

1 **IN THE SUPREME COURT OF THE STATE OF NEVADA**

2

3 MARCO ANTONIO TORRES,

4 Appellant,

5 vs.

6 THE STATE OF NEVADA,

7 Respondent.

Case No. 83216

**RESPONDENT'S
ANSWERING BRIEF**

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8 **RESPONDENT'S ANSWERING BRIEF**

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1 **STATEMENT OF THE ISSUE PRESENTED FOR REVIEW**

2 Whether the District Court committed error when it denied Torres’ motion
3 to suppress evidence of the murder.

4 **STATEMENT OF CASE**

5 From a procedural perspective, the posture of the prosecution as set forth
6 by the Appellant Marco Torres (“Torres”) is sufficient and not in need of further
7 elaboration.

8 **STATEMENT OF THE FACTS**

9 While the state believes that appellant Marco Torres’s (“Torres”)
10 statement of facts is sufficient for the purposes of this answering brief, the State
11 does feel compelled to add and clarify several points.

12 After the disconnection of the 911 call, the dispatcher called the number
13 back twice but got no answer. (Torres’ Appendix, Volume 1, p. 105:2-4 to p.
14 106:9-12, hereinafter “1 App. 105:2-4--106:9-12”).

15 When the police arrived on scene, a male in an adjoining residence
16 directed them to source of the disturbance (the victim’s residence) and
17 confirmed that two people lived in the residence. (1 App. 111:6-11, 127: 5-7).

18 When Torres finally opened a window and spoke, he identified himself as
19 “Bozo the Clown,” said everyone inside was okay, and that the police should
20 leave. (1 App. 112:7-9). He refused to come out of the residence and did not

1 present the other person (the victim) to the police to verify that all was well, so
2 the police gained entry via locksmith. (1 App. 113:3-5).

3 As the police were making entry, Torres became argumentative and tried
4 to prevent the police from effecting entry. (1 App. 113:18-23).

5 **SUMMARY OF THE ARGUMENT**

6 The warrantless entry into the residence did not violate Torres' rights
7 because the entry was lawful under the exigent circumstances and inevitable
8 discovery exceptions. The District Court committed neither error nor an abuse
9 of discretion and so reversal is not warranted.

10 **ARGUMENT**

11 **A. THE DISTRICT COURT PROPERLY DENIED TORRES' MOTION 12 TO SUPPRESS AND SO THERE WAS NO ERROR.**

13 **1. The police entry into the residence was proper based on exigent 14 circumstances and the objectively reasonable possibility of the 15 need for emergency aid or protection.**

16 Because exigent circumstances create an exception to the 4th
17 Amendment's warrant requirement, it is reasonable for police to enter a
18 residence without a warrant if exigent circumstances are present. *Michigan v.*
19 *Fisher*, 558 U.S. 45, 47 130 S. Ct. 546 (2009). One such exigency falls under
20 the emergency aid exception, which does not hinge on officers' subjective intent

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1 or the severity of the crime they are investigating when the emergency arises.

2 *Brigham City v. Stuart*, 547 U.S. 398, 404-05, 126 S. Ct. 1943 (2006).

3 The exception applies if an officer has “an ***objectively reasonable basis***
4 for believing that medical assistance was needed, or persons were in danger.”

5 *Fisher* at 49. [Bold and italics added.] A *threat* of danger will also suffice, and
6 objective reasonable basis is a less demanding standard than probable cause or
7 reasonable suspicion. *Id.* at 47. The actual or possible injury also need not be
8 severe to trigger the exception. *Id.* at 49. If there is a reasonable chance of a
9 person needing assistance inside a residence and police are unable to establish
10 contact, there is a sufficient objectively reasonable basis to believe that that
11 person needs immediate help. *Hannon v. State*, 125 Nev. 148, 207 P.3d 344
12 (2009).

13 Reviewing the facts of Torres’ case in light of *Fisher, supra*, the police
14 entered based on exigent circumstances and in an effort to aid the victim. *Fisher*
15 involved a disturbance call, the defendant refused to answer the door and
16 eventually told the police to leave, and the police asked whether the defendant
17 needed medical assistance based on a small cut on his hand and his unruly
18 behavior. *Fisher* at 45-46. Similarly, the instant case began with a 911 call with
19 a plea for help followed by a hang-up, Torres refused to answer when police

20 ///

1 arrived and initially told the police to leave, and there was a strong possibility
2 that someone in the residence needed help. (1 App. 100, 105-06, 111-13).

