STATE OF WISCONSIN
IN SUPREME COURT

STATE OF WISCONSIN,
Plaintiff-Respondent,

v.

Appeal No. 2013-AP-857

BRETT W. DUMSTREY,
Defendant-Appellant-Petitioner.

Waukesha County Circuit Court
Case No. 2012-CT-508

ON NOTICE OF APPEAL TO REVIEW A JUDGMENT OF CONVICTION AND ORDER DENYING DEFENDANT'S MOTION TO SUPPRESS EVIDENCE ENTERED IN THE CIRCUIT COURT FOR WAUKESHA COUNTY, THE HONORABLE DONALD J. HASSIN, JR., PRESIDING

DEFENDANT-APPELLANT-PETITIONER'S BRIEF AND APPENDIX

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STATEMENT OF THE ISSUE PRESENTED

1. Is the locked, private, underground parking garage, located underneath the apartment building in which Dumstrey is a tenant, an area protected by the Fourth Amendment of the United States Constitution, such that probable cause to arrest for a crime and exigent circumstances were required for City of Waukesha Police Officer Paul E. DeJarlais to conduct a warrantless entry?

Circuit Court's answer: No, the Defendant's lack of a reasonable expectation of privacy in the area, because it was accessible to multiple tenants, removed the area from the purview of the Fourth Amendment.

Court of Appeals' answer: No, Dumstrey's lack of a reasonable expectation of privacy in the area, because it was accessible to multiple tenants, precluded a finding that the area constitutes curtilage, removing it from the purview of the Fourth Amendment.

POSITION ON ORAL ARGUMENT AND PUBLICATION

Oral argument and publication were ordered in the Court of Appeals. Given this Court's acceptance of the case for review, it hardly seems plausible that the same would not be appropriate here as well.

STATEMENT OF FACTS

According to his testimony at an evidentiary motion hearing, on April 20, 2012, at around 10:30 P.M., City of Waukesha Police Officer Paul E. DeJarlais was off duty, driving in his personal vehicle from a Milwaukee Brewers baseball

game, where he had consumed two beers.[1] (16:18). While driving on North Street in Waukesha, he "looked in [his] rearview mirror and [he] saw a vehicle coming up from behind [him] at a very high rate of speed." (16:8). He further testified that the vehicle, later identified as the Defendant's, was tailgating other vehicles while they both traveled down the road. (16:8-10).

Officer DeJarlais testified that he pulled up to the Defendant's vehicle at the corner of North Street and St. Paul Avenue, (16:10), having already called the City of Waukesha Police Department and explaining his observations to a dispatcher, (16:11). While stopped, Officer DeJarlais made eye contact with the Defendant, (16:11), attempted to identify himself as a police officer by displaying his "badge and photo identification," and indicated to the Defendant that he "was on the phone with the police and that he needed to wait here, that the police were coming as [Officer DeJarlais] told him he was driving erratically," (16:12). The Defendant did not respond, and blankly stared back at him. (16:13). Officer DeJarlais also testified that, while stopped at this intersection, he "could tell his eyes were very sleepy looking and they had a sheen to them. They were kind of glassy." (16:13).

[1] At the hearing, defense counsel attempted to question Officer DeJarlais about the prevalence of individuals minimizing the extent of their alcohol consumption upon questioning. The Circuit Court, however, *sua sponte* restricted defense counsel from asking questions about this topic on multiple occasions, indicating that "The question isn't whether the police officer was intoxicated. It's whether he had probable cause to stop [the Defendant.]" (16:19). "Clearly the state of a witness' sobriety at the time he makes an observation is relevant . . . ." *Ruiz v. State*, 75 Wis. 2d 230, 237, 249 N.W.2d 277, 280 (1977).

When the traffic control signal at the intersection turned green, the Defendant did as Officer DeJarlais had asked and "sat just about throughout the whole green light" before eventually following Officer DeJarlais through the intersection and pulling alongside where Officer DeJarlais had stopped his vehicle. (16:13). After Officer DeJarlais repeated his request to wait, the Defendant again waited for "a couple seconds" before "he drove off and turned into a driveway headed towards the Riverwalk Apartments." (16:14).

