STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT III

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Case No. 2018AP1388-CR

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STATE OF WISCONSIN,

Plaintiff-Appellant,

v.

MICHAEL R. MCGINNIS,

Defendant-Respondent.

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ON APPEAL FROM AN ORDER SUPPRESSING EVIDENCE, ENTERED IN THE EAU CLAIRE COUNTY CIRCUIT COURT, THE HONORABLE WILLIAM M. GABLER, SR., PRESIDING

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# BRIEF AND APPENDIX OF THE PLAINTIFF-APPELLANT

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## STATEMENT OF THE ISSUE

Did the circuit court properly exclude evidence obtained outside of a home as a fruit of what it deemed an unlawful entry into the home to arrest Michael McGinnis?

The circuit court answered yes.

This Court should answer no. The officer had probable cause to arrest the defendant when he entered the home, and thus, evidence found outside of the home is not subject to the exclusionary rule pursuant to *New York v. Harris*, 495 U.S. 14 (1990), and *State v. Felix*, 2012 WI 36, 339 Wis. 2d 670, 811 N.W.2d 775.

## STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State does not request oral argument or publication. This Court can resolve this case by applying well-established law to the facts.

## INTRODUCTION

This is a State's appeal from an adverse suppression ruling. The State is challenging that ruling as it relates to any evidence police obtained outside of McGinnis's home—including statements made by McGinnis and evidence of intoxication in the form of his performance on the field sobriety tests and the results of his blood draw.[1]

This Court should conclude that when law enforcement entered McGinnis's home, they did so with probable cause to arrest McGinnis for a prohibited alcohol

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[1] As shorthand, the State will refer to McGinnis's performance on the field sobriety tests and the results of his blood draw as the "intoxication evidence."

content violation. Because law enforcement had probable cause to arrest McGinnis, the assumed illegality of the entry does not render inadmissible the evidence found outside of the home. Therefore, this Court should reverse the circuit court's order pertaining to the intoxication evidence and statements discovered outside of the home.

## STATEMENT OF THE CASE

Officer Bell and Officer Peterson received a dispatch that a hit-and-run occurred in the parking lot of the Happy Hollow Tavern at approximately 3:55 p.m. (R. 1:2; 23:4; A-App. 102, 108.) The dispatcher relayed that the suspect was driving a yellow Jeep and provided the license plate number. (R. 1:2; 23:5; A-App. 102, 109.) Bell ran the license plate number and discovered that the Jeep was registered to Michael McGinnis, who lived in an apartment complex near the Happy Hollow Tavern. (R. 1:2; 23:5–7; A-App. 102, 109–11.) Bell also discovered that McGinnis had six prior OWI convictions. (R. 1:2; 23:7; A-App. 102, 111.)

Officer Bell went directly to McGinnis's address and arrived within a minute of the dispatch. (R. 1:2; 23:7–8; A-App. 102, 111–12.) When he arrived, he saw the yellow Jeep in the parking lot, located McGinnis's apartment and knocked on McGinnis's front door, which McGinnis answered. (R. 1:2; 23:8–9; A-App. 102, 112–13.) In response to Bell's questions, McGinnis denied having been at the Happy Hollow, denied that the Jeep belonged to him, and declined to provide Bell with identification. (R. 1:2; 23:9–12; A-App. 102, 113–16.) Bell could see that McGinnis had glassy bloodshot eyes, and observed that his speech was slurred and very slow. (R. 1:2; 23:10–11; A-App. 102, 114–15.)

Officer Bell informed McGinnis that he was going to detain McGinnis to investigate the hit and run, and asked McGinnis to step outside. (R. 1:2; 23:12; A-App. 102, 116–

17.) McGinnis refused and began to shut the door. (R. 1:2; 23:13; A-App. 102, 117.) Bell stepped into the threshold of the doorway and grabbed McGinnis's hand. (R. 1:2–3; 23:13–14; A-App. 102–03, 117–18.) McGinnis pulled away, raised his hand above his head with a closed fist, and assumed a fighting stance. (R. 1:3; 23:14–15; A-App. 103, 118–19.) Bell grabbed his taser and yelled to McGinnis to put his hands behind his back. (R. 1:3; 23:15; A-App. 103, 119.) McGinnis did not comply, turned, and walked further into his home. (R. 1:3; 23:15; A-App. 103, 119.) Bell allowed McGinnis to walk away; McGinnis went to his bedroom and closed the door. (R. 1:3; 23:15–16; A-App. 103, 119–20.)

