STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2016AP2196-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

STEVEN T. DELAP,

Defendant-Appellant-Petitioner.

REVIEW OF A DECISION OF THE
COURT OF APPEALS, DISTRICT IV, AFFIRMING
THE CIRCUIT COURT'S ORDER DENYING
A MOTION TO SUPPRESS EVIDENCE,
ENTERED IN DODGE COUNTY CIRCUIT COURT,
THE HONORABLE STEVEN G. BAUER, PRESIDING

BRIEF OF THE PLAINTIFF-RESPONDENT

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ISSUES PRESENTED

1. Under *Payton v. New York*, 445 U.S. 573 (1980), may an officer enter a residence to arrest a suspect pursuant to a valid arrest warrant when the officer receives information that the suspect lives at the residence, the officer makes contact with the suspect outside the residence, and the officer follows the fleeing suspect into the residence?

Neither the circuit court nor the court of appeals answered this question.

This Court should answer, "yes."

2. Alternatively, under the exigent circumstance of hot pursuit, may an officer enter a residence to arrest a suspect pursuant to two arrest warrants when the suspect commits the jailable offense of obstruction by fleeing into the residence after the officer lawfully commands him to stop?

The circuit court answered, "yes."

The court of appeals answered, "yes."

This Court should answer, "yes."

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

As in any case important enough to merit this Court's review, oral argument and publication of the Court's decision are warranted.

INTRODUCTION

This case is about whether the Fourth Amendment allows officers to follow a suspect into his residence to arrest him on outstanding arrest warrants. Under long-settled precedent from the Supreme Court of the United States, officers can enter a residence to arrest a suspect on outstanding warrants if they have reason to believe he lives

there and is inside the residence. *Payton v. New York*, 445 U.S. 573 (1980). Both of those conditions are present here: the officers had two warrants for Delap's arrest, they had information from two sources that Delap lived at 110 Milwaukee Street, and they saw a person they believed to be Delap run inside that address. Under those circumstances and pursuant to *Payton*, the officers could enter the residence to arrest Delap on the warrants.

Alternatively, the exigent circumstance of hot pursuit justified the officers' entry into the residence to arrest Delap. When Delap ignored the officers' lawful command to stop and continued running into the residence, the officers had probable cause to arrest Delap for the jailable offense of obstruction, which is a violation of Wis. Stat. § 946.41(1). The officers immediately pursued Delap and used reasonable tactics to respond to Delap's behavior, move into the residence, and arrest Delap.

Under either theory, this Court should affirm, as the officers' entry into the residence to arrest Delap did not offend the Fourth Amendment.

STATEMENT OF THE CASE

Two officers from the Dodge County Sheriff's Office, Sergeant Michael Willmann and Deputy Dustin Waas, learned that Steven Delap was living at 110 Milwaukee Street in Neosho, Wisconsin and went there to arrest Delap on two outstanding arrest warrants. Based on information they received from fellow officers, they knew Delap had a history of fleeing. They also knew, from the felony warrant, that Delap had violent tendencies and a history of resisting and assaulting police officers.

When approaching 110 Milwaukee Street, the officers saw a man outside they believed to be Delap. It was, and when Delap saw the officers, he ran toward the back door of

the residence, ignoring Sergeant Willmann's yelling, "[S]top, police." Delap got inside the back door, but the officers prevented Delap from closing it. Eventually, the officers pushed the door open and arrested Delap inside the residence. The officers searched Delap incident to his arrest and found drug paraphernalia.

A. The suppression hearing

Based on his actions that evening, the State charged Delap with two counts: (1) obstructing an officer, repeater, and (2) possession of drug paraphernalia, repeater. (R. 1:1, Pet-App. B:1.)

Acting *pro se*, Delap moved to suppress "any evidence against him due to an illegal arrest."[1] (R. 21:1, Pet-App. F:1; 6:2, Pet-App. C:2.) In general, Delap claimed that the officers could not enter the residence because they lacked probable cause and exigent circumstances. (R. 6:4, Pet-App. C:4.) To support his position, Delap contended that the information the officers had linking Delap to 110 Milwaukee Street was not sufficiently verified or corroborated, that the officers did not know the exact location of the residence, and that they were not certain that the man they were chasing was Delap.[2] (R. 6:5, Pet-App. C:5.)

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[1] Delap's motion did not outline which evidence he thought should be suppressed. The circuit court assumed "the evidence to be his identity and the drug paraphernalia found on his person during the arrest." (R. 21:1, Pet-App. F:1.)

[2] At that hearing, after Delap confirmed that he was living temporarily at 110 Milwaukee Street at the time of the arrest, the circuit court concluded that Delap had standing to raise his Fourth Amendment claim. (R. 41:5–6, Pet-App D:5–6.)

Sergeant Willmann testified and provided background on the events that led to his and Deputy Waas's interaction with Delap. Roughly one month before he arrested Delap, Sergeant Willmann overheard that his colleague, Deputy John Gallenbeck, "conduct[ed] a traffic stop on a vehicle where the driver subsequently fled from the vehicle and went into a wooded area and deputies were unable to locate him." (R. 41:8, Pet-App. D:6.) He also understood that Deputy Gallenbeck had learned from a passenger in the vehicle that the fleeing individual "was Steven Delap and that he was living at 110 Milwaukee Street in Neosho." (R. 41:8, 13, Pet-App. D:8, 13.)

Sergeant Willmann also testified that about a week before the arrest, he "received a teletype correspondence from the Walworth County Sheriff's Office stating that [Delap] was involved in a very similar incident . . . where he had fled from a traffic stop in the same type of manner." (R. 41:8–9, Pet-App. D:8–9.) That teletype indicated that Delap lived at 110 Milwaukee Street. (R. 41:13, Pet-App. D:13.)