Officer DeJarlais followed the Defendant's vehicle to Riverwalk Apartments, where, according to his testimony, the Defendant "just kept driving around through this parking lot . . . ." (16:14). Eventually, Officer DeJarlais observed an "underground parking garage door going up and then [the Defendant] turned into that driveway and drove down beneath the apartment building into the parking garage." (16:15). At this point, Officer DeJarlais parked his personal vehicle so that his vehicle "was partially outside and the front end was inside," so that "when the officers got there they would be able to get into the garage otherwise the garage door would have come down and they wouldn't have been able to get in." (16:15). Officer DeJarlais then entered the garage, where he observed the Defendant exit his parked vehicle. (16:16).

As the Circuit Court indicated, "The record is that it was a remote controlled garage in which constituted the basement of the apartment building in which Mr. Dumstrey lived," (19:7), a "private parking lot available only to those who dwelled in the apartments and had a controlled mechanism" for entry,

(19:12). Mr. Dumstrey testified that he rented an apartment in the building and that he needed to use his remote garage door opener to gain entry via the vehicle entrance. (16:39). The only other entrance from outside the building was a locked door, (16:40), and the elevator from the basement to the apartments was only open to tenants as well, (16:41).

Upon making contact with him, the Defendant indicated to Officer DeJarlais that "he didn't believe [Officer DeJarlais] was an officer." According to his testimony, Officer DeJarlais then "actually physically removed [his] photo identification card from [his] wallet. Stuck it right up in front of his face to show that [he] was." At that time, the Defendant "finally believed [he was] an officer and he stopped." (16:17). A few seconds later, Officer Joseph M. Lichucki arrived at the scene, (16:18), and entered the garage through the door that Officer DeJarlais had kept opened, (16:37). At no time during these events was Officer DeJarlais aware of whether the Defendant had any prior convictions for Operating While Intoxicated. (16:21).

CASE HISTORY

A criminal complaint charging the Defendant with Operating While Intoxicated, Second Offense, contrary to Wis. Stat. §§ 346.63(1)(a) and 346.65(2)(am)2, was filed in Waukesha County Case Number 2012-CT-508 on April 24, 2012. (1). An amended criminal complaint adding a charge of Operating With a Prohibited Alcohol Concentration, Second Offense, contrary to Wis. Stat. §§ 346.63(1)(b) and 346.65(2)(am)2 was filed on May 10, 2012. (5). The

Defendant, by counsel, filed a Notice of Motion and Motion to Suppress Evidence on May 31, 2012, (6), and an evidentiary hearing on the motion was held on September 24, 2012, where the above-described testimony was given. The Circuit Court, the Honorable Donald J. Hassin, Jr., presiding, denied the motion on that date.

Characterizing the Defendant's position as that, "because he failed to follow the instructions of the officer throughout much of this, after having the officer make the observations he's testified on, is somehow to be rewarded because he made it to a safe haven," (16:43, App. 4), the Circuit Court noted that "the officer testified unequivocally that he identified himself as such," (16:44, App. 5), and held that "the officer pursu[ed the Defendant] into a garage as a result of their observations and their reasonable belief that [the Defendant] was operating a motor vehicle under the influence of intoxicants." (16:48, App. 9). The Circuit Court further held that entering the underground parking garage was "akin to simply following someone to the driveway and making a stop incident to the premises of the house itself." (16:51-52, App. 12-13).

The Defendant filed a Motion to Reconsider that decision on January 10, 2013, (7), citing *State v. Christofferson*, 2012-AP-571, an unpublished Court of Appeals decision issued on October 30, 2012, (App. 17), in which this Court suppressed evidence obtained after an officer illegally entered that defendant's garage to investigate a driving complaint. That motion was initially argued on January 17, 2013. In light of the issues discussed on that date, the Circuit Court

asked the State to file a memorandum of law. That memorandum was filed on January 25, 2013, (8), and on February 7, 2013, the Circuit Court, after hearing additional arguments, denied the Defendant's motion to reconsider, holding that the Defendant lacked the expectation of privacy in the underground parking garage that the defendant in *Christofferson* held in the garage attached to his house. (20:17-18, App. 14-15).

Dumstrey entered a guilty plea on February 21, 2013 (see 9), and was sentenced on March 12, 2013. (See Judgment of Conviction, App. 25). He timely filed a Notice of Intent to Pursue Post-Conviction Relief on March 19, 2013, (12, App. 27), and a Notice of Appeal on April 8, 2013, (14). At the Court of Appeals, the case was submitted on briefs on January 15, 2014, but withdrawn from submission on March 12, 2014, when the Court of Appeals ordered a three-judge panel and requested input from the Attorney General. Oral argument was held on October 1, 2014, and on December 23, 2014, the Court of Appeals, District II, filed its decision and opinion, affirming the circuit court's judgment, with the Honorable Paul F. Reilly dissenting.[2] (App. #).

