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STATE OF WISCONSIN

IN SUPREME COURT

Case 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

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AMENDED RESPONSE BRIEF OF DEFENDANT-APPELLANT

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ISSUE PRESENTED

> Mr. Weber was driving home when Deputy Dorshorst noticed that he had a defective brake lamp. As Mr. Weber slowed down to turn into his driveway, Deputy Dorshorst switched on his flashing lights. The deputy neither turned on his siren nor made eye contact with Mr. Weber. Within seconds, Mr. Weber continued into his turn and parked in his attached garage. The deputy followed Mr. Weber but stopped short of the garage. Mr. Weber then exited his car and walked toward the house door inside his garage. Under these circumstances, did the deputy face a genuine emergency situation such that his immediate warrantless entry into the curtilage of Mr. Weber's home—the attached garage—was constitutionally permissible?

The circuit court determined that the deputy's warrantless entry was justified by the exigent circumstance of "hot pursuit."

The court of appeals concluded that no exigency supported the deputy's warrantless entry.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Both oral argument and publication are customary for cases decided by this court.

SUPPLEMENTAL STATEMENT OF FACTS

As respondent, Mr. Weber chooses to supplement the statement of facts.

This case is about a warrantless, nonconsensual home entry and arrest that occurred under circumstances where there was no compelling need to act and there was ample time to get a warrant. Indeed, nothing would have been compromised if the police had first obtained a warrant—not the arrest itself, not the evidence of the purported offenses, not the safety of the police or others. In a broader sense, then, the facts of this case implicate a right of paramount importance: the right of the people to be secure against unreasonable searches and seizures in their own home.

The defective high mounted brake lamp

The events that sparked the intrusion into Mr. Weber's home took place on April 20, 2012. Mr. Weber was driving home when Deputy Dorshorst noticed that Mr. Weber had a "defective high mounted brake lamp." (34:4). The high mounted brake lamp is the lamp in the car's rear window. (34:4).

As Mr. Weber slowed down to turn into his driveway, Deputy Dorshorst switched on his flashing lights. (34:5; 10:1). The deputy neither turned on his siren nor made eye contact with Mr. Weber. At that moment, Mr. Weber was "maybe 100 feet prior to his driveway," (34:5), a distance a car traveling 15 mph would cover in less than 5 seconds. Mr. Weber continued into his turn and drove into his attached garage. (34:5). Deputy Dorshorst followed Mr. Weber but stopped 15 to 20 feet short of the garage. (34:6-7).

The warrantless home entry and arrest

Deputy Dorshorst and Mr. Weber exited their vehicles around the same time. (34:7). Deputy Dorshorst did not say anything to Mr. Weber at that point. (34:7). Instead, he ran to Mr. Weber's garage door and saw Mr. Weber walking up the interior steps toward the attached house door. (34:8).

Deputy Dorshorst went into Mr. Weber's attached garage and told him he needed to speak with him. (34:8-9). He was just entering the garage when he first spoke to Mr. Weber. (34:9).[1] At that point, Mr. Weber was nearing the top of the steps to his house. (34:10, 16). When Mr. Weber did not respond, Deputy Dorshorst grabbed Mr. Weber's arm. (34:10).

Deputy Dorshorst told Mr. Weber the reason he stopped him was for his high mounted brake lamp. (34:10-11). Deputy Dorshorst then asked Mr. Weber to walk toward his car so the deputy "could point out exactly the reason for the stop and which light was defective." (34:11).

During his contact with Mr. Weber inside the garage, Deputy Dorshorst noticed that Mr. Weber had slurred speech and glassy, bloodshot eyes. (34:12). He also smelled an odor of intoxicants. (34:12).

Deputy Dorshorst eventually brought Mr. Weber outside the garage. (34:12, 19). He asked Mr. Weber whether he had been drinking and Mr. Weber said he had. (34:12-13). The deputy later asked Mr. Weber for consent to search his

[1] The circuit court did not make an explicit finding as to whether the deputy was inside or outside the garage when he first spoke to Mr. Weber. (35:7-11).

car and Mr. Weber consented. (34:14). The search revealed a tinfoil square with a green leafy substance that tested positive for THC and a metal pipe. (34:14-15).

ARGUMENT

The State Failed to Meet its Burden of Establishing That Deputy Dorshorst's Warrantless Entry Into Mr. Weber's Garage[2] Was Justified By the Exigent Circumstances Exception to the Warrant Requirement Because There Was No Compelling Need for Official Action and There Was Ample Time to Get a Warrant. Therefore, the Deputy's Entry Was Constitutionally Unreasonable and All Fruits of the Entry Must Be Suppressed.

A. Introduction and standard of review.

Seconds before Mr. Weber entered his driveway, Deputy Dorshorst turned on his lights to stop Mr. Weber for a defective brake lamp. Mr. Weber turned into his driveway and pulled into the attached garage. When Mr. Weber walked toward the door to his house rather than toward the squad car, Deputy Dorshorst entered the garage, which was within the curtilage of Mr. Weber's home, and physically pulled Mr. Weber from the doorway of his house. Since Deputy Dorshorst entered the curtilage of Mr. Weber's home without a warrant, his entry can only be permitted if he reasonably believed that he was confronted with an emergency. ***State v. Smith***, 131 Wis. 2d 220, 228, 388 N.W.2d 601

[2] The state properly concedes that Mr. Weber's attached garage constitutes curtilage that is considered a part of the home for Fourth Amendment purposes. *See* ***State v. Dumstrey***, 2016 WI 3, ¶35, 366 Wis. 2d 64, 873 N.W.2d 502; ***Florida v. Jardines***, ___U.S. ___, 133 S.Ct. 1409, 1414 (2013).