Sergeant Willmann "checked [Delap] with Wisconsin Department of Transportation files and NCIC files," which "indicated [that Delap had] a warrant through Jefferson County and through Wisconsin Department of Corrections, a probation and parole warrant." (R. 41:9, Pet-App. D:9.) At the hearing, Sergeant Willmann testified that he believed the Jefferson County warrant was a felony warrant, but that "off the top of [his] head," he could not remember if it was a criminal misdemeanor or felony warrant. (R. 41:13, Pet-App. D:13.) Regardless, "[t]he warrant return for both warrants had indicated that [Delap had] a prior history of resisting and assaulting law enforcement officers." (R. 41:10, Pet-App. D:10.) Accordingly, Sergeant Willmann requested a second deputy, Deputy Waas, to accompany him to contact and arrest Delap. (R. 41:10, Pet-App. D:10.)

On September 6, 2015, Sergeant Willmann and Deputy Waas went to 110 Milwaukee Street to arrest Delap on the two warrants. (R. 41:8–9, Pet-App. D:8–9.) That night, Sergeant Willmann wore his "standard duty uniform," which identified him as a police officer and consisted of "green pants, tan shirt, patches, badge and name, [and a] duty belt." (R. 41:9–10, Pet-App. D:9–10.)

Sergeant Willmann and Deputy Waas parked about a block away from 110 Milwaukee Street out of concern that Delap "would either run or not answer the door" if they parked closer. (R. 41:40, Pet-App. D:40.) They left their cars and walked down Milwaukee Street, counting down the numbers on the houses. (R. 41:40, Pet-App. D:40.) Sergeant Willmann recalled that the last building they saw was 120, before they saw a final building, a duplex. (R. 41:40, Pet-App. D:40.) Based on that information, Sergeant Willmann knew that one of the two doors at the duplex had to be 110. (R. 41:40, Pet-App. D:40.)

When Sergeant Willmann walked "towards what [he] believed [was] the residence," he saw a man standing next to a car parked on Milwaukee Street and another man walking down the driveway in front of the duplex towards that car. (R. 41:10, Pet-App. D:10.) As he and Deputy Waas approached, "the individual who was walking down the driveway turned and looked at [them] and subsequently started turning around and running back towards the residence." (R. 41:10, Pet-App. D:10.) Based on the man's proximity to 110 Milwaukee Street and his reaction to them, Sergeant Willmann believed that the fleeing individual was Delap. (R. 41:38–39, 41, Pet-App. D:38–39, 40.)

Sergeant Willmann shined his flashlight on Delap and shouted, "stop, police," and ran after him. (R. 41:11, Pet-App. D:11.) Delap did not stop; he ran to the back of the residence. (R. 41:11, Pet-App. D:11.) Sergeant Willmann explained that

when Delap got to the rear door of the residence, he went inside and started shutting the door. (R. 41:11, Pet-App. D:11.) Sergeant Willmann used his shoulder to "keep the door from latching completely shut." (R. 41:12, Pet-App. D:12.) Sergeant Willmann and Delap pushed back and forth on the door until Deputy Waas joined Sergeant Willmann and the two officers pushed it open. (R. 41:12, Pet-App. D:12.) Inside, they placed Delap under arrest. (R. 41:12, Pet-App. D:12.) According to Sergeant Willmann, post-arrest, Delap told him "that he knew [they] were police officers and that he didn't wanna go back to jail because he didn't wanna detox off of heroin." (R. 41:36, Pet-App. D:36.)

On cross-examination, Sergeant Willmann stated that he "couldn't say 100 percent" that he knew that the residence he went into was 110 or that it was Delap that they were pursuing. (R. 41:39, Pet-App. D:39.) Upon questioning by the court, Sergeant Willmann clarified that he believed, based on his knowledge of the location and the information he received about Delap's past pattern of fleeing, he was chasing Delap into 110, given that he and Deputy Waas deduced that one of the doors on the building had to have been 110 and Delap reacted to seeing the two officers by running. (R. 41:40–41, Pet-App. D:40–41.)

Deputy Waas testified similarly. He stated that as he and Sergeant Willmann approached the residence, he noticed a man standing next to a car. (R. 41:52, Pet-App. D:52.) He remembered discussing with Sergeant Willmann whether the man next to the car could be Delap, but both settled on the man not being Delap. (R. 41:52, Pet-App. D:52.) Deputy Waas then saw another man coming down the driveway of 110 Milwaukee Street. (R. 41:53, Pet-App. D:53.) According to Deputy Waas, when Sergeant Willmann shined his flashlight on the man in the driveway, the man looked at the officers, turned, and started walking away. (R. 41:53,

Pet-App. D:53.) Deputy Waas testified that Sergeant Willmann yelled, "stop, police, very loudly," but the man took off running. (R. 41:53, Pet-App. D:53.)

During cross-examination, Deputy Waas explained that he knew Delap was the fleeing individual when Delap began running. (R. 41:56, Pet-App. D:56.) But, he stated, regardless of whether that individual was Delap, he would have pursued Delap because Delap obstructed the officers when he fled from them. (R. 41:56, Pet-App. D:56.)

Delap testified that on the night of his arrest, he was walking down his driveway when he "noticed some flashlights in the middle of the road." (R. 41:30, Pet-App. D:30.) He turned his head to look at the lights and "observed two police officers walking." (R. 41:30, Pet-App. D:30.) Delap testified that he stopped, turned around, and started walking until the officer shined his flashlight on Delap, at which point he "started walking or running, running towards the back door." (R. 41:30, Pet-App. D:30.) Delap ran into the residence and tried to close the door, but Sergeant Willmann held the door open. (R. 41:30, Pet-App. D:30.) According to Delap, he told Sergeant Willmann, "You need a warrant to come in here," and Sergeant Willman responded, "[N]o, I don't, no, I don't, you're under arrest." (R. 41:30, Pet-App. D:30.) Delap stated that Deputy Waas came to the door and helped Sergeant Willmann get inside. (R. 41:31, Pet-App. D:31.) At some point, one of the officers pulled his taser out, "got [Delap] to the ground, [and] got [Delap] in cuffs." (R. 41:31, Pet-App. D:31.)

