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

REPLY BRIEF AND APPENDIX OF DEFENDANT-APPELLANT-PETITIONER

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CONSTITUTIONAL PROVISION

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.

The state, twice, at the petition stage argued for reversal because Officer Keller unlawfully entered Ms. Reed's home without a warrant, consent, or exigency. Nothing changed, yet the state now argues Keller entered with both unequivocal freely-given consent and exigency. To get there the state ignores key facts, misstates case law, and embraces the lower courts' view that during a street encounter with police investigating a reported "altercation," a person should feel no compulsion to comply with an officer's directive to stop walking away, return, and remove hands from pockets. The state argues a person's choice to submit to police authority is a freely-undertaken voluntary act and is not the product of coercion unless accompanied by a threat. The state further argues that when the officer then points in the direction of that person's home saying "Alright, let's go…," the person's act of complying and accompanying the officer establishes unequivocal constitutional consent for the officer not just to go to the home (which the officer does not need), but also to enter (which he does); and argues the person attempting to close his front door with the officer still outside does not revoke whatever consent was supposedly given. The state is wrong.

Whether a warrantless police entry into a home based on a challenged claim of consent violates the Fourth Amendment presents a mixed question of fact and law. ***State v. Wantland***, 2014 WI 58, ¶ 19, 355 Wis. 2d 135. While a circuit court's findings of historical fact—i.e. "what the defendant [or officer] said and did"—are reviewed deferentially, and are upheld unless clearly erroneous; application of those facts to constitutional principles is a question of law reviewed *de novo*. ***State v.*** (Gary) ***Johnson***, 2007 WI 32, ¶ 59, 299 Wis. 2d 675 (J. Roggensack dissenting). Thus, whether historical facts establish constitutional consent is, or should be, a question of law and not historical fact; though in many, but not all, cases the legal question is resolved *ipso facto* from a found historical fact.

The case the state cites ***State v. Garcia***, 195 Wis. 2d 68, 72, 535 NW 2d 124 (Ct. App. 1995), is an example of a found historical fact *ipso facto* resolving the legal issue, as Garcia saying "come in" and "go ahead" in response to police asking permission to enter and search Garcia's hotel room and luggage is unequivocal; the words could not reasonably have any other meaning. But the reviewing court should still be deciding *de novo* whether the "historical fact" of a person saying "come in" and "go ahead" constitutes constitutional consent for Fourth Amendment purposes.

There is no basis in logic or law to apply, as the state argues, a "more deferential standard" (State's brief p. 8) when deciding constitutional justification for warrantless police entry into a home, which under long-established Fourth Amendment jurisprudence should garner greater, not less, protection. *See* ***Schneckloth v. Bustamonte***, 412 U.S. 218, 229 (1973); and ***Payton v. New York***, 445 U.S. 573, 589-90 (1980) (At the "very core [of the Fourth Amendment]

stands the right of a man to retreat to his own home and there be free from unreasonable governmental intrusions.").

While what standard of review applies often is outcome-determinative for an appellate issue, that is not so here. Regardless of what standard of review applies, two plus two still does not equal seven. Any notion that after having commanded Sullivan to not leave and to take his hands out of his pockets, Keller pointing and saying "Alright, let's go…," and Sullivan complying by turning and following as Keller walked past, does not *ipso facto* unequivocally establish anything. Because competing reasonable inferences can be drawn from the undisputed historical facts, a ruling that the facts establish unequivocal freely and voluntarily-given implied constitutional consent for Keller to enter Ms. Reed's apartment is, as a matter of law, clearly erroneous.

The state and lower courts accurately acknowledge constitutional consent requires an "unequivocal and specific" ask and an "unequivocal and specific" grant of permission to enter or search a protected place, but then fail to analyze the issue in that context. (State's brief p. 12; citing ***Gautreaux v. State***, 52 Wis. 2d 489, 492 (1971); (COA opinion, ¶ 1). Ms. Reed agrees with the state that ***Commonwealth v. Rogers***, 827 N.E.2d 669 (MA 2005), provides a useful, if not compelling, framework for deciding constitutional consent issues. (State's brief p. 16) The ***Rogers*** court noted the government must prove "more than an ambiguous set of facts that leaves [the court] guessing about the meaning of the interaction and, ultimately, the [person's] words or actions." ***Rogers***, *Id.* at 673, citing ***Schneckloth v. Bustamonte***, 412 U.S. 218, 228-29 (1973). If competing inferences can reasonably be drawn from historical facts, those facts are not "unequivocal" and cannot justify warrantless government entry into a home. ***Rogers***, *id.* at 674-75.

