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STATE OF WISCONSIN

C O U R T O F A P P E A L S

DISTRICT II

Case No. 2016AP1061-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

ROBERT TORRES,

Defendant-Appellant.

On Appeal from an Amended Judgment of Conviction Entered in the Racine County Circuit Court, the Honorable Michael J. Piontek, Presiding.

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

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ISSUE PRESENTED

Did law enforcement violate Robert Torres' right under both United States and Wisconsin Constitutions to be free from unreasonable searches and seizures when they entered his home without a warrant?

Mr. Torres was in his home on the second floor of a duplex when law enforcement entered without a warrant. (42:5; App. 105). Officers were there responding to the downstairs neighbor's report of an underage party and a generalized smell of marijuana. (42:3; App. 103). Mr. Torres moved to suppress any evidence found subsequent to the warrantless entry. (8). The trial court denied Mr. Torres' motion, finding that the community caretaker exception to the warrant requirement justified the entry. (42:10; App. 110).

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

A primary issue in Mr. Torres' case is the applicability of the community caretaker exception to the Fourth Amendment's warrant requirement where law enforcement suspects an unsupervised underage party. The bounds of the community caretaker exception as applied to warrantless home entries in Wisconsin are almost exclusively a product of Wisconsin jurisprudence and therefore is a matter of statewide concern. As such, Mr. Torres requests oral argument. Publication is also appropriate to further clarify the law regarding the community caretaker exception to the Fourth Amendment.

STATEMENT OF THE CASE AND FACTS

On October 10, 2013, the State filed a criminal complaint charging Robert Torres with five counts of possession of child pornography, contrary to Wis. Stat. § 948.12(1m), three counts of second degree sexual assault, contrary to Wis. Stat. § 940.225(2)(cm), one count of first degree recklessly endangering safety, contrary to Wis. Stat. § 941.30(1), one count of possession of a dangerous weapon by a person under the age of 18, contrary to Wis. Stat. § 948.60(2)(a), one count possession of Tetrahydrocannabinols (THC), contrary to 961.41(3g)(e), and one count of possession of a controlled substance (MDMA), contrary to Wis. Stat. § 961.41(3g)(b). (1). On October 30, 2013, the State filed an information which included an additional count of sexual exploitation of a child by a person under 18, contrary to Wis. Stat. § 948.05(1)(b). (2).

The complaint alleged that on September 6, 2013, the downstairs resident of a duplex reported to police that there was an underage party occurring in the upstairs apartment. (1:3). According to the complaint, officers ultimately entered the upstairs unit and discovered N.F., unconscious and partially nude. (1:3-4). N.F. later told officers her last memory was of being on the home's balcony. (1:4). Per the complaint, she was drinking and passed out due to intoxication. (1:4). Officers also located a handgun, marijuana cigarettes, and the co-defendant's cell phone containing videos and photographs depicting the sexual assault of N.F. (1:4-5). (1:4). The complaint further alleged that on September 24, 2013, a search warrant was executed on Mr. Torres' residence and law enforcement found pills testing positive for the drug ecstasy. (1:4).

Mr. Torres filed a motion to suppress any evidence seized as a result of law enforcement's warrantless entry into his home on September 6, 2013. (8). Mr. Torres argued that officers unlawfully entered his unit and unlawfully conducted a protective sweep. [1] (8:2; 18). Both officers testified at the hearing on the motion to suppress. (40:13, 49).

Suppression Hearing and Trial Court's Ruling

According to Officer Thomas Reigelman and Officer Brinelle Nabors, they were dispatched to 1366 Dean Boulevard for a "narcotics in progress" at approximately 9:17 p.m. on September 6, 2013. (40:13-14, 50). The original dispatch was not based on a concern for anyone's safety. (40:19-20). A two-unit duplex with an upper and a lower unit and shared front porch is located at that address. (10; 40:14-15). The call originated with the resident of the lower unit, K.L. (40:14).

K.L. first met with officers in the duplex's front yard. (40:14). K.L. told officers there was a "15 to 16-year-old male that lived upstairs" whose "mother and [] boyfriend were out of town for several days." (40:14). She claimed to have seen them drinking on the upper porch and was concerned about a smell of marijuana coming into her apartment. (40:14). K.L. told officers she believed that "several juveniles, both male and female, fled from the residence" after hearing her call the landlord to report the situation. (40:15). There is no indication in the record that she attempted to contact the tenant's parents, nor does the record contain an explanation for how she knew they were out of town or that their son was left unattended.

[1] This appeal involves the officers' entry into the home. Mr. Torres does not challenge the protective weep on appeal.

K.L. invited officers inside her apartment to smell the odor of marijuana. (40:14-15). Officer Reigelman could not deduce from the odor how long the smell had been there or whether the people who smoked were still upstairs. (40:21). Officers could not recall if K.L. said what time she came home, when she first smelled the marijuana, or when she saw the alcohol consumption. (40:22). K.L. said she wanted officers to make contact with the supposedly unattended juvenile upstairs. (40:16). She did not express a concern that the people upstairs were armed, dangerous, or in any way violent. (40:39).

Officer Nabor testified that a concern was to "make sure that the well-being of everybody who [was] attending that party [was] okay. Also there's no -- make sure there [was] no underage drinking or drugs going on. To make sure the well-being of whoever [sic] residence [it was], make sure everybody's okay. Community caretaker." (40:50-51). Officer Reigelman testified that "I know teens don't use very good judgment very often so it's kind of a community caretaker issue to check on a juvenile." (40:18).

The doorway to the upper unit had its own doorbell, a screen door, a front door, and Office Nabor testified he was "pretty sure" there were locks. (10; 40:24, 63-64). K.L.'s unit had its own doorway to the left of Mr. Torres' unit. (10; 40:24). The doorways for the two respective apartments had different house numbers. (10). The trial court made a factual finding that the two units had "separate entrances and separate stairways, separate doors." (42:6; App. 106).