On cross-examination, Delap admitted that he "assumed" and "suspected" that the officers were police officers and that he knew there were warrants for his arrest. (R. 41:32–33, Pet-App. D:32–33.) Delap claimed that he did not hear Sergeant Willman tell him to stop. (R. 41:33, Pet-App. D:33.) But he acknowledged that he ran because he did

not want to be arrested on the warrant and taken to jail. (R. 41:33, Pet-App. D:33.)

B. The circuit court denied the motion to suppress based on hot pursuit.

At the hearing, the court considered two justifications for the officers' actions. First, under *Payton*, the officers lawfully entered 110 Milwaukee Street because they had arrest warrants and reason to believe that Delap lived there and was currently there. (R. 41:19, Pet-App. D:19.) Second, the officers lawfully entered 110 Milwaukee Street because they were in hot pursuit of Delap. (R. 41:21–23, Pet-App. D:21–23.)

The circuit court originally seemed inclined to rule that the officers lawfully entered the home under *Payton*, stating, "[T]he bottom line is there's a legitimate arrest warrant for you and the police officer[s], through their investigation, had reason to believe and probable cause that you lived there, okay. That's all I needed, probable cause that you lived there and they had the arrest warrant. That's enough." (R. 41:19, Pet-App. D:19.) But it held off on making an ultimate decision on the constitutionality of the entry and allowed the parties to submit additional briefing. (R. 41:59–60, Pet-App. D:59–60; 20, Pet-App. E; 23; 24).[3]

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[3] Delap filed two CDs with his supplemental brief in the circuit court. (R. 25:1; 36:1.) The CDs were not included in the electronically filed record, but the Dodge County Clerk of the Circuit Courts retained a hard copy of each CD. The State obtained copies of those CDs from the Dodge County Clerk of Circuit Court. The CDs do not have individual record numbers. One CD contains a neighbor's dispatch call. The neighbor stated that the police used profanity when speaking with Delap. The second CD contains the ICop (dash camera) footage from the

In a written decision, the circuit court denied Delap's motion to suppress, concluding that the officers' decision to chase Delap into the home was justified by the exigent circumstance of hot pursuit. (R. 21, Pet-App. F.) In reaching that decision, the court relied on its findings that Sergeant Willmann told Delap to stop and that Delap's running was an obstruction (R. 41:58, Pet-App. D:58), and it recognized that "[a] law enforcement officer in hot pursuit of a fleeing jailable misdemeanor suspect is faced with exigent circumstances allowing the officer to follow a suspect into his home to effectuate an arrest." (R. 21:2, Pet-App. F:2.) Applying that law to the facts, the court reasoned, "Obstructing an officer is a jailable misdemeanor offense (in this case the Defendant could go to prison as he is charged as a repeat offender). Therefore, the officers were faced with exigent circumstances when, in hot pursuit, they followed the Defendant into his home to arrest him." (R. 21:2, Pet-App. F:2.) Because the officers' entry into Delap's residence was justified under the hot pursuit exigency, the court denied Delap's motion to suppress. (R. 21:2, Pet-App. F:2.) It did not address whether *Payton* provided an alternative ground to deny the suppression motion.

Delap pleaded no contest to the charges of obstructing an officer as a repeater and possessing drug paraphernalia as a repeater. (R. 39:5–6, 8–9.) The court imposed concurrent time served sentences of 45 days. (R. 42:9.)

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night of Delap's arrest. Although the dash camera did not catch the actual arrest, it did record the officers' post-arrest conversations with Delap. On that CD, Delap admitted that he saw the officers "walking down the street with flashlights" and that the officers "told [him] to stop and [he] tried to run into the house." (Time stamped 22:44:56–45:8.)

C. Delap's appeal

On appeal to the court of appeals, Delap argued that the exigent circumstance of hot pursuit could not justify the officers' entry into his residence because they lacked probable cause for obstruction. (*See* Delap's court of appeals brief at 17–23.) Delap also claimed that even if the officers had probable cause, their seizure of Delap was unreasonable and therefore unconstitutional. (*Id.* at 23–27.) The State countered that the officers had probable cause and that the officers reasonably executed the seizure. (*See* State's court of appeals brief at 3–6.)

The court of appeals affirmed. *State v. Delap*, No. 2016AP2196-CR, 2017 WL 1407571, ¶ 1 (Wis. Ct. App. Apr. 20, 2017) (unpublished).[4] The court reasoned that the officers had reasonable suspicion to stop Delap based on the following facts: (1) the officers saw a man who matched the description of Delap, (2) upon seeing the officers, that man turned and started walking[5] toward a building that the officers believed was Delap's residence, and (3) Sergeant Willmann shined his flashlight at Delap and shouted, "stop, police." *Id.* ¶ 13. According to the court, "[a]t that time, a reasonable officer could reasonably suspect that it was Delap

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[4] The case was decided by Judge Kloppenburg pursuant to Wis. Stat. § 752.31(2)(f).

[5] A few times, the court of appeals states that Delap walked away upon seeing the officers. Deputy Waas testified that Delap walked away. (R. 41:53, Pet-App. D:53.) Sergeant Willmann testified that Delap ran back towards the house. (R. 41:10, Pet-App. D:10.) Delap testified that he "started walking or running, running towards the back door." (R. 41:30, Pet-App. D:30.) The circuit court stated that Delap was "running" before Sergeant Willmann ordered him to stop. (R. 41:58.) The State adopts the circuit court's finding on that issue, as should this Court.

who was walking away, based on the information the officers possessed as to Delap's description and his residence, the man's turning away and walking towards that residence, and Delap's having recently fled from officers at two prior stops." *Id.*

The court also concluded that the officers had probable cause to arrest Delap for obstruction. *Delap*, 2017 WL 1407571, ¶ 16. The court reasoned that "upon commanding the man they reasonably suspected was Delap to stop, the officers intended to proceed to identify him, and the man's running away obstructed their investigation." *Id.*