3 In light of the 911 call, the plea for help, the hang-up, and Torres'
4 uncooperative attitude, the police had a strong basis for holding an objectively
5 reasonable belief that someone was in immediate need of medical care or
6 protection from an actual danger or threat of danger. That satisfies the
7 requirements of the exigent circumstance and emergency aid exceptions to the
8 warrant requirement. Therefore, the entry was proper. The *subjective* beliefs of
9 the police officers (that there was no exigency) were puzzling in the instant case
10 but ultimately not dispositive.

11 **2. The delay in the police entry and the passage of time did not**
12 **diminish the objectively reasonable basis for thinking there could**
13 **be a person in distress in the residence and therefore the exigent**
14 **circumstances exception still applied to the warrantless entry.**

15 Torres relies on a California case for the proposition that once the
16 exigency or emergency passes, the exigent circumstances exception ceases to
17 justify a warrantless search. *People v. Duncan*, 42 Cal. 3d. 91, 720 P.2d 2 (Cal.
18 1986). However, a closer look at *Duncan* confirms the propriety of the police's
19 actions in the instant case.

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///

1 *Duncan* arose from an exigent search connected to report of a burglary
2 and applied a two-part test: 1) what did the officer know; and 2) was the
3 officer's action reasonable. *Id.* at 97.

4 The first responding officer thought a burglary might be in progress
5 because of items he saw outside the residence, so he entered without a warrant
6 and discovered that the residence was empty. The Court found that his entry fell
7 under the exigent circumstances exception because the situation causing the
8 exigency could have still been in progress. *Id.* at 98.

9 A second officer made warrantless entry after the first had determined that
10 the house was empty, i.e. the exigency had passed. The Court found that the
11 second officer's warrantless entry could not take refuge in the exigency
12 exception. Thus, the second officer's warrantless entry was improper. *Id.* at 99.

13 Similar to *Duncan*, the exigency exception applies to the first group of
14 officers who responded to the 911 hang-up call. When they arrived, there were
15 exigent circumstances, See Part 1, *supra*, because they had a person asking for
16 help on the 911 call, a hang-up without explanation, two unanswered police calls
17 to the hang-up number, and a report that two people lived in the residence.

18 Nothing happened to eliminate the exigency during the time the first
19 officers were there. They were unable to verify the health and safety of the
20 second resident and unable to look through the residence. After identifying

1 himself as “Bozo the Clown,” Torres reported that everyone in the residence was
2 okay, refused to allow entry, and later tried to prevent police entry. (1 App.
3 112:7—113:10).

4 Because nothing happened to eliminate the exigency, the warrantless entry
5 fell squarely within the exigency exception regardless of the elapsed time.

6 Detective Fancher obtained a search warrant a few hours after the
7 discovery of the victim. (Respondent’s Appendix, pg. 1). This occurred after
8 the discovery of the homicide and no exigency existed at that point so a
9 warrantless search could not have sought refuge in the exigency exception.

10 However, Detective Fancher had obtained a search warrant and so a subsequent
11 search was valid. (Respondent’s Appendix, pg. 1).

12 **3. The police entry was proper based on the exigency or emergency**
13 **exception; additionally, the police would have inevitably**
14 **discovered the murder because they obtained a warrant not long**
15 **after the entry into the residence.**

16 Torres was inside the house with the police outside because of the 911 call
17 and concern over the health and safety of a person inside. The police were not
18 going anywhere (as evidenced by their remaining in place), leaving Torres in the
19 residence with the victim.

20 ///

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1 If evidence would have inevitably been discovered, then even assuming,
2 arguendo, a 4th Amendment violation, the police should be placed in the same,
3 not a worse, position than they would have been without the violation. *Murray*
4 *v. United States*, 487 U.S. 533, 537, 539, 108 S. Ct. 2529 (1988). Under the
5 exclusionary rule, even assuming, arguendo, bad faith, such bad faith would not
6 be a consideration for the court. *Nix v. Williams*, 467 U.S. 431, 445, 104 S. Ct.
7 2501 (1984).