Officers heard the upstairs floor "squeak" while they were still inside K.L.'s unit and were concerned "somebody else [would] try running out the front door." (40:16). As officers stepped back onto the shared front porch, "the door to

the upper unit flew open" and a male juvenile later identified as Alejandro Sanchez-Morales[2] appeared. (40:16, 52). Mr. Sanchez-Morales was still in the doorway; officers "didn't want him to be able to run past[.]" (40:26). Officers could not smell the marijuana outside, nor is there indication in the record that officers could smell the marijuana on Mr. Sanchez-Morales. (40:21, 27-8). Officer Reigelman testified as follows:

> Q: Did you at this point in time suspect this individual had something to do with the marijuana you smelled?
>
> A: I didn't know.
>
> Q: Could you smell it on him?
>
> A: I smelled it in the back hallway. I didn't smell it - -
>
> Q: The back hallway or the front hallway? [3]
>
> A: The hallway going up, the stairs going up.

(40:27). According to Officer Nabors, the downstairs neighbor provided a description of the upstairs tenant and Mr. Sanchez-Morales did not match that description. (40:52-53).

Officer Reigelman testified that he asked Mr. Sanchez-Morales "who he was," and he "[said] something like this is my friend's house, or something like that." (40:26). Officer

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[2] Mr. Sanchez-Morales was the co-defendant in this case.

[3] Even though this portion of Officer Reigelman's testimony interchanges "front" and "back," there is no indication in the record that he was ever inside or near any stairwell other than the front stairwell. It is Mr. Torres' position that Officer Reigelman is referring only to this front stairwell.

Nabors testified that they asked him if he was the owner or renter of the residence and Mr. Sanchez-Moralez said "No, I'll go get him." (40:52). Officer Reigelman indicated that regardless of whether or not Mr. Sanchez-Morales had offered to get the actual resident, it would not have necessarily made a difference – "[w]ell, he could say that, yeah, but we don't – we wouldn't let him automatically – we want[ed] to be with him" because "narcotics [were] involved." (40:27).

Officer Reigelman testified that Mr. Sanchez-Morales led him upstairs. (40: 16, 28). Officer Reigelman also testified that once Mr. Sanchez-Morales told him his friend lived there, he told the juvenile "[w]ell, we need to speak with your friend" and went inside the unit. (40:29). Officer Reigelman acknowledged that his report reflected that he told Mr. Sanchez-Morales to go upstairs and officers followed him inside the unit. (40:30). Officer Nabor testified that once Mr. Sanchez-Morales told officers he would get the resident of the home, officers informed him "we'll follow you upstairs" and Mr. Sanchez-Morales then held the door open for them and did not try to stop them. (40:53). There is no indication that officers asked to speak with an adult or asked if any adults were home before entering the unit.

Officer Reigelman was "about two to three steps behind" Mr. Sanchez-Morales, and Officer Nabors was behind Officer Reigelman. (40:33-34). There was an odor of marijuana in the stairwell. (40:27-28). Once Mr. Sanchez-Morales got to the top landing, "he real quickly shot into the apartment itself." (40:33). Officer Reigelman ordered Mr. Sanchez-Morales to stop and handcuffed him somewhere between the living room and near the dining room. (40:17, 34-35). Officer Reigelman testified that he ordered Mr.

Sanchez-Morales to stop "for fear that evidence may be destroyed." (40:40).

Mr. Sanchez-Morales was "looking, glancing over at" and was "making some gesture to somebody else." (40:34). Officer Reigleman took this to mean that Mr. Sanchez-Morales was warning another person that police were present, which concerned him in terms of officer safety and destruction of evidence. (40: 17). Officer Reigelman handcuffed Mr. Sanchez-Morales. (40:17). Officer Nabors then called for the other person to come out. (40:55). Mr. Torres stuck his head out, disappeared, then came around the corner "after about four or five seconds." (40:55-56). Officer Nabor heard "some wrestling around going on in there" before Mr. Torres came out. (40:68). Mr. Torres was also patted down and handcuffed. (40:38, 56).

Mr. Torres said there were no other people in the residence. (40:56). A protective sweep was done on account of the "heavy" smell of marijuana and to check for other people "for [officer] safety and theirs as well." (40:56; 40:69). Officer Nabor found an unconscious young female, alcohol, and a gun inside the bedroom Mr. Torres exited. (40:56).

The State argued that the entry was justified under three exceptions to the Fourth Amendment's warrant requirement – (1) the emergency doctrine, (2) exigent circumstances, and (3) the community caretaker exception. (18:4, 6). The trial court found that the warrantless entry into Mr. Torres' residence was justified because officers "were engaged in a community caretaker function." (42:10; App. 110). In denying Mr. Torres' motion to suppress, the trial court stated, "I think it's reasonable for the police to assume that they make sure that everyone's okay." (42:7; App. 107). The trial court ruled:

> [Officers responded] primarily having a concern about health and safety and when you have contact with the remaining persons who had not fled or may be unconscious in the premises and in the court cases that carved out this exception the court is required to consider the substantial interests the police have in ensuring the well-being and safety of those who might be victims of a crime or suffering from a drug overdose and, you know, they certainly had reason to have that suspicion and it was exigent in terms of the immediacy of it, the number of people that fled.

(42:8-9; App. 108-09). The trial court also found that that the officers did not create any exigent circumstances. (42:6; App. 106).

Mr. Torres pled guilty on January 23, 2015 to one count possession of child pornography, one count second degree sexual assault, one count of first degree recklessly endangering safety, and one count of possession of a dangerous weapon by a person under the age of 18. (19; 20; 21; 22). The remaining counts were dismissed and read in. (27). He received a global sentence of 20 years initial confinement followed by 10 years of extended supervision. (26; 27).[4]

[4] Prior to filing this appeal, Mr. Torres filed a postconviction motion challenging the assessment of DNA surcharges in his case. (30). His motion was granted and the trial court vacated the DNA surcharges for counts 8, 9, and 10, leaving the DNA surcharge assessed for count 1. (31; 32; App. 113-117). The amended judgment of conviction contains a clerical error that the total DNA surcharge amount owed is $750.00, whereas the assessment report correctly reflects that there is only a $250.00 DNA for count 1. (31; 32; App. 113-117). This discrepancy has no bearing on the issues contained in this appeal and undersigned counsel is attempting to rectify the issue directly with the Department of Corrections. If this Court would prefer another amended conviction, Mr.
(continued)

ARGUMENT

I. Police Violated Mr. Torres' Constitutional Right to be Free from Unreasonable Searches When They Entered His Home Without a Warrant.