(1986), *abrogated on other grounds by* ***State v. Felix***, 2012 WI 36, 339 Wis. 2d 670, 811 N.W.2d 775. Neither the United States Supreme Court nor this court has held that pursuing someone for a traffic violation (or, as the state contends, a misdemeanor jailable offense) constitutes an emergency sufficient to permit a warrantless entry.

It is a long-standing legal principle that a genuine emergency situation may permit a warrantless search or seizure under the Fourth Amendment. The United States Supreme Court recently undertook an analysis of the emergency or "exigency" exception to the warrant requirement, stating in unequivocal terms that courts must evaluate each case of alleged exigency based on the totality of circumstances. ***Missouri v. McNeely***, 569 U.S. ___, 133 S.Ct. 1552, 1559 (2013). Heeding ***McNeely's*** instruction, this court was careful recently not to abandon the totality of the circumstances approach toward determining exigency in favor of a categorical exception to the warrant requirement in the context of warrantless blood draws. ***State v. Parisi***, 2016 WI 10, ___ Wis. 2d ___, ___ N.W.2d ___.

This case presents the court with another opportunity to confirm that per se rules are entirely inconsistent with the fact-intensive nature of the reasonableness inquiry under the Fourth Amendment and Article I, Section 11 of the Wisconsin Constitution. The state is advocating for a per se exigency in a context that traditionally affords individual's the greatest constitutional protection: warrantless home entries. Specifically, the state seeks a ruling that it is categorically reasonable for law enforcement to conduct a warrantless home entry and arrest whenever there is "hot pursuit" of a suspect based on probable cause for a jailable offense.

This court should decline the state's invitation to water down the Fourth Amendment's protection against unreasonable searches and seizures. A careful review of the exigent circumstances doctrine, including the circumstance of "hot pursuit" of a fleeing suspect, reveals that the state's position fails to comport with binding precedent. The jurisprudential landscape indicates that there are two requirements for exigent circumstances to justify a warrantless search or seizure: (1) a compelling need for official action; and (2) no time to secure a warrant. ***McNeely***, 133 S.Ct. at 1559. These are standalone requirements—the Court in ***McNeely*** made clear that a "compelling need for official action" does not necessarily equate to "no time to secure a warrant." Thus, the test for exigent circumstances necessarily entails a case-by-case assessment of exigency.

To adopt the state's proposed per se exigency in this case is to ignore the above constitutional requirements. Rather than have courts consider all the facts and circumstances of a particular case involving "hot pursuit," such as the severity of the jailable offense and whether there was time to get a warrant, the state would have courts reduce the exigent circumstances analysis to a simple mathematical formula:

> "hot pursuit" + probable cause + any degree of jailable offense = reasonable warrantless invasion into the sanctity of the home.

That test defies not only United States Supreme Court precedent but common sense as well.

As the facts of Mr. Weber's case show, not every "hot pursuit" of a suspect based on probable cause for a jailable offense creates a true emergency that justifies a warrantless home entry. A holding to the contrary establishes that in these situations, the needs of law enforcement

always outweigh the right to privacy. The United States Supreme Court has been quick to strike down such overgeneralizations in the past. *See* ***Richards v. Wisconsin***, 520 U.S. 385, 388 (1997) (rejecting a categorical exception to the knock-and-announce requirement in felony drug investigations); ***McNeely***, 133 S.Ct. at 1561 (rejecting a categorical exception to the warrant requirement in the context of warrantless blood draws for drunk-driving offenses).

Whether the warrantless entry into Mr. Weber's garage was justified by the exigent circumstances exception to the warrant requirement and is therefore valid under the Fourth Amendment and Article I, Section 11 of the Wisconsin Constitution is a question of constitutional fact. ***State v. Richter***, 2000 WI 58, ¶26, 235 Wis. 2d 524, 612 N.W.2d 29. "The trial court's findings of evidentiary or historical fact will not be overturned unless they are clearly erroneous." ***Id***. This court "independently determine[s] whether the historical or evidentiary facts establish exigent circumstances sufficient to justify the warrantless entry into the defendant's home." ***Id***.

B. Relevant legal principles.

1. The general rule: the police need a warrant to effectuate a search or seizure in the home.

Both the Fourth Amendment to the United States Constitution and Article I, Section 11 of the Wisconsin Constitution guarantee citizens the right to be free from unreasonable searches and seizures. Historically, when interpreting the Wisconsin Constitution's protections in this area, this court has followed the United States Supreme Court's lead. ***Id***., ¶27.

Consistent with the above approach, this court has recognized that all warrantless searches and seizures within the home are presumptively unreasonable. ***Smith***, 131 Wis. 2d at 227-28 (citing ***Payton v. New York***, 445 U.S. 573 (1980)). This presumption is rooted in the notion that "when it comes to the Fourth Amendment, the home is first among equals. At the Amendment's 'very core' stands 'the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion.'" ***Florida v. Jardines***, ___U.S. ___, 133 S.Ct. 1409, 1414 (2013) (citation omitted). It is also a manifestation of the United States Supreme Court's preference that searches and seizures be conducted pursuant to a warrant. *See* William A. Schroeder, Factoring the Seriousness of the Offense into Fourth Amendment Equations—Warrantless Entries into Premises: The Legacy of Welsh v. Wisconsin, 38 U. Kan. L. Rev. 439, 447 n. 36 (1990).