Accordingly, the court ruled that the officers' entry into the residence was justified by hot pursuit. *Delap*, 2017 WL 1407571, ¶ 19. The officers immediately and continuously chased Delap when he fled after being told to stop, so they could arrest him for committing the jailable offense of obstruction. *Id.*

Finally, regarding the reasonableness of the officers' actions, the court noted that Delap had failed to explain how the facts that his "offense was minor" and "the police forcibly entered his residence" "over[o]de the probable cause and exigent circumstances analyses undertaken above." *Delap*, 2017 WL 1407571, ¶ 21. Accordingly, the court rejected the argument as "undeveloped." *Id.*

STANDARD OF REVIEW

This Court's "review of an order granting or denying a motion to suppress evidence presents a question of constitutional fact." *State v. Iverson*, 2015 WI 101, ¶ 17, 365 Wis. 2d 302, 871 N.W.2d 661 (quoting *State v. Robinson*, 2010 WI 80, ¶ 22, 327 Wis. 2d 302, 786 N.W.2d 463). Questions of constitutional fact are resolved with a two-step process. *State v. Hogan*, 2015 WI 76, ¶ 32, 364 Wis. 2d 167, 868 N.W.2d 124. This Court "first uphold[s] the circuit

court's finding of historical fact unless they are clearly erroneous." *Id.* This Court "then independently appl[ies] constitutional principles to those facts." *Id.*

SUMMARY OF THE ARGUMENT

Although the lower courts concluded that the officers' actions in this case were justified under the doctrine of hot pursuit, *Payton*, provides narrower grounds for affirmance. Under *Payton*, a police officer may enter a home to arrest a suspect if he or she has an arrest warrant for the suspect and reason to believe the suspect lives and is present in the home. As explained below, all of those conditions were present here.

Alternatively, this Court may affirm based on hot pursuit. When Delap ignored the officers' lawful command to stop and instead continued running into his residence, the officers had probable cause to arrest Delap for the jailable offense of obstruction. The officers immediately pursued Delap and used reasonable measures to enter the residence and arrest a resisting Delap.

Under either theory, the officers' entry into the residence to arrest Delap was justified. Consequently, this Court should affirm the court of appeals.

ARGUMENT

I. *Payton* authorized the officers' entry into the residence to arrest Delap on the two outstanding arrest warrants.

A. The Fourth Amendment prohibits unreasonable seizures and (absent consent or exigent circumstances) warrantless entries.

The United States Constitution and the Wisconsin Constitution prohibit unreasonable seizures. U.S. Const. amend. IV; Wis. Const. art. 1, § 11.[6] "An arrest is a seizure invoking protections afforded under the Fourth Amendment of the United States Constitution and Article I, Section 11 of the Wisconsin Constitution." *State v. Ferguson*, 2009 WI 50, ¶ 17, 317 Wis. 2d 586, 767 N.W.2d 187.

In general, "if the police have probable cause to make an arrest, they do not need a warrant." *Ferguson*, 317 Wis. 2d 586, ¶ 17 (citing *United States v. Watson*, 423 U.S. 411, 417–23 (1976)). "However, when the police must enter a home to arrest, if they have not obtained a warrant in advance, the entry and arrest are presumptively unlawful." *Id.* (citing *Payton*, 445 U.S. at 586). "This presumption is based on 'the overriding respect for the sanctity of the home that has been embedded in our traditions since the origins of the Republic.'" *Id.* (quoting *Payton*, 445 U.S. at 601).

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[6] Because Article I, Section 11 of the Wisconsin Constitution is "substantively identical," to the Fourth Amendment to the United States Constitution, this Court interprets Article I, Section 11 "consistently with the Fourth Amendment." *State v. Weber*, 2016 WI 96, ¶ 17, 372 Wis. 2d 202, 887 N.W.2d 554 (quoting *State v. Richter*, 2000 WI 58, ¶ 27, 235 Wis. 2d 524, 612 N.W.2d 29).

B. Officers may enter a residence to execute an arrest warrant if they reasonably believe the suspect resides there.

"A police officer with an arrest warrant can enter the suspect's residence to execute the warrant if there is reason to believe he will be found there." *United States v. Pallais*, 921 F.2d 684, 690 (7th Cir. 1990) (citing *Payton*, 445 U.S. at 603). In *Payton*, the Supreme Court reasoned, "If there is sufficient evidence of a citizen's participation in a felony to persuade a judicial officer that his arrest is justified, it is constitutionally reasonable to require him to open his doors to the officers of the law." *Payton*, 445 U.S. at 602–03.

"Thus, for Fourth Amendment purposes, an arrest warrant founded on probable cause implicitly carries with it the limited authority to enter a dwelling in which the suspect lives when there is reason to believe the suspect is within." *Payton*, 445 U.S. at 602–03. Accordingly, "*Payton* allows the police to enter a residence armed only with an arrest warrant" if "the facts and circumstances present the police with a reasonable belief that" (1) "the subject of the arrest warrant resides in the home," and (2) "the subject of the warrant is present in the home at the time entry is effected." *State v. Blanco*, 2000 WI App 119, ¶ 16, 237 Wis. 2d 395, 614 N.W.2d 512; *see also State v. Kiper*, 193 Wis. 2d 69, 85–86, 532 N.W.2d 698 (1995).

But if the police do not have reason to believe that the person named in the warrant lives at the place where the police are executing the warrant, they may not enter on the arrest warrant alone, based on the Supreme Court's decision in *Steagald v. United States*, 451 U.S. 204 (1981). In *Steagald*, the police received information that a federal fugitive could be found at a certain address "during the next 24 hours." *Id.* at 206. The police went to that address with an arrest warrant and found cocaine, but no fugitive. *Id.*

Steagald, who was not the fugitive but was outside of the home the police searched, was arrested and indicted on federal drug charges. *Id.*

The Supreme Court held that the officer's entry under the circumstances was unreasonable. It recognized that while the arrest "warrant embodied a judicial finding that there was probable cause to believe the [fugitive] had committed a felony" and thus authorized the officer to seize the fugitive, the warrant "did absolutely nothing to protect [Steagald's] privacy interest in being free from an unreasonable invasion and search of his home." *Steagald*, 451 U.S. at 213. To protect the homeowner, the Court held that absent consent or exigent circumstances, the police must obtain a search warrant to enter the home of a third-party to search for the subject of an arrest warrant. *Id.* at 205–06; *see also Blanco*, 237 Wis. 2d 395, ¶ 13 (noting that under *Steagald*, "an arrest warrant is insufficient to enter a third-party's home, even if the police believe that the subject of the arrest warrant is present there").

