STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT IV

Case No. 2017AP587-CR

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STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

ANTHONY S. TAYLOR,

Defendant-Appellant.

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On a Notice of Appeal From a Judgment of Conviction
Entered in the Circuit Court for Dane County,
the Honorable Stephen E. Ehlke, Presiding

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# BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

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KARA L. MELE
Assistant State Public Defender
State Bar No. 1081358

Office of the State Public Defender
Post Office Box 7862
Madison, WI 53707-7862
(608) 267-2124
melek@opd.wi.gov

Attorney for Defendant-Appellant

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## ISSUES PRESENTED

I. Is the use of a trained narcotics detection dog to sniff the front door of an apartment for the purpose of gathering incriminating evidence from inside the apartment a search under the Fourth Amendment?

The circuit court did not answer this question.

II. Was the ensuing consent to search the apartment voluntary under the circumstances?

The circuit court determined that the police obtained voluntary consent to search the apartment following the dog sniff.

III. If an unreasonable search occurred under the Fourth Amendment, and if the ensuing consent to search was voluntary, did the state meet its burden to show a sufficient break in the causal chain between the illegality and the seizure of evidence?

The circuit court did not answer this question because the state failed to raise it.

## STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Oral argument is not requested but is welcomed if the court would find it helpful in resolving this case. Because this case is to be decided by a single judge, publication is not warranted. Wis. Stat. Rule § 809.23(1)(b)4.

## STATEMENT OF THE CASE AND FACTS

Without a warrant, exigent circumstances, or consent, the police used a trained narcotics detection dog to sniff the front door of Shataqua Moore's apartment. According to the police, the dog alerted. Thereafter, Ms. Moore (who initially refused consent to search her apartment) signed a consent form. She consented because she saw the dog alert and was told that her consent would forego the lengthy process of getting a warrant. At the time, Ms. Moore's four-year-old son was alone inside the apartment, and Ms. Moore could not enter the premises without a police escort. The circuit court held that even if the dog sniff was unlawful, it did not negate Ms. Moore's consent to search. By virtue of his status as an overnight guest at Ms. Moore's apartment, Mr. Taylor challenges the denial of his motion to suppress.

### *The dispatch*

On December 21, 2015, at approximately 6:41 p.m., the police responded to a call about a physical fight in progress at an apartment complex in Madison. (1:2; 48:13). The fight involved Jasmine Crawford, who was Mr. Taylor's ex-girlfriend, and Shataqua Moore, who was Mr. Taylor's current girlfriend. (48:13, 26, 32-34). Ms. Crawford had confronted Ms. Moore and Mr. Taylor in the parking lot and stated that she was going to "beat [Ms. Moore's] ass. . . ." (48:33). Things got physical and Ms. Moore called the police. (48:34-35, 40).

Officer Jonathan Weaver arrived on scene and spoke with Ms. Crawford. (48:13). Ms. Crawford claimed that she saw Mr. Taylor carry a large bag of marijuana into Ms. Moore's apartment. (48:14). She alleged that Mr. Taylor would make trips to Chicago to pick up marijuana and take it back to Madison. (48:14). She claimed to have accompanied

Mr. Taylor on at least one of these occasions. (48:14). She also alleged that Mr. Taylor might be in possession of a firearm. (48:14).

When the police made contact with Ms. Moore, she was standing on the patio outside her apartment. (48:18, 35, 40). Detective Mansavage, who was standing on a sidewalk in the vicinity of Ms. Moore's apartment, claimed to smell marijuana. (48:16, 41). The police asked Ms. Moore for consent to search her apartment and she refused. (48:16, 35). A couple minutes later, Ms. Moore was told that she could not go inside her apartment without a police escort. (48:18, 29, 35-36). At the time, her four-year-old son was alone inside the apartment. (48:36, 43).

*The warrantless dog sniff and resulting search*

The officers advised Ms. Moore that they were prepared to obtain a search warrant. (48:16). The police summoned a trained narcotics detection dog to the first floor of the apartment complex. (48:16). There were four apartments on the first floor. (48:17). The dog sniffed multiple doors in the hallway and alerted at Ms. Moore's door. (48:16, 29).

The dog sniff occurred in the presence of Ms. Moore, her mother, and brother. (48:38-39, 41-42). After the dog alerted, the police again asked for consent to search. (48:16). Ms. Moore again refused. (48:16). At this time, Ms. Moore's mother tried pressuring her to give consent. (48:22-23, 39). Officer Weaver overheard the conversation. (48:23). He interrupted to tell Ms. Moore that the police would not just leave if she refused consent. (48:23). He also told her that the search warrant process could take as long as three hours. (48:20-21, 39, 45).

Ms. Moore asked whether her consent would speed up the search warrant process. (48:23, 45, 48). Officer Weaver told her that it would. (48:23). Ms. Moore then consented to the search. (48:23-25, 39, 45-47).

Upon searching the apartment, the police found a six-by-eight inch Tupperware container filled with marijuana. (48:27-28). Mr. Taylor was taken into custody. (48:28-29).

*The motion to suppress*

The state charged Mr. Taylor with one count of possession of THC as a second and subsequent offense. (1:1). Mr. Taylor moved to suppress the evidence found as a result of the dog sniff. (14; 17). Specifically, he argued that the dog sniff constituted an unlawful search under the Fourth Amendment. (14; 17; 48:7-8; 49:3). He also maintained that the ensuing consent was not voluntary. (14; 17; 48:7-8). He further contended that because any voluntary consent was the product of a Fourth Amendment violation, the evidence seized must be suppressed as fruit of the poisonous tree. (14; 17; 48:7-8; 49:3). The state opposed the motion by arguing that Ms. Moore voluntarily consented to the search. (19; 48:9; 49:3-4).

