STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

Case No. 2018 AP 746-CR

STATE OF WISCONSIN,

Plaintiff-Appellant,
v.

STEVEN D. PALMERSHEIM,

Defendant-Respondent.

ON APPEAL FROM AN ORDER OF THE TRIAL COURT SUPPRESSING EVIDENCE, IN THE CIRCUIT COURT FOR WAUKESHA COUNTY, BRANCH 9, THE HON. MICHAEL J. APRAHAMIAN, PRESIDING

BRIEF AND APPENDIX OF PLAINTIFF-APPELLANT

Respectfully submitted,

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STATEMENT OF THE ISSUES

Was Officer Young's warrantless entry into Palmersheim's garage to arrest him for Resisting and Obstructing an officer in relation to an OWI-related investigation justified under the exigent circumstance of hot pursuit?

The trial court answered: No.

STATEMENT ON PUBLICATION

As a one-judge appeal, this decision is not eligible for publication.

STATEMENT ON ORAL ARGUMENT

The State believes the briefs submitted in this matter fully present and meet the issues on appeal and fully develop the theories and legal authorities on each side so that oral argument would be of such marginal value that it does not justify the additional expenditure of court time or cost to the litigants.

STATEMENT OF THE CASE AND FACTS

On September 25, 2017, Palmersheim was arrested by Officer Richard Young of the City of Waukesha Police Department for Operating While Intoxicated. Palmersheim was subsequently charged with Operating While Intoxicated, 2nd Offense, contrary to §346.63(1)(a), Wis. Stats.

On February 5, 2018, the trial court, the Honorable Michael J. Aprahamian presiding, conducted an evidentiary hearing on Palmersheim's Motion to Suppress.(R. 1, Pet-App. A:1) At the hearing, Officer Young testified that he was notified by dispatch of a reckless vehicle complaint. (R. 2:22, 3:14, Pet-App. A:2-3). The caller advised he was following the vehicle, which was described as being all over the road. (R. 3:16-18, Pet-App. A:3) The caller gave dispatch his last name and a description of his vehicle. (R. 3:21-22, Pet-App. A:3) Officer Young responded to the residence of the suspect driver. (R. 3:25, 4:1, Pet-App. A:3-4) Upon arrival, Officer Young observed the caller point towards a red Ford Ranger parked in front of him. (R. 4:12-17, 22-23, Pet-App. A:4) Officer Young observed that the license plate and appearance of the red Ford Ranger matched the caller's description of the suspect vehicle. (R. 4:18-21, Pet-App. A:4)

Officer Young testified that the caller watched the driver get out of the vehicle. (R. 5:5-9, Pet-App. A:5) The caller described the subject as swaying from side to side. (R. 5:10-11, Pet-App. A:5) The caller also stated that the driver urinated at the side of his vehicle. (R. 5:11-12, Pet-App. A:5)

Officer Young exited his squad car and observed Palmersheim walk from the front of his vehicle towards what he later would discover was Palmersheim's residence. (R. 5:15-18, Pet-App. A:5) Officer Young attempted verbal contact with Palmersheim, and Palmersheim did not respond. (R. 5:20-24, Pet-App. A:5) Officer Young yelled for Palmersheim to stop. (R. 5:24-25, Pet-App. A:5) Palmersheim turned around and looked at Officer Young, who was in full police uniform and standing near his fully marked patrol car. (R. 5:25, 6:1-3, Pet-App. A:5-6) Palmersheim then turned and continued into the open garage of his residence. (R. 6:15-17, Pet-App. A:6) Officer Young testified that he "briskly walked and hustled up to try to catch up to him and at that point he was already in the garage." (R. 6:19-21, Pet-App. A:6) Once in the garage, Palmersheim hit the garage door button to close the garage door. (R. 6:25, 7:1-2, Pet-App. A:6-7) Officer Young put his foot in the threshold of the door so that the door would not close. (R.

