteered where he believed each Harris brother went after their argument over shoes ended. (19 at :42, :56, 1:08) It is historical fact that Cannon, not Sullivan, suggested Keller go with Sullivan to Ms. Reed's apartment, and Cannon, not Sullivan, who first answered Keller's question about Jerome being there. (19 at 5:08-5:11). It is historical fact that Sullivan, when asked by Keller, informed Keller "I don't, I

[7] *See* screenshot from video (19 at 9:21) (App. 130).

don't know" if Jerome was at the apartment, and told Keller only that Jerome was "supposed to go to my, my apartment to watch football." (19 at 5:04, 5:19). The video shows the conversation was largely between Keller and Cannon, and that Mr. Sullivan confirmed or clarified a few points when asked.

It is historical fact that Sullivan was present as officers discussed the knock-and-talk attempt at the apartment where Brandon Harris supposedly went. (19 at 6:44-7:00). It is historical fact there was no discussion about or mention of Keller entering Ms. Reed's apartment. It was objectively reasonable, then, for a person in Mr. Sullivan's shoes to infer that a similar knock-and-talk encounter is all Keller was planning to do in regard to Jerome—that is, police would go to the front door, knock and see if Jerome would agree to speak with them. And of course, knock-and-talk does not generally involve, much less inherently involve an entry or request to enter; is not a search; and is not something that requires consent or a warrant. ***Kentucky v. King***, 563 U.S. at 469-70.

Objectively, nothing Officer Keller said can reasonably be interpreted as a request to enter Ms. Reed's apartment and nothing Mr. Sullivan said can reasonably be interpreted as granting Keller consent to enter. And, as the court has observed, "[t]hat which is not asked for cannot be knowingly or voluntarily given." ***State v. Kiekhefer***, 212 Wis. 2d 460, 475, 569 N.W.2d 316 (Ct. App. 1997). The facts of record thus establish Officer Keller's warrantless entry into Ms. Reed's apartment was not based on any affirmatively or overtly expressed lawful consent to enter.

C. Mr. Sullivan did not grant unequivocal and voluntary implied consent for Officer Keller to enter Ms. Reed's apartment.

As established above, the circuit court's factual findings from testimonial evidence are entitled deference unless clearly erroneous. But application of those facts and historical facts derived from the video to the constitutional questions presented are questions of law, which this court reviews *de novo*. From the historical facts this court should conclude that (1) Officer Keller seized Mr. Sullivan when Keller directed Sullivan to return after Sullivan walked away from the initially voluntary interaction, (2) the state did not carry its burden of proving Sullivan's actions relating to implied consent by accompanying Keller to the apartment were freely and voluntarily given, and (3) the state failed to prove Keller received implied consent from Mr. Sullivan for his warrantless entry into Ms. Reed's apartment.[8]

1. A Fourth Amendment seizure occurred when Officer Keller yelled at Sullivan to "come back here, don't just leave" and told him to "keep your hands out of your pockets for me, ok."

The Fourth Amendment is not implicated in every street encounter between police and the public. ***Florida v. Bostick***, 501 U.S. 429, 434 (1991). Officer Keller's initial encounter with Cannon and Mr. Sullivan was not a seizure, even though Keller yelling "What's going on?" caused both

[8] Ms. Reed in the court of appeals conceded implied consent for Officer Keller to go to the public hallway of the apartment building, but the concession is immaterial as Keller did not need consent to enter the public space of the building. ***State v. Dumstrey***, 2016 WI 3, 366 Wis. 2d 64, 873 N.W. 2d 502.

to stop what they were doing and walk toward the officer. *Id.*; (19 at :30). However, a Fourth Amendment seizure occurs when police by show of authority restrict or restrain a person's freedom of movement. ***Terry v. Ohio***, 392 U.S. 1, 19 (1968); ***Bostick***; 501 U.S. at 434. ***Terry*** permits an officer to freeze a situation, temporarily seizing those present in order to ascertain what has happened or is going on and to obtain identification. *Id.* at 22; ***State v. Jackson***, 147 Wis. 2d 824, 835, 424 N.W. 2d 386 (1989).

The test is objective, and "considers whether an innocent reasonable person, rather than the specific defendant, would feel free to leave under the circumstances." ***County of Grant v. Vogt***, 2014 WI 76, ¶ 30, 356 Wis. 2d 343, 850 N.W.2d 253. A Fourth Amendment seizure generally occurs when an officer tells a person who has broken off contact by walking away to "stop" or "halt right there" or "stop and come to them."[9]

Ms. Reed does not suggest that Officer Keller seizing Mr. Sullivan in itself invalidates any otherwise freely, voluntarily, and unequivocally given consent. ***State v. Floyd***, 2017 WI 78, ¶ 32, 377 Wis. 2d 394, 898 N.W.2d 560. But the fact of a constitutional seizure is relevant to or informs whether Sullivan's actions were freely and voluntarily given, as is necessary for constitutional consent.