ARGUMENT

When reviewing a circuit court's denial of a motion to suppress evidence, this Court upholds a circuit court's findings of fact unless they are clearly erroneous. *State v. Grady*, 2009 WI 47, ¶ 13, 317 Wis. 2d 344, 352, 766 N.W.2d

[2] The Court of Appeals noted in its decision that the Defendant "does not contest that [Officer] DeJarlais had reasonable suspicion to stop him, and the State concedes that 'if the garage is curtilage, Officer DeJarlais improperly entered it to seize Dumstrey.'" ¶ 6 (App. 4). Because no "stop" actually occurred, whether Officer DeJarlais had reasonable suspicion is not at issue.

729, 733. However, because whether an entry constitutes a search, whether probable cause existed at the time of an entry, and whether exigent circumstances existed at the time of an entry are all questions of law, this Court reviews those rulings independently. *State v. Phillips*, 2009 WI App 179, ¶ 6, 322 Wis. 2d 576, 585, 778 N.W.2d 157, 161-62.

I. THE NEW FOURTH AMENDMENT.

"The Fourth Amendment provides in relevant part that '[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated.'" *United States v. Jones*, 132 S.Ct. 945, 949 (2012). Certain decisions issued by the United States Supreme Court have been observed to make significant changes to the framework by which Fourth Amendment issues are resolved in criminal cases throughout the country. *Arizona v. Gant*, 556 U.S. 332 (2009) is one example. In *New York v. Belton*, 453 U.S. 454 (1981), the United States Supreme Court had held that "when a policeman has made a lawful custodial arrest of the occupant of an automobile he may, as a contemporaneous incident of that arrest, search the passenger compartment of that automobile." *Id*. at 460. Justice Brennan dissented from the opinion in that case, and expressed a concern that the Court's holding "adopt[ed] a fiction – that the interior of a car is always within the immediate control of an arrestee who has recently been in the car." *Id*. at 466 (Brennan, J., dissenting).

Justice Brennan's fears were well-founded, as the Court's opinion in *Belton* was "widely understood to allow a vehicle search incident to the arrest of a recent

occupant even if there is no possibility the arrestee could gain access to the vehicle at the time of the search." *Arizona v. Gant*, 556 U.S. 332, 341 (2009). The United States Supreme Court even explicitly acknowledged that "Justice Brennan's reading of the Court's opinion has predominated." *Id*. at 342. This Court acknowledged the same, observing that "state and federal courts around the country took the general, 'bright-line' principle announced in *Belton* to mean that actual accessibility was no longer needed; rather, passenger compartments were searchable as long as the arrestee was at the scene." *State v. Dearborn*, 2010 WI 84, ¶ 23, 327 Wis. 2d 252, 265, 786 N.W.2d 97, 104; *see also Davis v. United States*, 564 U.S. ____, 131 S.Ct. 2419, 2424 (2011) ("For years, *Belton* was widely understood to have set down a simple, bright-line rule. Numerous courts read the decision to authorize automobile searches incident to arrests of recent occupants, regardless of whether the arrestee in any particular case was within reaching distance of the vehicle at the time of the search.").

This Court analyzed *Belton* in *State v. Fry*, 131 Wis. 2d 153, 388 N.W.2d 565 (1986). In that opinion, this Court referred to the "*Belton* rule" as "a simple and reasonable rule governing the search of an automobile after an arrest is made." *Id*. at 174, 388 N.W.2d at 574. This Court found no ambiguity in the *Belton* opinion; even Justice Bablitch's dissent in *Fry* did not question the majority's characterization of the "*Belton* rule," but rather argued for an interpretation of Wis. Stat. § 968.11 and the Wisconsin Constitution that would "require that warrantless noninventory searches of luggage, briefcases or other containers in the

interior of an automobile are permissible only if the containers searched are within an area from which an arrestee might gain possession of a weapon, or destroy or conceal evidence." *Id*. at 188, 388 N.W.2d at 580 (Bablitch, J., dissenting).