Payton and *Steagald* do not "divide the world into residences belonging solely to the suspect on the one hand, and third parties on the other." *Blanco*, 237 Wis. 2d 395, ¶ 14 (quoting *Valdez v. McPheters*, 172 F.3d 1220, 1225 (10th Cir. 1999) (reconciling *Payton* and *Steagald*)). Instead, "[t]he rule announced in *Payton* is applicable so long as the suspect 'possesses common authority over, or some other significant relationship to,' the residence entered by police." *Id.* (quoting *Valdez*, 172 F.3d at 1225). In short, police "entry into a residence pursuant to an arrest warrant is permitted when 'the facts and circumstances within the knowledge of the law enforcement agents, when viewed in the totality . . . warrant a reasonable belief that the location to be searched is the suspect's dwelling, and that the suspect is within the

residence at the time of entry.'" *Id.* (quoting *Valdez*, 172 F.3d at 1225–26).

For example, in *Blanco*, the court of appeals held that the police had a reasonable belief that Blanco lived at the residence they entered to execute his arrest warrant based on the following facts: (1) "a tip that Blanco was 'staying' at the apartment building"; (2) "confirmation from the building manger that Blanco may be staying in the . . . apartment"; (3) "representation from an occupant of the building that Blanco had just been outside the apartment smoking a cigarette" and that he returned to the apartment "after smoking his cigarette"; and (4) "evidence that Blanco was not at the Wauwatosa address or any other location investigated earlier that day by police." *Blanco*, 237 Wis. 2d 395, ¶ 17. Those facts, in particular the fact that "the police officers were informed that Blanco was 'staying' at" the apartment, made it reasonable for the police to believe that Blanco resided at the apartment. *Id.* ¶ 19. As a result, "the arrest warrant provided the police with lawful authority to enter [the apartment] to search for the subject of the arrest warrant, Blanco." *Id.* ¶ 20.

By contrast, in *Kiper*, the police did not have a reasonable belief that the subject of the warrant lived at the residence searched. *Kiper*, 193 Wis. 2d at 85. There, the officer executing the warrant knew "only that [the subject of the warrant] had moved from two addresses noted on the face of the arrest warrant, had no known present address, and that [the subject of the warrant] was present at [the third-party's] residence six weeks earlier." *Id.* at 84. This Court said that "without more substantial evidence, any belief held by [the officer] that [the subject of the warrant] may have resided at the apartment constituted no more than mere suspicion." *Id.*

Here, there is no dispute that the officers had two arrest warrants, including a felony arrest warrant, for Delap. (R. 1:2, Pet-App. B:2; 41:9–10, 13, Pet-App. D:9–10, 13.) Moreover, there can be no reasonable dispute that the officers knew Delap was inside, given that they chased him there. Thus, similar to *Blanco* and *Kiper*, the dispositive issue is whether the officers reasonably believed that Delap was residing at 110 Milwaukee Street. Because, as discussed below, Sergeant Willmann and Deputy Waas had such a reasonable belief, the officers' entry under the circumstances was lawful.

C. The officers had reason to believe that Delap resided at 110 Milwaukee Street.

Like in *Blanco*, the officers here received information that Delap "was *living at* 110 Milwaukee Street." (R. 1:2, Pet-App. B:2; 41:8, Pet-App. D:4 (emphasis added).) Phrases like "living" and "staying" are "consistent with *residing*." *Blanco*, 237 Wis. 2d 395, ¶ 18 (citing *United States v. Risse*, 83 F.3d 212, 216–17 (8th Cir. 1996) ("stating that the phrases 'staying with' and 'living with' are sufficient to support police officers' belief that the suspect resided at the location at issue")).

The officers first learned that Delap lived at 110 Milwaukee Street from Deputy Gallenbeck, who obtained that information when he investigated Delap's flight from the traffic stop. (R. 41:8, 13, Pet-App. D:8, 13.) The teletype from Walworth County further corroborated that Delap lived at 110 Milwaukee Street. (R. 41:13, Pet-App. D:13.) Thus, unlike in *Blanco*, where there was only one tip that Blanco lived at the apartment, here, there were two.

Furthermore, the communication from Walworth County, listing Delap's residence as 110 Milwaukee Street, came in only one week before Sergeant Willmann and

Deputy Waas went there to execute the warrants. (R. 41:8–9, 13, Pet-App. D:8–9, 13.) Therefore, unlike in *Kiper*, where the information was six weeks old, the information here about Delap's residence was fresh.

In addition, as Sergeant Willmann and Deputy Waas approached 110 Milwaukee Street, they saw a man fitting Delap's general description standing in the driveway to the residence. (R. 1:3, Pet-App. B:3.) That person, consistent with Delap's past behavior, ran from them as soon as he noticed they were officers. (R. 41:10, Pet-App. D:10.) At that point, they believed the person was Delap.[7] (R. 1:3, Pet-App. B:3; 41:38–39, 41, Pet-App. D:38–39, 41.) Finding Delap at 110 Milwaukee Street, coupled with the information they received from Deputy Gallenbeck and Walworth County, gave the officers reason to believe that Delap resided there.

This conclusion is bolstered by Delap's admission at the suppression hearing that he was "living there temporarily." (R. 41:5–6, Pet-App. D:5–6.) *See Blanco*, 237 Wis. 2d 395, ¶ 19 n.3 ("Although not dispositive of our decision in this case, we point out that Blanco's counsel admitted during the sentencing hearing that the . . . apartment was Blanco's 'temporary residence.'").