At the suppression hearing, Ms. Moore testified that she would not have consented to the search of her apartment had she not seen the dog alert at her door. (48:42). She explained that her mother told her to consent based on the dog's alert and that she ultimately listened to her mother. (48:39, 46-47). Ms. Moore further testified that when she consented, she believed the police were in the process of getting a warrant and that it could take several hours. (48:39). She did not want to wait for hours because her four-year-old son was alone inside the apartment, upset and scared. (48:39).

The circuit court, the Honorable Stephen E. Ehlke, presiding, denied Mr. Taylor's suppression motion. (49:8). The court held that even if the dog sniff was unlawful, it did not negate Ms. Moore's voluntary consent to search the apartment. (49:8; App. 102-06).

After the denial of the suppression motion, Mr. Taylor pleaded guilty to possession of THC. (50:6; App. 101). The circuit court imposed a 60-day jail sentence. (50:9; App. 101).

This appeal follows.

## ARGUMENT

### I. The Police's Use of a Trained Narcotics Detection Dog to Sniff the Front Door of Ms. Moore's Apartment For the Purpose of Gathering Incriminating Evidence From Inside the Apartment Was an Unreasonable Search Under the Fourth Amendment.

#### A. Introduction and standard of review.

In ***Florida v. Jardines***, 133 S.Ct. 1409, 1414-18 (2013), the United States Supreme Court held that the officers' use of a drug-sniffing dog on the front porch of Jardines' home, to investigate whether marijuana was being grown from within the home, was a search under the Fourth Amendment. The Court's rationale was property-based: the investigation took place in a constitutionally protected area (the curtilage of the home) and "was accomplished through an unlicensed physical intrusion," namely the use of "a trained police dog to explore the area around the home in hopes of discovering incriminating evidence. . . ." ***Florida v. Jardines***, 133 S.Ct. 1409, 1415-16 (2013). In other words, the police committed a trespass on Jardines' property. The Fourth Amendment violation was therefore rooted in a physical

intrusion onto a constitutionally protected area. ***Id***. at 1417. The Court left open the question whether the police's investigation also violated Jardines' reasonable expectation of privacy. ***Id***.

Since ***Jardines***, courts have been left to grapple with the following questions: can a resident of a multiunit dwelling claim curtilage protection where a dog sniff occurs outside of her apartment, and if not, can she claim a violation of her reasonable expectation of privacy? *See* Eric Connon, Growing Jardines: Expanding Protections Against Warrantless Dog Sniffs to Multiunit Dwellings, 67 Case W. Res. L. Rev. 309, 311 (2016). Courts from around the country—most notably, the United States Court of Appeals for the Eighth Circuit—have relied upon ***Jardines'*** theory of curtilage to declare a dog sniff outside an apartment door a search under the Fourth Amendment. *E.g.*, ***United States v. Hopkins***, 824 F.3d 726, 732-33 (8th Cir. 2016).

And recently, in ***United States v. Whitaker***, 820 F.3d 849, 854 (7th Cir. 2016), the Seventh Circuit held that the use of a drug-sniffing dog to search the front door of an apartment for the purpose of gathering incriminating evidence from inside the apartment was a Fourth Amendment search based on privacy grounds. Though ***Whitaker*** is the most significant decision on the matter since the United States Supreme Court decided ***Jardines***, the Seventh Circuit was not the first court to provide a privacy-based rationale for declaring a Fourth Amendment search in this context. *See* ***United States v. Thomas***, 757 F.2d 1359, 1366-67 (2d Cir. 1985).

Wisconsin has yet to weigh in on these significant constitutional issues. Mr. Taylor argues that the warrantless dog sniff of the apartment in this case constituted a Fourth Amendment violation, either as a trespass or as an intrusion

of his reasonable expectation of privacy,[1] as both tests are viable methods for establishing Fourth Amendment protection. ***State v. Popp***, 2014 WI App 100, ¶¶18-19, 357 Wis. 2d 696, 855 N.W.2d 471.

Whether police conduct violated the Fourth Amendment is a question of constitutional fact subject to a two-step standard of review. ***State v. Dumstrey***, 2016 WI 3, ¶12, 366 Wis. 2d 64, 873 N.W.2d 502. This court upholds a circuit court's findings of historical fact unless they are clearly erroneous. ***Id***., ¶13. It then independently reviews whether the facts meet the constitutional standard of reasonableness. ***Id***.

B. The dog sniff of Ms. Moore's apartment constituted a Fourth Amendment search under the property-based rationale of ***Jardines***.

i. ***Jardines***

In ***Jardines***, the police received an unverified tip that marijuana was being grown inside Jardines' home. ***Jardines***, 133 S.Ct. at 1413. Officers went to the home with a trained narcotics detection dog to investigate the tip. ***Id***. The dog sniffed the front porch and base of the front door and alerted. ***Id***. The police then obtained a warrant and searched Jardines' home, which turned up marijuana plants. ***Id***.

The United States Supreme Court took the case to decide whether the police's behavior constituted a Fourth Amendment search. ***Id***. at 1414. The Court began its analysis by noting that there are two methods for establishing a Fourth

[1] At the circuit court, the state conceded that Mr. Taylor could claim Fourth Amendment protection by virtue of his status as an overnight guest at Ms. Moore's apartment under ***Minnesota v. Carter***, 525 U.S. 83, 90 (1998). (48:5-6).

Amendment violation: a property-based test, where a search results from a physical trespass, and a privacy-based test, where a search occurs in an area where a person holds a reasonable expectation of privacy. ***Id***.

The Court chose to apply the property-based test and its analysis proceeded in two parts. First, it considered whether the investigation took place in a constitutionally protected area. ***Id***. at 1414-15. This was an easy question for the Court because the front porch is a classic example of curtilage—the area immediately surrounding and associated with the home that enjoys Fourth Amendment protection as part of the home itself. ***Id***.