Here, Mr. Sullivan after standing by silently as Cannon spoke with Officer Keller about the Harris brothers "fighting over stupid shit," unambiguously broke off contact by walking away. (19 at :30-1:15). When Keller noticed Sullivan had left, Keller yelled "Hey, why don't you come back here. Don't just leave" and then told Sullivan to "Keep your hands

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[9] *See* Wayne R. LaFave, *Search and Seizure*, sec. 9.4(a) (5th ed. 2017), long list of cases at notes 61 and 62.

out of your pockets for me, ok." (19 at 1:16, 1:22). Mr. Sullivan complied, stopped his egress, turned around, and walked the approximately 15 steps back to Keller's location and raised his hands, showing Keller his palms. (19 at 1:16-1:28). However, as noted above, the Fourth Amendment issue turns not on the subjective affect Keller's command had on Sullivan, but on answering "what would the typical person have understood by the exchange" or interaction between the officer and the subject person. ***Florida v. Jimeno***, 500 U.S. 248, 251 (1991). That is, the issue here is resolved by determining whether a typical reasonable person hearing Keller yell "come back, don't just leave" would or should have felt free to ignore Keller and continue to walk away. ***State v. Williams***, 255 Wis. 2d 1, ¶¶ 22-23.

While the law clearly contemplates resolution of the constitutional issue by a reasonable person standard, what constitutes a "reasonable person" does not lend itself to specific or clear definition. It presumes "a person of average intelligence" or experience. ***State v. Giebel***, 2006 WI App 239, ¶ 20, 297 Wis. 2d 446, 724 N.W.2d 402. The standard contemplates consideration of certain objectively apparent aspects of the person such as youth. ***J.D.B. v. North Carolina***, 564 U.S. 261 (2011). But what of race? In ***Mendenhall***, the Court noted the fact the defendant was "female and a Negro" was "not irrelevant," but nor was it "decisive." ***U.S. v. Mendenhall***, 446 U.S. at 558. Certainly by now, in 2018, this objectively apparent aspect of a case cannot be excluded from the totality of circumstances calculous and cannot be viewed as irrelevant.

That any person, reasonable or otherwise, would feel free to keep walking away when a police officer yells "come back here, don't just leave" and further directs the person to "keep your hands out of your pockets for me, ok," is difficult

to imagine. That an African-American man when told by a police officer to stop and show his hands should feel free to ignore the officer's command on the basis of his knowledge that he has done nothing wrong or illegal is inconceivable, or would evince implausible credulity. But that is exactly how the lower courts here ruled—that Officer Keller's directive should not have "placed [Mr. Sullivan] under any particular compulsion" to return "since he was not a suspect and not suspected of doing anything wrong." (20:42; App. 122).

It does not require a study of sociology or of African-American studies, or emersion into the Black Lives Matter movement, or being particularly woke in today's parlance to understand that the relationship of a reasonable African-American man to a show of government authority can differ from that of a reasonable man of the historically dominant white culture in America. As a Justice of the United Supreme Court has noted;

> For generations, black and brown parents have given their children "the talk"—instructing them never to run down the street; always keep your hands where they can be seen; do not even think about talking back to a stranger—all out of fear of how an officer with a gun will react to them. See e.g. W.E.B. Du Bois, The Souls of Black Folk (1903); J. Baldwin, The Fire Next Time (1963); T. Coates, Between the World and Me (2015).

Utah v. Strieff, __ U.S. __, 136 S.Ct. 2056, 2070 (2016) J. Sotomayor, dissenting.

The "talk" referenced in ***Strieff*** essentially instructs that the only reasonable response to a show of police authority of any kind is, in essence, careful and explicit submission.[10] The submission is not motivated by civic duty or good citizenship, but rather is a reasoned and practical instruction as a matter of security[11] or even survival.[12] It is not premised on police as a monoculture, but just that it is not possible to know how police will react in a given situation. The ubiquity of cell phones and body cameras and an endless news cycle makes this apparent to anyone paying even minor attention to the events of the world. But in the end the notion that it is objectively "reasonable" for any man, confident in his innocence, to challenge or confront police authority, much less to ignore it, is to deny reality and is constitutionally unreasonable. See e.g. ***Comm. v. Mass.***, 58 N.E. 333, 342 (2016) (discussion of "reality for black males" in regard to interaction with police).