That a warrant is generally required to perform a search or seizure in the home is not to be discounted as a mere "'inconvenience to be somehow 'weighed' against the claims of police efficiency.'" ***Riley v. California***, 573 U.S. ___, 134 S.Ct. 2473, 2493 (2014) (citation omitted). Rather, the warrant requirement "is 'an important part of our machinery of government.'" ***Id***. This is because it allows a neutral and detached magistrate to make the call on whether certain facts warrant government intervention—not a police officer "'engaged in the often competitive enterprise of ferreting out crime.'" ***Id***. at 2482 (citation omitted).

2. The exception to the general rule: probable cause and exigent circumstances.

Given that the touchstone of the Fourth Amendment is reasonableness, there are exceptions to the warrant requirement. ***Id***. at 2482. In the realm of home entries, warrantless searches and seizures are permitted upon probable cause and exigent circumstances. ***Katz v. United States***, 389 U.S. 347, 357 (1967); ***Payton***, 445 U.S. at 587-90. It is the state's burden to prove both. ***Smith***, 131 Wis. 2d at 228.

a. The two-part test and the totality of the circumstances.

The exigent circumstances exception to the warrant requirement "applies when the exigencies of the situation make the needs of law enforcement so compelling that a warrantless search [or seizure] is objectively reasonable under the Fourth Amendment." ***McNeely***, 133 S.Ct. at 1558 (citation omitted). The United States Supreme Court has described the exception as calling for an "emergency or dangerous situation," ***Payton***, 445 U.S. at 583, where speed is essential. *See* ***Warden v. Hayden***, 387 U.S. 294, 298-99 (1967); ***United States v. Santana***, 427 U.S. 38, 42 (1976). Consistent with that description, the test for exigent circumstances requires: (1) a compelling need for official action; and (2) no time to secure a warrant. ***Michigan v. Tyler***, 436 U.S. 499, 509 (1978) (citing ***Warden***); ***McNeely***, 133 S.Ct. at 1559. Wisconsin law is in accord.

Smith, 131 Wis. 2d at 228 ("Warrantless entry is permissible only where there is urgent need to do so, coupled with insufficient time to secure a warrant.").[3]

Because exceptions to the warrant requirement are "'few in number and carefully delineated' . . . the police bear a heavy burden when attempting to demonstrate an urgent need that might justify warrantless searches or arrests." ***Welsh v. Wisconsin***, 466 U.S. 740, 749-50 (1984) (citation omitted). It follows that in defending a warrantless search or seizure as reasonable, the state cannot simply check a box marked "imminent destruction of evidence" or "hot pursuit of a fleeing suspect" and call it a day. The reasonableness inquiry requires that each case of alleged exigency be evaluated on its own facts and circumstances. ***McNeely***, 133 S.Ct. at 1559; ***Riley***, 134 S.Ct. at 2494. Indeed, a totality of the circumstances approach toward determining exigency is the only way to avoid paying short shrift to the two-part test referenced above.

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[3] Four circumstances are often cited as potentially giving rise to an exigency sufficient to justify a warrantless search or seizure: (1) "hot pursuit" of a fleeing suspect; (2) a threat to the safety of a suspect or others; (3) a risk that evidence will be destroyed; and (4) a likelihood that a suspect will flee. ***State v. Richter***, 2000 WI 58, ¶31, 235 Wis. 2d 524, 612 N.W.2d 29. This is not an immutable list. *See* ***Missouri v. McNeely***, 569 U.S. ___, 133 S.Ct. 1552, 1558-59 (2013); ***United States v. Struckman***, 603 F.3d 731, 743 (9th Cir. 2010). Thus, to the extent that Wisconsin law mandates the presence of one of the above factors in order to establish exigency, *see* ***State v. Smith***, 131 Wis. 2d 220, 230-31, 388 N.W.2d 601 (1986), it appears at odds with United States Supreme Court precedent. While any one of the above factors (or a combination thereof) may contribute to a finding of exigency, the totality of the circumstances nature of the inquiry precludes any "hard and fast" rules in this regard.

This point is best demonstrated by ***McNeely***. There, the government argued that the natural metabolization of alcohol in the bloodstream presents a per se exigency that justifies a warrantless, nonconsensual blood draw in all drunk-driving cases. ***McNeely***, 133 S.Ct. at 1556. The United States Supreme Court recognized that law enforcement has a compelling need to act in this context, as critical evidence of a serious crime diminishes by the minute. ***Id***. at 1560-61. But the Court made clear that a compelling need to act does not necessarily equate to the additional requirement that there be no time to secure a warrant. ***Id***. at 1561-63; *see also* ***Id***. at 1571-72 (Roberts, C.J., concurring in part, dissenting in part). Recognizing that technological advancements "allow for the more expeditious processing of warrant applications, particularly in contexts like drunk-driving investigations where the evidence offered to establish probable cause is simple," the Court rejected the government's proposed per se rule. ***Id***. at 1561-62. It held: "In those drunk-driving investigations where police officers can reasonably obtain a warrant before a blood sample can be drawn without significantly undermining the efficacy of the search, the Fourth Amendment mandates that they do so." ***Id***. at 1561.