Thus, "After *Fry*, the law in Wisconsin was clear: following a lawful arrest, police may search the contents of an automobile while the defendant is at the scene . . . ." *Dearborn*, ¶ 25, 327 Wis. 2d at 266, 786 N.W.2d at 105. "Wisconsin, like nearly every other jurisdiction to address the question, likewise understood *Belton* to adopt a bright-line rule allowing the search of passenger compartments, even if the arrestee did not have access to the passenger compartment at that time." *Id*., ¶ 23, 327 Wis. 2d at 265, 786 N.W.2d at 104. However, the United States Supreme Court's decision in *Arizona v. Gant*, 556 U.S. 332 (2009), is "a clear break from *Fry* and its progeny." *Id*., ¶ 27, 327 Wis. 2d at 267, 786 N.W.2d at 105. In *Gant*, the United States Supreme Court held that a vehicle search subsequent to an arrest is permissible only "when the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search," 556 U.S. at 343, or "when it is 'reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle,'" *id*. (quoting *Thornton v. United States*, 541 U.S. 615, 632 (2004) (Scalia, J., concurring)). Under that holding, "the Court adopted a *new*, two-part rule." *Davis v. United States*, 564 U.S. ____, 131 S.Ct. 2419, 2425 (2011) (emphasis added).

In *State v. Dearborn*, 2010 WI 84, 327 Wis. 2d 252, 786 N.W.2d 97, this Court addressed the applicability of *Gant* to searches that occurred prior to the

issuance of that decision. This Court recognized that "[u]nder *Fry* and [*State v.*] *Pallone*[, 2000 WI 77, 236 Wis. 2d 162, 613 N.W.2d 568], the search the officers conducted on Dearborn's truck was clearly lawful. The officers therefore acted in objectively reasonable reliance on clear and settled Wisconsin Supreme Court precedent." *Id.*, ¶ 28, 327 Wis. 2d at 268, 786 N.W.2d at 105. But this Court also recognized that, as a result of *Gant*, "the search of Dearborn's truck was a violation of Dearborn's constitutional rights . . . because Dearborn was secured and therefore unable to reach the passenger compartment of his vehicle at the time of the search [and] the warden could not have reasonably expected to find evidence in the vehicle regarding Dearborn's revoked license." *Id.*, ¶ 29, 327 Wis. 2d at 268, 786 N.W.2d at 105-06.

Even more recently, this Court recognized the effect of the United States Supreme Court's decision in *Missouri v. McNeely*, 569 U.S. -----, 133 S.Ct. 1552 (2013), on its prior holding in *State v. Bohling*, 173 Wis. 2d 529, 547, 494 N.W.2d 399 (1993). *See State v. Kennedy*, 2014 WI 132, ¶ 27, 359 Wis. 2d 454, 856 N.W.2d 834, 843-44; *State v. Foster*, 2014 WI 131, ¶ 40, 360 Wis. 2d 12, 856 N.W.2d 847, 857. This Court's "decision in *Bohling* was the settled law in Wisconsin for the two decades preceding the decision in *McNeely*," *State v. Kennedy*, 2014 WI 132, ¶ 37, 359 Wis. 2d 454, 856 N.W.2d at 846, but the United States Supreme Court's decision "resolve[d] a split of authority on the question whether the natural dissipation of alcohol in the bloodstream establishes a *per se* exigency that suffices on its own to justify an exception to the warrant requirement

for nonconsensual blood testing in drunk-driving investigations," *McNeely*, 133 S.Ct. at 1558, and resolved that split against this Court's holdings.

As significant as they are, neither of these cases represent anything nearly as significant a change in the foundation of Fourth Amendment analysis as the United States Supreme Court's decision in *United States v. Jones*, 132 S.Ct. 945 (2012). The "reasonable expectation of privacy" analysis has certainly dominated Fourth Amendment jurisprudence over the last half-century, but the United States Supreme Court's decision in *United States v. Jones*, 132 S.Ct. 945 (2012), "unquestionably affirms the Court's continuing recognition of the Fourth Amendment's roots in property law and the Court's willingness to adhere to a property rationale . . . ." *State v. Felix*, 2012 WI 36, ¶ 102, 339 Wis. 2d 670, ¶ 102, 811 N.W.2d 775, ¶ 102 (concurrence).