Mr. Sullivan's compliance with or submission to Keller's show of authority and directive constraining his freedom of movement or liberty, instead of arguing or challenging that authority, does not render Mr. Sullivan's actions in complying free and voluntary for

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[10] See, Geeta Gandbhir and Blair Foster, A Conversation With My Black Son, N.Y. Times, March 17, 2015.

https://www.nytimes.com/2015/03/17/opinion/a-conversation-with-my-black-son.html

[11] See, e.g., ***Alexander v. City of Round Rock***, 854 F.3d 298 (5th Cir. 2017)(allegation of police beating for noncompliance in refusing to answer questions after complying with police request for identification).

[12] See, e.g. Philando Castile, Freedie Gray, Stephen Clark, Amadou Diallo, Sylville Smith, Terence Crutcher, Samuel DuBose, Sandra Bland, Walter Scott, Laquan McDonald, Alton Sterling, Eric Garner, Tamir Rice, and countless others.

Fourth Amendment purposes. This is so even though as the court of appeals erroneously found dispositive, Mr. Sullivan did not utter "a word or gesture of protest." (App. 112, ¶ 29).

Officer Keller's testimony establishes his directive to Mr. Sullivan to "come back, don't just leave" was an assertion of police authority, not a voluntary suggestion or a social request. (20:20). There is no question that it restrained Mr. Sullivan's freedom of movement. From Officer Keller's answer "No" to the question of whether Mr. Sullivan "would have been free to go about his business" had Sullivan "ignored" him and kept walking, it is reasonable to infer that had Mr. Sullivan kept walking the next move from the at least six officers on the scene would not have been to ask "pretty please." *Id.* Mr. Sullivan reasonably understood he was not free to leave, and he submitted to authority by ending his egress and walking back to Keller, and thereafter complying with Keller's directives.

The circuit court stating "the officer was not ordering [Sullivan] to come back" because there was "no indication … Mr. Sullivan was any kind of a suspect…or was trying to escape" applied an incorrect legal standard; is both objectively and subjectively wrong; and is constitutionally unreasonable. (20:41). So too is the trial court's conclusion that Keller's command to return should not have "placed [Mr. Sullivan] under any particular compulsion since he was not a suspect and not suspected of doing anything wrong." (20:42) Mr. Sullivan would have had no way of knowing what Keller suspected. Further, Keller testified Sullivan's "behavior appeared to be suspicious to me" and, in any event, the correct objective legal test presumes an innocent person. ***Vogt***, 2014 WI 76, ¶ 30; (20:10).

It is true that Mr. Sullivan was not "trying to escape," but that fact supports the legal conclusion that he was seized when he submitted to Keller's command that he return. *See*, ***California v. Hodari D.***, 499 U.S. 621, 629 (1991) (fleeing person not seized until physically restrained). Moreover, the issue here is resolved by application of an objective reasonable person standard, not the circuit court's view of Sullivan's subjective "particular compulsion" in regard to Keller's directive that he return.

The facts of record derived from the video show after Sullivan's return Keller directed Sullivan's movements, and that Sullivan submitted to or complied with the directives. Keller told Sullivan to "Keep your hands out of your pockets for me, ok;" and Sullivan complied. (19 at 1:24) Keller never asked Sullivan to take him to Reed's apartment, and Sullivan never offered to take him. But the video shows Keller, while pointing in the direction of the apartment building, stated or directed: "Alright, let's go…ah…let's go look over…see if he's over here. If anything we could just all kind of talk;" and Sullivan complied by turning and following Keller in the direction Keller pointed after Keller started walking. (19 at 7:48). During the walk Keller said "Hey, why don't you step over here with me," at which point as seen on the video Sullivan moved in front for the first time as they continued to walk. (19 at 8:27). And, finally, Keller directed Sullivan to "Hey, don't just go in like that" as Sullivan let himself in the apartment. (19 at 9:19).

While as noted above the fact of constitutional seizure alone does not in itself invalidate otherwise voluntary and unequivocal consent, it can be an important factor in the totality of circumstances calculous regarding consent. It is readily apparent how a seized person could freely and voluntarily grant an explicit express request for consent.

However, is difficult to imagine a scenario where implied consent could reasonably be viewed as being voluntarily and unequivocally given by a person seized by police whose actions or movements are being dictated by police. Certainly a seized person's submission to authority in complying with police directives to do something (e.g. remove hands from pockets) or walk to a place (e.g. police pointing and stating "let's go look over here"), cannot be viewed as actions or movements freely and voluntarily undertaken.