For purposes of this case, the takeaway from ***McNeely*** is two-fold. First, the exigent circumstances exception to the warrant requirement is not amenable to per se rules in any context. ***Id***. at 1559. Second, "technological developments that enable police officers to secure warrants more quickly, and do so without undermining the neutral magistrate judge's essential role as a check on police discretion, are relevant to an assessment of exigency." ***Id***. at 1563.

Of course, ***McNeely*** was not novel in its determination that a variety of factors, including recent advancements to the warrant-application process, are relevant to an assessment of exigency. An additional factor that bears mentioning here is the gravity of the underlying offense for which the warrantless search or seizure is being made. ***Welsh***, 466 U.S. at 753. In ***Welsh***, a case involving a warrantless home entry and arrest for drunk driving, the United States Supreme Court endorsed a "common-sense approach" toward determining exigency, holding:

> [A]n important factor to be considered when determining whether any exigency exists is the gravity of the underlying offense for which the arrest is being made. . . . [A]pplication of the exigent circumstances exception in the context of a home entry should rarely be sanctioned when there is probable cause to believe that only a minor offense . . . has been committed.

Id.

Although there exists a circuit split on the question whether ***Welsh*** creates a felony/misdemeanor distinction for finding exigent circumstances, *see* ***Stanton v. Sims***, 571 U.S. ___, 134 S.Ct. 3, 5 (2013), this court has wisely chosen to reject a bright-line rule that precludes a finding of exigency in a case involving a misdemeanor. ***State v. Ferguson***, 2009 WI 50, ¶¶28-29, 317 Wis. 2d 586, 767 N.W.2d 187. In the spirit of the totality of the circumstances, the court in ***Ferguson*** held that an important factor for finding exigency is the penalty that attaches to the underlying offense—i.e., is the offense jailable or nonjailable? ***Id***. A jailable offense might make it more likely

that an exigency exists in a given case, whereas a nonjailable offense might make it less likely. ***Id***., ¶¶28-30. This is exactly what the flexible test of reasonableness demands.[4]

It is critical that this court bear in mind the above legal principles when considering the propriety of the state's proposed per se rule regarding the doctrine of "hot pursuit," as the doctrine is a mere subset of the exigent circumstances exception to the warrant requirement. More specifically, this court must ask: does a rule that precludes courts from considering all the facts and circumstances in a case of alleged exigency, such as the severity of the jailable offense and whether there was time to get a warrant, comport with the above precedent?

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[4] ***Ferguson*** adopted Justice Prosser's concurrence in ***State v. Sanders***, 2008 WI 85, 311 Wis. 2d 257, 752 N.W.2d 713, to the extent that Justice Prosser argued there should be no bright-line rule precluding a finding of exigency in a case involving a misdemeanor. ***State v. Ferguson***, 2009 WI 50, ¶¶27-29, 317 Wis. 2d 586, 767 N.W.2d 187. The state extrapolates from this that the court in ***Ferguson*** endorsed Justice Prosser's apparent position that whenever there is "hot pursuit" of a suspect based on probable cause for a jailable offense, there is an exigency sufficient to justify a warrantless home entry—in other words, a per se rule. *See* ***State v. Sanders,*** 2008 WI 85, ¶134, 311 Wis. 2d 257, 752 N.W.2d 713 (Prosser, J., concurring). The state's contention is misguided for two reasons. First, it is clear that ***Ferguson*** did not create a per se exigency in any context, let alone "hot pursuit," which was not even at issue in the case. The court simply considered the exigent circumstances exception as a whole and held, consistent with a case-by-case assessment of exigency, that "in determining the *extent to which* the underlying offense *may* support a finding of exigency," the critical factor is the penalty at issue. ***Ferguson***, 317 Wis. 2d 257, ¶28 (Emphasis added.). Second, the state's interpretation of ***Ferguson*** would place the decision in direct conflict with ***McNeely*'s** admonition against per se rules.

b. The exigent circumstance of "hot pursuit" of a fleeing suspect.

As noted, one type of circumstance that may give rise to an exigency sufficient to permit a warrantless search or seizure is "hot pursuit" of a fleeing suspect. ***McNeely***, 133 S.Ct. at 1558. Generally, the doctrine involves a situation where the police engage in an immediate and continuous pursuit of a suspect from the scene of a crime. ***Welsh***, 466 U.S. at 753; ***Richter***, 235 Wis. 2d 524, ¶32. Neither the United States Supreme Court nor this court has had much occasion to apply the exception to justify a warrantless home entry. But when each court has, there was indisputably a compelling need for official action and no time to get a warrant.

Warden is considered the United States Supreme Court's seminal decision on hot pursuit. *See* 3 Wayne R. LaFave, Search & Seizure § 6.1(d), at 390-91 (5th ed. 2012). In ***Warden***, an armed man robbed a cab company. ***Warden***, 387 U.S. at 297. Two cab drivers followed the man and called the police, noting that the man had entered a residence. ***Id***. The police arrived in less than five minutes and entered the premises. ***Id***. The police then searched the home and arrested the suspect. ***Id***. at 298. The Court upheld the warrantless entry, reasoning that "The Fourth Amendment does not require police officers to delay in the course of an investigation if to do so would *gravely endanger their lives or the lives of others*. *Speed here was essential*. . . ." ***Id***. at 298-99 (Emphasis added.)