In *Jones*, the Court rejected the Government's argument "that no search occurred [since the defendant] had no 'reasonable expectation of privacy' . . . ." 132 S.Ct. at 950. The Court stated, "But we need not address the Government's contentions, because Jones's Fourth Amendment rights do not rise or fall with the *Katz* formulation." *Id*. Instead, the Court held, "the *Katz* reasonable-expectation-of-privacy test has been *added to*, not *substituted for*, the common-law trespassory test." *Id*. at 952 (emphasis in original). Because the common-law trespassory test remains a legitimate test of whether an individual's Fourth Amendment rights have been violated, "when 'the Government obtains information by physically intruding' on persons, houses, papers, or effects, 'a "search" within the original

meaning of the Fourth Amendment' has 'undoubtedly occurred.'" *Florida v. Jardines*, 133 S.Ct. 1409, 1414 (2013) (*quoting Jones* at 950-51, n.3).

Prior to *Jones*, an explanation of the Fourth Amendment's protection against unreasonable searches could begin and end with the statement that "[a] 'search' occurs when an expectation of privacy that society is prepared to consider reasonable is infringed," *United States v. Jacobsen*, 466 U.S. 109, 113 (1984). After *Jones*, such an explanation must now continue, "or when the government engages in an unlicensed physical intrusion of a constitutionally protected area in order to obtain information," *United States v. Gutierrez*, 760 F.3d 750, 754 (7th Cir. 2014) (citing *Florida v. Jardines*, 133 S.Ct. 1409, 1414-15 (2013)). But old habits die hard, and even parties arguing before the United States Supreme Court in the aftermath of *Jones* have needed to be reminded that it was no longer necessary to "decide whether the officers' investigation of [the defendant's] home violated his expectation of privacy under *Katz*. One virtue of the Fourth Amendment's property-rights baseline is that it keeps easy cases easy." *Jardines*, 133 S. Ct. at 1417.

The Court of Appeals faced a similar struggle in its analysis of the current case. It somehow determined that, "[t]o address whether Dumstrey's parking garage was part of the curtilage of his apartment home, we look to factors used to examine curtilage and reasonable expectation of privacy and case law from other jurisdictions applying those factors and then turn to a property-rights based trespass analysis." *State v. Dumstrey*, 2015 WI App 5, ¶ 9, 359 Wis. 2d 624, 633,

859 N.W.2d 138, 142. In addition, the State's Response in Opposition to Petition for Review begins its argument, just as the Court of Appeals did its analysis, with a discussion of whether Dumstrey had a reasonable expectation of privacy in the area in question. After *Jones*, this is simply not necessary. *See Jardines*, 133 S. Ct. at 1417.

The seismic shift brought by *Jones* is best exemplified by the application of the *Jones* analysis to the facts in *Conrad v. State*, 63 Wis. 2d 616, 218 N.W.2d 252 (1974), and *Watkins v. State*, 59 Wis. 2d 514, 208 N.W.2d 449 (1973). In *Conrad*, this Court characterized "a common storage room of an apartment house" as "clearly within the curtilage" of a tenant's home. 63 Wis. 2d at 633, 218 N.W.2d at 261. This Court was referring to its decision in *Watkins*, in which officers entered "the storage room in the basement of the defendant's apartment building." 59 Wis. 2d at 514, 208 N.W.2d at 449.

> The storage area was easily accessible to the public and passersby and apparently had in the past been used by persons other than tenants in the apartment building. The door to the storage room always stood open and only a few of the individual lockers within the room had their doors closed or padlocks on them. The incriminating evidence was observed on a chair beneath the utility meters and in a locker standing open nearby. This room was not for the exclusive use of the defendant and not even for the exclusive use of the tenants of the building.

Id. at 514, 208 N.W.2d at 449-50. This Court held in *Watkins* that the search in that case was legal because "[t]he defendant could harbor no expectation of privacy in this area," *id*., using language that alludes to Justice Harlan's concurrence in *Katz v. United States*, 389 U.S. 347 (1967). *See also Conrad*, 63

Wis. 2d at 633, 218 N.W.2d at 261 ("Again *Watkins* demonstrates that the extension of the *Katz* rule permits inroads upon the protection of the curtilage unless there is a subjective demonstration of a reasonable expectation of privacy.") The logic in *Watkins*, however, does not survive *Jones*. As discussed above, *Jones* makes clear that the "expectation of privacy" test is not the exclusive test.

