STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

Case No. 2015AP1815-CR

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ANDREW S. SATO,

DEFENDANT-APPELLANT.

APPEAL FROM A JUDGMENT OF CONVICTION AND AN ORDER DENYING A MOTION TO SUPPRESS EVIDENCE ENTERED IN THE CIRCUIT COURT FOR MILWAUKEE COUNTY, THE HONORABLE GLENN H. YAMAHIRO AND THE HONORABLE WILLIAM S. POCAN, PRESIDING

BRIEF OF THE PLAINTIFF-RESPONDENT

BRAD D. SCHIMEL
Attorney General

WARREN D. WEINSTEIN
Assistant Attorney General
State Bar #1013263

Attorneys for Plaintiff-Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 264-9444
(608) 266-9594 (Fax)
weinsteinwd@doj.state.wi.us

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STATEMENT ON ORAL ARGUMENT AND PUBLICATION

This case can be resolved on the briefs by applying well-established legal principles to the facts of the case.

Accordingly, the State does not request oral argument. The case does not meet criteria for publication.

STATEMENT OF THE CASE

The Milwaukee County Circuit Court[1] convicted Andrew S. Sato on his plea of guilty to robbery with threat of force; the court sentenced him to a thirteen-year sentence bifurcated into eight years of initial confinement and five years of extended supervision (29). Sato appeals arguing the circuit court erred in denying his motion to suppress the evidence police obtained after executing a search warrant on his apartment.

The State takes the following facts from the hearing on Sato's motion to suppress.

On October 28, 2013, a delivery driver for Gold Rush Chicken called police and reported an armed robbery (49:5-6). According to the police report resulting from the phone call, Gold Rush Chicken received a phone order for a food delivery to 6221 West Fairview in Milwaukee (49:7). When the delivery man arrived at that address, no one claimed the food order so the delivery man called the phone number from which the order emanated (49:8). The driver saw the cell phone of a man standing near 6221 West Fairview light up (49:8). As the man approached the delivery car, the driver rolled down the passenger side window (49:8-9). The

[1] The Honorable Glenn H. Yamahiro denied Sato's suppression motion (52), and convicted him (29); the Honorable William S. Pocan denied Sato's post-conviction motion (43).

passenger seat contained pizza, chicken and $50 cash (49:9). The man reached for the items through the passenger window (49:9). The driver told the man, "You have to pay first" (49:9). The man replied, "I got your money right here" at which time he displayed a gun in his right hand (49:9). The man then grabbed the food and ran between 6221 and 6225 West Fairview (49:9-10). When he reached the rear of the buildings, he turned toward 6225 West Fairview where the driver lost sight of the man (49:10).

The next morning, October 29, 2013, Officer Steven Strasser discovered the phone number used to place the food order was associated with Valerie McDonald at 6311-A West Fairview, less than a block from the scene of the robbery (49:7, 11). Strasser went to 6311 West Fairview, where he interviewed Colleen McDonald (49:11). Colleen told Strasser the phone number belonged to her brother Kevin who spent the previous evening at 6225 West Fairview with his friend, Shannon Zellmer (49:12).

Strasser interviewed Kevin, who told him at about 10:30 p.m. while he was watching television with Zellmer at 6225 West Fairview, Apartment 2, Sato asked to borrow his phone to place a food order (49:13). Sato lived next door at 6225 West Fairview, Apartment 3 (49:13). After Kevin lent Sato his phone, Sato left (49:14). Sato returned out of breath after 20 to 30 minutes and said, "If the pizza guy calls, don't answer" (49:14).

Strasser then went to 6225 West Fairview where he interviewed Zellmer (49:15). Zellmer confirmed Kevin's version of events and further confirmed Sato lived at 6225 West Fairview, Apartment 3 (49:15). He also indicated that Sato and his girlfriend were currently at home as he had heard them (49:15).