Accordingly, under *Payton*, Sergeant Willmann and Deputy Waas were authorized to enter 110 Milwaukee Street to execute the arrest warrants for Delap because they reasonably believed he lived there and was inside.

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[7] Delap agrees that the officers believed the fleeing individual was Delap. (Delap's Br. 14 ("In the present case, law enforcement pursued an individual whom they believed to be Mr. Delap into his residence.").)

D. Delap's argument is not persuasive.

Delap invokes only general principles from *Payton*. He argues that the arrest warrants here did not "provide legal authority for the officers to enter 110 Milwaukee St. for the purpose of arresting Mr. Delap," because "[t]he officers in this case did not have probable cause to believe that Mr. Delap was living at that address" since "Sgt. Willmann testified that he simply 'believed' that information had been obtained to that effect" and "some of the information was at least a month old." (Delap's Br. 46 n.5.)

The State disagrees. As explained above, the officers' had information from two different sources that Delap lived at 110 Milwaukee Street. The second source of information, the teletype, was fresh, as it was only one week old. Furthermore, when the officers went to 110 Milwaukee Street, they found Delap outside the residence. Those facts establish probable cause supporting the officers' entry. Accordingly, this Court may affirm based on *Payton*.

II. Alternatively, the exigent circumstance of hot pursuit justified the officers' entry into the residence to arrest Delap.

A. Hot pursuit as an exception to the warrant requirement.

"[N]ot all warrantless entries are unlawful." *Ferguson*, 317 Wis. 2d 586, ¶ 19. Although *Payton* and *Steagald* presume that warrantless entries and arrests are unlawful, there are exceptions that overcome that presumption. *Id.* For example, the police may enter a home to arrest a suspect without a warrant when exigent circumstances are present. *Id.*; *see also Kiper*, 193 Wis. 2d at 89 ("We agree that if exigent circumstances developed during an attempt to identify and arrest [the suspect], [the officer] could have lawfully entered the [third party's] apartment without a

search warrant.") "Exigent circumstances exist when 'it would be unreasonable and contrary to public policy to bar law enforcement officers at the door.'" *Ferguson*, 317 Wis. 2d 586, ¶ 19 (quoting *Richter*, 235 Wis. 2d 524, ¶ 28). "The State bears the burden of proving that a warrantless home entry is justified by exigent circumstances." *Id.* ¶ 20.

The exigent circumstances doctrine "significantly limits" the situations in which a warrant is needed to enter a home to complete an arrest. *Steagald*, 451 U.S. at 221. Although "exigent circumstances may be present in a number of different situations," one "well-recognized" category that authorizes an officer's warrantless entry into a home is the "hot pursuit of a suspect." *Ferguson*, 317 Wis. 2d 586, ¶ 20 (quoting *Richter*, 235 Wis. 2d 524, ¶ 29).

Both the Supreme Court and this Court "have long recognized" that "'hot pursuit' cases fall within the exigent-circumstances exception to the warrant requirement." *Steagald*, 451 U.S. at 218; *see also Ferguson*, 317 Wis. 2d 586, ¶¶ 20, 27 (adopting Justice Prosser's concurrence in *State v. Sanders*, 2008 WI 85, 311 Wis. 2d 257, 752 N.W.2d 713, which discussed the hot pursuit doctrine at length); *State v. Weber*, 2016 WI 96, ¶ 28, 372 Wis. 2d 202, 887 N.W.2d 554 ("Both this court and the Supreme Court of the United States have recognized that 'law enforcement officers may make a warrantless entry onto private property . . . to engage in "hot pursuit" of a fleeing suspect.'" (citation omitted)).[8] Under the doctrine of hot pursuit, an officer is

[8] The lead opinion in *Weber,* authored by Justice Ziegler, was joined in full by Chief Justice Roggensack and Justice Gableman. Although Justice Kelly wrote separately on the issue of probable cause, he noted that the "lead opinion's explanation of the 'hot pursuit' doctrine [was] well-stated, and need[ed] no further

justified in following a suspect into a home to make an arrest when there "is probable cause to make an arrest for a jailable crime" and "immediate or continuous pursuit of the [suspect] from the scene of a crime." *Sanders*, 311 Wis. 2d 257, ¶ 117 (Prosser, J., concurring).

"The necessity—and thus the intuitive reasonableness—of a hot pursuit doctrine in our constitutional law is apparent": it "helps ensure that a criminal suspect will not be rewarded for fleeing the police and that the police will not be penalized for completing a lawful attempt to apprehend a suspect, who, by his own actions, has drawn the police into his home." *Weber*, 372 Wis. 2d 202, ¶ 30. "Law enforcement is not a child's game of prisoner['s] base, or a contest, with apprehension and conviction depending upon whether the officer or the defendant is fleetest of foot." *Id.* (quoting *Sanders*, 311 Wis. 2d 257, ¶ 133 (Prosser, J., concurring) (alteration in original)). Accordingly, "[a] police officer in continuous pursuit of a perpetrator of a crime committed in the officer's presence . . . must be allowed to follow the suspect into a private place, or the suspect's home if he chooses to flee there, and effect the arrest without a warrant." *Id.* (quoting *Sanders*, 311 Wis. 2d 257, ¶ 133 (Prosser, J., concurring) (alteration in original)).

Because the hot pursuit doctrine itself "serves [that] important public policy purpose," hot pursuit is a sufficient and independent justification for a warrantless entry and arrest. *Weber*, 372 Wis. 2d 202, ¶¶ 30, 41–42. As such, it authorizes an officer's entry into a home even when no other public policy considerations, such as "preventing the

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treatment" in his concurrence. *Weber*, 372 Wis. 2d 202, ¶ 48 n.1 (Kelly, J., concurring).

destruction of evidence" or "protecting a home's occupants," are present. *Id.* ¶ 30; *see also Sanders*, 311 Wis. 2d 257, ¶ 118 (Prosser, J., concurring) ("There is no implication in our case law that 'hot pursuit' cannot stand alone as an exigent circumstance justifying a warrantless home entry and arrest. On the contrary, our cases explicitly recognize that hot pursuit is a sufficient justification for a warrantless entry and arrest.")