Officer Bell stayed in the doorway and called for backup. (R. 1:3; 23:16; A-App. 103, 120.) McGinnis yelled, "why are you here," from his bedroom. (R. 1:3; 23:24; A-App. 103, 128.) Bell told McGinnis that he was investigating a hit-and-run and asked that McGinnis exit the apartment. (R. 1:3; 24:24–25; A-App. 103, 128–29.)

Officer Peterson arrived. Shortly thereafter, McGinnis came out of his bedroom, calmly walked up to the officers, apologized for lying, and provided Officer Bell with his driver's license. (R. 1:3; 23:17–18; A-App. 103, 121–22.) Peterson placed McGinnis in handcuffs, walked him outside, and had McGinnis sit in the back of the squad car. (R. 23:26–27, A-App. 130–31.)

Officer Bell eventually asked McGinnis to perform field sobriety tests. (R. 1:3; 23:19; A-App. 103, 123.) McGinnis failed those tests, and Bell told McGinnis that he was under arrest. (R. 1:3, A-App. 103.) McGinnis started to walk away. (R. 1:3, A-App. 103.) Bell and another officer grabbed McGinnis to place him under arrest. (R. 1:3, A-App. 103.) McGinnis forcefully resisted. (R. 1:3, A-App. 103.) Bell deployed his taser to subdue McGinnis, and placed him under arrest. (R. 1:3, A-App. 103.)

The State charged McGinnis with operating while intoxicated, seventh offense, hit and run, obstructing an officer, and disorderly conduct. (R. 1:1–2, A-App. 101–02.) The State later filed an amended Information that included the additional charge of operating with a prohibited alcohol concentration, seventh offense. (R. 7:2.)

McGinnis filed a motion to suppress. (R. 10.) He asserted that Officer Bell violated the Fourth Amendment when Bell breached the threshold of McGinnis's apartment and grabbed his arm. (R. 10.) McGinnis asked the court to suppress the intoxication evidence and any statement made by McGinnis after the time that Officer Bell breached the threshold of McGinnis's apartment. (R. 10.)

Officer Bell testified at the suppression hearing consistent with the facts discussed above.[2]

The State argued that probable cause and exigent circumstances justified Bell's entry into McGinnis's home. (R. 23:29–39, A-App. 133–43.) The State argued that the exigency was the dissipation of alcohol combined with the opportunity for McGinnis to consume alcohol inside the home created a risk that evidence, his blood alcohol concentration relevant to the time he was driving, would be destroyed. (R. 23:29, 38–39, A-App. 133, 142–43.)

Before ruling, the circuit court admitted that this was an exceedingly close case. (R. 24:2–3, A-App. 148–49.) The court made the following findings of fact:

1. Officer Bell received a dispatch at about 3:55 p.m. regarding a recent hit-and-run incident at the Happy Hollow Tavern. (R. 24:3, A-App. 149.)

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[2] The citations to record 23 are the citations to Bell's testimony at the suppression hearing.

2. Dispatch informed Officer Bell that a yellow Jeep hit a parked car and drove off and provided Bell with the license plate number. (R. 24:3–4, A-App. 149–50.)

3. Officer Bell ran that license plate number and discovered that the Jeep was registered to McGinnis. (R. 24:4, A-App. 150.) He learned McGinnis's address, that McGinnis had six prior OWI convictions, and that he was subject to a .02 prohibited alcohol concentration restriction. (R. 24:4, A-App. 150.)

4. Officer Bell went to McGinnis's home and saw the Jeep parked in the parking lot. (R. 24:4, A-App. 150.)

5. Officer Bell went up to McGinnis's door and knocked; McGinnis eventually opened the door. (R. 24:5, A-App. 151.)

6. McGinnis denied being at the Happy Hollow Tavern, denied that his vehicle was involved in a hit-and-run, and declined to provide Bell with his driver's license. (R. 24:5, A-App. 151.)