Second, the Court considered whether the investigation constituted a trespass of the curtilage of Jardines' home. ***Id***. at 1415-16. Since members of the general public (including the police) have an implied license to enter the curtilage of a person's home for the purpose of visiting the home, the inquiry turned on whether the police's investigation exceeded that social courtesy. ***Id***. at 1415-16. The Court concluded that it did: there is no customary invitation to snoop about the area surrounding a person's home with the intention of finding incriminating evidence. ***Id***. at 1416. The Court further explained:

> To find a visitor knocking on the door is routine (even if sometimes unwelcome); to spot that same visitor exploring the front path with a metal detector, or marching his bloodhound into the garden before saying hello and asking permission, would inspire most of us to—well, call the police. The scope of a license—express or implied—is limited not only to a particular area but also to a specific purpose. Consent at a traffic stop to an officer's checking out an anonymous tip that there is a body in the trunk does not permit the officer to

> rummage through the trunk for narcotics. Here, the background social norms that invite a visitor to the front door do not invite him there to conduct a search.

***Id***.

As the "officers learned what they learned only by physically intruding on Jardines' property to gather evidence," the Court held that a Fourth Amendment search had occurred. ***Id***. at 1417.

ii. Post-***Jardines***

Since ***Jardines***, courts have been confronted with the question whether the curtilage conception provides Fourth Amendment protection to an apartment dweller where a warrantless dog sniff occurs at his or her front door. *See* Connon, 67 Case W. Res. L. Rev. at 312-319; *see also* Kathryn E. Fifield, Let This Jardines Grow: The Case for Curtilage Protection in Common Spaces, 2017 Wis. L. Rev. 147, 169-171. In those cases where courts have found Fourth Amendment protection in this context, the dog sniff occurred at the threshold of the home as opposed to an area beyond the threshold, typically referred to as a "common area" of a multiunit dwelling.

For example, in ***Hopkins***, the dog sniff took place at the creases of the front door to Hopkins' rented townhome. ***Hopkins***, 824 F.3d at 731. In determining whether the area immediately in front of Hopkins' door was curtilage, the court applied the four-factor curtilage test set forth in ***United States v. Dunn***, 480 U.S. 294, 301 (1987). ***Id***. That test examines: (1) the proximity of the area claimed to be curtilage to the home; (2) whether the area is included within an enclosure surrounding the home; (3) the nature of the uses to which the area is put; and (4) the steps taken by the resident to protect the area from observation by people

passing by. ***Id***. The court held that the proximity of the area investigated to Hopkins' home strongly supported a finding of curtilage. ***Id***. at 732. This made up for the fact that the front door was not enclosed by a fence or wall and was visible to the public. ***Id***.

Though it principally relied on the ***Dunn*** factors to support its decision, the ***Hopkins*** court also reasoned that the space immediately in front of Hopkins' townhome was easily understood as curtilage based on our daily experience. ***Id***. (citations omitted). This more simplistic analysis is consistent with ***Jardines***, where the United States Supreme Court did not reference the ***Dunn*** factors in reaching its curtilage determination.

The Illinois Supreme Court recently reached a similar result. *See* ***People v. Burns***, 50 N.E.3d 610 (Ill. 2016). Like ***Hopkins***, the dog sniff in ***Burns*** took place outside Burns' apartment door. ***Id***. at 614. In holding that the landing immediately outside of Burns' front door was curtilage, the court applied the ***Dunn*** factors. ***Id***. at 620. As in ***Hopkins***, the court reasoned that the proximity of the landing to the apartment strongly supported a finding of curtilage. ***Id***. It further found that the remaining factors weighed in Burns' favor, particularly because the apartment was located in a locked structure. ***Id***. at 620-21. That the apartment was in a locked building also contributed to the court's conclusion that the landing was easily understood as curtilage under ***Jardines***. ***Id***. at 621.

The highest criminal court in Texas has employed a comparable analysis to that of ***Hopkins*** and ***Burns*** in the wake of ***Jardines***. *See* ***State v. Rendon***, 477 S.W.2d 805 (Tex. Crim. App. 2015). In ***Rendon***, the dog sniff occurred at the front door of Rendon's apartment, which was located in a semi-private upstairs landing. ***Id***. at 806-07. In holding that

the area sniffed was curtilage, the court simply reasoned that the threshold of the home is "intimately linked to the home, both physically and psychologically. . . ." ***Id***. at 810 (internal quotation marks and citation omitted). This basic approach mirrored that of ***Jardines***: an application of the ***Dunn*** factors is unnecessary where the curtilage question is easily understood from our daily experience. *See* ***Id***. at 809-10.

iii. The instant case

The police in this case physically occupied private property in order to secure incriminating evidence and therefore conducted a Fourth Amendment search under ***Jardines***. As in ***Jardines*** and the cases mentioned above, the dog sniff occurred at the entrance to Ms. Moore's home. Whether analyzed under the basic approach set forth in ***Jardines*** or with reference to the ***Dunn*** factors, the area at issue was constitutionally protected as curtilage. Since the dog sniff exceeded the implied license that any member of the public would have to approach Ms. Moore's home, a Fourth Amendment search took place.

That the investigation producing incriminating evidence in this case occurred at the front door threshold to Ms. Moore's apartment makes this case as straightforward as ***Jardines***. Like the front porch in ***Jardines***, the front door threshold to Ms. Moore's apartment (located in a hallway that serves only four apartments) is easily understood as an area "'immediately surrounding and associated with the home . . . .'" ***Jardines***, 133 S.Ct. at 1414 (quoting ***Oliver v. United States***, 466 U.S. 170, 180 (1984)). Indeed, the police could not have gotten any closer to Ms. Moore's apartment without being inside the apartment itself.