Hot pursuit justifies an officer's entry into the home to complete an arrest even when the suspect is standing in a semi-private area, such as the "the doorway of the house." *United States v. Santana*, 427 U.S. 38, 40 (1976). A suspect who chooses to expose him or herself "to public view, speech, hearing and touch as if [he or] she had had been standing completely outside [the] house," is, in essence, in a "'public' place." *Id.* at 42. Thus, when the police seek to arrest such a suspect, they are "merely intend[ing] to perform a function which [the Supreme Court] approved in [*United States v.*] *Watson*, [423 U.S. 411 (1976)]." *Id.* ("In [*Watson*], we held that the warrantless arrest of an individual in a public place upon probable cause did not violate the Fourth Amendment.") Consequently, "a suspect may not defeat an arrest which has been set in motion in a public place, and is therefore proper under *Watson*, by the expedient escaping into a private place." *Id.* at 43. The officer is justified in following the suspect into the home to complete the arrest. *Id.*

Applying the above principles here, the officers' entry into Delap's residence[9] to complete his arrest was justified

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[9] Like Delap, the State will generally refer to 110 Milwaukee Street as Delap's residence. (*See e.g.*, Delap's Br. 2 (referring to

because the officers had probable cause to arrest Delap for the jailable offense of obstruction and they followed him into his residence in hot pursuit.

B. The officers' entry into Delap's residence was supported by probable cause and justified by the hot pursuit exception.

1. The officers had probable cause to believe that Delap committed the jailable offense of obstruction.

"'[P]robable cause' is not a terribly high standard. All one needs is evidence 'sufficient to warrant a reasonable person to conclude that the defendant . . . committed or [was] in the process of committing an offense.'" *Weber*, 372 Wis. 2d 202, ¶ 55 (Kelly, J., concurring) (alteration in original) (citing *State v. Blatterman*, 2015 WI 46, ¶ 35, 362 Wis. 2d 138, 864 N.W.2d 26). "[A]lthough probable cause must amount to 'more than a possibility or suspicion that the defendant committed an offense,' the evidence required to establish probable cause 'need not reach the level of proof beyond a reasonable doubt or even guilt that is more likely than not.'" *State v. Lange*, 2009 WI 49, ¶ 38, 317 Wis. 2d 383, 766 N.W.2d 551 (quoting *State v. Secrist*, 224 Wis. 2d 201, 212, 589 N.W.2d 387 (1999)). "[P]robable cause eschews technicality and legalisms in favor of a 'flexible, common-sense measure of the plausibility of particular conclusions about human behavior.'" *Secrist*, 224 Wis. 2d at 215 (quoting *Kiper*, 193 Wis. 2d at 83).

Here, the quantum of evidence must show that Delap "knowingly resist[ed] or obstruct[ed] an officer while such

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110 Milwaukee Street as "Mr. Delap's residence" numerous times).)

officer [was] doing any act in an official capacity and with lawful authority." Wis. Stat. § 946.41(1). Stated more simply, the evidence must show that (1) Sergeant Willmann and Deputy Waas were acting in an official capacity and with lawful authority, and (2) Delap knowingly resisted or obstructed what Sergeant Willmann and Deputy Waas were lawfully trying to accomplish in their official capacities. The evidence here demonstrates that when the officers entered Delap's residence, they had probable cause to arrest Delap for violating Wis. Stat. § 946.41(1).

First, Sergeant Willmann and Deputy Waas were acting in an official capacity and with lawful authority. Under *Terry v. Ohio*, 392 U.S. 1 (1968), officers are allowed to stop and question a person when they have reasonable suspicion that criminal activity is afoot. Here, the officers had the legal authority to command Delap to stop running from them so they could perform a reasonable-suspicion-based *Terry* stop: (1) the officers were close to the residence where they were attempting to execute the arrest warrant (R. 41:40, Pet-App. D:40); (2) the officers saw a person standing in the driveway of the residence where they were attempting to execute the warrant (R. 41:10, Pet-App. D:10); (3) the person immediately turned and ran when he saw the officers coming toward him[10] (R. 41:10, Pet-App. D:10); and (4) the person the officers were attempting to arrest, Delap, is a known fleer. (R. 1:2–3, Pet-App. B:2–3; 41:8–9, Pet-App. D:8–9.) Those facts created at least reasonable suspicion to perform a *Terry* stop. Thus, when Sergeant Willmann, who

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[10] "Flight at the sight of police is undeniably suspicious behavior" that, at the very least, "gives rise to a reasonable suspicion that all is not well." *State v. Anderson*, 155 Wis. 2d 77, 84, 454 N.W.2d 763 (1990).

was wearing his standard duty uniform and who identified himself as a police officer, ordered Delap to stop, he acted pursuant to *Terry* in his official capacity and with lawful authority.

Second, the evidence demonstrates that Delap knowingly resisted or obstructed what Sergeant Willmann and Deputy Waas were lawfully trying to accomplish in their official capacities. Again, the uniformed officers were in the area because they were trying to execute two warrants for Delap's arrest. (R. 41:9, Pet-App. D:9.) They saw someone in the driveway of the residence where they were going to execute the warrants, and that person immediately turned and started running away when he noticed the officers. (R. 41:10, Pet-App. D:10.) At that point, the officers believed that the person running away from them was Delap. (R. 41:38–39, 41, Pet-App. D:38–39, 41.) They lawfully and loudly commanded Delap to stop, but he kept on running. (R. 41:11, 53, Pet-App. D:11, 53.) Under those facts, a reasonable officer would conclude that Delap, a frequent fleer, was once again attempting to avoid arrest by ignoring Sergeant Willmann's lawful command to stop and retreating into his residence.