A. Principles of law and standard of review.

The Fourth Amendment to the United States Constitution and Article I, § 11 of the Wisconsin Constitution guarantees citizens the right to be free from unreasonable searches and seizures. "[T]he Fourth Amendment has drawn a firm line at the entrance to the house." ***Payton v. New York***, 445 U.S. 573, 590 (1980). Warrantless searches and seizures inside a home are "presumptively unreasonable." ***Payton***, 445 U.S. at 586. Even one step into a protected space constitutes an entry for purposes of the Fourth Amendment. ***State v. Johnson***, 177 Wis. 2d 224, 231-32, 501 N.W.2d 876 (Ct. App. 1993).

Warrantless searches are "per se unreasonable," subject only to "a few carefully delineated exceptions." ***State v. Ziedonis***, 2005 WI App 249, ¶ 13, 287 Wis.2d 831, 707 N.W.2d 565 (quoting ***State v. Boggess***, 115 Wis.2d 443, 449, 340 N.W.2d 516(1983)). A warrantless entry is a search for purposes of the Fourth Amendment. ***State v. Pinkard***, 2010 WI 81, ¶ 30, 327 Wis. 2d 346, 785 N.W.2d 592. The State bears the burden of proving that a warrantless search falls within "one of a few, narrowly drawn exceptions." S***tate v. Milashoski***, 159 Wis. 2d 99, 111, 464 N.W.2d 21 (Ct. App. 1990), *aff'd*, 163 Wis. 2d 72, 471 N.W.2d 42 (1991).

Torres requests that this Court direct the circuit court to make the requisite changes without further altering the existing deadlines in Mr. Torres' case.

Among such exceptions to the warrant requirement recognized by Wisconsin courts are the community caretaker exception, the emergency exception, and the exigency exception. The community caretaker exception is applied when law enforcement acts as "a community caretaker to protect persons and property." ***State v. Pinkard***, 2010 WI 81, ¶ 14. The emergency exception is applied when an entry occurs because a person requires "immediate aid or assistance" for an "actual or threatened injury." ***Boggess***, 115 Wis. 2d at 452. The exigent circumstances exception is applied when an arrest is "made in 'hot pursuit,'" there is "a threat to [the] safety of a suspect or others," there is a risk of destruction of evidence, or "a likelihood that [a] suspect will flee." ***State v. Kiekhefer***, 212 Wis. 2d 460, 476, 569 N.W.2d 316 (Ct. App. 1997).

This Court applies a two part test when reviewing the denial of a motion to suppress. ***State v. Popp***, 2014 WI App 100, ¶ 13, 357 Wis. 2d 696, 855 N.W.2d 471. Trial court findings of fact are upheld unless clearly erroneous and review of the application of constitutional principles to the facts are reviewed de novo. ***Id***.

B. The warrantless entry into Mr. Torres' home did not fall within the scope of the community caretaker exception.

"Officers may exercise two types of functions – law enforcement functions and community caretaker functions." ***Pinkard***, 2010 WI 81, ¶ 18. An officer who "discovers a member of the public who is in need of assistance" is acting within a community caretaker capacity. ***State v. Kramer***, 2009 WI 14, ¶ 32, 315 Wis.2d 414, 759 N.W.2d 598. Wisconsin courts permit warrantless home entries when officers are acting pursuant to this community caretaker

function. [5] ***Pinkard***, 2010 WI 81, ¶ 14. A warrantless entry into a home premised on the community caretaker function is "more suspect" than an equivalent vehicle entry. ***State v. Ultsch***, 2011 WI App 17, ¶ 12, 331 Wis. 2d 242, 793 N.W.2d 505 (citing ***Pinkard***, 2010 WI 81, ¶ 20). In ***Cady v. Dombrowski***, the United States Supreme Court stated that the exercise of an officer's community caretaker authority must be "totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute." 413 U.S. 433, 441 (1973).

Wisconsin courts employ a three-part test to determine whether an officer's conduct can be properly considered part of the community caretaker exception to the Fourth Amendment's warrant requirement. ***Pinkard***, 2010 WI 81, ¶ 29. Courts evaluate:

> (1) whether a search or seizure within the meaning of the Fourth Amendment has occurred;
>
> (2) if so, whether the police were exercising a bona fide community caretaker function; and
>
> (3) if so, whether the public interest outweighs the intrusion upon the privacy of the individual such that the community caretaker function was reasonably exercised within the context of a home.

Id. "Overriding this entire process is the fundamental consideration that any warrantless intrusion must be as limited as is reasonably possible, consistent with the purpose justifying it in the first instance." ***State v. Anderson***, 142 Wis. 2d 162, 169, 417 N.W.2d 411 (Ct. App. 1987)(established the

[5] The United States Supreme Court has not recognized the community caretaker exception as a justification for a warrantless home entry. ***Pinkard***, 2010 WI 81, ¶ 26 n. 8.

aforementioned three-part test), rev'd on other grounds, 155 Wis. 2d 77, 454 N.W.2d 763 (1990).

Application of the three-part test

1. A search occurred.

A warrantless entry is a search for purposes of the Fourth Amendment. ***Id.***, ¶ 30. It was uncontested in the trial court that a search occurred – "[t]here is no question that the officer did not have a search warrant at that time. That's not disputed and the question is at the time of that entry whether or not one of the exceptions to the search warrant requirement was present." (42:5; App. 105). The trial court also stated that this first part was "pretty much agreed to or stipulated to." (42:8; App 108). Officer's entry into Mr. Torres' unit was therefore a search for purposes of satisfying the first prong of the three-part community caretaker test.

2. There was no bona fide community caretaker function to justify the warrantless intrusion because police did not have an objectively reasonable basis to believe anyone inside Mr. Torres' residence was in need of assistance.