Nor can the case law that flows from *Conrad* survive *Jones*, for the same reason. In *State v. Grawien*, 123 Wis. 2d 428, 367 N.W.2d 816 (Ct. App. 1985), for example, *Conrad* was cited for the proposition that "[t]he law in Wisconsin with respect to curtilage now holds that where there is reasonable expectation of privacy, there can be no search except upon warrant issued on probable cause." *Id*. at 436, 367 N.W. 2d at 819 (*citing Conrad*, 63 Wis. 2d at 634, 218 N.W.2d at 261)). As discussed above, in *Jones*, the United States Supreme Court rejected the Government's argument "that no search occurred [since the defendant] had no 'reasonable expectation of privacy' . . . ." 132 S.Ct. at 950. The Court stated, "But we need not address the Government's contentions, because Jones's Fourth Amendment rights do not rise or fall with the *Katz* formulation." *Id*. Instead, the Court held, "the *Katz* reasonable-expectation-of-privacy test has been *added to*, not *substituted for*, the common-law trespassory test." *Id*. at 952 (emphasis in original). Similarly, in *State v Bauer*, 127 Wis. 2d 401, 379 N.W.2d 895 (Ct App. 1985), *Katz* was cited by the Court of Appeals for the proposition that "Only those government intrusions that infringe upon a privacy interest violate the [F]ourth

[A]mendment." *Id*. at 405, 379 N.W.2d at 897 (*citing Katz*, 389 U.S. 347, 350 (1967)). As discussed above, *Jones* emphasizes that *Katz* says nothing of the sort.

The "confusion about the interaction between the reasonable expectation of privacy standard and the traditional pre-*Katz* interpretation of the Fourth Amendment'" has "persisted for decades." *United States v. Perea-Rey*, 680 F.3d 1179, 1185 (9th Cir. 2012). As such, it is perhaps understandable that the Court of Appeals, in the present case, conflated the issues of whether an area constitutes curtilage and whether an individual holds a "reasonable expectation of privacy" in that area. This confusion is best exemplified by the court's review of relevant Wisconsin law. The Court of Appeals observed that, "In *State v. Davis*, 2011 WI App 74, ¶¶ 3, 12, 333 Wis. 2d 490, 798 N.W.2d 902, we accepted the parties' characterization that a garage attached to a trailer home was curtilage." ¶ 9 (App. 6). This is correct. But the Court of Appeals erroneously contrasted this characterization with this Court's holding in *Watkins*, stating, "On the other hand, in *Watkins*, our supreme court held that a common storage room in the basement of an apartment building 'was not within the defendant's constitutionally protected sphere of contemplated personal privacy.'" *Id*. (App. 6) (internal citation omitted). The implication of this comparison is that the garage area in *Davis* was curtilage, but the storage area in *Watkins* was not. As discussed above, this Court held in *Conrad v. State*, 63 Wis. 2d 616, 218 N.W.2d 252 (1974), that the area described in *Watkins* did constitute curtilage.

The Court of Appeals wrote, "To address whether Dumstrey's parking garage was part of the curtilage of his apartment home, we look to factors used to examine curtilage and reasonable expectation of privacy . . . and then turn to a property-rights trespass analysis." ¶ 9 (App. 6-7). This erroneous statement of law further conflates multiple separate analyses. A correct statement of law would be, "To address whether Dumstrey's parking garage was part of the curtilage of his apartment home, we look to factors used to examine curtilage." After the United States Supreme Court's decision in *Jones*, this conflation must cease. *Jones* "unquestionably affirms the Court's continuing recognition of the Fourth Amendment's roots in property law and the Court's willingness to adhere to a property rationale . . . ." *State v. Felix*, 2012 WI 36, ¶ 102, 339 Wis. 2d 670, ¶ 102, 811 N.W.2d 775, ¶ 102 (Prosser, J., concurring).

II. Curtilage.

Just as an "area outside the defendant's residence, which was not specifically allocated to one tenant or the other, was a common area to both, and as such became part of the curtilage of the premises" in *State v. O'Brien*, 223 Wis. 2d 303, 315, 588 N.W.2d 8, 13 (1999), so must the underground parking structure in the present case be considered part of the curtilage of the premises. The State's Response in Opposition to Petition for Review refers to *United States v. Dunn*, 480 U.S. 294 (1987), as "[t]he seminal case for a curtilage analysis," and it is difficult to disagree. Judge Reilly's dissenting opinion applies the *Dunn* factors to

the facts of the present case. *State v. Dumstrey*, 2015 WI App 5, ¶ 23, 359 Wis. 2d 624, 643-44, 859 N.W.2d 138, 147-48. His analysis is spot-on.