The historical facts establish Mr. Sullivan's objectively reasonable belief that he was seized. And unlike in a situation such as a traffic stop where the handing off of ticket or warning would reasonably signal termination of the seizure, Mr. Sullivan here would have had no way of knowing when, or even if, he was un-seized. See ***State v. Kolk***, 2006 WI App 261, ¶ 21, 298 Wis. 2d 99, 726 N.W.2d 337 (consent invalid in part because "Kolk was never unseized.").

As established above, the court applies an objective reasonableness test when deciding Fourth Amendment issues. ***Kentucky v. King***, 563 U.S. at 464. However, while not determinative the subjective thoughts of the officer can inform the analysis of whether the officer's actions were objectively reasonable under the circumstances. ***State v. Kramer***, 2008 WI App 62, ¶¶ 33-35, 311Wis. 2d 468, 750 N.W.2d 941. In this regard, Keller's testimony that he would not have permitted Sullivan to "go about his business" had Sullivan ignored the directive to return establishes Keller's subjective belief that he had seized Sullivan. (20:20). Mr. Sullivan's submission to Keller's show of authority by terminating his egress and returning to where Keller was standing proves Sullivan, too, thought he was seized. (19 at 1:16-24). Keller's and Mr. Sullivan's subjective assumptions or beliefs here were objectively reasonable.

Constitutional consent is not freely and voluntarily given by a person's mere acquiescence or submission to a show of police authority. ***Florida v. Royer***, 460 U.S. 491, 497 (1983). Here, all Mr. Sullivan did throughout was submit to Officer Keller's lawful authority to freeze the situation by directing Sullivan to not leave, and submit to Keller's directives on what to do and where to go. But even if this court were to somehow conclude Officer Keller preventing Mr. Sullivan from leaving and directing his movements did not constitute a Fourth Amendment seizure, these historical facts are highly relevant to the issue of the voluntariness in regard to what Mr. Sullivan did and said, and therefore to the issue of voluntariness for whatever actions might be viewed as having constituted implied consent for the warrantless entry into Ms. Reed's apartment.

2. Any of Mr. Sullivan's actions which could conceivably constitute implied consent for Keller to enter Ms. Reed's apartment were constitutionally involuntary.

To justify a warrantless search on the basis of consent, the government bears the burden of proving it "highly probable or reasonably certain" consent was given "freely and voluntarily." ***Schneckloth***, 412 U.S. at 222; ***State v. Harris***, 2010 WI 79, ¶ 35, 326 Wis. 2d 685, 786 N.W.2d 409 (defining "clear and convincing" in the context of a criminal case.). Voluntary means "an essentially free and unconstrained choice" that is not the "product of duress or coercion, express or implied." ***Schneckloth***, *id.* at 227. Voluntariness is determined from the totality of circumstances surrounding the consent and the characteristics of the person. ***State v. Artic***, 2010 WI 83, ¶ 33, 327 Wis. 2d 392, 786 N.W.2d 430.

Here, the historical facts of record show Mr. Sullivan's initial interaction with Officer Keller's was voluntary. When Officer Keller rolled up in his squad car and asked "What's going on," Mr. Sullivan walked toward Keller but said nothing. (19 at :30). Mr. Sullivan wisely did not immediately flee; as he likely and reasonably would know unprovoked flight could for a person like him, innocent and minding his own business, potentially lead to an involuntary yet lawful police encounter with unknowable and potentially harsh consequences. ***Illinois v. Wardlow***, 528 U.S. 119 (2000). The video shows that as Cannon, not Sullivan, explained to Keller what happened (two brothers "fighting over stupid shit"), told Keller where they went (to apartments in opposite directions), and explained the he and Sullivan tried to "defuse the situation," Mr. Sullivan stood by silently, saying nothing. (19 at :30-1:15).

It is historical fact that Mr. Sullivan terminated whatever initial voluntary encounter he had with Officer Keller by walking away. (19 at 1:15). Walking away is a decisive and unequivocal act. The video shows Cannon engaged in an animated conversation with Keller, volunteering information and offering editorial comment throughout the time they were in the street talking. In contrast, Mr. Sullivan after his ordered return said relatively little, and spoke and moved in direct response to Keller's questions and directives.

When Officer Keller asked "can you guys stick around this area for a moment," Cannon responded "Oh, yeah," while Sullivan replied "You mean stand outside?...I was going to watch the game." (19 at 4:50-57). Cannon, not Sullivan, then first volunteered that Jerome went to Sullivan's home, and it was Cannon, not Sullivan, who suggested Keller should go to Sullivan's apartment. (19 at 5:00, 5:08). When Keller asked

Sullivan if Jerome was currently at his apartment, Sullivan responded "I don't, I don't know, he's supposed to, though." (19 at 5:19). Cannon then interjected "No, I saw him walk that way (pointing to the apartment), he might be there already…so." (19 at 5:21). Mr. Sullivan just shrugged. (19 at 5:25).