7:3-15, Pet-App. A:7) The door then retracted to the up position. (R. 7:12-15, Pet-App. A:7)

Officer Young then asked Palmersheim to step outside the garage, and Palmersheim complied. (R. 8:12-14, Pet-App. A:8) Officer Young began to interview Palmersheim about the reckless driving complaint. (R. 9:3-5, Pet-App. A:9) As he was speaking with Palmersheim, Officer Young could smell a strong odor of intoxicants coming from Palmersheim. (R. 9:5-6, Pet-App. A:9) Officer Young also observed that Palmersheim's eyes were halfway open, and his eyes were glassy and bloodshot. (R. 9:7-9, Pet-App. A:9) Palmersheim was swaying from side to side, his speech was slurred, and he had difficulty forming a sentence. (R. 9:9-11, Pet-App. A:9) Officer Young asked Palmersheim if he would perform field sobriety tests, and Palmersheim refused. (R. 10:8-11, Pet-App. A:10)

Palmersheim then walked back into the garage. (R. 10:12-13, Pet-App. A:10) Officer Young followed Palmersheim into the garage, made contact with the rear part of Palmersheim's arm, and physically prevented Palmersheim from going into the residence. (R. 10:13-15, Pet-App. A:10) Palmersheim stopped trying to get in the residence and came back outside of the garage with Officer Young. (R. 10:16-17, Pet-App. A:10) Officer Young again asked Palmersheim if

he would perform field sobriety tests, and Palmersheim did not answer. (R. 10:22-25, Pet-App. A:10) A back-up officer arrived, and that officer and Officer Young took Palmersheim into custody and placed him under arrest for Operating While Intoxicated. (R. 10:25, 11:10-16, Pet-App. A:10-11)

On March 21, 2018, the trial court issued its written Decision and Order. (*See* Pet-App. B:1-11) The court found that Officer Young had probable cause to arrest Palmersheim for Obstruction after Palmersheim refused to stop when Officer Young ordered him to do so and Palmersheim walked into the garage. (Pet-App. B:6) However, the court declined to find that Officer Young was engaged in hot pursuit when he put his foot inside the threshold of the garage door to stop the door from closing. (Pet-App. B:10) The court found Officer Young's actions constituted an unlawful entry and granted Palmersheim's Motion to Suppress. (Pet-App. B:10)

STANDARD OF REVIEW

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). The circuit court's findings of historical fact must be reviewed with deference unless clearly erroneous. *Id*. The reviewing court must then independently apply constitutional principles to those facts. *Id*. at ¶18 (citation omitted).

ARGUMENT

I. THE EXIGENT CIRCUMSTANCE OF "HOT PURSUIT."

Warrantless entry into a home for the purpose of arrest is presumptively unreasonable under the Fourth Amendment. *Payton v. New York*, 445 U.S. 573, 586, 100 S.Ct. 1371 (1980). Fourth Amendment protections extend to the home's curtilage. *State v. Dumstrey*, 2016 WI 3, ¶23, 366 Wis. 2d 64, 873 N.W.2d 502 (citations omitted). "[T]he curtilage is the area to which extends the intimate activity associated with the sanctity of a [person's] home and the privacies of life . . ." *Id.* (quoting *Oliver v. United States*, 466 U.S. 170, 180, 104 S.Ct. 1735 (1984)). A garage attached to the home has consistently been held to be curtilage for Fourth Amendment purposes. *Id.* at ¶35. In addition, placement of a foot across the threshold of a doorway of a home constitutes entry for purposes of Fourth Amendment analysis. *State v. Larson*, 2003 WI App 150, ¶¶10-11, 266 Wis. 2d 236, 668 N.W.2d 338; *State v. Johnson*, 177 Wis. 2d 224, 231-32, 501 N.W.2d 876 (Ct. App. 1993).