Strasser formulated a plan to "knock and talk" with Sato (49:17). Accompanied by three other officers, Strasser and Officer Iverson approached the back door to the apartment building at 6225 West Fairview (49:16). Iverson and Officer Post knew 6225 West Fairview, Apartment 3 to be Sato's residence from previous encounters (49:17). If Sato answered the door, Strasser intended to arrest Sato for robbery and freeze the scene pending a search warrant (49:17). If Sato did not answer the door, Strasser intended to just freeze the scene and get a search warrant (49:17). Officer Post proceeded to Sato's east bedroom window for containment (49:16; 51:11).

After identifying themselves as police, Strasser and Iverson knocked and pounded on the door for about ten minutes (49:17). After about ten minutes, Post heard sounds through the bedroom window (49:18, 36; 51:8-10). The noise sounded as if the occupants of the apartment were moving things around; he communicated his perception to Strasser (49:18).

Believing Sato was destroying evidence of the armed robbery and for safety (Sato had a history of violent offenses), Strasser and Iverson forced entry into the apartment and arrested Sato (49:18-19). The officers removed Sato from the scene (49:19). His girlfriend was not arrested (49:19). Officers Post and Iverson remained in the apartment with Sato's girlfriend to freeze the scene awaiting a search warrant (49:19-20). The police did not search the apartment (49:21, 58). No property was seized prior to police obtaining a search warrant (49:21).

Upon the issuance of a search warrant, the officers executed a search of the apartment (49:20). As a result of the search, police seized a Gold Rush Chicken bag located in a trash can; chicken, buns and slaw in the refrigerator; a pizza box with pizza located behind a dresser; and items identifying Sato (6:4).

At a second hearing, Officer Post testified about the layout of the 6225 West Fairview apartment building (51). The court also received a set of twelve photographs of the building and surrounding area (13:Ex. 2). The apartment building contained six units, three on the bottom floor and three on the top floor (51:21). Post testified he took up a position in the "gangway" (51:8). The "gangway" is a narrow passageway between the side of Sato's apartment building and the adjoining property (13:Ex. 2:image 4, 5, 11). It is bordered by a brown fence running along the property line from the garage on the neighboring property to

approximately the second of four windows on the side of Sato's building (13:Ex. 2:image 4, 11). The brown fence ends at a cyclone fence and gate across the driveway of the neighboring white house, which encloses the backyard of that house (13:Ex. 2:image 4).

STANDARD OF REVIEW

The denial of a motion to suppress presents a question of constitutional fact. An appellate court must uphold the circuit court's findings of fact unless they are clearly erroneous. It reviews de novo the application of constitutional principles to those facts. *State v. Martin*, 2012 WI 96, ¶ 28, 343 Wis. 2d 278, 816 N.W.2d 270.

Exigent circumstances and attenuation present questions of law. An appellate court reviews questions of law de novo. *State v. Tuescher*, 226 Wis. 2d 465, 468, 595 N.W.2d 443 (Ct. App. 1999).

ARGUMENT

In claiming error, Sato reasons that Officer Post invaded the curtilage of Sato's home without a warrant when he positioned himself in the "gangway" outside of Sato's bedroom window. According to Sato, because of this warrantless intrusion upon the curtilage, Post's report of noises from within Sato's apartment cannot provide the exigency necessary to justify Strasser's and Iverson's entry

into Sato's apartment to arrest him. The resulting unconstitutional entry taints the subsequent search warrant requiring suppression of the fruits of the search.

In the State's view, Sato's theory presents three possible issues for this Court: (1) Was the "gangway" area within the curtilage of Sato's apartment? (2) If Post did not enter Sato's curtilage illegally, did the noises inside Sato's apartment give police the exigent circumstances necessary to forgo the Fourth Amendment's warrant requirement? (3) If the police entered Sato's apartment illegally, was the search warrant sufficiently attenuated from the entry to purge any taint?

I. The circuit court correctly determined Officer Post did not violate the Fourth Amendment by standing near Sato's bedroom window.

The first question — whether Officer Post violated the Fourth Amendment when he took up a position outside Sato's bedroom window — affects only whether the noises he heard could properly be considered by the police in determining whether an exigency justified their entry into Sato's apartment to arrest him.

