STATE OF WISCONSIN

IN SUPREME COURT

No. 2014AP304-CR

STATE OF WISCONSIN,

Plaintiff-Respondent-Petitioner,

v.

RICHARD L. WEBER,

Defendant-Appellant.

ON REVIEW OF A DECISION OF THE COURT OF APPEALS, DISTRICT IV, REVERSING AN ORDER DENYING A MOTION TO SUPPRESS EVIDENCE AND REMANDING WITH DIRECTION TO PERMIT PLEA WITHDRAWAL, ENTERED IN WOOD COUNTY CIRCUIT COURT, THE HONORABLE GREGORY J. POTTER, PRESIDING.

REPLY BRIEF OF PLAINTIFF-RESPONDENT-PETITIONER

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ARGUMENT

Hot Pursuit Is An Independent Exigency That Justifies A Warrantless Entry And Arrest. It Is Not Subject To Any Additional Stand-Alone Requirements Or "Two- Part Test" To Determine Whether An Exigency Exists.

In *Missouri v. McNeely*, 133 S.Ct. 1552, 1568 (2013), the United States Supreme Court held "that in drunk-driving investigations, the natural dissipation of alcohol in the

bloodstream does not constitute an exigency in every case sufficient to justify conducting a blood test without a warrant." *McNeely* is very strictly limited to its facts, and the Court did not address the doctrine of hot pursuit except to note that it was one of a variety of exigent circumstances that may justify a warrantless search. *Id*. at 1559 (citations omitted).

After listing hot pursuit among other well-recognized exigencies like providing emergency assistance to an occupant of a home, entering a burning building to extinguish a fire and investigate its cause, and preventing the imminent destruction of evidence, the Supreme Court observed that each exigency had two things in common: a compelling need for official action and no time to secure a warrant. *McNeely*, 133 S.Ct. at 1559.[1] Contrary to Weber's argument, however, the Court's observation did not establish a separate "two-part test" for all exigencies. The Supreme Court simply acknowledged that both a compelling need to act and insufficient time to obtain a warrant are present in each recognized exigency; those factors are not stand-alone requirements that necessitate further inquiry beyond the parameters of the exigency itself. *See id*.

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[1] The Supreme Court made a similar observation two years earlier: *Kentucky v. King*, 563 U.S. 452, 460 (2011):

> This Court has identified several exigencies that may justify a warrantless search of a home. Under the emergency aid exception, for example, officers may enter a home without a warrant to render emergency assistance to an injured occupant or to protect an occupant from imminent injury. *Police officers may enter premises without a warrant when they are in hot pursuit of a fleeing suspect*. And – what is relevant here – the need to prevent the imminent destruction of evidence has long been recognized as a sufficient justification for a warrantless search.

Kentucky v. King, 563 U.S. 452, 460 (2011) (quotation marks and citations omitted) (emphasis added).

As in every Fourth Amendment analysis, courts examine the totality of the circumstances to determine whether police conduct is justified. So courts assess the facts of each case to decide whether an officer needed to provide emergency assistance to someone inside a home, whether an officer had to put out or investigate the origin of a fire, whether an officer needed to prevent the destruction of evidence -- or whether an officer was in hot pursuit of a fleeing suspect.

Hot pursuit is established when the totality of the circumstances demonstrates that an officer engaged in "an immediate or continuous pursuit of [a suspect] from the scene of a crime."[2] *State v. Richter*, 2000 WI 58, ¶ 32, 235 Wis. 2d 524,

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[2] As discussed in the State's brief-in-chief, the crime at issue must be a jailable offense. *See State v. Ferguson*, 2009 WI 50, ¶¶ 29-30, 317 Wis. 2d 586, 767 N.W.2d 187. And the pursuing officer must, of course, have probable cause to believe that the fleeing suspect has committed a jailable offense.

As he entered the garage, Deputy Dorshorst had probable cause to believe that Weber had committed two jailable offenses when he failed to pull over after the deputy activated his emergency lights, drove all the way into his garage instead and then ignored the deputy's instructions to stop and talk. Wis. Stat. §§ 346.04(2t) and 946.41(1) (34:4-9; Pet-Ap. 104-09). The record belies Weber's contention that there is no evidence that he knowingly failed to stop for Deputy Dorshorst (Weber Br. 21). Weber also appears to argue that there was no probable cause to arrest him for these offenses because his efforts to elude Deputy Dorshorst were less flagrant than those of the defendants in some of the cases cited in the State's brief-in-chief (Weber Br. 18-22).