A warrantless entry into a home may nevertheless pass constitutional muster if it is both supported by probable cause and justified by exigent circumstances. *State v. Robinson*, 2010 WI 80, ¶24, 327 Wis. 2d 302, 786 N.W.2d 463 (citations omitted). The burden of proof on this question

lies with the State. *Id.* The test for exigent circumstances is an objective one and looks to "[w]hether a police officer under the circumstances known to the officer at the time [of entry] reasonably believes that delay in procuring a warrant would gravely endanger life or risk destruction of evidence or greatly enhance the likelihood of the suspect's escape." *State v. Richter*, 2000 WI 58, ¶30, 235 Wis. 2d 524, 612 N.W.2d 29. "The touchstone of the Fourth Amendment is reasonableness, and reasonableness is measured in objective terms by examining the totality of the circumstances." *Ohio v. Robinette*, 519 U.S. 33, 39, 117 S.Ct. 417 (1996)(quoting *Florida v. Jimeno*, 500 U.S. 248, 250, 111 S.Ct. 1801 (1991)).

"Hot pursuit" of a suspect is category of exigent circumstance. State v. *Richter*, 2000 WI 58, ¶29, 235 Wis. 2d 524, 612 N.W.2d 29. "'Hot pursuit'" is established where there is immediate or continuous pursuit of a suspect from the scene of a crime." *Id.* at ¶32 (internal quotations and citations omitted).

II. RECENT NON-BINDING WISCONSIN SUPREME COURT OPINIONS WITH SIMILAR FACT PATTERNS: *STATE V. WEBER* AND *STATE V. DELAP*.

1. *State v. Weber*, 2016 WI 96, 372 Wis.2d 202, 887 N.W.2d 554

In *State v. Weber*, Wood County Deputy Dorshorst attempted to stop a vehicle driven by Weber after observing

an equipment violation and the vehicle weaving from its lane of travel. *Id*. at ¶4. Deputy Dorshorst activated his squad's emergency lights, but Weber did not stop. *Id*. Instead, Weber drove about 100 feet, turned into a driveway, and pulled into an attached garage. *Id*. Deputy Dorshorst followed Weber and parked in the driveway. *Id*. Weber and Deputy Dorshorst exited their respective vehicles at about the same time and Weber moved towards an entry door to the attached residence that was inside the garage. *Id*. at ¶5. Deputy Dorshorst ran towards Weber and told him to stop. *Id*. Weber did not stop; he continued up the steps towards the door. *Id*. Deputy Dorshorst entered the garage and physically detained Weber just inside the door to the residence at the top of the stairs. *Id*. Weber later challenged the constitutionality of the arrest. *Id*. at ¶11.

Justice Ziegler, author of the lead opinion, reaffirmed that the "basic ingredient" of the hot pursuit exigency is "immediate or continuous pursuit of a suspect from the scene of a crime" and noted that its application was limited to those cases where the underlying offense is a jailable offense. *Id*. at ¶¶28, 32. Justice Ziegler concluded that Deputy Dorshorst's actions were objectively reasonable under the totality of the circumstances because:

1) Deputy Dorshorst was engaged in immediate or continuous pursuit of Weber from the scene of a crime, i.e. Weber's flight from a lawful traffic stop on a public highway;

2) The underlying offenses, failure to obey and obstructing, were jailable offenses, and

3) Deputy Dorshorst intrusion into Weber's garage was limited, brief, and "a last resort." *Id*. at ¶36-39.

In his concurrence, Justice Kelly wrote that application of the "hot pursuit" doctrine was precluded because there was not probable cause to believe Weber committed a jailable offense. *Id*. at ¶46. However, Justice Kelly thought the entry was lawful because Weber gave consent for Deputy Dorshorst to enter. *Id*. at ¶¶79-82.

In her dissent, Justice Ann Walsh Bradley found that the facts of *Weber* "stood in stark contrast" to those in *United States v. Santana*, which the State shall discuss in the next section. *Id*. at ¶114. Contrasting the facts before the Court with those in *Santana*, Justice Walsh Bradley noted there was no urgent need to act to prevent Weber from destroying evidence. *Id*. at ¶117. Justice Ann Walsh Bradley also indicated that the lead opinion failed to address whether or not Deputy Dorshorst had time to secure a warrant. *Id*. at ¶118. Justice Ann Walsh Bradley concluded that because the State did not show Deputy Dorshorst had "no time" to get a warrant or that there was an urgent need

to act, the State did not meet its burden in demonstrating exigent circumstances sufficient to overcome the presumption of unreasonableness of a warrantless home entry. *Id*. at ¶122.