"When the Government obtains information by physically intruding on [a person's home] … a search within the original meaning of the Fourth Amendment has undoubtedly occurred." *Florida v. Jardines*, ___ U.S. ___, 133 S. Ct. 1409, 1414 (2013) (internal quotation marks omitted). Sato argues that because Post entered the curtilage of his

home, police could not properly consider what he heard and thus the State could not establish the exigent circumstances exception to the warrant requirement. However, "no search in the constitutional sense controlled by the Fourth Amendment takes place when a police officer observes objects [or, as in this case, hears] from a place where he has a right to be …." *State v. Taylor*, 60 Wis. 2d 506, 517, 210 N.W.2d 873 (1973). So if Post had the right to be in the gangway, the circuit court correctly considered the noises in determining whether exigent circumstances existed.

A. The circuit court correctly determined the area where Officer Post heard noises was not within the curtilage of Sato's apartment.

The protections of the Fourth Amendment extend beyond the walls of a home to include the curtilage of the residence. *State v. Davis*, 2011 WI App 74, ¶ 9, 333 Wis. 2d 490, 798 N.W.2d 902. "[C]urtilage is the area to which extends the intimate activity associated with the sanctity of a [person]'s home and the privacies of life, and therefore has been considered part of the home itself for Fourth Amendment purposes." *Oliver v. United States*, 466 U.S. 170, 180 (1984) (citation omitted); *State v. Martwick*, 2000 WI 5, ¶ 26, 231 Wis. 2d 801, 604 N.W.2d 552. The determination of curtilage presents a question of constitutional fact. *Martwick*, 231 Wis. 2d 801, ¶ 16.

The extent of the curtilage depends upon the nature of the premises. 1 WAYNE R. LAFAVE, SEARCH AND SEIZURE

§ 2.3(d), 767-68 n.146 (5th ed. 2012). The Wisconsin Supreme Court recently reaffirmed its adoption of the four factors set forth by the United States Supreme Court in *United States v. Dunn*, 480 U.S. 294, 301 (1987), to determine whether the curtilage encompasses a particular area in dispute. *State v. Dumstrey*, 2016 WI 3, ¶ 32, 366 Wis. 2d 64, 873 N.W.2d 502. Those factors are: (1) the proximity of the area claimed to be curtilage to the home; (2) whether the area is included within an enclosure surrounding the home; (3) the nature of the uses to which the area is put; and (4) the steps taken by the resident to protect the area from observation by people passing by. *Id*; *Dunn*, 480 U.S. at 301. *See also Martwick*, 231 Wis. 2d 801, ¶ 30.

The determination is not a mechanical application of factors but an assessment of the relation of the area in question to the particular home involved.

> [Appellate courts] do not mechanically apply these factors as part of a finely tuned formula. Instead, the factors are useful analytical tools only to the degree that, in any given case, they bear upon the centrally relevant consideration-whether the area in question is so intimately tied to the home itself that it should be placed under the home's umbrella of Fourth Amendment protection.

Dumstrey, 366 Wis. 2d 64, ¶ 32 (citation and internal quotation marks omitted). The circuit court correctly concluded that the gangway area was not within the

curtilage of Sato's apartment (51:21). The court used the *Dunn* four factors to reach its conclusion (52:19-20).

The first factor looks to the proximity of the gangway area to Sato's apartment. The gangway ran along that part of the building forming the outside wall of Sato's bedroom (13:Ex. 2:image 4, 5). At first blush, this might be considered a near proximity. However, this Court should keep in mind that Sato's building housed five other apartments, two on the same level as his and three on the second level (51:20). The *Dumstrey* Court appears to adopt a limited view of curtilage for apartment buildings. The Court observed, "The United States Court of Appeals for the First Circuit has held that, in an apartment building, 'a tenant's [home] cannot reasonably be said to extend beyond his [or her] own apartment and perhaps any separate areas subject to his [or her] exclusive control. … We tend to agree.'" *Id.* ¶ 34 (quoting *United States v. Cruz Pagan*, 537 F.2d 554, 558 (1st Cir. 1976)). *See also Commonwealth. v. Thomas*, 267 N.E.2d 489, 491 (Mass. 1971) ("In a modern urban multifamily apartment house, the area within the 'curtilage' is necessarily much more limited than in the case of a rural dwelling subject to one owner's control. … In such an apartment house, a tenant's 'dwelling' cannot reasonably be said to extend beyond his own apartment and perhaps any separate areas subject to his exclusive control."). *Dumstrey* appears to weigh this factor in favor of the conclusion that the gangway was not within the curtilage.