7. During that conversation, Officer Bell observed that McGinnis had bloodshot eyes and slurred speech—Bell believed that McGinnis's blood alcohol concentration exceeded the .02 restriction. (R. 24:5–6, A-App. 151–52.)

8. Officer Bell asked McGinnis to step outside, and McGinnis declined. (R. 24:6, A-App. 152.)

9. Officer Bell then informed McGinnis that Bell was detaining him to investigate the hit-and-run. (R. 24:6, A-App. 152.)

10. After hearing that, McGinnis tried to close the door, but Officer Bell placed his foot in the doorway and across the threshold to prevent him from doing so. (R. 24:6, A-App. 152.)

11. Officer Bell grabbed McGinnis, but McGinnis pulled away and Officer Bell allowed McGinnis to turn

around and walk away and into his bedroom. (R. 24:6–7, A-App. 153.)

12. Officer Bell called for backup. Officer Peterson arrived and informed Bell that he had learned that McGinnis was at the Happy Hollow Tavern that afternoon. (R. 24:7, A-App. 153.)

13. Officer Bell was still standing in the doorway when McGinnis came out of his bedroom with a changed demeanor and admitted to being at the Happy Hollow Tavern earlier that day. (R. 24:7, A-App. 153.)

14. While McGinnis was still inside his residence, Officer Bell[3] placed him in handcuffs to subdue him and take him outside. (R. 24:7–8, A-App. 153–54.)

Based on those facts, the circuit court concluded that Officer Bell entered McGinnis's home without probable cause to arrest. (R. 24:8, 18–19, A-App. 154, 164–65.) The court also concluded that dissipating blood alcohol content (or adding to it by drinking in the home) does not amount to the destruction of evidence and therefore was not an exigency allowing the police entry. (R. 24:13–14, A-App. 159–60.)

The court then considered whether the exclusionary rule should apply. It noted that police obtained the intoxication evidence outside of McGinnis's home, but concluded that the evidence was inadmissible because there was no probable cause to arrest McGinnis before Officer Bell entered the home. (R. 24:11–12, A-App. 157–58.)

The State appeals and challenges the suppression order as it relates to the intoxication evidence and any

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[3] Officer Peterson, not Officer Bell, placed McGinnis in handcuffs. (R. 23:26–27, A-App. 130–31.) While this is a clearly erroneous finding of fact, it is not consequential to this case.

statements made outside of the home. The State does not challenge the suppression of any in-home statements made by McGinnis *after* Officer Bell entered the threshold.

## STANDARD OF REVIEW

Appellate courts reviewing an order denying a motion to suppress evidence will uphold a circuit court's findings of fact unless they are clearly erroneous. *State v. Secrist*, 224 Wis. 2d 201, 207, 589 N.W.2d 387 (1999). Whether the facts constitute probable cause is a question of constitutional fact. *Id*. at 208. The court determines questions of constitutional fact independently but benefitting from the circuit court's analysis. *Id*.

## ARGUMENT

### Officer Bell had probable cause to arrest McGinnis before he entered the home, thus evidence obtained outside of the home is admissible pursuant to *New York v. Harris* and *State v. Felix*.

#### A. Officer Bell had probable cause to arrest McGinnis for a suspected prohibited alcohol content violation.

"The Fourth Amendment requires probable cause to support every search or seizure in order to 'safeguard the privacy and security of individuals against arbitrary invasions by government officials.'" *State v. Hughes*, 2000 WI 24, ¶ 19, 233 Wis. 2d 280, 607 N.W.2d 621 (citation omitted). "Police have probable cause to arrest if they have 'information which would lead a reasonable police officer to believe that the defendant probably committed a crime.'" *State v. Felix*, 2012 WI 36, ¶ 28, 339 Wis. 2d 670, 811 N.W.2d 775 (citation omitted).