Interpreting the front door threshold to Ms. Moore's apartment as a common area shared by other apartment dwellers would be unreasonable in light of our daily experience. There is no question that apartment dwellers and their invitees have free range to use the shared hallway—or lobby or parking lot—of a multiunit complex to go about their daily business. But the front door threshold to an apartment in a multiunit complex is *not* an area that is used by all apartment dwellers and their invitees. Whereas it might be common for a tenant to relax in the lobby of his apartment building, it would be uncommon (and unwelcomed) for him to camp out immediately in front of another tenant's unit. In fact, it would give the tenant who is subjected to that intrusion a reason to call the police, just as a homeowner would if he spotted a visitor exploring his front path with a metal detector. *See* ***id***. at 1416.[2] That is because the area in question is "'intimately linked to the home, both physically and psychologically,' and is where 'privacy expectations are most heightened.'" ***Jardines***, 133 S.Ct. at 1415 (quoting ***California v. Ciraolo***, 476 U.S. 207, 213 (1986)). The basic approach set forth in ***Jardines*** therefore supports a finding of curtilage in this matter.

Application of the ***Dunn*** factors to the facts of this case yields the same result. As in ***Hopkins*** and ***Burns***, the first ***Dunn*** factor—the proximity of the area searched to the home—strongly supports a finding of curtilage. As discussed, the testimony was that the dog sniff occurred at Ms. Moore's apartment door. The police could not have gotten any closer without being inside the apartment. *Compare with* ***Dumstrey***,

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[2] *See* Carrie Leonetti, Open Fields in the Inner City: Application of the Curtilage Doctrine to Urban and Suburban Areas, 15 GEO. MASON U. C.R. L.J. 297, 317 (2005) (noting that apartment dwellers have a collective right to exclude all individuals that do not have a legitimate purpose on the premises).

366 Wis. 2d 64, ¶¶34-35 (parking garage located beneath multiunit complex not closely proximate to defendant's apartment because it was not attached to the home itself).

The second ***Dunn*** factor—whether the area is included within an enclosure surrounding the home—also weighs in favor of finding curtilage. The front door threshold to Ms. Moore's apartment was located within a multiunit complex. *Compare with* ***Dumstrey***, 366 Wis. 2d 64, ¶¶38-39 (parking garage not included within the overall enclosure that encompasses the entire apartment building).

The third ***Dunn*** factor—the nature of the uses to which the area is put—similarly favors the front door threshold being curtilage. The testimony was that Ms. Moore has two entrances to her unit: an interior door accessed by a common hallway and a patio door. (48:17). From this evidence, it is reasonable to infer that the front door threshold is the primary path of egress and ingress and its use is generally limited to Ms. Moore and her invitees. *Compare with* ***Dumstrey***, 366 WIs. 2d 64, ¶¶40-42 (parking in common parking garage not a use associated with an intimate activity of the home).

The fourth ***Dunn*** factor focuses on the steps taken to protect the area from observation by people passing by. There is no testimony indicating whether Ms. Moore's apartment was located in a locked structure. However, it was included within an enclosure surrounding the home. Thus, while the area was visible to other tenants and visitors of the building, it was not exposed to the public at large. In this regard, it should be noted that the front porch in ***Jardines*** was not shielded from public view, yet the Court easily understood the area as curtilage. ***Jardines***, 133 S.Ct. at 1413-15.

While courts do not mechanically apply the ***Dunn*** factors, ***Id***., ¶32, it is noteworthy that three of the four factors strongly favor a curtilage designation in this case. The ultimate question is "'whether the area in question is so intimately tied to the home itself that it should be placed under the home's 'umbrella' of Fourth Amendment protection.'" ***Id***. (quoting ***Dunn***, 480 U.S. at 301). The front door threshold to an apartment meets that test.

To summarize, whether the curtilage question is analyzed under the basic approach of ***Jardines*** or with reference to the ***Dunn*** factors, the precise location of the dog sniff in this case must not be overlooked. If the front door threshold to an apartment is not a constitutionally protected area, it would seem an apartment never carries with it a certain extent of curtilage. This would create a gap in privacy protections "on grounds that correlate with income, race, and ethnicity." ***Whitaker***, 820 F.3d at 854; *see also* Connon, 67 Case W. Res. L. Rev. at 325-26; Fifield, 2017 Wis. L. Rev. 147 at 172-76. Extending ***Jardines*** to multiunit dwellers—at least in the context of police action centered on the front door threshold to the home—ensures equal Fourth Amendment protections for all.

Since the police's investigation occurred in a constitutionally protected area, the remaining question is whether "it was accomplished through an unlicensed physical intrusion." ***Jardines***, 133 S.Ct. at 1415. This case is on all fours with ***Jardines*** in that regard: the police brought a trained narcotics detection dog to investigate the area surrounding Ms. Moore's home with the hopes of discovering incriminating evidence. As Justice Scalia aptly put it, "[t]here is no customary invitation to do *that*." ***Id***. at 1416. Since the police "learned what they learned only by intruding on [Ms. Moore's] property to gather evidence," a Fourth Amendment searched occurred. ***Id***. at 1417.

C. The dog sniff of Ms. Moore's apartment also constituted a Fourth Amendment search under the privacy-based rationale of ***Whitaker***.

i. ***Whitaker***

***Whitaker*** involves facts similar to the instant case. There, the police received some tips about drug dealing out of an apartment in Madison. ***Whitaker***, 820 F.3d at 851. The property manager of the apartment building signed a consent form authorizing a K9 search of the premises. ***Id***. The dog first alerted on an Escalade parked in the space for the subject apartment. ***Id***. The police then took the dog to the second floor of the apartment building and into its locked hallway. ***Id***. There were six to eight apartments on the floor. ***Id***. The dog alerted at Whitaker's apartment door on a second pass. ***Id***.

Whitaker contended that the dog sniff of the area outside his apartment door constituted a search under the Fourth Amendment, both as a trespass under ***Jardines*** and as a violation of his privacy interests under ***Kyllo v. United States***, 533 U.S. 27 (2001), and ***Katz v. United States***, 389 U.S. 347 (1967). ***Id***. at 852. Setting trespass aside, the Seventh Circuit held that the use of the drug-sniffing dog "clearly invaded reasonable privacy expectations. . . ." ***Id***.