The second factor considers whether the gangway is "included within an enclosure that also surrounds [Sato's] home." *Dumstrey*, 366 Wis. 2d 64, ¶ 38. The circuit court found

> [W]hat we saw in the photos was a partial fence that appeared to divide the building that the defendant lived in from the … home next door. It did not run the length of the building. … I believe it was one-half or less of the east side of the apartment building that the fence ran … starting at, approximately, the rear of the building. It seemed to coincide … to where the homeowner east of the defendant's unit would have wanted it placed in order to give themselves some privacy, not the reverse.

(52:18-19). The evidence supports the circuit court's conclusion. The gangway was not within an enclosure of any kind. The brown fence next to the gangway does not enclose the gangway. The fence encloses the neighbor's backyard (13:Ex. 2:image 4, 5, 11). This second factor weighs in favor of the circuit court's conclusion that the gangway is not within the curtilage.

The third factor looks to the nature of the use. The concept of curtilage protects "the area to which extends the intimate activity associated with the sanctity of a [person's] home and the privacies of life." *Oliver*, 466 U.S. at 180 (internal quotation marks and citation omitted); *United States v. French,* 291 F.3d 945, 951 (7th Cir. 2002). The circuit court found, "There is no indication regarding nature and uses to which that area was put. There was no indication that there was any use to which that area was being put that would relate to any claims of privacy" (52:20).

Again, the evidence supports the circuit court's conclusion. The photographs show the only structure near the gangway to be the neighbor's brown fence along the property line between Sato's apartment building and the neighbor's residence next door (13:Ex. 2:image 4, 5, 11). This third factor weighs against the gangway being within the curtilage. *See, e.g., Martwick*, 231 Wis. 2d 801, ¶ 41 ("Nothing indicates that the [cultivation] area was used for intimate activity associated with the sanctity of a man's home and the privacies of life.") (citation and internal quotation marks omitted).

Finally, the fourth factor looks to the steps Sato had taken to protect the gangway from observation by passersby. *Dumstrey,* 366 Wis. 2d 64, ¶ 43. The circuit court found, "[T]here's no evidence in this record that steps were taken by [Sato] to protect the [gangway] area from observation by people passing by" (52:20). The evidence supports the circuit court's conclusion in this regard also. A passerby on the street or in the alley or in the parking area can easily view the gangway. The building and the neighbor's brown fence provide the only obstruction to viewing the gangway area. And an observer aligned perpendicular to and in front of the gangway has a completely unobstructed view from the street to the alley (13:Ex. 2:image 4, 5, 11). Since neither Sato nor the building's owner attempted to screen the gangway from public view, this fourth factor weighs in favor of the circuit

court's conclusion that the gangway is not within the curtilage.

Sato relies on *State v. Popp*, 2014 WI App 100, 357 Wis. 2d 696, 855 N.W.2d 471. Sato's brief at 27-30. His reliance is misplaced. First, unlike the multi-unit apartment building at issue here, *Popp* involved a single unit trailer. *Id.* ¶¶ 3, 5. The officers' positions next to the windows, therefore, invaded an area controlled only by Popp and Thomas, Popp's trailer-mate, (and perhaps an owner — the opinion does not say). Here, six other entities (five other tenants and the owner) had joint control of the area. Second, Thomas specifically denied consent to enter the trailer (and presumably the curtilage) so the police activity was more egregious than Post's merely standing in the gangway. *Id.* ¶ 6. Third, the officers went up the back steps and onto the porch to look through one window. *Id.* ¶ 20. *See Jardines*, 133 S. Ct. at 1415-17 (holding the curtilage encompassed Jardine's front porch rendering a dog sniff from the porch a violation of the Fourth Amendment). The officers also went onto a grass and snow-covered area to look through a second bay window partially shielded by blinds. *Popp*, 357 Wis. 2d 696, ¶ 7. One of the officers intruded a second time, shining a flashlight into the trailer in order to make observations which then appeared in the subsequent search warrant. *Id.* ¶¶ 7, 11. Here, Post stood in the gangway but did not look in the window before he heard noises. Unlike sight, hearing