Nine years later, the Court confronted the hot pursuit doctrine again. In ***Santana***, an undercover officer arranged a heroin "buy" with a third party. ***Santana***, 427 U.S. at 39. The third party purchased the drugs from Santana's house and

delivered them to the officer. ***Id***. at 40. Upon her arrest, the third party informed the officer that Santana had the money. ***Id***. When the police approached Santana's house, Santana was standing in the doorway holding a brown paper bag. ***Id***. Once Santana saw the police, she went into the vestibule of her house. ***Id***. The officers entered her home and arrested her. ***Id***. The Court upheld the warrantless entry, noting that the need to act quickly was even greater than in ***Warden***: "The fact that the pursuit here ended almost as soon as it began did not render it any the less a 'hot pursuit'. . . . Once Santana saw the police, there was likewise a realistic expectation that *any delay would result in destruction of evidence*." ***Id***. at 43 (Emphasis added.)

As both ***Warden*** and ***Santana*** demonstrate, the immediate and continuous pursuit of a fleeing suspect is relevant to an assessment of exigency. Certainly the chase factors into the question whether there is a compelling need to act, as the government has an interest in preventing a suspect from fleeing the scene of a serious crime. However, to say that the chase alone renders the situation sufficiently "hot" is to ignore the special facts that the Court explicitly relied upon to justify the warrantless entry in both cases—the risk of safety to the police or others and the risk of evidence destruction. These special facts made the government's need to act more compelling and also created a situation where there was no time secure a warrant. Thus, the takeaway from ***Warden*** and ***Santana*** is that courts should review the circumstances surrounding hot pursuit, not merely its existence, in determining exigency. *Accord* ***Mascorro v. Billings***, 656 F.3d 1198 (10th Cir. 2011); ***State v. Bolte***, 115 N.J. 579 (1989); ***Butler v. State***, 309 Ark. 211, 829 S.W.2d 412 (1992); ***State v. Wren***, 115 Idaho 618, 768 P.2d 1351 (App. 1989).

This court's decisions applying the hot pursuit doctrine are not inconsistent with ***Warden*** and ***Santana***. In ***West v. State***, 74 Wis. 2d 390, 246 N.W.2d 675 (1976), the court upheld a warrantless home entry and arrest in a situation similar to that of ***Warden***. There, two men robbed a grocery store at gunpoint and battered one of the store employees. ***West v. State***, 74 Wis. 2d 390, 393, 246 N.W.2d 675 (1976). The store manager called the police and an officer tracked down the location of the suspects to a particular home. ***Id***. at 393-94. The police entered the home within minutes of the suspects' arrival. ***Id***. at 394. In upholding the warrantless entry, the court considered the circumstances surrounding the hot pursuit, not merely its existence: "The *safety of other possible occupants of the house and the need to minimize the possibility of flight or armed resistance* justified the undelayed entry in the case before us." ***Id***. at 400 (Emphasis added.).

Richter is no different. In that case, the police received a dispatch reporting a burglary at a trailer park. ***Richter***, 235 Wis. 2d 524, ¶3. An officer in the area responded and was immediately flagged down by the victim. ***Id***. The victim stated that she saw the burglar run into a trailer home across the street. ***Id***. The officer approached the trailer home and noticed signs of a forced entry. ***Id***., ¶4. The officer entered the trailer home and performed a search that turned up marijuana. ***Id***., ¶8. In assessing exigency, this court considered all the facts and circumstances surrounding the police action: "a *break-in* across the street just moments earlier, a contemporaneous eyewitness report that the suspect had entered Richter's trailer, *tell-tale signs of forced entry* at the trailer, *and sleeping people inside potentially at risk of harm* from the intruder." ***Id***., ¶31 (Emphasis added.). Relying on

Warden, the court determined that the officer's hot pursuit of the suspect and his need to protect the people inside the trailer justified the warrantless entry. ***Id***., ¶¶35-41.[5]

To summarize: when the United States Supreme Court and this court have utilized the doctrine of hot pursuit to justify a warrantless home entry, each court has considered the circumstances surrounding the hot pursuit, not merely its existence, in determining reasonableness. This approach is entirely consistent with the two-part test for determining exigency, namely that there is a compelling need to act *and* no time to secure a warrant.

C. Application to the facts of this case.

Application of the above principles to the facts of this case is straightforward and yields one result: Deputy Dorshorst's warrantless entry into Mr. Weber's garage was unreasonable.

1. Probable cause to arrest.

Deputy Dorshorst needed both probable cause and exigent circumstances to invade the sanctity of Mr. Weber's home. ***Payton***, 445 U.S. at 587-90. Although Deputy Dorshorst may have had probable cause to arrest for the

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[5] To the extent the court in ***Richter*** determined that the officer's immediate and continuous pursuit of the suspect alone justified the warrantless entry, the decision might be at odds with the two-part test for determining exigency. Without the attendant circumstances demonstrating a threat to the safety of others, the facts do not necessarily support a finding that there was no time to secure a warrant. However, given the court's reliance on ***Warden*** and its consideration of all the facts and circumstances surrounding the warrantless entry, a fair interpretation of the decision is that the combination of exigencies served to establish the reasonableness of the police action.

defective high mounted brake lamp, *see* Wis. Stat. § 345.22 ("A person may be arrested . . . for the violation of a traffic regulation. . . ."), he did not have probable cause to arrest for failure to stop under Wis. Stat. § 346.04(2t), nor obstruction under Wis. Stat. § 946.41(1).

This court looks to the totality of the circumstances in determining probable cause to arrest. ***State v. Lange***, 2009 WI 49, ¶20, 317 Wis. 2d 383, 766 N.W.2d 551. "Probable cause to arrest refers to that quantum of evidence which would lead a reasonable police officer to believe that the defendant probably committed a crime." ***State v. Paszek***, 50 Wis. 2d 619, 624, 184 N.W.2d 836 (1971).