The Seventh Circuit reached that conclusion through Justice Kagan's concurring opinion in ***Jardines***, where she maintained that the dog sniff of Jardines' front door violated his privacy interests within the home. ***Id***. at 852-53. Justice Kagan argued that the issue had already been resolved by ***Kyllo***, where the Court determined that the police's use of a thermal-imaging device to detect heat emanating from a home was a Fourth Amendment search on privacy grounds. ***Jardines***, 133 S.Ct. at 1419 (Kagan, J., concurring). There,

the Court announced the following rule: "'[w]here . . . the Government uses a device that is not in general public, to explore details of the home that would previously have been unknowable without physical intrusion, the surveillance is a 'search' and is presumptively unreasonable without a warrant.'" ***Id***. (quoting ***Kyllo***, 533 U.S. at 40).

Applying the rule of ***Kyllo*** to the facts of ***Jardines***, Justice Kagan reasoned that the police action could easily be understood as a Fourth Amendment search. ***Id***. Specifically, the officers used a device not generally available to the public (a trained narcotics detection dog) to explore details of the home (the presence of particular substances) that would not have been knowable without entering the home. ***Id***.

As noted, the Seventh Circuit in ***Whitaker*** used the same reasoning to extend ***Kyllo*** to the multiunit dwelling context. ***Whitaker***, 820 F.3d at 852-53. The court acknowledged that Whitaker "did not have a reasonable expectation of complete privacy in his apartment hallway." ***Id***. at 853. However, it properly focused (as did Justice Kagan) on the nature of the intrusion at issue: the dog sniff was centered on Whitaker's activities *within the home*, the most sacred of places for Fourth Amendment purposes. ***Id***. That the dog may have been allowed to pass through the hallway of the multiunit complex was therefore irrelevant. ***Id***.; *see also* Connon, 67 Case W. Res. L. Rev. at 334-35 (per ***Kyllo***, the proper focus in this context is on the target of the search rather than the location of the searcher).

ii. Pre-***Whitaker***

Since ***Jardines***, ***Whitaker*** appears to be the most notable decision holding that a dog sniff outside an apartment door constitutes a Fourth Amendment search on privacy grounds. However, it bears mentioning that the United States

Court of Appeals for the Second Circuit reached the very same conclusion many years earlier in ***Thomas***.

In ***Thomas***, the police obtained a warrant to search the defendant's apartment based in part on a dog sniff that occurred at the apartment door. ***Thomas***, 757 F.2d at 1366-67. The Second Circuit held that the dog sniff violated the defendant's "heightened expectation of privacy in his dwelling. . . ." ***Id***. at 1367. Interestingly enough, the court's analysis foreshadowed the rule to come in ***Kyllo*** roughly 16 years later:

> With a trained dog police may obtain information about what is inside a dwelling that they could not derive from the use of their own senses. Consequently, the officers' use of a dog is not a mere improvement of their sense of smell, as ordinary eyeglasses improve vision, but is a significant enhancement accomplished by a different, and far superior, sensory instrument. Here the defendant had a legitimate expectation that the contents of his closed apartment would remain private, that they could not be "sensed" from outside his door. Use of the trained dog impermissibly intruded on that legitimate expectation.

***Id***. Once again, the focus was on the target of the search—not the location of the searcher—to find Fourth Amendment protection in this context.

iii. The instant case

That the investigation in this case centered on the inside of Ms. Moore's home makes this case an easy one to resolve on privacy grounds. There are few bright-line rules when it comes to the Fourth Amendment, but one remains constant: the amendment "draws 'a firm line at the entrance to the house. . . .'" ***Kyllo***, 533 U.S. at 50 (quoting ***Payton v. New York***, 445 U.S. 573, 590 (1980)). Accordingly, the

United States Supreme Court has held that where a search inside a home is concerned, the subject individual has an expectation of privacy that society is always prepared to recognize as reasonable. ***Id***. at 34.

It follows that Ms. Moore had a heightened expectation of privacy in her apartment, *see* ***Dumstrey***, 366 Wis. 2d 64, ¶22, and Mr. Taylor shared that expectation of privacy given his status as an overnight guest. ***Minnesota v. Olson***, 495 U.S. 91, 96 (1990). Their reasonable expectation of privacy concerned *all* details of the apartment, as "the entire area is held safe from prying government eyes." ***Kyllo***, 533 U.S. at 37.

Here, as in ***Whitaker*** (and ***Thomas***), the police used a super-sensitive instrument not generally available to the public (a trained narcotics detection dog) to discover details of Ms. Moore's apartment (the presence of controlled substances) that otherwise would have been unknowable without entering the premises. A Fourth Amendment search therefore occurred. ***Whitaker***, 820 F.3d at 853-54.

There being no question that the police conducted the dog sniff in this case without a warrant, exigent circumstances, or consent, the search—whether an intrusion of property or privacy interests—was constitutionally unreasonable. *See* ***Dumstrey***, 366 Wis. 2d 64, ¶22 (searches and seizures inside a home without a warrant are presumptively unreasonable).

## II. Ms. Moore's Ensuing Consent to Search Was Not Voluntary Because It Was Given Under Duress or Coercion.

### A. General legal principles and standard of review.

The second question is whether the consent given by Ms. Moore following the illegal dog sniff was voluntary. Consent must be given freely and voluntarily. ***State v. Artic,*** 2010 WI 83, ¶32, 327 Wis. 2d 392, 786 N.W.2d 430. "Law enforcement officers are expected to investigate possible illegal conduct, but the criminal law under which they operate 'cannot be used as an instrument of unfairness.'" ***Id***. (quoted source omitted). Thus, when a suspect is asked for consent, his or her response "must be 'an essentially free and unconstrained choice,' not 'the product of duress or coercion, express or implied.'" ***Id***. (quoted source omitted). It is the state's burden to prove voluntary consent by clear and convincing evidence. ***Id***.