does not require a separate intrusion such as occurred in *Popp*. The facts of this case distinguish it from *Popp*.

B. Sato has no reasonable expectation of privacy in the area where Officer Post heard noises.

The *Dumstrey* Court surveyed two recent United States Supreme Court cases involving searches, specifically, *United States v. Jones*, ___ U.S. ___, 132 S. Ct. 945 (2012), and *Florida v. Jardines*, ___ U.S. ___, 133 S. Ct. 1409 (2013). From *Jones*, the *Dumstrey* Court observed, "'Fourth Amendment rights do not rise or fall with the *Katz*[2] formulation.' … Rather, 'the *Katz* reasonable-expectation-of-privacy test has been *added* to, not *substituted for*, the common-law trespassory test.'" *Dumstrey*, 366 Wis. 2d 64, ¶ 28 (quoting from *Jones*, 132 S. Ct. at 950, 952) (emphasis the Court's). The *Dumstrey* Court also observed the *Jardines* Court used a trespassory test to conclude police violated the Fourth Amendment by using a drug sniffing dog on Jardine's porch. *Dumstrey*, 366 Wis. 2d 64, ¶ 29.

The *Dumstrey* Court concluded, "Given the Supreme Court's recent emphasis on the distinction between the trespassory, curtilage analysis and the reasonable expectation analysis, we conclude … we must consider separate and distinct from a reasonable expectation of privacy whether the area in question is constitutionally protected curtilage." *Id.* ¶ 30. The *Dumstrey* Court then

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[2] *Katz v. United States*, 389 U.S. 347, 352 (1967).

analyzed both the curtilage question and Dumstrey's reasonable expectation of privacy.

Here, the circuit court did not determine whether Sato had a reasonable expectation of privacy in the gangway, most probably because its decision preceded *Dumstrey*. The evidence presented to the circuit court establishes, however, that Sato did not have a reasonable expectation of privacy in the gangway area.

Whether Sato had a reasonable expectation of privacy turns on two questions: "(1) whether the person exhibits an actual, subjective expectation of privacy in the area; and (2) whether society is willing to recognize such an expectation as reasonable." *Id.* ¶ 47 (citation omitted). The ultimate inquiry depends on the totality of circumstances. *Id.*

> In answering these questions, [the court has] identified six factors as relevant: "(1) whether the defendant had a property interest in the premises; (2) whether he [or she] was legitimately (lawfully) on the premises; (3) whether he [or she] had complete dominion and control and the right to exclude others; (4) whether he [or she] took precautions customarily taken by those seeking privacy; (5) whether he [or she] put the property to some private use; and (6) whether the claim of privacy is consistent with historical notions of privacy."

Id.

The same evidence that supports the second, third and fourth factors of the curtilage analysis also supports the conclusion that Sato did not exhibit an actual, subjective expectation of privacy in the gangway area. Sato legally occupied the apartment, although the record contains no

evidence of who had a property interest as lessee of that apartment. Sato did not have complete dominion and control. At best he had joint control with the owner and the other five tenants. He took no precautions customarily taken by those seeking privacy as evidenced by the absence of any obstruction to view from the street and alley. He did nothing to put the gangway to any use. And neither historical notions of privacy nor society in general reasonably recognize a privacy interest in such an open passage way. "A sidewalk, pathway, common entrance or similar passageway offers an implied permission to the public to enter which necessarily negates any reasonable expectancy of privacy" *State v. Edgeberg*, 188 Wis. 2d 339, 347, 524 N.W.2d 911 (Ct. App. 1994) (citation omitted).