In the case at bar the circuit court accurately noted "the facts here come from the video;" but what the court recounted from the 9 ½ minute video is hardly a model of clarity or accuracy. (20:16-17, 40). The court reporter took the extraordinary step of including multiple "(sic)" references not for errors of syntax or grammar, but for several of the court's many obvious factual errors.[1] Other obvious non-"(sic)"-identified errors include the court stating "the brother," meaning Jerome Harris, "was on probation and had a no-contact order" (20:42); and "It was not clear to me who closed the door, whether it was Mr.—whether it was Mr. Sullivan or whether it was one of the individuals in the apartment," (20:44)—it was Sullivan, as Keller's testimony and the video plainly show, and the state seems to concede. (State's brief pp. 2, 5 & 29).

The state glosses over the fact that at the suppression hearing when asked if Sullivan had ignored his commands would he "have been free to go about his business," Keller responded "No." (20:20). In this same vein, when asked "Did Mr. Sullivan give you permission to go into the apartment?" Keller responded "He did not." (20:25). The state also ignores that at the first opportunity Sullivan and Harris challenged Keller on the lawfulness of his entry, and Keller did not claim consent. (19 at 13:17-15:35).[2] The gist of the state's argument then must be that Officer Keller was either lying or mistaken

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[1] E.g. "They [the officers] met up with two people, Mr. Sullivan and Mr. Harris (sic)" (20:41); "My recollection was that during that conversation Mr.—Mr. Sullivan indicated that Mr. Reed (sic) was at the apartment" (20:42); and "He [Sullivan] discussed what happened with the officer, as did—as did Mr. Harris (sic)," (20:42).

[2] The state argues observations occurring after entry are "relevant to the consent-withdrawal analysis," and therefore presumably should also be relevant to the consent analysis. (State's brief p. 32).

about his seizing Mr. Sullivan and not having consent to enter Ms. Reed's apartment.

The state's argument that Mr. Sullivan was not seized because Keller did not draw his gun, threaten Sullivan or reveal his intent to seize Mr. Sullivan would all be fine points to rebut an argument Sullivan was seized when Keller first approached saying "What's going on?" (State's brief pp. 22-24). Ms. Reed makes no such argument. At the outset Mr. Sullivan reasonably believed he was free to leave; until Keller stopped him. Officer Keller's command to "come back," "don't just leave," and "keep your hands out of your pockets for me, ok;" was unambiguously a show of official authority curtailing Mr. Sullivan's liberty. Mr. Sullivan's response unambiguously demonstrates Sullivan's submission to that authority, which Sullivan maintained throughout the entire incident. (19 at 1:16-:24).

The parties do not dispute what the video depicts in terms of what Officer Keller and Mr. Sullivan did and said. While investigating a report of an "altercation," Officer Keller learned from Mr. Cannon two brothers had an argument and left, going in opposite directions. (19 at :30-1:15). When Keller noticed Sullivan had walked away, Keller "yelled" "Hey, why don't you come back here. Don't just leave" and "Keep your hands out of your pockets for me, ok." (20:41; 19 at 1:16-:24). The tone of Keller's command, as heard on the video, and Keller's testimony establish Keller was not asking a question; he was commanding Sullivan's return. (20:20); (State's brief p. 23). When Keller then stated "Can you guys stick around this area for a moment," Cannon responded "Oh, yeah." (19 at 4:48). Sullivan in contrast, continued to express his desire to leave, stating "You mean outside?...I was going to watch the game;" to which Keller

responded: "I know. Until we can get everything straightened out…." (19 at 4:50-:58).

After Cannon suggested Keller go to Sullivan's apartment because one of the brothers might be there, Keller, who was facing Sullivan (App 101), pointed past Sullivan (App. 102), and told Sullivan "Alright, let's go…," (19 at 7:48). As Keller walked past him (App. 103), Sullivan turned around, away from Keller, to follow. (App. 104); (19 at 7:49-50). As Sullivan began walking, Keller said "…ah...let's go look over…see if he's over here, if anything we could all just kind of talk." (19 at 7:50-:53). Sullivan accompanied Keller, walking on Keller's left (App. 105, 106) (19 7:58-8:26), until Keller said "Hey, do you want to step over here with me" (19 8:26-:27); immediately after which Sullivan moved directly in front. (App. 107) (19 at 8:29). Upon arrival at his apartment door, Sullivan knocked, opened the door just wide enough to let himself in, and tried to close the door behind him with Keller outside. (19 at 9:15-19). With the door very nearly closed, Keller told Sullivan "Hey, don't just walk in like that" as Keller reached across the threshold pushing the door back open. (19 at 9:21).