Voluntary consent is assessed by considering the totality of the circumstances. ***Id***., ¶33. The Wisconsin Supreme Court has identified a non-exhaustive list of factors relevant to the inquiry:

> (1) whether the police used deception, trickery, or misrepresentation in their dialogue with the defendant to persuade him to consent; (2) whether the police threatened or physically intimidated the defendant or "punished" him by the deprivation of something like food or sleep; (3) whether the conditions attending the request to search were congenial, non-threatening, and cooperative, or the opposite; (4) how the defendant responded to the request to search; (5) what characteristics the defendant had as to age, intelligence, education, physical and emotional condition, and prior experience with the police; and (6) whether the police informed the defendant that he could refuse consent.

***Id***. "Discussion regarding either the absence of a search warrant or the possibility of getting one bears on several of these factors." ***Id***.

Whether consent was voluntarily given is a question of constitutional fact. ***State v. Phillips***, 218 Wis. 2d 180, 195, 577 N.W.2d 794 (1998). As noted in Section I, *supra*, this court reviews questions of constitutional fact under a two-step standard of review.

B. Following the illegal dog sniff, Ms. Moore did not voluntarily consent to the search of her apartment.

Under the totality of the circumstances, Ms. Moore's ensuing consent to search the apartment was not the product of a free and unconstrained choice.

The first two factors ask whether the police used any deception, trickery, misrepresentation, or threats in getting consent from Ms. Moore. The officers were clearly identified and indicated the reasons for wanting consent. They also acknowledged that they did not have a search warrant. However, the evidence shows that the police claimed the authority to obtain a search warrant where one could not in fact be obtained.

When Ms. Moore initially refused consent at the outset of the encounter, the officers told her that they were prepared to obtain a search warrant. But there were not then grounds upon which a warrant could issue, as evidence by what came next: they summoned a trained narcotics detection dog to conduct a sniff of Ms. Moore's apartment door. After the dog sniff occurred, and while Ms. Moore's mother was pressuring her to give consent because of the dog sniff, an officer reiterated the police's authority to obtain a warrant. (38:23).

However, the dog sniff occurred without a warrant and without any precedential decision specifically authorizing the action.

Whether viewed as a misrepresentation or a false threat to obtain a warrant, the situation was coercive. *See* ***Bumper v. North Carolina***, 391 U.S. 543, 550 (1968) (consent ensuing from officer's claim to have a warrant presents a situation instinct with coercion); *see also* 4 Wayne R. LaFave, Search and Seizure, § 8.2(c), at 95-98 (5th ed. 2012) (relying on ***Bumper*** to conclude "it may generally be said that a threat to *obtain* a search warrant is likely to be held to invalidate a subsequent consent if there were not then grounds upon which a warrant could issue. . . ."); ***Artic***, 327 Wis. 2d 392, ¶¶41 (a threat to obtain a search warrant does not invalidate consent unless it is baseless). The first two factors therefore weigh against a finding of voluntary consent.

The third factor asks whether the conditions attending the request to search were congenial, non-threatening, and cooperative, or the opposite. Nothing about this situation was congenial or cooperative. From the very beginning, Ms. Moore made it clear that she did not want the officers inside her apartment. She explained that her four-year-old son was inside the apartment alone, upset, and scared. (38:36, 39). She was told that she could not go check on her son without a police escort. She indicated that the police inside her apartment would upset her son all over again. (38:36). She was told that she might have to wait several hours while the police obtained a warrant. At the time, her mother was pressuring her to consent to the search. During that conversation, an officer interrupted to assure Ms. Moore that the police were not going anywhere. Under these conditions, it cannot reasonably be argued that the conditions attending

the request to search were congenial and cooperative. Accordingly, this factor weighs against a finding of voluntariness.

The fourth factor focuses on how the defendant responded to the request to search. "An initial refusal of a request to search will weigh against a finding of voluntariness." ***Artic***, 327 Wis. 2d 392, ¶56. It is clear from the record that Ms. Moore refused consent twice before signing the form—once before the dog sniff occurred, and once after. This factor therefore weighs against a finding of voluntariness.

The fifth factor evaluates the defendant's characteristics, including age, education, intelligence, physical and emotional condition, and experience with the police. The record shows that Ms. Moore was under both physical and emotion distress during this time period. She had just gotten into a physical confrontation with Ms. Crawford. She broke her finger during the incident. (38:34). Some of her hair was torn out. (38:35). She had to rush her four-year-old son inside the apartment after Ms. Crawford physically attacked her. (38:34). As indicated, she was concerned because he was alone, upset, and scared. The police told her that she could not go check on her son without a police escort and that it could take several hours to get a search warrant. She did not want the police inside her apartment because it would frighten her son. Under these circumstances, Ms. Moore was "particularly susceptible to improper influence, duress, intimidation, or trickery." ***Phillips***, 218 Wis. 2d at 202-03. This factor therefore weighs against voluntariness.

Finally, the sixth factor focuses on whether the officers informed Ms. Moore that she could refuse consent. While Ms. Moore's repeated refusals create the reasonable inference that she was aware she could withhold consent, there is no

indication in the record that the officers advised her of this right. Thus, this factor weighs against a finding of voluntariness. *See* ***Artic***, 327 Wis. 2d 392, ¶61.

On balance, the totality of the circumstances shows that Ms. Moore did not voluntarily consent to the search of her apartment following the illegal dog sniff.

## III. Even if the Ensuing Consent Was Voluntary, the State Has Failed to Meet Its Burden to Show a Sufficient Break in the Causal Chain Between the Illegality and the Seizure of Evidence. Therefore, All Evidence Seized as a Result of the Consent Search Must Be Suppressed as "Fruit of the Poisonous Tree."

### A. General legal principles and standard of review.

Even if Ms. Moore voluntarily consented to the search of her apartment, the remaining question is: should the evidence seized during the search be excluded because it was obtained as a result of the police exploiting the illegal dog sniff to acquire consent? The answer turns on "whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint." ***Wong Sun v. United States***, 371 U.S. 471, 488 (1963).