> Applying the *Dunn* factors to Dumstrey's garage mandates a finding of curtilage. First, Dumstrey's garage is located in direct proximity to Dumstrey's home (directly beneath it) and is tethered to the home by an elevator. Second, Dumstrey's garage is fully enclosed within the same four walls of the apartment building that enclose Dumstrey's residence (i.e., it is an "attached" garage) and is entirely shielded from the general public as it is a gated, underground garage. Third, Dumstrey uses his garage in many of the same ways that middle America utilizes its garages in the "privacies of life"—the keeping and storing of his vehicle in a secure setting, the ability to have a relatively warm vehicle during Wisconsin's frigid winters, the avoidance of wind and rain when accessing his vehicle, the safety and security of an elevator from garage to residence, and the avoidance of crime in the open city streets. Lastly, Dumstrey chose a residence that has an underground garage protected from open observation and entry by both the general public and the government. Dumstrey's garage is as much an "attached garage" as is any garage attached to a single-family home.

Id.

The State's Response in Opposition to Petition for Review asserts that the underground parking area in the present case "is not in close proximity to the home within the apartment house context." It is not at all clear what this means. In *State v. Martwick*, 2000 WI 5, 231 Wis. 2d 801, 604 N.W.2d 552, this Court analyzed whether objects "located between 50 and 75 feet from the house" were within that home's curtilage. *Id*. at ¶ 33, 231 Wis. 2d at 818, 604 N.W.2d at 560. This Court noted, "If the proximity factor would be the sole factor examined in the *Dunn* analysis, this would be a close case." *Id*. And in *State v. O'Brien*, 223 Wis. 2d 303, 588 N.W.2d 8 (1999), this Court analyzed whether a vehicle "parked

approximately 200 feet west of the home" was within the home's curtilage, holding that it was. *Id*. at 316, 588 N.W.2d at 14. Of course, if proximity is to be analyzed by measuring distance "as the crow flies," then the distance at issue in the present case is zero, since the parking area and the Dumstrey's apartment are within the same building. Appellate courts "consistently hold that an attached garage is part of the curtilage." *State v. Leutenegger*, 2004 WI App 127, ¶ 21 n.5, 275 Wis. 2d 512, 525 n.5, 685 N.W.2d 536, 543 n.5.

Judge Reilly's observation that "Dumstrey may have a lessened amount of privacy among his fellow tenants, but he and his fellow tenants retain their constitutional right to be free from unreasonable government intrusions," *id*. at ¶ 25, 359 Wis. 2d at 645, 859 N.W.2d at 148, is consistent with the holdings of courts in other jurisdictions. "Contemporary concepts of living such as multi-unit dwellings must not dilute [an individual]'s right to privacy any more than is absolutely required." *Fixel v. Wainwright*, 492 F.2d 480, 484 (5th Cir. 1974). "[T]enants in a multi-unit residence may have a privacy interest in certain common areas with respect to the general public, including police officers." *State v. Michel*, 331 P.3d 1097 (Or. App. 2014). *See also State v. Larson*, 977 P.2d 1175 (Or. App. 1999) ("Although the area was available for use by all of the tenants, and perhaps their guests, it was not available for use by other members of the public. The presence of an individual, other than a resident or guest, in the back area peering up at the second floor windows would offend social and legal norms of behavior.").

The analysis that carried the day in *Jones* mirrors the analysis undertaken by the Sixth Circuit Court of Appeals in *United States v. Carriger*, 541 F.2d 545 (6th Cir. 1976). The court stated in that case, "we are of the view that *Katz*, considered with the case law before it, should be read as holding that trespassing is one form of intrusion by the Government that may violate a person's reasonable expectation of privacy." *Id.* at 549. As such, the court held that an arrest made after officers were able to gain "entry through a locked entrance as workmen were leaving the twelve unit apartment building" was invalid. *Id*. at 547. That court quoted a passage from Justice Jackson's concurrence in *McDonald v. United States*, 335 U.S. 451 (1948), worth repeating here as well.