In her dissent, Justice Rebecca Grassl Bradley focused on the fact that there was no "chase." *Id*. at ¶¶143-46. Justice Rebecca Grassl Bradley stated that "[t]here was no recently committed jailable crime that prompted the pursuit, nor was there a crime scene from which Weber fled." *Id*. at ¶144. Justice Rebecca Grassl Bradley focused on the 100 feet Weber travelled and how that did not create an "exigency" because the deputy was not "chasing" Weber after Weber committed a jailable offense. *Id*. at ¶145.

2. *State v. Delap*, 2018 WI 64.

In *State v. Del*ap, officers responded to 110 Milwaukee Street in Neosho after learning that Delap had two valid and outstanding warrants for his arrest. *Id*. at ¶15. The teletype that alerted the officers to the warrants indicated that 110 Milwaukee Street in Neosha was Delap's last known address. *Id*. at ¶13. The officers parked their squad cars approximately a block away from the residence out of concern that Delap would either run or not open the door. *Id*. at ¶15. As they were walking down the street to Delap's residence, one of the officers observed a man

walking down a driveway. *Id*. at ¶16. When the man saw the officers, he looked at them and then ran towards the back of the complex. *Id*. The officers shouted for the man to, "Stop," but the man did not comply. *Id*. Based on the man's reaction and his proximity to 110 Milwaukee Street, the officer believed the man to be Delap. *Id*. at ¶17. The man started to open the rear door of the residence to go inside. *Id*. at ¶18. Sergeant Willmann used his shoulder to keep the door from closing. *Id*. The man and Sergeant Willmann pushed back and forth until another officer arrived, and together the two officers pushed the door open. *Id*. The man, who was later identified as Delap, was arrested. *Id*. at ¶19. During a search of Delap's person, the officers located three syringes and a silver tube used for smoking crack cocaine. *Id*. at ¶20. Delap was charged with Obstructing and Possession of Drug Paraphernalia. *Id*. at ¶21.

Delap filed a Motion to Suppress, which was denied on the basis that the officers' entry into Delap's home was permitted under the hot pursuit doctrine. *Id*. at ¶¶22-24. The Court of Appeals affirmed this decision. *Id*. at ¶24. The Wisconsin Supreme Court affirmed the Court of Appeals, but not on the basis of "hot pursuit." *Id*. at ¶¶28-42. Rather, the Court found that the matter was governed by the

holding in *Payton v. New York*, that "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." *Id*. at ¶30 (quoting *Payton*, 445 U.S. at 603). Therefore, the lead opinion did not address the applicability of the "hot pursuit" doctrine.

However, in his concurrence, Justice Michael Gableman chose to address the doctrine. *Id*. at ¶¶43-50. One of the reasons Justice Gableman cited for addressing the applicability of the "hot pursuit" doctrine was the need to "alleviate any confusion stemming from our splintered decision in *State v. Weber*..." *Id*. at ¶44. Justice Gableman first examined whether the officer was "engaged in pursuing or chasing the defendant." *Id*. at ¶¶48-50. Justice Gableman found that this element was satisfied, even though the chase was short. *Id*. at ¶50. Justice Gableman noted, "A pursuit or chase that ends 'almost as soon as it began [does] not render it any less a 'hot pursuit' sufficient to justify the warrantless entry.'" *Id*. at ¶48 (citing *State v. Sanders*, 2008 WI 85, ¶109, 311 Wis. 2d 257, 752 N.W.2d 713 (Prosser, J., concurring)(citation omitted).

The facts of both *Weber* and *Delap* are similar to the facts in this case: an officer during the course of an

investigation locates the suspect. The suspect, upon seeing the officer, flees to their residence. The officer pursues the suspect and makes brief entry into the curtilage of the suspect's residence whereupon the suspect is taken into custody. *Weber* and *Delap* make clear that the Court is uncomfortable with applying the "hot pursuit" doctrine to these situations. The Court could not get a majority consensus in *Weber*, and the lead opinion in *Delap* chose not to address the issue even though the doctrine's applicability was argued in the lower courts. *Delap*, 2018 WI 64, ¶24.