The state asserts Ms. Reed's argument regarding seizure fails because: "…'asking someone to remove his hands from his pockets will not transform a consensual encounter into a seizure.' ***United States v. Griffin***, 884 F. Supp. 2d 767, 785 (E.D. Wis. 2012) (citing ***United States v. Broomfield***, 417 F.3d 654, 656 (7th Cir. 2005)." (State's brief p. 24). However, the state omits the second half of the quoted sentence, which in full states:

> While the Court of Appeals for the Seventh Circuit has held that asking someone to remove his hands from his pockets will not transform a consensual encounter into a seizure, [*Broomfield*], **it more recently held that an**

> **officer telling an individual to keep his hands up does constitute a seizure,** *Gentry*, 597 F.3d at 847 ("The officer's contact with Gentry was never consensual in nature, however, because the officer told Gentry to keep his hands up."). (emphasis added)

The ***Griffin*** court then ruled:

> [The officer] approaching Griffin's car and identifying himself as a Milwaukee Police Detective was merely a consensual encounter and thus did not amount to a seizure under the Fourth Amendment. But it immediately became a seizure under the Fourth Amendment when, in response to Griffin dropping his hands out of [the officer's] view, [the officer] ordered Griffin to keep his hands up.

Griffin, *id.* at 785. The case at the core of the state's argument directly supports Ms. Reed's position that Sullivan was seized and that his actions in submitting to police authority by following police commands do not establish constitutional consent to enter Ms. Reed's home.

The Milwaukee police officer in ***Griffin*** (as was true for Keller with Sullivan), had no reasonable suspicion to believe anything illegal was occurring or had occurred, yet the officer "admonished defendant about dropping his hands stating 'that's how people can get hurt because we don't know what you're doing. I don't know if you have…a gun, if you have weapons, you know, if you got dope or anything like that.'" ***Griffin***, *id.* at 772. Any reasonable person knows this to be true; that ignoring a police command is "how people get hurt." Mr. Sullivan would reasonably have known that ignoring Keller would very likely have drastic or even tragic consequences, and so he submitted to Keller's authority and followed Keller's commands.

The Attorney General misstates Ms. Reed's point on race by arguing Ms. Reed asks this court to give it "overriding consideration." (State's brief p. 24). Ms. Reed's overriding point is that any person, regardless of race, would not reasonably have felt free to ignore Officer Keller's commands. Ms. Reed's precise point about race is that to hold the view or to argue that a young African-American male in America should reasonably feel free to ignore police commands like those Officer Keller made to Mr. Sullivan would seemingly require one to either ignore reality or view the world through a lens of blindered privilege.

In response to Ms. Reed's challenge that no court has upheld a search on facts remotely similar to those presented here, the state cites ***Commonwealth v. Rogers***, 827 N.E.2d 669 (MA 2005). (State's brief p. 16). As was true in citing to ***Griffin*** on seizure, the state in citing ***Rogers*** seemingly hoists itself with its own petard—***Rogers*** directly supports Ms. Reed's argument that Keller's entry was unlawful.

In ***Rogers*** an officer came upon a woman claiming to have just been assaulted and robbed by Rogers and a woman named Rose, at Rogers' apartment. *Id.* at 671. The officer knew Rogers and Rose, and knew the apartment from prior contacts. *Id.* The officer and two others went to the apartment, knocked, and Rose answered. *Id.* The officer asked where he could find Rogers; Rose and two other persons inside pointed toward the kitchen, the location of which the officer knew from his prior contacts. *Id.* The officer walked in and found Rogers in the kitchen with a pile of drugs. *Id.* at 672.

The ***Rogers*** court correctly ruled implied-consent entry for Fourth Amendment analysis requires both an unequivocal ask and an unequivocal voluntarily grant of permission to enter. *Id.* at 672-73. The court ruled when competing

reasonable inferences can be drawn from historical facts, as a matter of law the facts are not unequivocal. *Id.* at 673. The court analyzed the issue in the context of other implied consent cases, including this court's decision in ***State v. Tomlinson***, 2002 WI 91, 254 Wis. 2d 502, where in immediate response to a direct ask to enter, the person who opened the door stepped away leaving the door wide open, and walked back further inside inviting the officers to follow. The ***Rogers*** court ruled the officer did not unequivocally request entry by asking Rose if she knew where Rogers was, and that Rose pointing and telling the officer Rogers was in the kitchen was not an unequivocal grant of consent to enter. Consequently, the officer letting himself in and walking to the kitchen violated the Fourth Amendment.