The circuit court correctly determined that the noises Officer Post heard could be properly considered in determining whether exigent circumstances relieved police of the Fourth Amendment's warrant requirement.

II. The circuit court erred in concluding that exigent circumstances did not relieve the police of the requirement to obtain a warrant.

If the circuit court incorrectly determined that the curtilage of Sato's apartment did not include the gangway, then the noises Post heard cannot constitute an exigency to justify police entry into the apartment. If, however, the circuit court correctly held that the curtilage of Sato's apartment did not include the gangway, then this Court

must determine whether the noises Post heard provided the necessary exigent circumstance justifying police entry. The State contends that the circuit court erred in finding no exigent circumstances. Since the noises Post heard justified the police entry, the entry did not taint the subsequent search warrant and the circuit court's ultimate refusal to suppress the fruits of the search should be affirmed.

Warrantless entry into a home to effectuate an arrest is presumptively unreasonable. *Peyton v. New York*, 445 U.S. 573, 588-89 (1980); *Laasch v. State,* 84 Wis. 2d 587, 592, 267 N.W.2d 278 (1978). A recognized exception to the rule against a warrantless entry to arrest is probable cause and exigent circumstances.[3] *Peyton*, 445 U.S. at 589; *State v. Ferguson*, 2009 WI 50, ¶ 19, 317 Wis. 2d 586, 767 N.W.2d 187. The exception recognizes that in special circumstances, when there is an urgent need coupled with insufficient time to obtain a warrant, "it would be unrealistic and contrary to public policy to bar law enforcement officials at the doorstep." *State v. Robinson*, 2010 WI 80, ¶ 24, 327 Wis. 2d 302, 786 N.W.2d 463. *See also Kentucky v. King*, 563 U.S. 452, 460 (2011) ("[T]he need to prevent the imminent destruction of evidence has long been recognized as a sufficient justification for a warrantless search").

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[3] The circuit court held that the information the officers had prior to knocking on Sato's door amounted to probable cause both to arrest him and to search his apartment (52:22). Sato does not take issue with the circuit court's conclusion.

Strasser testified he entered the apartment because he feared that a delay in obtaining a warrant would risk that evidence of the armed robbery would be destroyed, and for safety (49:18-19). Strasser's belief that a delay in obtaining a warrant would risk the destruction of evidence alone is sufficient to support exigency. *Robinson*, 327 Wis. 2d 302, ¶ 31, n.13.

Police here intended to conduct a knock and talk. Police may permissibly take that course of action. *King*, 563 U.S. at 455 ("The Kentucky Supreme Court held that the exigent circumstances rule does not apply … because the police should have foreseen that their conduct would prompt the occupants to attempt to destroy evidence. We reject this interpretation of the exigent circumstances rule."). The noises Post heard provided the necessary exigency because the officers reasonably feared the destruction of evidence.

In *Robinson*, the Wisconsin Supreme Court held that "[o]nce Robinson was aware of the officers' presence outside his door and footsteps were immediately heard running from the door, it was certainly reasonable for the officers to assume that Robinson would destroy evidence of his illegal drug activity." *Robinson*, 327 Wis. 2d 302, ¶ 31.

In *King*, officers "could hear people inside moving, and it sounded as though things were being moved inside the apartment. These noises, … led the officers to believe that drug-related evidence was about to be destroyed." *King*, 563 U.S. at 456 (quotation marks and brackets omitted). The

King Court held that "Where, as here, the police did not create the exigency by engaging or threatening to engage in conduct that violates the Fourth Amendment, warrantless entry to prevent the destruction of evidence is reasonable and thus allowed." *Id.* at 462 (footnote omitted).

In *State v. Hughes*, 2000 WI 24, ¶ 27, 233 Wis. 2d 280, 607 N.W.2d 621, awareness of the police and the strong smell of marijuana amounted to sufficient exigent circumstances to justify a warrantless entry and search for drugs.