8 Assuming arguendo an improper police entry, evidence is still admissible
9 if warrant is obtained later. *Segura v. United States*, 488 U.S. 796, 815, 104 S.
10 Ct. 3380 (1984). In fact, Detective Fancher applied for and obtained a warrant.
11 (State's Appendix, Volume 1, Page 1). For evidence to be the fruit of the
12 poisonous tree, moreover, the purported illegality must be the but-for cause for
13 the "fruit." *Id.* at 813.

14 That is not the case here. The murder would have been discovered
15 regardless of the warrantless entry. In the instant case, the police were outside
16 the residence, not leaving, while Torres was inside with the victim. Even
17 without the (in this case, lawful) warrantless entry, the police would have
18 eventually gained entry or otherwise discovered the victim.

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DATED: November 29th, 2021.

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VERIFICATION

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because:

[x] This brief has been prepared in a proportionally spaced typeface using Microsoft Word in Times New Roman, 14 pt. font; or

[] This brief has been prepared in a monospaced typeface using Microsoft Word in _____ with [*state number of characters per inch and name of type style*].

2. I further certify that this brief complies with the page- or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is either:

[x] Proportionately spaced, has a typeface of 14 points or more and contains approximately 1,595 words as per NRAP 32(a)(7)(A)(ii); or

[] Monospaced, has 10.5 or fewer characters per inch, and contains ____ words or ____ lines of text; or

[] Does not exceed ____ pages.

3. Finally, I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the

1 record to be supported by a reference to the page and volume number, if any, of
2 the transcript or appendix where the matter relied on is to be found. I understand
3 that I may be subject to sanctions in the event that the accompanying brief is not
4 in conformity with the requirements of the Nevada Rules of Appellate Procedure

5 DATED: November 29th, 2021.

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Case No. 83216

RESPONDENT'S APPENDIX

Volume 1

8 **RESPONDENT'S APPENDIX, Volume 1**

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SEARCH WARRANT 1

20SW00051

LEA # 2014-112

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IN THE JUSTICE COURT OF PAHRUMP TOWNSHIP
COUNTY OF NYE, STATE OF NEVADA

PAHRUMP JUSTICE COURT

BY J. Robnett

DUPLICATE ORIGINAL SEARCH WARRANT
NRS 179.045

2020 APR 10 P 4:01

IN THE MATTER OF THE APPLICATION
FOR A SEARCH WARRANT,

SEARCH WARRANT

RECEIVED AND FILED

State of Nevada, to any Peace Officer in the State of Nevada:

Proof having been made by telephonic affidavit before me by ^{DETECTIVE} Deputy FANCHER of the Nye County Sheriff's Office, by sworn oath incorporated by reference herein, that there is probable cause to believe that certain evidence, specifically:

- FRAGILE DNA EVIDENCE ~~FRAGILE DNA EVIDENCE~~
FINGER PRINTS, BLOOD, DNA, ETC.
- ONE SAMPLE FROM SUSPECT
- DIGITAL PHOTOGRAPHS OF INTERIOR OF HOUSE.
- ANY & ALL ITEMS, WEAPONS, INSTRUMENTS THAT COULD BE USED TO INJURE OTHER PERSONS
- ANY & ALL CELLPHONES, TEXTS, VOICEMAILS, ETC
- ARTICLES OF PERSONAL PROPERTY THAT SHOW POSSESSION

is currently located at:

835 S. LINDA ST, UNIT #103

and as I am satisfied that there is probable cause to believe that said evidence is located as set forth above and based upon the sworn telephonic affidavit of ~~Deputy~~ ^{DETECTIVE} FANCHER there are sufficient grounds for the issuance of the Search Warrant.

You are hereby commanded to search said location for said property, serving this warrant upon the property any time of day (or night) and if the property is there to seize it and prepare a written inventory of the evidence seized and return the inventory to the Court within 10 days.

Dated this 4TH day of APRIL, 2020, at 0741 hrs.

JUDGE LISA CHAMBERS

Signed by ^{DETECTIVE} Deputy FANCHER acting upon oral authorization of (JUDGE LISA CHAMBERS.)

ENDORSED this 10th day of April, 2020.

JUDGE Lisa Chambers

COURT COPY