While the *Weber* Court struggled with whether the "hot pursuit" doctrine applied, it also struggled with whether a suspect's conduct of fleeing upon seeing law enforcement could provide probable cause to believe the suspect committed a jailable offense. In the lead opinion, Justice Ziegler stated:

> [W]e acknowledge the concern that applying the hot pursuit doctrine to uphold a warrantless entry in a case where fleeing law enforcement was itself the violation giving rise to the pursuit will lead to the application of the hot pursuit doctrine in every case involving a fleeing suspect, no matter the gravity of the first offense committed, since flight itself can constitute a jailable offense.
> *Weber*, 2016 WI 96, ¶43.

Justice Ziegler ultimately dismissed this concern reasoning that the State will not always be able to establish a

suspect was knowingly fleeing, these warrantless entries are still governed by Fourth Amendment requirements that they be reasonable, and because a holding that fleeing can never form the basis for probable cause might give suspects an incentive to flee law enforcement. *Id*. at ¶43. However, the concern noted in the lead opinion by Justice Ziegler was discussed extensively by Justice Ann Walsh Bradley, who disagreed with the analysis of the lead opinion. *See id*. at ¶¶123-137.

While the Court in *Weber* struggled with this issue, the circuit court in this matter did not. The circuit court found in the State's favor on this issue that there was probable cause to believe the defendant committed the jailable offense of Obstructing based on his conduct upon seeing law enforcement. (Pet-App. B:6) In addition, the State believes Officer Young had probable cause to arrest Palmersheim for Disorderly Conduct after the complainant's description of Palmersheim urinating outside his car. *See* Wis. Stat. § 947.01(1). Therefore, the State urges this Court to review this matter with the understanding that one of the issues that caused the divide in *Weber* was resolved in favor of the State in the circuit court.

III. OFFICER YOUNG'S BRIEF ENTRY INTO PALMERSHEIM'S GARAGE WAS LAWFUL UNDER THE "HOT PURSUIT" DOCTRINE.

1. The "Hot Pursuit" Doctrine May Justify A Warrantless Entry Even If There Was No Prolonged "Chase" of The Suspect.

In the court's Decision and Order, the court stated that it was "particularly persuaded" by the dissenting opinion of Justice Rebecca Grassl Bradley in *Weber* regarding the liberties the Fourth Amendment was enacted to protect. (Pet-App. B:9) In her dissent, Justice Rebecca Grassl Bradley appeared to focus on whether a "chase" occurred and found that because there was no real "chase," the "hot pursuit" doctrine did not apply. *Weber*, 2016 WI 96, ¶¶143-46. Similarly, the circuit court observed that Officer Young did not turn on his emergency lights and did not run after Palmersheim. (Pet-App. B:9) The court also found that Officer Young's pursuit was not continuous because he stopped at the threshold of the garage once Palmersheim was inside. (Pet-App. B:9) The circuit court noted that there was nothing that suggests Officer Young felt this was an emergency or that he would not be able to wait for a warrant to make request. (Pet-App. B:9) Based on these factors, the circuit court found that the officer's entry into the garage was unlawful and granted the Motion the Suppress. (Pet-App. B:9-10)

In *United States v. Santana*, the Supreme Court discussed what kind of "chase" is required for "hot

pursuit" cases. 427 U.S. 38, 42-43, 96 S.Ct. 2406 (1976). In *Santana*, Officer Gilletti, an undercover narcotics officer, arranged to have Patricia McCafferty purchase heroin. *Id*. at 39. Patricia completed the buy and turned over the heroin to Officer Gilletti. *Id*. at 40. Officer Gilletti then advised McCafferty she was under arrest and asked where the money he gave her for the buy was located. *Id*. McCafferty stated, "Mom has the money," which Officer Gilletti believed meant that Santana had the money. *Id*.