There must be more than a possibility or suspicion that the defendant committed an offense, but "the evidence

need not reach the level of proof beyond a reasonable doubt or even that guilt is more likely than not." *Secrist*, 224 Wis. 2d at 212. Probable cause is a totality of the circumstances assessment. *State v. Kutz*, 2003 WI App 205, ¶ 11, 267 Wis. 2d 531, 671 N.W.2d 660. And police officers can rely on the collective information possessed by the police agency prior to the arrest. *State v. McAttee*, 2001 WI App 262, ¶ 11, 248 Wis. 2d 865, 637 N.W.2d 774. Most importantly, probable cause is an objective standard; neither the officer's subjective assessment of probable cause nor his motivation for making the arrest are relevant to the inquiry. *Kutz*, 267 Wis. 2d 531, ¶ 12.

Here, Officer Bell had probable cause to arrest McGinnis before he stopped McGinnis from closing the door by stepping into the doorway.

Officer Bell's knowledge of McGinnis's prior convictions and of his .02 PAC restriction informs the probable cause inquiry. *State v. Lange*, 2009 WI 49, ¶ 33, 317 Wis. 2d 383, 766 N.W.2d 551. Wisconsin law provides for three distinct violations of Wis. Stat. § 346.63(1): operating while impaired, operating with a detectable amount of a restricted controlled substance in the blood, and operating with a prohibited alcohol concentration (PAC). Wis. Stat. § 346.63(1)(a), (am), and (b). Although the crimes may be joined if they rise from the same incident or occurrence, each crime is distinct. Wis. Stat. § 346.63(1)(c).

The information available to Officer Bell before McGinnis attempted to close the door supplied probable cause for him to believe that McGinnis was probably operating a motor vehicle with a prohibited alcohol concentration. Bell knew that McGinnis had six prior OWI convictions and was subject to a .02 PAC restriction. (R. 24:4, A-App. 150.) A .02 PAC violation can occur after a person consumed a relatively minor amount of alcohol. *See, e.g.*, *State v. Goss*, 2011 WI 104, ¶ 26, 338 Wis. 2d 72, 806

N.W.2d 918 (addressing the probable cause standard for a preliminary breath test, the smell of alcohol and knowledge that a very small amount of alcohol would result in exceeding the legal limit would lead to the reasonable conclusion that a violation of the statute was "highly plausible").

By all appearances, McGinnis was above a .02: Bell observed that McGinnis had slow, slurred speech and glassy, bloodshot eyes. (R. 23:10–11, A-App. 114–15.) Bell knew that McGinnis's vehicle was recently reported to be involved in a hit-and-run at a tavern near McGinnis's home, and that that vehicle was parked outside of McGinnis's apartment. (R. 23:5–9, A-App. 109–13.) There did not appear to be anyone else inside McGinnis's apartment. (R. 23:10, A-App. 114.) The reasonable inference being that McGinnis had driven his vehicle home from the tavern. That information, taken together, is sufficient to establish probable cause of a PAC violation.

Moreover, the information available to Officer Bell at the time of the arrest does not need to conclusively prove that McGinnis was intoxicated. *Lange*, 317 Wis. 2d 383, ¶ 38. And Bell's primary purpose of investigating a hit-and-run does not negate probable cause for the PAC violation. *Kutz*, 267 Wis. 2d 531, ¶ 12 (The officer's motivation is not relevant to the injury.). *See also*, *Whren v. United States*, 517 U.S. 806, 813 (1996) (the subjective intent of an officer plays no role in ordinary Fourth Amendment analysis).

Thus, when Officer Bell entered McGinnis's home, he had probable cause to arrest McGinnis for a suspected PAC violation. As explained below, because the home entry was based on probable cause to arrest, the application of the exclusionary rule is limited to evidence discovered in the home.

### B. Even assuming Officer Bell's entry into McGinnis's doorway was illegal, the circuit court should not have applied the exclusionary rule in this case.

The exclusionary rule "is a judicially-created rule that is not absolute, but rather requires the balancing of the rule's remedial objectives with the 'substantial social costs exacted by the exclusionary rule.'" *Felix*, 339 Wis. 2d 670, ¶ 30 (quoting *State v. Knapp*, 2005 WI 127, ¶ 22–23, 285 Wis. 2d 86, 700 N.W.2d 899; *Illinois v. Krull*, 480 U.S. 340, 352–53 (1987)). When there is an absence of any remedial value in applying the exclusionary rule and the important societal goals of "conviction of criminals and public safety" are furthered by admitting the evidence, "courts should not impose the severe penalty of suppression." *State v. Noll*, 111 Wis. 2d 587, 590, 331 N.W.2d 599 (Ct. App. 1983).