The testimony elicited at the suppression hearing bolsters this conclusion. At the hearing, Sergeant Willmann testified that "post arrest [Delap] admitted to [him] that [Delap] knew [they] were police officers and that he didn't wanna go back to jail because he didn't wanna detox off of heroin." (R. 41:36, Pet-App. D:36.) Moreover, Delap testified that he "suspected" that Sergeant Willmann and Deputy Waas were police officers and that he knew there were outstanding warrants for his arrest. (R. 41:32, Pet-App. D:32.) And when asked if the reason he ran was to "get away from a police officer" to avoid being "arrested on the warrant and taken to jail," Delap answered, "That is correct." (R.

41:33, Pet-App. D:33.) On the dash cam recording from that night, Delap admitted that he saw the officers "walking down the street with flashlights" and that he heard the officers tell him "to stop [when he] tried to run into the house." (Time stamped 22:44:56–45:8.)

All of this evidence demonstrates that Delap knowingly resisted or obstructed the officers' lawful attempt to stop (and eventually arrest) him. Accordingly, the evidence shows that the officers had probable cause to believe that Delap committed the crime of obstructing before entering Delap's residence.

2. The officers immediately pursued Delap and performed a limited entry into Delap's residence to prevent Delap's continued flight.

Again, the "basic ingredient of the exigency of hot pursuit is 'immediate or continuous pursuit of [a suspect] from the scene of a crime." *Weber*, 372 Wis. 2d 202, ¶ 28. That basic ingredient was present here.

As explained above, the officers immediately pursued Delap after he ran from Sergeant Willmann's command to stop. (R. 41:10–11, Pet-App. D:10–11.) Thus, there was no delay between Delap committing the illegal act of obstructing and the officers' pursuit of Delap.

Moreover, obstruction is a jailable offense that carries a penalty of up to nine months in jail. Wis. Stat. § 346.17(2t). That penalty—jail time—"demonstrate[s] that the State has a strong 'interest in arresting individuals suspected of committing [that] offense[ ].'" *Weber*, 372 Wis. 2d 202, ¶ 37 (quoting *Welsh v. Wisconsin*, 466 U.S. 740, 754 n.14 (1984)).

Finally, the officers' intrusion here was appropriately limited. To start, Delap's actions forced the officers to enter Delap's residence to accomplish the stop. *See Weber*, 372

Wis. 2d 202, ¶ 77 (Kelly, J., concurring) ("The reason the events at issue took place in Mr. Weber's garage is because that is where Mr. Weber chose for them to take place."). The stop and arrest could have occurred outside Delap's residence; it occurred inside because Delap chose to evade his arrest under the warrants.

And Sergeant Willmann reasonably prevented Delap from closing the door of the residence. The officers knew that Delap had "violent tendencies," including "a history of resisting and assaulting law enforcement officers." (R. 1:2, Pet-App. B:2; 41:10, Pet-App. D:10.) Given that information, the last thing the officers would want to do is lose sight of Delap and allow him to retreat into his residence, where he could grab a weapon or attempt to ambush and assault the officers. Losing sight of Delap would have made the situation more dangerous.

Moreover, Sergeant Willmann also reasonably removed his taser from his holster. Delap's refusal to let the officers into his residence, even after he was informed that the officers were there to execute the arrest warrants (R.1:3, Pet-App. B:3; 41:20, Pet-App. D:20), coupled with the officer's knowledge of Delap's "violent tendencies" and assaultive behavior toward law enforcement (R. 1:2, Pet-App. B:2; 41:10, Pet-App. D:10.), obligated the officers to escalate their response. Sergeant Willmann did that by removing his taser and ordering Delap away from the door. Only after Sergeant Willmann indicated that he had a taser did Delap finally comply with the officers' directives. (R. 1:3, Pet-App. B:3; 41:31, Pet-App. D:31.) As soon as Delap laid on the ground, Sergeant Willmann holstered his taser and handcuffed Delap. (R. 1:3, Pet-App. B:3.) The officers searched Delap incident to his arrest; neither officer searched Delap's residence. (R. 1:3–4, Pet-App. B:3–4.) The drug paraphernalia Delap sought to exclude at the

suppression hearing was found in his pocket. (R. 1:3–4, Pet-App. B:3–4.)

In short, although the officers needed to use some force to hold and eventually push open Delap's door, and although Sergeant Willmann drew his taser, those actions were necessary and limited responses to Delap's behavior. Accordingly, the entry here was reasonable.

C. Delap's arguments are not persuasive.

To the extent that Delap argues that hot pursuit should not qualify as an exigent circumstance justifying entry into the home (Delap's Br. 22–34, 42–45), this Court has flatly rejected that argument. *See Sanders*, 311 Wis. 2d 257, ¶ 118 (Prosser, J., concurring); *Weber*, 372 Wis. 2d 202, ¶¶ 30, 41–42.

Delap's other main argument seems to be that the pursuit here was not reasonable because the offense was minor and the entry was forceful. This Court should reject both arguments.

As explained above, Delap committed a jailable offense. *See Ferguson*, 317 Wis. 2d 586, ¶ 29 ("[C]ourts, in evaluating whether a warrantless entry is justified by exigent circumstances should consider whether the underlying offense is a jailable or nonjailable offense . . . ."). By attaching a significant penalty—jail time—to the offense of obstruction, the "legislature has indicated that it finds resistance or obstruction of an officer to be a serious matter regardless of the underlying circumstances." *Weber*, 372 Wis. 2d 202, ¶ 43 n.14.

Further, as demonstrated above, the officers' actions were necessary and calculated responses to Delap's behavior. The officers' employed no more force than necessary to arrest Delap. As a result, the entry was reasonable.

In sum, this Court may affirm the decisions of the lower court based on *Payton*; alternatively, it may affirm based on the hot pursuit exception to the warrant requirement.

CONCLUSION

This Court should affirm the court of appeals' decision and affirm Delap's judgment of conviction.

Dated this 6th day of October, 2017.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 7,902 words.

Dated this 6th day of October, 2017.

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CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § 809.19(12)

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This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

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Dated this 6th day of October, 2017.

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