Here, Post heard sounds almost identical to those in *King*. Sato and his girlfriend must have been aware of the police presence. And police had at least as much information as in *Robinson* and *King*.

Robinson, *Hughes* and *King* were drug cases but that distinction should not matter. Here, the crime was more serious than a drug case, armed robbery. The severity of the crime does affect the amount of evidence required to establish the exigency. The less severe the crime, the greater the evidence of exigency must be. *Id.* ¶¶ 36-39. And this case does share one circumstance with *Robinson*, *Hughes* and *King*. Food, like drugs, can be consumed thus destroying evidence of the particular crime involved.

The circuit court emphasized that police had enough information to apply for and get a search warrant prior to their approach to Sato's apartment (52:22). The circuit court's reliance on sufficient evidence for probable cause is

suspect in view of the *King* Court's rejection of lower courts' justification for ignoring exigent circumstances because "after acquiring evidence that is sufficient to establish probable cause to search particular premises, the officers do not seek a warrant but instead knock on the door and seek either to speak with an occupant or to obtain consent to search" *King*, 563 U.S. at 466. The *King* Court believed, "[t]his approach unjustifiably interferes with legitimate law enforcement strategies." *Id.*

The information police had at the time of their entry demonstrated an exigency sufficient to forgo the warrant requirement and justified police entry into Sato's apartment.

III. The circuit court correctly held that the search warrant was sufficiently attenuated to purge the taint of any unlawful entry.

Evidence does not become "fruit of the poisonous tree" simply because it would not have come to light but for illegal actions by law enforcement. *Wong Sun v. United States,* 371 U.S. 471, 487–88 (1963); *State v. Artic*, 2010 WI 83, ¶ 64, 327 Wis. 2d 392, 786 N.W.2d 430. "[E]vidence is not to be excluded if the connection between the illegal police conduct and the discovery and seizure of the evidence is 'so attenuated as to dissipate the taint.'" *State v. Rogers*, 2008 WI App 176, ¶ 21, 315 Wis. 2d 60, 762 N.W.2d 795 (quoting *Segura v. United States*, 468 U.S. 796, 805 (1984)).

If the police illegally entered into Sato's apartment to arrest him because they lacked exigent circumstances, this

Court must determine whether the evidence discovered as a result of the search authorized by the search warrant was sufficiently attenuated to purge the taint of the illegal entry. The State bears the burden to prove the admissibility of evidence after the primary taint of a constitutional violation has been established. *State v. Harris*, 2016 WI App 2, ¶ 9, ___ Wis. 2d ___, ___ N.W.2d ___.

"The object of attenuation analysis is 'to mark the point at which the detrimental consequences of illegal police action become so attenuated that the deterrent effect of the exclusionary rule no longer justifies its cost.'" *Artic*, 327 Wis. 2d 392, ¶ 65 (quoting *Brown v. Illinois*, 422 U.S. 590, 609 (1975) (Powell, J., concurring)), "The primary concern in attenuation cases is whether the evidence objected to was obtained by exploitation of prior police illegality or instead by means sufficiently attenuated so as to be purged of the taint." *Harris*, 2016 WI App 2, ¶ 13 (quoting *State v. Anderson*, 165 Wis. 2d 441, 447–48, 477 N.W.2d 277 (1991)).

To determine whether the primary taint was purged, the *Brown* Court looked to three factors: (1) the temporal proximity of the arrest and the confession; (2) the presence of intervening circumstances; and, particularly (3) the purpose and flagrancy of the official misconduct. *Brown*, 422 U.S. at 603–04; *Artic*, 327 Wis. 2d 392, ¶ 66.