The second step of the community-caretaker analysis requires this Court to decide whether the officer was engaged in a bona fide community caretaker function in the context of the circumstances "as they existed at the time of the police conduct." ***Id.***, ¶ 31. Again, it is a function "totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute." ***Cady***, 413 U.S. at 441. Subjective law enforcement concerns are permitted so long the officer "has articulated an objectively reasonable basis under the totality of the circumstances for the

community caretaker function."[6] ***Pinkard***, 2010 WI 81, ¶ 31, citing ***Kramer***, 2009 WI 14, ¶ 36.

In ***State v. Ultsch,*** this Court rejected a proposed community caretaker entry after finding police lacked an "objectively reasonable basis" to believe there was someone in need of assistance inside the home. 2011 WI App 17, ¶ 22. Officers were dispatched to the scene of a motor vehicle accident where there was damage to a building and the offending vehicle had left the scene; the damage to the building was significant enough that the occupant was concerned about its structural integrity. ***Id.***, ¶ 2. The offending vehicle was found at the end of a one-quarter mile long driveway of a private residence nearby, displaying damage to a front fender. ***Id.*** When officers arrived, they were unable to get up the driveway because of snowy conditions. ***Id.***, ¶ 3. An individual who identified himself as the homeowner came down and said his girlfriend was the driver and she was "possibly in bed or asleep," but did not identify who she was. ***Id***. After the boyfriend left the property, officers took a four-wheel-drive vehicle up the driveway; they did not see any blood on the snow. ***Id***. Officers knocked on the door, announced, and when there was no answer, entered through the unlocked door. ***Id.***, ¶ 4. An officer made his way through to the bedroom in the rear of the house, woke up Ultsch, questioned her, and transported her to the sheriff's

[6] The United States Supreme Court in ***S. Dakota v. Opperman*** highlighted that the State's proposed exception to the warrant requirement in that case was not a mere pretext to conceal an investigatory police motive. 428 U.S. 364, 375–76 (1976)(warrantless routine inventory search upheld, Court stated "[a]s in ***Cady***, [413 U.S.433,] there is no suggestion whatever that this standard procedure […] was a pretext concealing an investigatory police motive.")

department to perform field sobriety tests and chemical testing. ***Id.***, ¶¶ 4-5.

In finding no objectively reasonable basis to believe Ultsch needed assistance, this Court emphasized that the damage to the vehicle was isolated to the fender, no blood was present, and there were no other indications of injury. ***Id.***, ¶ 19. This Court also relied on the fact that no one gave officers information that the driver was in a vulnerable situation or had been injured. ***Id.,*** ¶ 20. To the contrary, officers encountered the owner of the residence and did not ask him about the driver's condition, nor was there any indication from him that she needed assistance. ***Id.***

In ***State v. Dull***, this Court again rejected a proposed community caretaker-based entry. 211 Wis. 2d 652, 659, 565 N.W.2d 575 (Ct. App. 1997). An officer received a noise complaint, and upon arrival, encountered two juveniles who were suspected of drinking and subsequently placed in custody. ***Id.*** at 655. One of the two juveniles lived at the home and informed police that while his parents were not home, his twenty-one year old brother, Dull, was. ***Id.*** The juvenile refused consent to enter and offered to have the officer wait outside while he went to retrieve his brother. ***Id.*** at 656. The officer told the juvenile he would remain in custody until the officer made contact with the brother; the juvenile hesitantly gave consent to enter. ***Id.*** The officer went inside the residence, opened Dull's bedroom door, and found him in bed with a juvenile girl. ***Id.***

This Court found that the initial approach towards the home was part of the community caretaker function, but the interaction turned investigatory. ***Id***. at 659. This Court wrote that the officer's "role as a community caretaker ended when he determined that [the juvenile] was intoxicated and took

him into custody[.] At this point, the deputy returned to his traditional role; he was enforcing the state's beverage control laws." ***Id.*** at 659. Finally, this Court said "[s]pecifically, we have concerns with the State's claim that the deputy's entry into the residence during his alleged exercise of the community caretaking function was 'as limited as is reasonably possible.'" ***Id.*** at 660 (citing ***Anderson***, 211 Wis. 2d at 169).

Conversely, this Court found an objectively reasonable basis to pursue a community caretaker entry in ***State v. Ferguson***, 2001 WI App 102, ¶ 12, 244 Wis.2d 17, 629 N.W.2d 788. There, officers were dispatched to an apartment building for a fight when they encountered eighteen-year-old Deidre Foster standing outside, "irate, angry and intoxicated." ***Id.***, ¶ 2. Officers went to the apartment where the call was initiated, knocked, and received no response. ***Id.***, ¶ 3. Foster again appeared, unlocked the door, and stated "if I'm going to get arrested then everyone is." ***Id.*** When Foster entered, she yelled to everyone that police were there, and police followed her into her apartment. ***Id.***, ¶¶ 3-4. There officers observed two teenagers who appeared to have been consuming alcohol, numerous empty alcohol containers, and "liquor strewn around the apartment." ***Id.*** Foster gave officers permission to "take a look around" and they found a "highly intoxicated young man lying on the floor" in the bathroom, sick, and who had been vomiting. ***Id.*** The underage man had to be assisted in walking. ***Id.***

Further search led officers to a locked bedroom door. ***Id.*** ¶ 5. Foster initially told police that the room's occupant, Ferguson, was at work. ***Id.*** Officers confirmed with Ferguson's employer that he had not been to work for days. ***Id.*** Two of the party-goers then told officers that in fact three people were in the locked bedroom. ***Id.*** Officers began

knocking and yelling in an attempt to bring the occupants out. ***Id.*** After 30 minutes of knocking, officers "jimmied" open the door. ***Id.*** Inside, officers found people in the bed, and upon opening the adjoining closet, found marijuana plants. ***Id.*** Officers maintained that the entry into the room and entry into the closet was borne out of a concern that additional people were ill or passed out. ***Id.***

This Court found officers had objective evidence supporting a concern for the occupants inside the locked room. ***Id.***, ¶ 13. Prior to entry, officers viewed severely intoxicated minors, saw evidence of significant alcohol consumption, and knew there were potentially three people inside who did not respond. ***Id.***, ¶ 15. In upholding the search, the Court said "the police here *never stepped out of their caretaking role.*" ***Id.,*** ¶ 22 (emphasis added).