There are three factors relevant to this determination: (1) the temporal proximity of the official misconduct and seizure of evidence; (2) the presence of intervening circumstances; and (3) the purpose and flagrancy of the official misconduct. ***State v. Phillips***, 218 Wis. 2d 180, 205, 577 N.W.2d 794 (1998).

"Whether evidence should be suppressed because it was obtained pursuant to a Fourth Amendment violation is a question of constitutional fact." ***Id***. at 204. As noted in Section I, *supra*, this court reviews mixed questions of fact under a two-step standard of review.

B. The consent to search in this case was not sufficiently attenuated from the police illegality to purge the primary taint.

As a preliminary matter, the state never argued that Ms. Moore's consent to search the apartment was sufficiently attenuated from the illegal dog sniff. Rather, the state maintained that the dog sniff was irrelevant because Ms. Moore voluntarily consented to the search of her apartment after the illegality occurred. (48:9; 49:3).

The state's position disregards the well-established principle that the "mere fact that consent to search is voluntary . . . does not mean that it is untainted by prior illegal conduct." ***Phillips***, 218 Wis. 2d at 204. As ***Phillips*** instructs,

> When, as here, consent to search is obtained after a Fourth Amendment violation, evidence seized as a result of that search must be suppressed as 'fruit of the poisonous tree' unless that State can show a sufficient break in the causal chain between the illegality and the seizure of evidence.

***Id***. at 204-05. It was the state's burden to show a sufficient break in the causal chain at the circuit court. ***Id***. at 204. Its failure to do so therefore constitutes a forfeiture of the argument. *See* ***Apex Electronics Corp. v. Gee***, 217 Wis. 2d 378, 384, 577 N.W.2d 23 (1998). Nevertheless, as the forfeiture rule is not absolute, ***Id***., Mr. Taylor chooses to address the issue.

i. Temporal proximity

This factor examines "both the amount of time between the illegal [conduct] and the consensual search and the conditions that existed during that time." ***Phillips***, 218 Wis. 2d at 206. The state did not elicit testimony about the length of time that passed between the illegal dog sniff and the consensual search. However, given the overall sequence of events described by Officer Weaver and Ms. Moore, it is reasonable to infer that only a short amount of time elapsed between the two actions.[3]

The testimony shows that once the dog sniff occurred, Ms. Moore's mother (who was present for the sniff) pressured Ms. Moore to consent to the search of her apartment. (48:22-24, 38-39; 49:6-7). Ms. Moore's mother reasoned that the police were going to get a warrant anyway because the dog had alerted at the door. (48:39; 49:7). At the end of that conversation, Ms. Moore signed the consent form. (48:23, 39). Under these circumstances, there is little doubt that only a short period of time elapsed between the dog sniff and the consent to search. "This fact weighs against finding the consensual search attenuated." ***Id***.

The conditions that existed at the time of the consent are also relevant. This encounter did not involve any physical force. But as indicated above, it was hardly cooperative.

Officer Weaver testified that Ms. Moore initially refused consent after the dog alerted. (48:16). *Compare with* ***Phillips***, 218 Wis. 2d at 207 (prior to consenting, the defendant did not act annoyed or object to the agents'

[3] The record does indicate that the entire incident leading to consent lasted approximately one hour. Officer Weaver testified that he responded to the dispatch at approximately 7:45 p.m. (48:13). Ms. Moore signed the consent form at 20:49, or 8:49 p.m. (21:2).

presence in the basement); ***Artic***, 327 Wis. 2d 392, ¶¶76-78 (prior to consenting, the defendant was discussing "family and stuff" while sitting at the kitchen table with the officer). As Ms. Moore's mother pressured[4] her to consent to the search, Officer Weaver interjected to inform Ms. Moore that the police would not just walk away if she refused consent. (48:22-23). He also explained how long the search process would take—up to several hours—if the police had to get a warrant. (48:20-21, 39, 45; 49:7-8). And all of this happened while Ms. Moore's four-year-old son was inside the apartment by himself, upset and scared. (48:36, 39; 49:6). She was not allowed to go check on her son without a police escort. (48:36; 49:6).

In light of this evidence, it cannot reasonably be argued that this was the type of congenial, laid-back atmosphere that would mitigate the short temporal proximity that weighs against attenuation. The first factor therefore favors suppression.

ii. Intervening circumstances

The second factor focuses on the "presence or absence of meaningful intervening circumstances." ***Artic***, 327 Wis. 2d 392, ¶79. The key question is whether "the defendant acted 'of free will unaffected by the initial illegality.'" ***Id***. (quoting ***Rawlings v. Kentucky***, 448 U.S. 98, 108 (1980)). "To constitute sufficient intervening circumstances, the interim facts or evidence must show a 'discontinuity between the illegal [action] and the consent such that the original illegality is weakened and attenuated." ***Id***. (quoted source omitted).

[4] Officer Weaver described Ms. Moore's mother as "quite excited. She was upset with Ms. Moore, demanding to know why Ms. Moore was covering for Mr. Taylor." (48:22).

Here, the record demonstrates that there were no meaningful intervening circumstances between the illegal dog sniff and Ms. Moore's resulting consent. Quite the contrary, the undisputed facts show that but for the illegal dog sniff, Ms. Moore would not have consented to the search of her apartment.