Keller then, after discussing Sullivan's probation status and talking with other officers about the knock-and-talk attempt with Brandon Harris at a different apartment, pointed toward Reed's apartment and said to Sullivan "Alright, let's go…ah…let's go look over…see if he's over here. If anything we could just all kind of talk to him." (19 at 7:48). As Keller started to walk past Sullivan, Sullivan complied with the "let's go" directive by turning around and walking with Keller to the apartment.

The facts, thus, establish Mr. Sullivan did nothing more than submit to Officer Keller's authority, that he was not voluntarily present, and that he did not voluntarily take or lead Keller to Ms. Reed's apartment. Mr. Sullivan upon being seized merely submitted to Keller's directive that they go to the apartment, something Keller did not need permission, consent or a warrant to do. Mr. Sullivan did not voluntarily consent to Keller's entry into the apartment because Keller never asked to go in and Sullivan never offered to take Keller into the apartment. Under the circumstances, the state did not prove Mr. Sullivan by his words or actions voluntarily took Officer Keller to Ms. Reed's apartment, much less voluntarily consented to Keller entering the apartment.

3. None of Mr. Sullivan's actions or words gave Keller implied consent to enter Ms. Reed's apartment.

There does not appear to be any case, anywhere, with facts remotely close to those presented where a court has found implied consent to enter a home. All implied-consent-to-enter cases share a common thread of freely given, unequivocal and unambiguous gestures or actions; most typically in opening a door, then holding or leaving the door open and either gesturing inviting entry or standing aside or walking away from the open door, specifically suggesting an invitation to follow. *See e.g.*, ***U.S. v. Sabo***, 724 F.3d 891, 894 (2013):

> Sabo did not simply answer the door. He stepped back and to the side so that [the officer] could enter. What's more, Sabo's actions came in direct response to [the officer's] request to enter. In other words, [the officer] asked and Sabo answered, albeit nonverbally. We have recently noted that "this court on more than one occasion, has found that the act of opening a door and stepping back to allow entry is sufficient to demonstrate consent." *Harney*, 702 F.3d at 925….We make the same finding here—Sabo's nonverbal cue manifested his implied consent for McCune to enter. [string cite of supporting cases omitted].

Accord, ***State v. Phillips***, 218 Wis. 2d at 187-88 (defendant upon request opened bedroom door, walked inside leaving door open, and retrieved items police had asked for once inside, thereby inviting police entry); ***U.S. v. Walls***, 225 F.3d 858, 862-63 (2000) ("Walls opened the door and stepped back to allow [the officer's] entrance;" and citing cases where "opening the door and stepping back" and person "gestured for officers to enter and stepped back, opening the door"

established implied consent to enter); *But, cf.* ***State v. Mitzel***, 685 N.W.2d 120 (ND 2004) (no consent to enter where defendant acquiesced to police request to follow him to his bedroom, opened door, and police pushed the door back open after defendant's girlfriend closed the door before police could enter).

In a nutshell, here Mr. Sullivan was told by a police officer he could not leave after Sullivan had walked away. When asked, Sullivan informed the officer one of the people he was looking to talk to about an argument over shoes was supposed to go to Sullivan's apartment that day to watch a football game. But Sullivan further advised he did not know if the person was actually there because he had been outside talking with Cannon. When the officer then gestured or pointed and told Sullivan let's go see if he's there, Sullivan, who knew he was not free to walk away, complied and accompanied the officer to the apartment. Sullivan walked in front as the two entered the public space of the building; but let only himself into the private space, attempting to close the apartment door with the officer still outside. The officer then entered by pushing door back open, letting himself in.

Even in a social setting absent the inherently coercive nature of a targeted police investigation Officer Keller's action in letting himself into the apartment would not be objectively reasonable. It would not be reasonable to go to the house of a person one had not previously met seeking to talk to that person; encounter someone outside who apparently lived there and who agreed to see if the person was home, but who upon entry attempted to close the door; and believe this somehow created implied consent push the door back open and enter. But the notion this circumstance would impliedly justify an armed government agent entering a private home is not just unreasonable; it is dangerous and violates the

Fourth Amendment. A version of this circumstance is all that happened here, except instead of Mr. Sullivan voluntarily offering to see if Jerome was at the apartment, Sullivan only accompanied Keller to the apartment because Keller, after seizing Sullivan, directed Sullivan to do so.