Here, as in ***Ultsch*** and ***Dull*** and unlike in ***Ferguson***, officers did not have an objectively reasonable basis to believe there was anyone inside Mr. Torres' unit in actual need of assistance. Officer's information from K.L. was only that she observed underage drinking on the porch and smelled marijuana. (40:14). Officers did not know when the downstairs neighbor saw underage drinking on the porch. (40:22). There is no evidence regarding how K.L. knew the occupants were juveniles or how she knew they were unsupervised. She did not claim to have viewed any reckless, unruly, or intoxicated behavior. Upon arrival, officers did not view anything to supplement K.L.'s observations which would have created the need for a community caretaker intervention. The officers did not view any reckless, intoxicated, or unruly behavior such as in ***Ferguson***. 2001 WI App 102, ¶¶ 2-5. Officers smelled marijuana in the

downstairs tenant's apartment,[7] but could not tell how long the odor of marijuana had been present. (40:21-22). Officers did not smell marijuana outside on the shared front porch or on Mr. Sanchez-Morales. (40:21, 27-28). The only person from the upstairs unit officers encountered prior to entry was Mr. Sanchez-Morales, and there is nothing in the record that would indicate he seemed intoxicated or at any risk. Finally, just as in ***Ultsch***, officers did not ask about the safety and condition of the occupants before entry. 2011 WI App 17, ¶ 20.

What officers demonstrated was a desire to investigate a potential "underage party" and suspected marijuana use. (40:50). This is unsurprising; the original dispatch was labeled a "narcotics in progress," with no mention of a concern for anyone's safety. (40:14, 19). When they arrived, they detected the smell of marijuana, suspected underage consumption, and wished to investigate the minimal observations they were able to make up until that point, specifically testifying to a desire to "make sure there [was] no underage drinking or drugs going on." (40: 50). Just as the officer in ***Dull***, officers were acting in accordance with their traditional role to investigate and enforce the law, e.g., the juvenile or drug code. 211 Wis.2d at 659. Unlike the officers in ***Ferguson***, where this Court found that officers "never stepped out of their caretaking role," officers here never seemed to step into it. 2001 WI App 102, ¶ 22.

[7] There was no accompanying testimony regarding how officers, while inside K.L.'s apartment, knew the odor's source was necessarily from the upstairs apartment, as opposed to from within the apartment in which they actually smelled the odor.

3. Even if police were acting pursuant to a bona fide community caretaker exception, it was nonetheless unreasonably exercised.

The third and final step in determining whether an entry qualifies as a community caretaker exception is a determination of whether the officer's conduct was reasonable. ***Pinkard***, 2010 WI 81, ¶ 41. It involves a balancing between the public interest advanced by the officer's warrantless action against the citizen's constitutional interests. ***Id***. This requires the court to consider four factors - (1) the degree of the public interest and the exigency of the situation; (2) the attendant circumstances surrounding the [search], including time, location, the degree of overt authority and force displayed; (3) whether an automobile is involved; and (4) the availability, feasibility and effectiveness of alternatives to the type of intrusion actually accomplished." ***Id.***, ¶ 42. The third consideration serves to re-emphasize that there is a "heightened privacy interest in preventing intrusions into one's home." ***Id.***, ¶ 56. Again, this Court has explicitly instructed that such entries "must be as limited as is reasonably possible, consistent with the purpose justifying it in the first instance." ***Anderson***, 142 Wis. 2d at 169.

In ***State v. Pinkard***, the Wisconsin Supreme Court upheld a warrantless home entry where law enforcement entered a residence after receiving an anonymous tip that two people were inside sleeping next to "cocaine, money, and a digital scale" with the rear door of the residence standing open. 2010 WI 81, ¶¶ 1-2. Officers responded to find an opened exterior door, knocked, announced their presence, and remained outside for 30-45 second before entering. ***Id.***, ¶¶ 3-4. Officers testified that the purpose of entry was "[t]o make sure that the occupants [] were not the victims of any type of

crime; that they weren't injured; that they weren't the victims of [] a home invasion, robbery; that they were okay, and to safeguard any life or property in the residence." ***Id.*** Once inside, officers could see into an open bedroom door that two people were sleeping. ***Id.***, ¶ 5. Officers again announced themselves and received no response. ***Id.*** Officers had to shake Pinkard to wake him up. ***Id.*** Cocaine, crack cocaine, marijuana, and a digital scale were in plain view and seized. ***Id.***

After first finding that the officers were engaged in a bona fide community caretaker function,[8] the Wisconsin Supreme Court concluded that the entry was reasonably performed. ***Id.,*** ¶ 60. The Supreme Court found that officers "reasonably concluded" assistance was needed in light of the indications of potential drug overdose and the standing-open door, which indicated the resident's inability to "look after their own interests." ***Id.,*** ¶¶ 47, 52. The Court further found that the public has an interest in tending to those who may be suffering from a drug overdose or who are victims of a crime. ***Id.,*** ¶ 48. As to the level of intrusiveness, the 30-45 second delay in entering was found reasonable given the conclusion that there was potentially a more "severe medical concern." ***Id.***, ¶ 49. No weapons were drawn and no force was employed; officers behaved so as to "minimize the intrusion." ***Id.***, ¶ 55.

The importance of alternatives to immediate warrantless entry was echoed by this Court in ***State v. Ziedonis***, 2005 WI App 249, ¶ 27, 287 Wis. 2d 831, 707

[8] The Supreme Court noted that the finding that this entry satisfied the second step of the analysis and constituted a bona fide community caretaker function was "a close call." ***Pinkard***, 2010 WI 81, ¶ 33.