Regarding failure to stop, the state contends that Mr. Weber "cannot credibly argue that Deputy Dorshorst did not have probable cause" to arrest under Wis. Stat. § 346.04(2t). (State's Brief, 13). The state's contention is apt considering its failure to acknowledge it must show a *knowing* failure to stop. *See* Wis. Stat. § 346.04(2t) ("[n]o operator of a vehicle, after having received a visible or audible signal to stop . . . shall *knowingly* resist . . . by failing to stop. . . .") (Emphasis added.). But had the state attempted to demonstrate a knowing failure to stop, the record would have belied its assertion anyway.

Here, the probable cause calculus involves the following known facts: (1) the attempted stop occurred when Mr. Weber was slowing down to turn into his driveway; (2) the deputy turned on his flashing lights when Mr. Weber was "maybe 100 feet" prior to his driveway; and (3) Mr. Weber continued into his turn and parked in his garage, the door of which was open by the time the deputy first observed it, and which Mr. Weber did not attempt to close. Notably absent from the record is any testimony that the deputy turned on his

siren or made eye contact with Mr. Weber, or that Mr. Weber was aware of or reacted to the deputy's presence in any way. Moreover, there is no evidence establishing Mr. Weber's speed going into his turn,[6] and nothing indicates the distance between Mr. Weber and the deputy when the flashing lights were activated. This record does not establish probable cause for a knowing failure to stop.

Perhaps the best measuring stick the court can use in deciding this issue is to consider the variety of cases the state offers on the topic of hot pursuit. (State's Brief, 11 n. 5). Of the cases involving the underlying offense of resisting or obstructing, the vast majority (if not all) contain facts indicating that the suspect intentionally thwarted police intervention. *See e.g.*, ***Gasset v. State***, 490 So.2d 97 (Fla.Dist.3 Ct. App. 1986) (probable cause where defendant led police on a high-speed chase at speeds of up to eighty mph); ***Rosembert v. Borough of East Lansdowne***, 14 F.Supp.3d 631 (E.D. Penn. 2014) (probable cause where defendant admitted to fleeing or attempting to elude police); ***Stutte v. State***, 2014 Ark. App. 139, 432 S.W.2d 661 (2014) (probable cause where defendant did not pull over after officer activated lights, siren, and shined a spot light into defendant's car); ***Middletown v. Flinchum***, 95 Ohio St.3d 43, 765 N.E.2d 330 (2002) (probable cause where defendant thwarted two police attempts to stop his vehicle and later ran from police despite shouts of "stop" and "police"); ***State v. Legg***, 633 N.W.2d 763 (Iowa 2001) (probable cause where defendant sped up and ran stop sign after officer activated lights and later ignored commands to stop before heading

[6] Assuming Mr. Weber was 100 feet from his driveway as the deputy estimated, if Mr. Weber was going a constant 20 mph it would have taken 3.4 seconds to enter his driveway, if 15 mph, 4.5 seconds, and if 10 mph, 6.8 seconds.

into garage); ***People v. Lloyd***, 216 Cal.App.3d 1425, 265 Cal.Rptr. 422 (1989) (probable cause where defendant saw officer's lights but sped up, ran a stop sign, and later ignored officer's request for driver's license); ***State v. Nichols***, 225 Ga.App.609, 484 S.E.2d 507 (1997) (probable cause where defendant saw police, abruptly stopped vehicle, quickly backed up, turned into driveway and continued backing at a high rate of speed until he crashed into parked vehicle); ***State v. Blake***, 468 N.E.2d 548 (1984) (probable cause where defendant increased speed in excess of 90 mph in response to officer's lights and siren and ignored officer's verbal command to stop); ***State v. Brown***, 733 So.2d 1282 (La.Ct.App. 1999) (probable cause where defendant saw officers, jumped out of car, ran home, and ignored command to stop); ***LaHaye v. State***, 1 S.W.3d 149 (Tex.Crim.App 1999) (probable cause where defendant ran moped into parked car, ran toward apartment complex, and ignored officer's command to stop).

Of course, this case is different. Unlike those cited above, there are no facts indicating that Mr. Weber knew of the deputy's presence, let alone that he knowingly failed to stop. The court should therefore conclude that Deputy Dorshorst did not have probable cause to arrest Mr. Weber for failing to stop under Wis. Stat. § 346.04(2t).

The state's contention that the deputy had probable cause to arrest Mr. Weber for obstruction under Wis. Stat. § 946.41(1) is equally tenuous. (State's Brief, 13). Similar to the failure to stop statute, § 946.41(1) requires *knowing* obstruction. *See* Wis. Stat. § 946.41(1) ("whoever *knowingly* . . . obstructs an officer . . . is guilty of a Class A misdemeanor."). The absence of facts indicating that Mr. Weber knowingly thwarted the deputy's effort to stop him before entering his garage undermines the state's position

on this front as well. And while the state contends that Mr. Weber's failure to heed to the deputy's verbal commands once he was in his garage is relevant to the probable cause analysis, (State's Brief, 13), the assertion is a non-starter. The whole idea behind the hot pursuit doctrine is that the police have probable cause to arrest *before* the fleeing suspect enters his or her home. ***Santana***, 427 U.S. at 43 ("a suspect may not defeat an arrest which has been set in motion in a *public place*. . . .") (Emphasis added.). The court should therefore conclude that Deputy Dorshorst did not have probable cause to arrest Mr. Weber for obstruction under § 946.41(1).