The facts here are far less favorable to the government than those in either ***Rogers*** or ***Tomlinson***. Unlike Mr. Sullivan, the persons alleged to have granted consent in those cases were not seized and their actions were not compelled by police commands. In both cases the person left the door open; in contrast Mr. Sullivan here tried to close the door until stopped by Keller's entry in pushing the door back open. In ***Tomlinson*** in direct response to a direct ask, the person gestured the officer in by stepping directly back from the open door and walking inside, inviting the police to follow. In ***Rogers*** and Ms. Reed's case there was no direct ask, and in ***Rogers*** the person merely pointed in response to a question of where someone was. In contrast, Mr. Sullivan closed, or attempted to close, the door which should have resolved any lingering ambiguity regarding supposed permission to enter.

Under the circumstances the undisputed facts here fall far short of the standard necessary to established implied constitutional consent for police to enter Ms. Reed's home.

II. Any Consent Granted was Revoked by Sullivan's Attempt to Close the Door with Keller Still Outside.

The state asserts that closing a door is an ambiguous act, but offers no explanation of the ambiguity. (State's brief p. 32). Closing a door both literally and figuratively is or signals a terminus. Moreover, the state seems to concede in its newly minted exigency argument that Mr. Sullivan closing his door was an attempt to exclude Keller from the apartment. (State's brief, pp. 29, 35-36).

The cases upon which the state relies, ***People v. Hamilton***, 214 Cal. Rptr. 596 (Cal. Ct. App. 1985), and ***State v. Luther***, 663 P.2d 1261 (Or. App. 1983), support Ms. Reed's argument that closing a door constitutes unequivocal withdrawal of consent to enter. The ***Hamilton*** court ruled "the attempt to shut the door…was direct, positive and capable of only one interpretation." *Id.* at 602. The court added "[t]he fact that the officer was able to push the door open in spite of her attempt to close it in no way compromises the clear meaning of her action." *Id.*

Luther, on the other hand, is a straightforward consent-entry case. The defendant in ***Luther*** invited the officer into his room. 663 P.2d at 1262. After leaving the officer returned, knocked, and the defendant came outside into the hallway, closing the door behind him. *Id.* at 1263. When the officer asked to go back in the defendant tried to re-open the door for the officer, but found it locked. The officer asked who had a key, and the defendant said his mother did and assisted the officer in obtaining a key and helping him open the door by pointing out which key would open it. *Id.*

Hamilton directly supports Ms. Reed's argument; closing a door unequivocally revokes consent to enter. ***Luther***

is inapposite as Mr. Sullivan did not try to open the door for Keller; Sullivan tried to close it with Keller still outside.

As for the state's new exigency argument, should the court rule it not forfeited, the argument is meritless. The argument falters at the gate in that the exigent circumstances exception to the warrant requirement for entry into a home presupposes the existence of probable cause for a warrant. ***State v. Parisi***, 2016 WI 10, ¶ 30, 367 Wis. 2d 1. The limited knowledge Keller had or reasonably suspected was woefully inadequate to establish probable cause.

But setting that aside, the state's argument that Keller reasonably feared for his safety is baseless and troubling. The circuit court accurately ruled "There was nothing about this incident or about the individuals that indicated there was an immediate threat to the officer." (20:45). That finding is not clearly erroneous and is dispositive. The state, though, embraces the contrived notion that Mr. Sullivan walking slowly toward his home on a Sunday afternoon was "suspicious," as was his knocking before entering and then "softly" pushing the door closed, which the state characterizes as a "furtive movement." (State's brief p. 29). The state argues these suspicious acts, Sullivan being on probation, and Harris arguing over shoes, created a danger and suggested Sullivan or the apartment occupants might "grab a weapon" or "hide contraband" or "escape" or "ambush" Keller while he was alone, "outnumbered three-to-one" in a public hallway (State's brief pp. 29, 36).

The quotidian movements the state describes do not connote danger; nor does the fact of probation, which by definition creates a strong disincentive to cause trouble. The reference to the presence of contraband or weapons comes from nothing in the record, suggesting the possibility the

state's argument is grounded on some unstated fact or aspect of Mr. Sullivan's or Mr. Harris's profile. Courts have consistently rejected such dubious or fanciful exigency arguments, *see e.g.* ***State v. Cervantes***, 2013 WI App 41, 346 Wis. 2d 730 (unpublished decision issued February 12, 2013) (App. 108-13); this court should do the same.

CONCLUSION

Ms. Reed asks that this court vacate her conviction, and order evidence seized from Officer Keller's unlawful search suppressed.

Dated this 23rd day of July, 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 2965 words, as defined in Wis. Stat. § 809.01(12).

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that:

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

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

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

Dated this 23rd day of July, 2018.

Signed:

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