N.W.2d 565. There, officers used sirens, air horns, and loud speakers outside the home to try and make contact with an inside non-responsive resident. ***Id.,*** ¶ 29. Officers waited for an hour-and-a-half prior to entering. ***Id.,*** ¶ 28. Even once officers were entering through an ajar door, they continued to announce themselves and knock the door frame with a baton in continued attempts to gain the attention of someone inside. ***Id.***, ¶¶ 27, 29. This Court wrote, "[i]t appears as though the officers did everything they could to avoid entering the house." ***Id.***, ¶ 27. *See also* ***Ferguson***, 2001 WI App 102, ¶ 5 (officers "[…]took the trouble to call Ferguson's employer to locate him" and knocked on the door for thirty minutes with actual knowledge of unresponsive occupants before entering"); *but cf.* ***State v. Paterson***, 220 Wis.2d 526, 536, 583 N.W.2d 190 (Ct. App. 1998) (in invalidating entry, Court said "[h]ere the police had other effective options short of entry into the residence. They could have monitored the residence and waited out the situation. Or, they could have made attempts to locate the owner or occupants in an effort to determine whether something was truly amiss[.]"); ***Dull***, 211 Wis.2d at 661 (where officers encountered juvenile consuming alcohol outside residence, officers did not consider alternatives to entry such as attempting to yell to inside resident or calling the juvenile's mother).

Here, even assuming officers were acting pursuant to a bona fide community caretaker function, they nonetheless unreasonably pursued it. First, while the State has an interest in ensuring the sobriety of juveniles, the State failed to present any evidence regarding what potential or actual harm existed when officers arrived, such that a warrantless entry would be justified under the community caretaker exception. In ***Pinkard*** and ***Ziedonis***, doors were haphazardly left open and residents were non-responsive. ***Ziedonis***, 2005 WI App 249, ¶ 5; ***Pinkard***, 2010 WI 81, ¶¶ 3-5. In ***Ferguson***, officers

viewed unruly, intoxicated, and reckless juvenile activity and knew there could be unresponsive individuals inside. ***Ferguson***. 2001 WI App 102, ¶¶ 2-5. In these cases, the community's interests were clear, apparent, and particularized – officers reasonably believed people were inside, remained unresponsive, and therefore potentially in harm's way. On the other hand, from the vantage point of being outside Mr. Torres' unit and on the shared front porch, officers knew nothing that would indicate the need to assist someone inside. Officers failed to take steps to answer these unknowns regarding whether in fact minors were unattended or in need of the requisite aid.[9]

The degree of authority and force displayed during the warrantless entry into Mr. Torres' unit was also unreasonable. Officers positioned themselves in a way that prevented Mr. Sanchez-Morales from leaving when he first came out of Mr. Torres' unit. (40:26). Mr. Sanchez-Morales and Mr. Torres were placed in handcuffs. (40:17, 56). The degree of force employed here is more akin to the unlawful display of authority in ***Dull***, 211 Wis.2d at 659, than that which was upheld in ***Pinkard***, 2010 WI 81, ¶ 55, ***Ferguson***, 2001 WI App 102, and ***Ziedonis***, 2005 WI App 249.

This Court must also factor in that this intrusion was into a private home, and not a vehicle, because there is a "heightened privacy interest in preventing intrusions into one's home." ***Pinkard***, 2010 WI 81, ¶¶ 42, 56. "[T]he

[9] Mr. Torres does not dispute that the State has an interest in checking on unsupervised minors, especially where drug or alcohol consumption is involved. However, Mr. Torres does argue that the Fourth Amendment requires officers independently corroborate a neighbor or community member's concerns about a lack of supervision prior to entering a private residence without a warrant.

physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed[.] " ***Pinkard***, 2010 WI 81, ¶ 30 (quoting ***State v. Ferguson***, 2009 WI 50, ¶ 17, 317 Wis.2d 586, 767 N.W.2d 187). As referenced above, the United States Supreme Court has not recognized the community caretaker exception as a basis for a warrantless home entry. ***Pinkard***, 2010 WI 81, ¶ 26 n. 8.

The "availability, feasibility, and effectiveness of alternatives" to the intrusion also favors a finding that the officers acted unreasonably. Officers did not ask Mr. Sanchez-Morales if an adult was present. They did not ask him if anyone was in need of assistance. Mr. Sanchez-Morales offered to get Mr. Torres. (40:53). Even absent such an offer, officers could have simply told Mr. Sanchez-Morales to retrieve the other occupants to further assess a need for a community caretaker intervention. Police did not attempt to yell to the other residents or locate Mr. Torres' parents, an alternative suggested in ***Dull***. 211 Wis.2d at 661. They did not "monitor[] the residence [or] wait[] out the situation" as suggested in ***Paterson.*** 220 Wis.2d at 536. Officers made no attempt to contact the home's inhabitants prior to entering without a warrant, unlike the officers in ***Ziedonis***, who used horns, sirens, and batons before resorting to a warrantless entry. 2005 WI App 249, ¶ 27. Here, the officers barged into Mr. Torres' home and up the staircase without hesitating or calling out, in contrast to the thirty minutes of knocking prior to police entry in ***Ferguson***, 2001 WI App 102, ¶ 5. Officer Reigelman testified that entry was a foregone conclusion – even with Mr. Sanchez-Morales' offer to get the tenant– "[w]ell, he could say that, yeah, but we don't – we wouldn't let him automatically – we want[ed] to be with him[.]" (40:27). Instead of doing "everything they could to avoid entering the house," officers here never

considered any other alternatives. ***Ziedonis***, 2005 WI App 249, ¶ 27.

Officers entered Mr. Torres' unit without a warrant and absent any bona fide community caretaker concerns. Their conduct demonstrated a desire to investigate a purported underage party and suspected drug use. Nothing about the officer's conduct demonstrated an objective concern for the welfare of the upper unit's occupants, only a hindsight characterization that community caretaker functions were underlying the entry. Even if there was a bona fide community caretaker function in play, it was nonetheless unreasonably exercised. Officers did not give the occupants of the residence the opportunity to address officers' concerns absent a warrantless entry. Their quick and unannounced entry was accompanied by an immediate detention. As such, the State has failed to meet its burden to prove that the community caretaker exception is justification for the warrantless entry. Any evidence obtained as a result of the entry must be suppressed.