The first factor is the time between the entry and the search. *Id.* ¶ 73. The record does not disclose the exact time between the entry into Sato's apartment and the execution of the search warrant, but Strasser testified he left the apartment, wrote up the search warrant, got it signed and then returned to execute it (49:20). Assistant District Attorney Christopher Ladwig testified that Strasser drafted the warrant's supporting affidavit and Ladwig reviewed it (49:69). The search warrant affidavit avers that Ladwig reviewed the affidavit for the search warrant at 2:00 p.m. October 29, 2013 (6:13). Strasser testified he went to locate and talk to the McDonalds at 9:00 to 10:00 a.m. (49:11). So, about three hours elapsed between the entry and the search, assuming an hour from 10:00 a.m. for the interviews and the arrest. In *Rogers*, the police took two hours to obtain a warrant. *Rogers*, 315 Wis. 2d 60, ¶ 22.

The second factor is the presence or absence of meaningful intervening circumstances. *Artic,* 327 Wis. 2d 392, ¶ 79. In addressing this issue, courts look to whether the officers exploited their unlawful conduct, in this case the entry into Sato's apartment. *Id.* Here, the presence of intervening circumstance favors attenuation. First, the officers did not conduct any search of the apartment after the entry (49:21, 58). True, Post did a protective look through the apartment. Post testified he looked in all of the rooms to determine if anybody else was present (49:48-49). Post and Iverson also stayed in the apartment awaiting the

warrant. Post testified he was with Sato's girlfriend for "quite sometime" (49:48). The *Rogers* Court found neither of these required suppression. *Rogers*, 315 Wis. 2d 60, ¶ 22.

None of the facts in the search warrant affidavit derived from the entry. Strasser knew all of the information in the affidavit prior to police entry into Sato's apartment (6:10-13). This also distinguishes this case from *Popp* where the unlawful intrusion provided part of the information to support the search warrant application. Thus, as in *Rogers*, the warrant was based entirely on sources independent from the entry. *Id.* ¶¶ 21-22.

A prosecuting official and a detached magistrate reviewed the affidavit supporting the application for search warrant. The magistrate issued the warrant. The Wisconsin Supreme Court "has considered whether there is evidence of some degree of bad faith exploitation of the situation on the part of the officer." *Artic,* 327 Wis. 2d 392, ¶ 91 (citing *State v. Richter*, 2000 WI 58, ¶ 53, 235 Wis. 2d 524, 612 N.W.2d 29). Conversely, "courts frequently hesitate to find that an officer's violation of the law was 'purposeful' or 'flagrant' when the officer broke the law acting in good faith." *Id.* (citing *United States v. Washington*, 387 F.3d 1060, 1075 (9th Cir. 2004).

The third factor is the purposefulness and flagrancy of the police conduct. "This factor is 'particularly' important because it goes to the heart of the exclusionary rule's objective of deterring unlawful police conduct." *Artic*,

327 Wis. 2d 392, ¶ 91 (citing *State v. Phillips*, 218 Wis. 2d 180, 209, 577 N.W.2d 794 (1998)).

The record does not contain evidence of bad faith on the part of police. Strasser testified his strategy was to knock and talk, primarily to affect Sato's arrest, not to search the apartment (49:17). A knock and talk is a legal activity. *King*, 563 U.S. at 455. Strasser entered the apartment because he believed he had exigent circumstances (49:22). Post took up his position in the gangway for containment (51:11). He was to prevent Sato's escape through the bedroom window. None of the officers searched the apartment at the time of the entry (49:21, 58).

Under the facts of this case, the search was sufficiently attenuated from the entry that, even if the entry was without exigent circumstances, the fruits of the search should not be suppressed. The police did not exploit any prior police illegality.

CONCLUSION

For the reasons given above, this Court should affirm the circuit court's denial of Sato's motion to suppress the fruits of the search warrant executed on his apartment and affirm his judgment of conviction.

Dated at Madison, Wisconsin, this 3rd day of March, 2016.

Respectfully submitted,

BRAD D. SCHIMEL
Attorney General

WARREN D. WEINSTEIN
Assistant Attorney General
State Bar #1013263

Attorneys for Plaintiff-Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 264-9444
(608) 266-9594 (Fax)
weinsteinwd@doj.state.wi.us

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 5,484 words.

Dated this 3rd day of March, 2016.

_____
Warren D. Weinstein
Assistant Attorney General

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Warren D. Weinstein
Assistant Attorney General