2. Exigent circumstances.

That Deputy Dorshorst may have had probable cause to arrest Mr. Weber for the defective high mounted brake lamp does not end the analysis. Absent a genuine emergency situation, the deputy could not have entered Mr. Weber's home without an arrest warrant. The state does not contend that the deputy's immediate and continuous pursuit of Mr. Weber for the defective brake lamp satisfies this requirement.

Rather, the state argues that the deputy's pursuit of Mr. Weber for the jailable offenses of failure to stop and obstruction alone, without any consideration of the surrounding facts or circumstances, constituted a genuine emergency situation. Without conceding that the deputy had probable cause to arrest for either offense, Mr. Weber addresses that argument.

To determine whether a sufficient exigency exists in this case, the court should apply an objective test that asks whether a police officer under the circumstances known to the

officer at the time of entry reasonably believed that there was a compelling need to act and no time to get a warrant.[7]

a. No compelling need to act.

The first question is whether the deputy reasonably believed that there was a compelling need to enter Mr. Weber's home without a warrant to effectuate an arrest. The following facts inform the court's decision on the reasonableness of the deputy's decision to enter: the deputy noticed that Mr. Weber had a defective break lamp; at that time, Mr. Weber was slowing down to turn into his driveway; the deputy turned on his lights when Mr. Weber was maybe 100 feet prior to his driveway; Mr. Weber continued into his turn and parked in his garage, where he left the garage door open; the deputy pulled up behind Mr. Weber's car; Mr. Weber got out of his car and *walked* toward the inside of his house; and the deputy did not try and speak with Mr. Weber until he was just entering the garage.

Common sense says there was no compelling need to arrest based on the above facts. Even with the generous assumption that the deputy was in immediate and continuous pursuit of Mr. Weber based on probable cause for a *jailable* offense, the above facts hardly demonstrate the type of "now or never" situation that might excuse an officer's indifference to the warrant requirement. The deputy's testimony is apt: he would have simply knocked on Mr. Weber's door or attempted other means (presumably, a warrant) had he not invaded the privacy of Mr. Weber's home. (34:21). While law enforcement may have an interest in effectuating lawful

[7] This test represents a slight modification of the objective test set forth in ***Smith***. It appears to more accurately reflect the United States Supreme Court's test for exigent circumstances. *See* ***McNeely***, 133 S.Ct. at 1559.

public arrests, a claim of police efficiency alone is insufficient to justify a warrantless search or seizure. ***Riley***, 134 S.Ct. at 2493.

In assessing the compelling need to arrest, the court should also consider the penalty that attaches to the underlying offenses allegedly at issue. The state may have an interest in preventing a suspect from fleeing the scene of a crime. But as ***Ferguson*** instructs, the weight of that interest varies depending on the severity of the penalty under consideration. ***Ferguson***, 317 Wis. 2d 586, ¶28. It logically follows that the greater the penalty, the greater the state's need to act. ***Id***.[8] This is consistent with the flexible test of reasonableness.

Here, the offenses allegedly at issue constituted Class A misdemeanors that exposed Mr. Weber to jail time. *See* Wis. Stat. §§ 346.04(2t), 346.17(2t), 946.41(1), 939.51(3)(a). Thus, they are relevant to the exigency analysis to a greater degree than any particular nonjailable offense might be. But it does not follow that these nonviolent misdemeanors support a need to act that parallels the need to

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[8] Notably, "at common law, the hot pursuit doctrine apparently was limited to felons, and even before Welsh some courts had suggested that the doctrine applies only to fleeing felons." William A. Schroeder, Factoring the Seriousness of the Offense into Fourth Amendment Equations—Warrantless Entries into Premises: The Legacy of Welsh v. Wisconsin, 38 U. Kan. L. Rev. 439, 468 n. 102, 103 (1990). Mr. Weber points this out for two reasons. First, it lends support to the notion that the state's need to act in a case involving hot pursuit is greater where the penalty that attaches to the underlying crime is greater. Second, the actual common law rule should be kept in mind when reading the state's quote on page 14 of its brief, apparently cited for the proposition that at common law an officer could conduct a warrantless entry upon hot pursuit of a fleeing misdemeanant. Not so. *See* ***Payton v. New York***, 445 U.S. 573, 595 n.41 (1980).

act in a situation involving a crime or crimes with more severe penalties. In this regard, it is noteworthy that the underlying offenses in this case are a far cry from the jailable crimes at issue in ***Warden***, ***Santana***, ***West***, and ***Richter***. Thus, while the underlying offenses in this case are relevant to the exigency analysis, they are certainly not dispositive of the issue of a compelling need to arrest.

A final point regarding the compelling need to arrest is noteworthy. In ***Warden***, ***Santana***, ***West***, and ***Richter***, there were circumstances aside from the hot pursuit of a serious crime that bolstered the state's compelling need to act. For example, in ***Santana***, a reasonable belief in the imminent destruction of evidence supported a compelling need to act. Likewise, in ***Warden***, ***West***, and ***Richter***, a reasonable belief in a threat to the safety others contributed to the mix. Here, no equivalent circumstances existed. This was, quite frankly, the coolest of pursuits.