That Weber was better at keeping his cool, so to speak, does not mean that probable cause was lacking. Probable cause to arrest is the quantum of evidence within the arresting officer's knowledge at the time of the arrest that would lead a reasonable police officer to believe that the defendant probably committed or was committing a crime. *State v. Mitchell*, 167 Wis. 2d 672, 681, 482 N.W.2d 387 (1999); *State v. Koch,* 175 Wis.2d 684, 701, 499 N.W.2d 152 (1993); Wis. Stat. § 968.07(1)(d) ("A law enforcement officer may arrest a person when ... [t]here are reasonable grounds to

612 N.W.2d 29 (alteration in original) (citations omitted) (internal quotation marks omitted). No further analysis is required by *McNeely* or *Richter*. *McNeely*, 133 S.Ct. at 1559; *Richter*, 235 Wis. 2d 524, ¶ 36. And with good reason: By definition, an officer who is in "hot pursuit" of a fleeing suspect has a compelling need to act and no time to obtain a warrant.[3]

Hot pursuit is unique from other exigencies because it essentially involves an arrest in progress. Police officers and the community they protect unquestionably have a compelling interest in discouraging suspects from fleeing to their homes or other private places to avoid a lawful stop and arrest for any jailable offense. *See United States v. Santana*, 427 U.S. 38, 43

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believe that the person is committing or has committed a crime."). There must be more than a possibility or suspicion that the defendant committed an offense, but the evidence need not reach the level of proof beyond a reasonable doubt or even that guilt is more likely than not. *Mitchell,* 167 Wis. 2d at 681–82, 482 N.W. 2d 364. The evidence in this case clearly meets that standard.

[3] Not surprisingly, suspects who try to evade lawful detention by the police frequently do so not just to escape, but to dispose of evidence or to retrieve and use a weapon. As a practical matter, then, officers in hot pursuit of a suspect often will face other exigent circumstances like the potential for destruction of evidence or the risk of harm to the police and others. *See, e.g., United States v. Santana*, 427 U.S. 38, 43 (1976); *Warden v. Hayden*, 387 U.S. 294, 298-99 (1967); *Richter*, 235 Wis. 2d 524, ¶¶ 37-43. Weber incorrectly points to such cases as proof that the exigency of hot pursuit alone cannot justify a warrantless home entry and arrest.

That hot pursuit is so often accompanied by additional exigent circumstances is not relevant. In *Richter*, this court upheld the warrantless entry into the defendant's trailer based on two independent exigencies: hot pursuit and the need to protect the safety of the people inside the trailer. *Richter*, 235 Wis. 2d 524, ¶¶ 2, 31. The *Richter* court found that hot pursuit alone justified the entry. *Id*. ¶ 36. Similarly, in *Sanders*, this court sanctioned police officers' entry into a home to detain a subject who refused to produce identification and then ran inside while the officers were investigating an animal cruelty complaint. *Sanders*, 311 Wis. 2d 257, ¶ 25.

(1976) ("[A] suspect may not defeat an arrest which has been set in motion in a public place, and is therefore proper under *Watson*, by the expedient of escaping to a private place."); *State v. Sanders*, 2008 WI 85, ¶ 72, 311 Wis. 2d 257, 752 N.W. 2d 713 (J. Prosser, concurring) (abandoning the principle that hot pursuit justifies warrantless entry would create "a perverse incentive for misdemeanor defendants to flee from police officers into their homes to prevent their lawful seizure"). A case like this one, where the fleeing suspect is driving drunk, provides an all too vivid and alarming illustration of that point. And it would defy logic to suggest that an officer might reasonably be able to obtain a warrant right in the middle of attempting to detain a fleeing suspect.