C. The warrantless entry into Mr. Torres' home did not fall within the scope of the emergency exception.

The emergency exception to the Fourth Amendment's warrant requirement is applicable where law enforcement makes a warrantless entry into a home based on a reasonable belief that a person is "in need immediate aid or assistance." ***Boggess***, 115 Wis. 2d at 450. "The rule demands that the government official's actions be motivated solely by a perceived need to render immediate aid or assistance, not by a need or desire to obtain evidence for a possible prosecution." ***Id.***

Wisconsin courts employ a two-step analysis in determining the application of the emergency doctrine to a warrantless search. ***Id.*** The first part is subjective – "[f]irst, the search is invalid unless the searching officer is actually motivated by a perceived need to render aid or assistance." ***State v. Prober***, 98 Wis. 2d 345, 365, 297 N.W.2d 1 (1980), overruled on other grounds by ***State v. Weide***, 98 Wis. 2d 345, 297 N.W.2d 1 (1980). The second part of the test is objective. ***Id***. The State must show that "a reasonable person under the circumstances would have thought an emergency existed." ***Id***.

The objective part of the test "requires that the officer be able to point to specific facts that, taken with the rational inferences from those facts, reasonably warranted the intrusion into an area in which a person has a reasonable expectation of privacy."***Boggess***, 115 Wis. 2d at 451. The objective test is met when a reasonable person would have believed, under the totality of the circumstances, that: "(1) there was an immediate need to provide aid or assistance to a person due to *actual or threatened physical injury*; and (2) that immediate entry into an area in which a person has a reasonable expectation of privacy was necessary in order to provide that aid or assistance." ***Id.*** at 452(emphasis added).

The emergency exception is employed where officers are aware of an active emergency. In ***State v. Kraimer***, police received anonymous calls from a notably upset man saying he killed his wife four days earlier, his wife's body in the home with him and his four children, and he "wanted to get the matter resolved." 99 Wis. 2d 306, 308, 298 N.W.2d 568, 569 (1980). Officers were able to deduce that the caller was Kraimer. ***Id.*** at 308-309. Given the emotional state of the caller and the risk posed to the remaining children, the Wisconsin Supreme Court upheld the entry. ***Id.*** at 328. *See*

also ***Boggess***, 115 Wis. 2d at 450 (it was reasonable to believe immediate entry was needed in light of calls that children in residence were battered and in need of medical attention, specifically indicating that one child was limping); ***State v. Rome***, 2000 WI App 243, 239 Wis. 2d 491, 620 N.W.2d 225 (crying woman with baby walking on sidewalk told officers she left husband home along with their two-year old; husband had been drinking, threatening, grabbed wife's hair, and wife acknowledged she was concerned about the child's welfare and asked officers to check on the child).

Application of the two-part test

Here, officers were not subjectively "motivated by a perceived need to render aid," which is the first prong required in order for a warrantless entry to be justified under the emergency exception. ***Boggess***, 115 Wis. 2d at 450–51. Officers were responding to a "narcotics in progress." (40:14). When officers arrived, they investigated the situation from outside the duplex and inside K.L.'s downstairs unit. (40:14-15). When officers heard someone from the upstairs unit leaving Mr. Torres' residence, they stood in such a manner as to prevent the person from leaving. (40:16, 26). There is no indication in the record that officers asked Mr. Sanchez-Morales if he or any other occupants were safe. Upon entering the unit, officers put both Mr. Sanchez-Morales and Mr. Torres in handcuffs. (40:36, 38). Nothing about this conduct demonstrates that officers were subjectively motivated by a need to provide assistance or aid to the unit's occupants.

And, as demonstrated in "Section B," even if these particular officers were "motivated by a perceived need to render aid," a reasonable person would not have believed that an emergency existed. Here, the initial report did not include

any concerns about anyone's safety, but was rather a "narcotics in progress" based on an odor of marijuana at a suspected underage drinking party. (41:13, 19). K.L. never told offers she saw an "actual or threatened" physical injury. (40:14); ***Boggess***, 115 Wis.2d at 453. Officers never viewed anything to supplements K.L.'s observations. As such, the State has failed to meet its burden to prove that an emergency justified the warrantless entry. Any evidence obtained as a result of the entry must be suppressed.

D. The warrantless entry into Mr. Torres' home did not fall within the scope of the exigent circumstances exception.

The Wisconsin Supreme Court has identified four circumstances which could support a warrantless entry of a residence based on exigent circumstances: "(1) an arrest made in 'hot pursuit,' (2) a threat to safety of a suspect or others, (3) a risk that evidence will be destroyed, and (4) a likelihood that the suspect will flee." ***Kiekhefer***, 212 Wis. 2d at 476. A warrantless entry into the home requires "both probable cause and exigent circumstances that overcome the individual's right to be free from government interference." ***State v. Hughes***, 2000 WI 24, ¶ 17, 233 Wis. 2d 280, 607 N.W.2d 621, relying on ***Payton***, 445 U.S. at 575. "The quantum of evidence required to establish probable cause to search is a 'fair probability' that contraband or evidence of a crime will be found in a particular place." ***Hughes***, 2000 WI 24, ¶ 21.

The question of whether exigent circumstances existed at the time of an entry "is limited to the objective facts reasonably known to, or discoverable by, the officers at the time of the entry." ***Kiekhefer***, 212 Wis. 2d at 476, citing ***Illinois v. Rodriguez***, 497 U.S. 177, 186 (1990). "The government cannot justify a search on the basis of exigent

circumstances that are of the law enforcement officers' own making." ***Kiekhefer***, 212 Wis. 2d at 476.[10]

In ***Kiekhefer***, officers came to Kiekhefer's home, hoping to do a consensual search, because he was suspected of holding marijuana and guns for another suspect. ***Id.*** at 465. Officers knocked on the home's door, and his mother allowed them inside. ***Id.*** at 466. When they approached Kiekhefer's closed bedroom, officers smelled the odor of marijuana, opened the door, and walked in. ***Id***. Kiekhefer and his girlfriend were immediately handcuffed and patted down. ***Id.*** Kiekhefer ultimately disclosed the whereabouts of marijuana and the officers searched his room. ***Id.*** at 467. The State argued that an entry and search were necessary because of the risk that evidence may be destroyed or removed, and because of a risk of weapons. ***Id.***

This Court invalidated the entry, finding that "the mere presence of contraband without more does not give rise to exigent circumstances" and that the odor of marijuana alone did not justify a warrantless entry into Kiekhefer's bedroom. ***Id.*** at 478-79. Officers, while standing outside the bedroom, did not hear the sound of destruction and the evidence sought was of a type as to make destruction difficult. ***Id.*** at 478-9.