> Doubtless a tenant's quarters in a rooming or apartment house are legally as well as practically exposed to lawful approach by a good many persons without his consent or control. Had the police been admitted as guests of another tenant or had the approaches been thrown open by an obliging landlady or doorman, they would have been legally in the hallways. Like any other stranger, they could then spy or eavesdrop on others without being trespassers. If they peeped through the keyhole or climbed on a chair or on one another's shoulders to look through the transom, I should see no grounds on which the defendant could complain. If in this manner they, or any private citizen, saw a crime in the course of commission, an arrest would be permissible.
>
> But it seems to me that each tenant of a building, while he has no right to exclude from the common hallways those who enter lawfully, does have a personal and constitutionally protected interest in the integrity and security of the entire building against unlawful breaking and entry. Here the police gained access to their peeking post by means that were not merely unauthorized but by means that were forbidden by law and denounced as criminal. . . . Having forced an entry without either a search warrant or an arrest warrant to justify it, the felonious character of their entry, it seems to me,

> followed every step of their journey inside the house and tainted its fruits with illegality.
>
> . . .
>
> [T]he method of enforcing the law exemplified by this search is one which not only violates legal rights of defendant but is certain to involve the police in grave troubles if continued. That it did not do so on this occasion was due to luck more than to foresight. Many home-owners in this crime-beset city doubtless are armed. When a woman sees a strange man, in plain clothes, prying up her bedroom window and climbing in, her natural impulse would be to shoot. A plea of justifiable homicide might result awkwardly for enforcement officers. But an officer seeing a gun being drawn on him might shoot first. Under the circumstances of this case, I should not want the task of convincing a jury that it was not murder. I have no reluctance in condemning as unconstitutional a method of law enforcement so reckless and so fraught with danger and discredit to the law enforcement agencies themselves.

Id. at 458-61.

In the present case, the parking area in the Defendant's apartment building constitutes protected curtilage, just like the storage area in *Watkins*. *See Conrad*, 63 Wis. 2d at 633, 218 N.W.2d at 261. Officer DeJarlais trespassed on the property when he followed the Defendant's vehicle into the building, and "encroached on a protected area." *See Jones*, 132 S.Ct. at 952. Without a warrant, this trespass, combined with "an attempt to find something or to obtain information," constitutes a violation of the Defendant's constitutional rights. *Id*. at 951 n.5.

The Fourth Amendment protects the citizen against "the invasion of his indefeasible right of personal security, personal liberty. and private property . . . ." *Boyd v. United States*, 116 U.S. 616, 630 (1886). "[E]xcept in certain carefully

defined classes of cases, a search of private property without proper consent is 'unreasonable' unless it has been authorized by a valid search warrant." *Camara v. Mun. Court of City & Cnty. of San Francisco*, 387 U.S. 523, 528-29 (1967). "It is one thing to seize without a warrant property resting in an open area . . . without an intrusion into privacy, and it is quite another thing to effect a warrantless seizure of property . . . situated on private premises to which access is not otherwise available for the seizing officer." *G. M. Leasing Corp. v. United States*, 429 U.S. 338, 354 (1977).

CONCLUSION

The United States Supreme Court has made it clear that a search has occurred where "[t]he Government physically occupied private property for the purpose of obtaining information." *United States v. Jones*, 132 S.Ct. 945, 949 (2012). The Court of Appeals has effectively held that a police officer may enter a private area that is only accessible to the residents of an apartment building because the area is accessible to the residents of the apartment building. This cannot be true.

The State has conceded that "'if the garage is curtilage, Officer DeJarlais improperly entered it to seize Dumstrey.'" *State v. Dumstrey*, 2015 WI App 5, ¶ 6, 359 Wis. 2d 624, 631, 859 N.W.2d 138. Officer DeJarlais entered a private building without permission for the purpose of conducting a seizure under the Fourth Amendment. Perhaps one of the other twenty-nine tenants could have granted him permission to enter, but none did. Perhaps one of the other twenty-

nine tenants *would* have granted him permission to enter, but none was asked. If this decision is affirmed, no resident of an apartment building would have any basis to challenge the admissibility of evidence obtained by officers setting up permanent camp inside a parking garage like the one here, or placing hidden cameras in the hallways of the building that cannot otherwise be accessed by the public. This Court must reverse.

Dated this 15th day of April, 2015.

Respectfully submitted,

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CERTIFICATION OF FORM, LENGTH, AND ELECTRONIC COPY

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of this brief is 5,734 words.

I further certify that I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § 809.19(12), and that the text of the electronic copy of this brief is identical to the text of the paper copy.

Dated this 15th day of April, 2015.

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CERTIFICATION OF 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 Wis. Stat. § 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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