The home is not a magical place where criminal suspects who are fast enough to beat the police to their front door can then run inside and claim sanctuary. The law does not and should not sanction that result. Because "the ultimate touchstone of the Fourth Amendment is 'reasonableness,' *Brigham City v. Stuart*, 547 U.S. 398, 403 (2006), "the warrant requirement is subject to certain reasonable exceptions." *Kentucky v. King*, 563 U.S. 452, 459 (2011). Hot pursuit properly sits among those reasonable exceptions as an exigency that justifies a warrantless entry to detain a fleeing suspect.[4]

And that is always the case when an officer is in hot pursuit of a suspect because the alternatives simply are not *reasonable*. An officer doesn't need to stop the chase when she

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[4] *See, e.g., McNeely*, 133 S.Ct. at 1559; *King*, 563 U.S. at 460; *Sanders*, 311 Wis. 2d 257, ¶¶ 119-34, n.12 (J. Prosser, concurring); *Gasset v. State*, 490 So.2d 97, 98-99 (1986); *Commonwealth v. Jewett*, 471 Mass. 624, 31 N.E.2d 1079, 1089 n.8 (2015); *Rosembert v. Borough of East Lansdowne*, 14 F.Supp.3d 631, 641-42 (E.D. Penn. 2014); *Stutte v. Arkansas*, 2014 Ark. App. 139, 432 S.W.2d 661, 664-65 (2014); *State v. Keenan*, 50 Kan.App.2d 358, 325 P.3d 1192, 1202 (2014).

reaches the suspect's house, to then sit outside and contemplate things like whether the offense is sufficiently "severe" to justify immediate entry, whether the suspect would be able or likely to slip out of the house and escape, whether the suspect might arm himself to keep the officer at bay, or whether anything else might or might not occur while the officer seeks a warrant.

An officer in hot pursuit often won't know why a suspect fled or what the suspect would do once inside his home. And it doesn't matter. The only thing the officer needs to know is that she has probable cause to make an arrest for a jailable offense and that she has been in "immediate or continuous pursuit … from the scene of [the] crime." *Richter*, 235 Wis. 2d 524, ¶ 32 (citations omitted) (internal quotation marks omitted).

As the Illinois Appellate Court explained in a case much like this one:

> When defendant repeatedly ignored [Officer] Dawdy's commands to stop and tried to elude him by going (or, rather, staggering) into Foiles's house, reasonable suspicion ripened into probable cause, and the fourth amendment did not require Dawdy to simply shrug his shoulders and go obtain a warrant. Apparently, defendant thought the enforcement of traffic laws resembled a children's game of tag, whereby Dawdy was "it" and defendant was "safe" if he reached "home" before Dawdy apprehended him. As *Santana* teaches, the fourth amendment does not contemplate this game.

People v. Wear, 867 N.E. 2d 1027, 1046 (Ill. App. Ct. 2007) (citation omitted).

The court of appeals misapplied the law and incorrectly held that in cases involving hot pursuit "*Richter* also includes the requirement that the officer reasonably believes the delay in obtaining a warrant would endanger life, risk destruction of evidence, or greatly enhance the likelihood of the person's escape." *State v. Weber*, No. 2014AP304-CR, slip op. ¶ 7 (Wis. Ct.

App. October 8, 2015) (citing *Richter*, 235 Wis. 2d 524, ¶ 30) (Pet-Ap. 152-53).

This court should reverse the court of appeals' decision and clarify that under Wisconsin law, hot pursuit of a suspect based on probable cause for a jailable offense is a stand-alone justification for a warrantless home entry and arrest. *Smith*, 131 Wis. 2d at 229; *Richter*, 235 Wis. 2d 524, ¶ 29; *Sanders*, 311 Wis. 2d 257, ¶ 134 (J. Prosser, concurring); *State v. Ferguson*, 2009 WI 50, ¶ 27, 317 Wis. 2d 586, 767 N.W. 2d 187.

CONCLUSION

For all of the above reasons, the State of Wisconsin asks this court to reverse the court of appeals' decision in this case, clarify that under Wisconsin law, hot pursuit of a suspect based on probable cause for a jailable offense is a stand-alone justification for a warrantless home entry and arrest, and affirm both the circuit court's decision to deny Weber's motion to suppress evidence and Weber's judgment of conviction.

Dated this 8th day of April, 2016.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 2,009 words.

Dated this 8th day of April, 2016.

_____

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CERTIFICATE OF COMPLIANCE
WITH WIS. STAT. § (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 Wis. Stat. § (Rule) 809.19(12). I further certify that this electronic brief is identical in content and format to the printed form of the brief filed as of 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 8th day of April, 2016.

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