Conversely, the Wisconsin Supreme Court found exigent circumstances to justify a warrantless entry in ***State v.***

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[10] This same line of reasoning is evident throughout cases involving exceptions to the warrant requirement. ***Horton v. California***, 496 U.S. 128, 128–29 (1990) (for the plain view doctrine to apply, it is an "essential predicate that the officer did not violate the Fourth Amendment in arriving at the place from which the object could be plainly viewed); ***INS v. Delgado***, 466 U.S. 210, 217, n. 5, (1984) (so long as officers are lawfully present in a location, they may seek consensual encounters with those present).

Robinson, 2010 WI 80, 372 Wis.2d 302, 786 N.W.2d 463. That case involved officers arriving at a defendant's door with purported knowledge of two warrants; one for a "family offense" and one for "the possession of [or] delivery of a controlled substance."[11] . 2010 WI 80, ¶ 5. Officers went to an address for Robinson which had been supplied by an anonymous informant. ***Id.,*** ¶ 7. The informant also said Robinson was selling marijuana out of his apartment. ***Id.,*** ¶ 27. Officers knocked on the door, heard movement inside, and called the phone number which the confidential informant had provided for Robinson. ***Id.,*** ¶ 8. A phone was then heard ringing inside, officers knocked again, and the person inside identified himself as Robinson. ***Id.*** After identifying themselves as police, officers heard footsteps running from the door. ***Id***. Officers kicked open the door, observed marijuana, and arrested Robinson. ***Id.,*** ¶¶ 9-10.

The Supreme Court in ***Robinson*** found that the anonymous tip demonstrated reliability because it provided the subject's name, address, and cell phone number, which gave sufficient probable cause. ***Id.,*** ¶ 29. Furthermore, exigent circumstances were present because officers heard sounds of running, which could reasonably mean evidence was being destroyed. ***Id.,*** ¶ 31. Of particular relevance to the Court was the fact that it was entirely lawful for police to knock on Robinson's door, and therefore officers were lawfully situated when they encountered the exigency. ***Id.***, ¶

[11] The suspected open warrant for possession or delivery of a controlled substance turned out to be only a commitment order for unpaid fines related to a 1998 conviction. ***Id***., ¶ 15. The Supreme Court analysis assumed without deciding that this commitment order did not constitute an arrest warrant. ***Id.***, ¶ 23. The Supreme Court did not specifically say the warrant for a "family offense" did not constitute an arrest warrant, but the opinion is analyzed as though that is the case.

32. As such, Robinson's own choice to run from the knocking door created the exigency. ***Id***.

Here, officers did not have probable cause to believe evidence of a crime would be found inside Mr. Torres' home prior to entry. Under Wisconsin case law, underage drinking is not a crime because it is subject only to forfeiture. ***Ferguson***, 2001 WI App 102, ¶ 13. With regards to the suspected marijuana – officers did not have sufficient evidence supporting a probable cause finding prior to entering into the unit. The State only produced evidence that officers smelled marijuana inside K.L.'s apartment and not outside the door to Mr. Torres' residence prior to entering. (40:21).[12] Regardless, Officer Reigelman testified he could not tell how long the smell of marijuana had been there. (40:21). There is no indication he could smell it on Mr. Sanchez-Morales and he specifically testified that he could not smell it outside on the front porch. (40:21, 27). The odor of marijuana inside the stairwell of Mr. Torres' unit cannot be used to support a finding of probable cause because officers had already unlawfully entered the home by that point and probable cause needed to be established by facts known to the officers prior to entry.

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[12] The Wisconsin Supreme Court case ***State v. Secrist*** speaks directly to the particularity required for an odor of marijuana to establish probable cause. 224 Wis. 2d 201, 216, 589 N.W.2d 387 (1999). The Court wrote how important it was to "determine the extent of the officer's training and experience in dealing with the odor of marijuana" to inform how credible the officer is in determining the "strength, []recency, and [] source" of a smell of marijuana in the context of establishing probable cause for an arrest. ***Secrist***, 224 Wis. 2d at 216. Furthermore, an officer must "be able to link the unmistakable odor of marijuana to a specific person" before probable cause to arrest is established, and that link must be "reasonable and capable of articulation." ***Id.*** at 216-17.

Even if officers had probable cause to believe contraband or evidence of a crime would be found inside Mr. Torres' home, there were no exigencies to justify the warrantless entry. As discussed previously, "the mere presence of contraband without more does not give rise to exigent circumstances." ***Kiekhefer***, 212 Wis. 2d at 478. Prior to entry, officers had only exchanged minimal words with Mr. Sanchez-Morales on the shared front porch. There is no evidence that Mr. Sanchez-Morales acted in such a way as to indicate a potential risk of destruction of evidence prior to officer's entry. Mr. Sanchez-Morales' quick movement on the stairwell's top landing cannot support a finding of exigent circumstances because the officers had already entered the home. ***Kiekhefer***, 212 Wis. 2d at 476.

As such, the State has failed to meet its burden to prove that exigent circumstances justified the warrantless entry. Any evidence obtained as a result of the entry must be suppressed.

CONCLUSION

Officers entered Mr. Torres' home without a warrant, and there is no legally recognized exception to the warrant requirement that justifies the entry. There were no exigent circumstances and no known emergency. Furthermore, officers were not acting in pursuit of any bona fide community caretaker function when they walked into Mr. Torres' unit. This Court should reverse the decision of the trial court, vacate Mr. Torres' conviction, and remand with instructions that the trial court suppress any evidence obtained pursuant to the warrantless entry.

Dated this 22nd day of September, 2016.

Respectfully submitted,

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CERTIFICATION AS TO FORM/LENGTH

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) 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 brief is 8,413 words.

CERTIFICATE OF COMPLIANCE WITH 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 § 809.19(12). I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed on or after 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 22nd day of September, 2016.

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CERTIFICATION AS TO APPENDIX

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with § 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; (3) a copy of any unpublished opinion cited under § 809.23(3)(a) or (b); and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

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