Prior to the illegal dog sniff, Ms. Moore refused consent for the search. The officers told her they were prepared to obtain a search warrant. Still, Ms. Moore did not provide consent. The police then brought a trained narcotics detective dog to the scene. Still, Ms. Moore did not give consent. The dog then alerted at Ms. Moore's apartment door, and even then, Ms. Moore did not want to provide consent. However, as both Officer Weaver and Ms. Moore testified,[5] Ms. Moore's mother pressured her to consent to the search after the dog sniff. Her mother reasoned that the police were going to get a warrant anyway because the dog had signaled at her door. During that conversation, Officer Weaver interrupted to assure Ms. Moore that the police would not just walk away if she refused to give consent. He told her that it could take several hours to get a warrant. At that point, believing that the police were going to get a warrant anyway, and knowing that her four-year-old son was alone inside the apartment, Ms. Moore asked whether her consent would speed up the process. Officer Weaver indicated that it would. Ms. Moore then consented. She made clear at the suppression hearing that she would not have consented had the dog not alerted. Nothing in the record refutes her testimony in this regard.

[5] The circuit court "watched closely both Officer Weaver and Ms. Moore as they testified" and found them both credible. (49:4).

As the above timeline makes clear, there was no intervening event of significance whatsoever between the illegal dog sniff and Ms. Moore's consent. The second factor therefore favors suppression.

iii. Purposefulness and flagrancy of the police conduct

The third factor focuses on (1) whether the police conducted the illegal action with the purpose of extracting incriminating evidence; and (2) whether they flagrantly violated the law. ***Id***., ¶91 (citing ***Brown v. Illinois***, 422 U.S. 590, 603-04 (1975)). The Wisconsin Supreme Court has indicated that this factor is especially important "because it is most closely tied to the rationale of the exclusionary rule—to discourage police misconduct." ***State v. Richter***, 2000 WI 58, ¶53, 235 Wis. 2d 524, 612 N.W.2d 29.

"'Because the primary purpose of the exclusionary rule is to discourage police misconduct, application of the rule does not serve this deterrent function when police action, although erroneous, was not undertaken in an effort to benefit the police at the expense of the suspect's protected rights.'" ***Phillips***, 218 Wis. 2d at 209. "Thus inherent in the flagrancy or purposefulness evaluation is an inquiry into whether there is evidence of some degree of bad faith exploitation of the situation on the part of the officer." ***Richter***, 235 Wis. 2d 524, ¶53. Where the illegal police action is undertaken in good faith, courts are hesitant to find purposefulness or flagrancy. ***Artic***, 327 Wis. 2d 392, ¶91.

Here, it is clear from the record that the police acted with the purpose of extracting incriminating evidence. The dog sniff was conducted to detect the presence of illegal substances within Ms. Moore's apartment.

There is also evidence to suggest that the police conducted the dog sniff to pressure Ms. Moore to give consent. After Ms. Moore initially refused consent, the officers told her they were prepared to obtain a search warrant. The police then brought a trained narcotics detection dog to the scene and conducted the sniff in Ms. Moore's presence. After the dog alerted, the police again asked for consent, and Ms. Moore again refused. Ms. Moore's mother then pressured her to give consent because the dog had alerted. Overhearing this conversation, Officer Weaver interrupted to make sure Ms. Moore understood that the police would not just leave if she refused to provide consent. Under these circumstances, it is reasonable to infer[6] that the police used the dog sniff as a way of leaning on Ms. Moore to give consent. *Compare with* ***Richter***, 235 Wis. 2d 524, ¶54 (no evidence to suggest officer's illegal action taken to pressure defendant to consent to search); ***Phillips***, 218 Wis. 2d at 211 (same); ***Artic***, 327 Wis. 2d 392, ¶100 (same); ***State v. Kiekhefer***, 212 Wis. 2d 460, 569 N.W.2d 316 (Ct. App. 1997) (same).

The state might argue that the police conducted the dog sniff in good faith reliance on binding appellate precedent; however, that argument has already been shot down by the Seventh Circuit in ***Whitaker***. *See* ***Whitaker***, 820 F.3d at 854-55. This genre of the good faith exception to the exclusionary rule applies "where officers conduct a search in objectively reasonable reliance upon clear and settled [] precedent that is later deemed unconstitutional by the United States Supreme Court." ***State v. Dearborn***, 2010 WI 84, ¶51, 327 Wis. 2d 252, 786 N.W.2d 97.

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[6] It is necessary to draw reasonable inferences from the record on the attenuation factors due to the state's failure to raise the issue at the circuit court.

As in ***Whitaker***, when the dog sniff in this case occurred, no appellate decision specifically authorized the police to use a trained narcotics detection dog to sniff the front door of an apartment for the purpose of detecting incriminating evidence within the apartment. If anything, the logic of ***Kyllo*** and ***Jardines*** should have reasonably led the police to believe that such action constituted an unreasonable search under the Fourth Amendment. *See* ***Whitaker***, 820 F.3d at 855. There being no binding precedent that authorized the dog sniff, it cannot be said that the officers acted in good faith in this case.

To summarize, even if there was voluntary consent following the dog sniff, all three attenuation factors weigh in favor of suppressing the evidence obtained as a result of the Fourth Amendment violation in this case.

## CONCLUSION

For the reasons set forth above, Mr. Taylor respectfully requests that the court reverse the judgment of conviction and remand to the circuit court with directions that all evidence derived from the search be suppressed.

Dated this 31st day of July, 2017.

KARA L. MELE
Assistant State Public Defender
State Bar No. 1081358

Office of the State Public Defender
Post Office Box 7862
Madison, WI 53707-7862
(608) 267-2124
melek@opd.wi.gov

Attorney for Defendant-Appellant

## 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 8,081 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 31st day of July, 2017.

Signed:

KARA L. MELE
Assistant State Public Defender
State Bar No. 1081358

Office of the State Public Defender
Post Office Box 7862
Madison, WI 53707-7862
(608) 267-2124
melek@opd.wi.gov

Attorney for Defendant-Appellant

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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 s. 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.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using one or more initials or other appropriate pseudonym or designation instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated this 31st day of July, 2017.

Signed:

_____

KARA L. MELE
Assistant State Public Defender
State Bar No. 1081358

Office of the State Public Defender
Post Office Box 7862
Madison, WI 53707-7862
(608) 267-2124
melek@opd.wi.gov

Attorney for Defendant-Appellant