State v. (Donnell) ***Johnson***, 177 Wis. 2d 224 (Ct. App. 1993), is instructive here. In that case an officer accompanied Johnson to an apartment where he said his girlfriend lived so that Johnson could retrieve identification to justify for the officer his presence in the building. Johnson went into the apartment, and the officer followed, placing himself "right on the threshold…[a]proximately four to six inches maybe," inside "so he couldn't slam the door shut on me." 177 Wis.2d at 228. The court of appeals determined that no evidence at the suppression hearing supported a finding that Johnson consented to the officer's entry into the apartment, even though Johnson had acquiesced to the officer's suggestion that they proceed to the apartment. *Id.* at 233, 237. The court reversed because, like here, there was no unambiguous request to enter and no unequivocal consent to enter was given.

While this issue is resolved by determining whether the circumstances viewed objectively justify Keller's warrantless entry, while not determinative it is worth noting the record supports a conclusion that neither Keller nor Sullivan subjectively believed Keller had consent to enter. Sullivan when confronting Keller about the entry shortly after the entry stated he went to Reed's apartment to "ask, ask her cuz, if it was alright for you (Keller) to come in." (19 at 13:36). Sullivan asked Keller directly "But how can you all come in here, and I didn't…without having permission?" (19 at 15:05). Keller, consistent with his testimony that Sullivan did not give him "permission to go into the apartment," did

not claim consent. (20:25) Keller stated he entered because "you guys are like hiding shit right in front of me." (19 at 15:19). But Keller's observation happened after his initial entry, which occurred when he breached the threshold by pushing the nearly closed apartment door back open.[13] (19 at 9:21-22). And, in any event, the movement of Jerome turning his back may have piqued Keller's interest or raised concern, the observation falls far short of what would be necessary to create an exigency justifying a police officer's warrantless entry into a private home.

The circuit court in its oral ruling confused several historical facts and applied incorrect standards of law. In addition to the clearly erroneous finding about "ambiguity" regarding who closed or attempted to close the apartment door, the court confused who was on probation; who said what; and who provided details to Keller, impliedly attributing to Sullivan things said by Cannon. (20:42). And aside from applying an incorrect legal standard regarding Fourth Amendment seizure, the court's focus on Sullivan not objecting to Keller re-opening the door suggests incorrectly that Sullivan or Reed somehow had to invoke their Fourth Amendment right to enjoy its protection. (20:44). See, ***Johnson***, 177 Wis. 2d at 233-34 ("A person need not protest, however, to gain the Fourth Amendment's protection. Consent 'cannot be found by a showing of a mere acquiescence….'").

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[13] *See* ***Kyllo v. United States***, 533 U.S. 27, 37 (2001) (entry occurs by "any physical invasion of the structure of the home, 'by even a fraction of an inch'…."); ***State v. Larson***, 2003 WI App 150, ¶ 11, 266 Wis. 2d 236, 668 N.W.2d 338 (physical breach of threshold to prevent door closing "was an entry for Fourth Amendment purposes.").

The court of appeals' also misstates or misrepresents historical facts on points big and small. The court states at ¶ 6 prior to Sullivan walking away, "Cannon did most of the talking." The video shows Cannon did all of the talking, Sullivan said nothing. (19 at :30-1:15). This renders the court's conclusion at ¶ 39 that "Keller merely invited Sullivan to continue providing information about the Harris brothers" misleading or false. The court at ¶ 7 states when Sullivan "started to walk away" Keller called out to come back. The video shows Sullivan was not starting to walk away; he had walked away and was a considerable distance from Keller when Keller commanded his return. (19 at 1:16). The court at ¶ 7 also states when Keller later asked if Cannon and Sullivan could just hang around for a moment "Both men indicated they would." The video shows Cannon responded saying "Oh, yeah;" Mr. Sullivan, in contrast, said "You mean stand outside? …I was going to watch the game." (19 at 4:46-57). The court at ¶ 8 states "Sullivan opened an exterior door and allowed Keller into the building;" the implication being Sullivan had some basis or authority to exclude Keller from the public area of the building, which is not true. *See* ***State v. Dumstrey***, 2016 WI 3, 366 Wis. 2d 64, 873 N.W. 2d 502. The court at ¶ 12 states "A man subsequently identified as Jerome said firmly, "Hey, don't just walk in like that," and doubled down at n. 4 stating "I disagree on this point with Reed." The video Keller's voice is clearly heard; Jerome's voice would not have been audible through the nearly closed door, and Keller in the complaint unambiguously states "I held the partially open door open and…requested Kirk to not just walk in." (1:3) (19 at 9:21).