Officer Gilletti and other officers went to Santana's residence and saw Santana outside with a brown paper bag in her hand. *Id*. The officers pulled up to within 15 feet of Santana, got out of their van and shouted, "Police!" while displaying their identification. *Id*. Santana retreated to the vestibule of her house. *Id*. The officers followed through the open door and caught Santana in her vestibule. *Id*. As Santana tried to pull away, two packets of white powder fell out of the bag, which were later determined to be heroin. *Id*. at 40-41. Santana was charged with Distribution of Heroin. *Id*. at 41. Santana moved to suppress the heroin and money. *Id*. The District Court found that this did not constitute a "hot pursuit," because it believed "hot pursuit" meant "a chase in and about public streets." *Id*.

The Supreme Court held that while "hot pursuit" does require some sort of chase, "it need not be an extended hue and cry 'in and about (the) public streets.'" *Id*. at 42-43. The Court further stated, "The fact that the pursuit here ended almost as soon as it began did not render it any less a 'hot pursuit' sufficient to justify the warrantless entry into Santana's house." *Id*. at 43. The Court found that in this situation, the need to act quickly was great because it was likely Santana would destroy evidence once she saw the police. *Id*. The Court also noted that the amount of intrusion was less than the need to act quickly. *Id*. at 42. The Court concluded that, "[A] suspect may not defeat an arrest which has been set in motion in a public place . . .by the expedient of escaping to a private place." *Id*. at 43.

2. Officer Young's Actions Were Objectively Reasonable And Meet The Requirements of The "Hot Pursuit" Exception to The Warrant Requirement.

Working backwards in the instant case, Officer Young's intrusion into the defendant's garage was extremely limited in that it consisted initially of essentially a foot across the threshold of the garage and concluded with a brief entry into the garage to apprehend Palmersheim. Second, at the time Officer Young entered the garage, probable cause existed for the jailable offense of Obstructing an Officer.

Third, Officer Young was in immediate and continuous pursuit of Palmersheim from the time he saw him until the time Officer Young placed him under arrest.

Furthermore, like the officer in *Santana*, who was trying to prevent the destruction of evidence, Officer Young had to apprehend Palmersheim before he made it into the house. Officer Young had a reasonable suspicion Palmersheim had been Operating While Intoxicated. In order to prove this charge, the State must show that Palmersheim was driving or operating under the influence of an intoxicant. *See* Wis. Stat. §346.63(1)(a). Allowing Palmersheim to enter the residence while Officer Young obtained a warrant would give Palmersheim the opportunity to argue that the alcohol he consumed was consumed while he was inside the residence, not while he was driving. In essence, the defendant could destroy evidence that he had been drinking and driving just by virtue of being allowed to enter the residence.

In the instant case, after hearing the report by dispatch and speaking with the complainant, Officer Young had a reasonable suspicion that Palmersheim drove while intoxicated. Probable cause for Obstructing arose when Palmersheim ignored Officer Young’s lawful command to stop. Officer Young then briefly and in a quite limited manner

entered the curtilage of Palmersheim's residence, not the actual residence, while in hot pursuit of Palmersheim for the jailable offense of Obstructing. Under the totality of the circumstances, Officer Young's actions were objectively reasonable.

CONCLUSION

For the reasons stated in this Brief, the order of the trial court suppressing evidence should be reversed, and this action be remanded to that court for further proceeding consistent with the order of this Court.

Dated this 13th day of July, 2018 at Jefferson, Wisconsin.

Respectfully submitted,

Electronically submitted by

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in s. 809.19(8)(b) and (c) for a brief produced with a monospaced serif font. The length of this brief is 20 pages (excluding the Appendix and Certification) with 3,892 words.

In addition, I hereby certify that an electronic copy of this brief has been submitted pursuant to §809.19(12) and that the text of the electronic copy of the brief is identical to the text of the paper copy of the brief.

Dated this 13th day of July, 2018 at Jefferson, Wisconsin.

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APPENDIX

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CERTIFICATION

I hereby certify that filed with this brief, as part of this brief, is an appendix that complies with s. 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; and (3) 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, 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 first names and last initials instead of full names or 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 reference to the record.

Dated this 13th day of July, 2018 at Jefferson, Wisconsin.

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