Thus, the exclusionary rule does not universally apply to all Fourth Amendment violations. *Herring v. United States*, 555 U.S. 135, 141 (2009). To apply the exclusionary rule, but-for causality is a necessary condition. *Wong Sun v. United States*, 371 U.S. 471, 485 (1963). However, but-for causality, alone, is not a sufficient condition. *Hudson v. Michigan*, 547 U.S. 586, 592 (2006).

Instructive here is *New York v. Harris* and *State v. Felix*. In, *Harris* the Supreme Court held that "where the police have probable cause to arrest a suspect, the exclusionary rule does not bar the State's use of a statement made by the defendant outside of his home, even though the statement is taken after [a warrantless] arrest made in the home in violation of *Payton* [*v. New York*, 445 U.S. 573, (1980)]." *New York v. Harris*, 495 U.S. 14, 21 (1990). This so-called *Harris* rule derives from the principle that the warrant requirement for an in-home arrest is meant to protect an individual from an unreasonable search of the home—it is not meant to protect the individual from the

seizure, which is reasonable as supported by probable cause. *Minnesota v. Olson*, 495 U.S. 91, 95 (1990). Accordingly, because the in-home arrest warrant rule—the *Payton* rule—protects the individual from an unreasonable search of the home, evidence obtained outside of the home is not subject to exclusion if probable cause supported the arrest. *Harris*, 495 U.S. at 21.

In *Felix,* the Wisconsin Supreme Court, recognized that *Harris* established a per se rule regarding statements, and concluded that the "*Harris* rule [is] as applicable to physical evidence obtained from the defendant outside of the home." *Felix*, 339 Wis. 2d 670, ¶ 49. The court reasoned that "[u]nder the *Harris* rule, police are sufficiently deterred from violating *Payton* because 'the principle incentive to obey *Payton* still obtains: the police know that a warrantless entry will lead to the suppression of any evidence found, or statements taken, *inside the home*.'" *Felix*, 339 Wis. 2d 670, ¶ 40 (citing *Harris*, 495 U.S. at 20 (emphasis added)). "There is no compelling reason to go further and suppress evidence lawfully obtained from a defendant outside of the home." *Id*.

*Harris* and *Felix* control. Even assuming Officer Bell unlawfully entered McGinnis's home, he had probable cause to arrest him. Hence, there was "no compelling reason to go further and suppress" the lawfully obtained intoxication evidence and statements discovered outside of the home. *See Felix*, 339 Wis. 2d 670, ¶ 40.

The circuit court recognized as much, but it excluded the evidence based on the erroneous conclusion that Bell lacked probable cause to arrest. The court reasoned that that was so because Bell had a subjective intent of investigating the hit-and-run and lacked information regarding McGinnis's level of intoxication. (R. 24:12–13, A-App. 158–59.) But as addressed above, Bell's subjective intentions are irrelevant to the probable cause inquiry and Bell had

probable cause to arrest McGinnis for operating above .02 without knowing McGinnis's exact degree of intoxication.

Pursuant to *Harris* and *Felix*, the evidence found outside of the home is therefore not subject to exclusion even if the home entry was illegal. And invoking the exclusionary rule in this case "put[s] the police . . . not in the *same* position they would have occupied if no violation occurred, but in a worse one." *Murray v. United States*, 487 U.S. 533, 541 (1988). This Court should reverse.

## CONCLUSION

For the above reasons, this Court should reverse, in part, the circuit court's order suppressing the evidence and remand with directions that the evidence discovered outside of the home is not subject to exclusion.

Dated this 14th day of November, 2018.

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 3,137 words.

Dated this 14th day of November, 2018.

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TIFFANY M. WINTER
Assistant Attorney General

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

I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of 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 14th day of November, 2018.

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TIFFANY M. WINTER
Assistant Attorney General

# Appendix
## *State of Wisconsin v. Michael R. McGinnis*
## Case No. 2018AP1388-CR

## APPENDIX CERTIFICATION

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 Wis. Stat. § 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 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, 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.

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TIFFANY M. WINTER
Assistant Attorney General

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TIFFANY M. WINTER
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