The court of appeals posited Sullivan "gently push[ed] the door to a closed position," (¶ 12) and "he applied slight to moderate pressure to make the door slowly swing toward the closed position," (¶ 12, n. 3), and Sullivan gave the door a "soft push," (¶ 13), as though Sullivan only softly exercising his rights and Keller gently violating them has a bearing on the validity of Keller's warrantless entry. The court then "summarize[s]" at ¶ 13 "it appears that Sullivan made a nuanced attempt to momentarily *delay* Keller's entrance, by slipping into the apartment and giving the door a soft backwards push." (emphasis in original). But physics and common experience teach that encountering a closed door prevents entrance and does not merely delay it.

Here, after being present while police discussed a knock-and-talk attempt with Brandon Harris, Mr. Sullivan complied with Officer Keller's directive that they "go look over…see if [Jerome Harris] is over [at the apartment]" so, "if anything we could just all kind of talk." (19 at 7:48). None of Sullivan's actions or words can objectively be construed as an offer to take Keller to the apartment, which, of course, Keller did not need consent to do. And certainly none of Sullivan's actions or words offered Keller entry into the apartment. On the contrary, Sullivan closing the door unequivocally informed Keller he should go no further. Under the circumstances as derived from undisputed historical facts, Mr. Sullivan did not grant Officer Keller implied consent to enter Ms. Reed's apartment.

D. No exigency justified Officer Keller's warrantless entry into Ms. Reed's home.

At the time Officer Keller entered Ms. Reed's apartment by pushing the nearly close door back open, to Keller's knowledge there was no suspected crime afoot.

Keller responded to a call of an "altercation" outside an apartment complex which had obviously ended by the time Keller arrived. (20:7). Keller learned the altercation had been verbal only, there was no physical fight. (19 at 3:44-4:04; 7:17-20). There was no mention of or reason to believe anyone was armed. The historical facts thus establish Keller was investigating what was at most potential disorderly conduct, but also very possibly conduct that was non-criminal.

The Court has made clear "[a]ny warrantless entry based on exigent circumstances must, of course, be supported by a genuine exigency." ***Kentucky v. King***, 563 U.S. at 470. The state bears the burden of proving such exigency. ***State v. Smith***, 131 Wis. 2d 220, 228, 388 N.W.2d 601 (1986). The court, following the federal rule, applies an objective reasonableness test to determine if a warrantless entry can be justified by "hot pursuit," a threat to safety of a suspect or others, a risk evidence would be destroyed, or likelihood that a suspect would flee. ***Smith***, 131 Wis. 2d at 229.

Officer Keller at the suppression hearing testified he was "concerned about possibly being weapons involved, so for my safety and the destruction of any type of evidence, I kept the door open to visually see inside." (20:13). However, the circuit court found "There was nothing about this incident or about the individuals that indicated that there was an immediate threat to the officer." (20:45). The court's finding is accurate and fully supported by the record. A generalized concern for safety is not a constitutional exigency.

The circuit court's statement that when "an officer's in a location like that [an apartment building hallway] and they're isolated [though with other officers very near], and there are people who are wanted [for possible operating after

revocation], there's a warrant for their arrest [though which proved to not be true], it is a legitimate concern that the officer makes sure he knows who's doing what right in front of him" (20:45), does not establish a constitutional exigency justifying a warrantless entry into a home. An officer's legitimate desire to want to know what is going on in front of him while investigating a possible verbal spat over a pair of shoes is not a recognized constitutional exigency justifying a warrantless entry into a home. Had Officer Keller an inarticulable hunch regarding danger, he could have waited a few seconds for one of the other officers with him to arrive.

Regarding Officer Keller's claim of concern for destruction of evidence, Keller did not specify what the evidence relating to an alleged shoe argument was, or whether whatever that hypothetical evidence might be was or might be vulnerable to possible destruction.

This court owes no deference to the lower courts' conclusion that the district attorney carried its burden of proving by clear and convincing evidence that Officer Keller had implied consent to enter Ms. Reed's apartment without a warrant. The lower courts' rulings were error. Reasonable objective conclusions drawn from undisputed historical facts establish Keller's entry into Ms. Reed's home violated Ms. Reed's rights under the Fourth Amendment.

II. If This Court Were to Somehow Conclude Mr. Sullivan Granted Officer Keller Implied Consent to Enter Ms. Reed's Home, Whatever Consent May Have Been Granted was Revoked by Sullivan's Attempt to Close the Door with Keller Still Outside.

Mr. Sullivan made two unequivocal voluntary physical moves during the course of his encounter with Officer Keller. Mr. Sullivan walked away as Keller continued to converse with Daniel Cannon about the spat between the Harris brothers over a pair of shoes, thus unequivocally terminating his initial voluntary encounter with Keller. (19 at 1:09-15). And, Mr. Sullivan attempted to close his apartment door while Keller was still outside in the hallway, which to an objective observer is an unequivocal and universal signal to go no further, telling the person you shall not pass. In between, Keller directed Sullivan's movements and actions, including that they go to Ms. Reed's apartment for Keller to try to speak with Jerome Harris, who Sullivan when asked confirmed might be there to watch a football game.