In advocating for a per se rule, the state apparently maintains that there is always a compelling need to act in the face of a suspect who flees the scene of a jailable crime. Indeed, it must have a compelling interest in mind to advance a position that contravenes the well-established rule that exigency must be assessed on a case-by-case basis. To the extent that the state's interest is to ensure that fleeing suspects do not escape apprehension and conviction, the assertion is a red herring. Requiring a warrant in these types of situations is not rewarding bad behavior. It is difficult to conceive how sitting in one's home waiting for the police to obtain an arrest warrant constitutes a reward—the individual can still be charged with a crime. Moreover, if the situation presents a reasonable threat to the suspect's apprehension or conviction, the police are free to enter the home without a warrant.

In light of the totality of the circumstances of this case, the court should conclude that there was no compelling need to enter Mr. Weber's home without a warrant to effectuate an arrest.

b. Ample time to get a warrant.

Even if this court were to hold that there is always a compelling need to act in the face of a suspect who flees the scene of a jailable offense, no matter the surrounding circumstances, there must also be no time to secure a warrant. ***McNeely*** was unequivocal on this point: just because there is a compelling need to act does not mean there is no time to secure a warrant. ***McNeely***, 133 S.Ct. at 1560-63.

Recent advancements in the warrant-application process have changed the game as far as the reasonableness of warrantless searches and seizures are concerned—they are relevant to any assessment of exigency. ***Id***. at 1562-63. Thus, in the absence of a situation where the police are just outside a home and evidence is about to be destroyed, a person is about to be injured, a fire has broken out, a suspect is likely to flee, or some other common-sense emergency exists, courts must think long and hard about validating a warrantless entry when the availability of a warrant is often a few finger taps away.

The facts that inform this court's decision on whether the deputy reasonably believed there was a compelling need to act apply to the issue at bar, namely whether the deputy reasonably believed there was no time to get a warrant. These facts demonstrate that there was plenty of time to get a warrant without compromising the arrest; the evidence of the purported offenses; or the safety of the deputy or others. Equally important is what the facts do not show: that the

deputy attempted to get a warrant without response, or that the deputy knew from prior experience that it would be difficult to get a warrant at that time of day.

With respect to the arrest itself, Mr. Weber was not a flight risk. The facts show he pulled into his driveway, parked in his attached garage, left the garage door open, and *walked* toward his house door. Moreover, the deputy blocked Mr. Weber's car with his own. No reasonable police officer would interpret this situation as creating a flight risk.

As for the evidence of the alleged offenses, there was no physical evidence for Mr. Weber to destroy.

Regarding threats to the safety of the deputy or others, there were none.

Finally, there is no evidence demonstrating that the deputy applied for a warrant without response, or that the deputy understood based on his prior experience that a warrant would be difficult to obtain at that time of day.

The bottom line is that there is a dearth of evidence supporting the contention that there was no time to get a warrant in this case. Indeed, no reason, aside from inconvenience and annoyance, appears for the failure to obtain a warrant. But those reasons do not suffice where one of our most cherished constitutional rights is at stake:

> We are not dealing with formalities. The presence of a . . . warrant serves a high function. Absent some grave emergency, the Fourth Amendment has interposed a magistrate between the citizen and the police. This was done not to shield criminals nor to make the home a safe haven for illegal activities. It was done so that an objective mind might weigh the need to invade that privacy in order to enforce the law. The right of privacy

> was deemed too precious to entrust to the discretion of those whose job is the detection of crime and the arrest of criminals. Power is a heady thing; and history shows that the police acting on their own cannot be trusted. And so the Constitution requires a magistrate to pass on the desires of the police before they violate the privacy of the home. We cannot be true to that constitutional requirement and excuse the absence of a . . . warrant without a showing by those who seek exemption from the constitutional mandate that the exigencies of the situation made that course imperative.

McDonald v. United States, 335 U.S. 451, 455-56 (1948). It was the state's burden to prove that there was no time to secure a warrant, ***Smith***, 131 Wis. 2d at 228, and the state has failed to do so.

In light of ***McNeely's*** clear instruction[9] and the state's failure to offer any facts demonstrating that there was no time to secure a warrant in this case, the court should conclude that the deputy's warrantless entry into the sanctity of Mr. Weber's home was unreasonable under the Fourth Amendment and Article I, Section 11 of the Wisconsin Constitution. The result is that the evidence derived from the warrantless home entry should be suppressed. ***Ferguson***, 317 Wis. 2d 586, ¶21.

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[9] It is noteworthy that ***McNeely*** dealt with a stronger than usual case for application of the exigent circumstances exception. ***McNeely***, 133 S.Ct. at 1571 (Roberts, C.J., concurring in part and dissenting in part). Yet, the Court still required a showing that there was no time to secure a warrant without *significantly* compromising the police's investigation. ***Id.*** at 1561. It cannot reasonably be argued that this case, involving no interest as paramount as the imminent destruction of evidence of a serious crime, is somehow immune from ***McNeely's*** reach.

CONCLUSION

The court of appeals took a common-sense approach toward resolving this case and correctly determined that no exigency supported Deputy Dorshorst's warrantless home entry. Therefore, Mr. Weber, by counsel, respectfully requests that the court affirm the court of appeals' opinion and remand to the circuit court with directions to vacate the judgment of conviction, allow Mr. Weber to withdraw his plea, and grant the suppression motion.

Dated this 26th day of August, 2016.

Respectfully submitted,

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CERTIFICATION AS TO FORM/LENGTH

I certify that this petition meets the form and length requirements of Rules 809.19(8)(b) and 809.62(4) 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 petition is 7,794 words.

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that:

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

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

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

Dated this 26th day of August, 2016.

Signed:

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