It is clear that consent once given, may be withdrawn. ***Georgia v. Randolph***, 547 U.S. 103 (2006); ***State v. Wantland***, 2014 WI 58, ¶ 25, 355 Wis. 2d 135, 848 N.W.2d 810. Courts have ruled that "withdrawal of consent need not be effectuated through particular 'magic words,' but an intent to withdraw consent must be made by an unequivocal act or statement." ***U.S. v Sanders***, 424 F.3d 768, 774 (8th Cir. 2005) (citations omitted). The test parallels that of whether consent or implied consent was given in the first place. That is, the issue turns on whether the action clearly communicated to an objective observer that the person was revoking or limiting whatever consent was previously given. *Id.* at 775.

Closing a door both literally and figuratively signifies a denied opportunity. In a Fourth Amendment context, courts consistently rule closing a door or attempting to close a door is an unequivocal act terminating any previously given consent to enter. *See e.g.*, ***Burton v. U.S.***, 657 A.2d 741, 747 (1994)("For example, the closing and locking a car trunk and the shutting of a bedroom door are acts that courts have held to be express revocations of consent.") (citations omitted); ***Com. v. Suters***, 60 N.E.3d 383, 391(Mass.App.Ct. 2016) ("[A] reasonable person in the position of the police officers would understand that any consent that may have previously been given by [wife] to entry into the…room was withdrawn" by husband "closing the door behind him.").

The circuit court ruled that Officer Keller encountering the closing door did not revoke consent not because a person closing a door connotes ambiguity, but "because it was not clear to me who closed the door" and "I think…[it] would have been ambiguous to the officer." (20:46, 47) The court also emphasized "There was no indication that—from Mr. Sullivan that he had—had objected to the officer opening the door. Again, it was not clear to me who actually closed that door." (20:44). However, as established earlier in this brief the court's ruling regarding ambiguity is clearly erroneous. Officer Keller knew it was Sullivan as confirmed by his testimony and comments at the scene, and the point is confirmed by careful review of the video. (20:26; 19 at 9:19-21, 12:37). And, as also established earlier, Mr. Sullivan and Ms. Reed had no obligation to resist Keller's warrantless entry in order to enjoy their rights granted by the Fourth Amendment.

The court of appeals emphasis on the door being gently or softly closed has no legal significance. Regardless of the force with which it was closed, Keller had no lawful

justification to reopen it. To suggest that Mr. Sullivan was somehow required to engage in a struggle with Keller at the door to keep Keller out is a dangerous notion and one not supported by law. And the court labeling Sullivan closing the door a "nuanced possible delaying tactic" is odd and unsupported fiction, and cannot be a valid basis for the government's warrantless entry into Ms. Reed's home. (COA op. ¶ 30).

In grounding its legal conclusion about consent on errors of fact and law, the lower courts failed to consider the totality of circumstances. Officer Keller did not have freely and voluntarily given implied consent to enter Ms. Reed's apartment. Consequently, Keller's warrantless entry violated Ms. Reed's right to be free from an unreasonable government search as guaranteed by the Fourth Amendment. The evidence upon which Ms. Reed was charged and convicted was derived exclusively from the illegal search and should have been suppressed. ***Wong Sun v. United States***, 371 U.S. 471, 488 (1963). Had the evidence been properly suppressed there would have been no basis for conviction.

CONCLUSION

As established above, Mr. Sullivan's act of compliance with a police directive to go to Ms. Reed's apartment to see if one of the brothers police were investigating for having gotten into a verbal argument over a pair of shoes was present and willing to talk did not give police implied consent to enter the apartment. And, if it somehow did, Mr. Sullivan's act of closing the apartment door with the officer still outside unequivocally revoked whatever implied consent might have existed. Officer Keller's warrantless entry into Ms. Reed's apartment therefore violated Ms. Reed's Fourth Amendment right to be free from an unreasonable government search of

her home. Consequently, the circuit court's decision denying motion to suppress evidence and the court of appeals' decision affirming the judgment were error. Ms. Reed asks that this court reverse the lower courts' decisions, vacate Ms. Reed's conviction, and order the evidence seized as a result of the warrantless entry and search be suppressed.

Dated this 23rd day of April, 2018.

Respectfully submitted,

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CERTIFICATION AS TO FORM/LENGTH

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is: proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line of body text. The length of the brief is 10,927 words.

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that:

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

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

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

Dated the 23rd day of April, 2018.

Signed:

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CERTIFICATION AS TO APPENDIX

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

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

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

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