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STATE OF WISCONSIN

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

DISTRICT III

Case No. 2020AP000007 – CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

KALLIE M. GAJEWSKI,

Defendant-Appellant.

Appeal from a Judgment and Order Entered in
the Marathon County Circuit Court,
the Honorable Michael K. Moran, Presiding

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

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ISSUE PRESENTED

Without a warrant, law enforcement climbed onto the porch of Ms. Gajewski's home, pulled her out of her doorway, and arrested her for OWI. Was the arrest unconstitutional such that the evidence derived from it should be suppressed?

The circuit court answered no.

POSITION ON ORAL ARGUMENT AND PUBLICATION

Neither oral argument nor publication is requested.

STATEMENT OF THE CASE

The state charged Ms. Kallie Gajewski with operating while intoxicated – fourth offense in five years. (37:1). Ms. Gajewski filed two motions to suppress evidence. First, she moved the circuit court to suppress any statements made before she had received *Miranda*[1] warnings. (14:1). Second, Ms. Gajewski moved the court to suppress the fruits of her illegal arrest, including the results of her blood alcohol content test. (15:1).

[1] *Miranda v. Arizona*, 384 U.S. 436 (1966).

On March 17, 2017, the circuit court held a suppression hearing. (52:1). At the hearing, Officer Goetsch and Deputy Stroik testified about the events of August 28, 2016, when they arrested Ms. Gajewski. (52:1-32). The parties also stipulated to the introduction of Stroik's squad video, although the video wasn't played at the hearing.[2] (53:33-35; App. 133-35). Instead the court agreed to watch the video before ruling on either suppression motion, and it requested supplemental briefs addressing the testimony given at the hearing. (52:35).

Ms. Gajewski filed a brief in support of her two motions to suppress. (19:1). She first argued that she was in custody when Stroik ordered her to stop as she attempted to go inside her home, and that she was never Mirandized despite her custodial status. She then argued that law enforcement should not have circled her property, peered into her car, or walked onto her porch to arrest her, as they had no warrant, no probable cause, and no exigent circumstances to justify such invasions. (19:4-7).

The State also submitted a brief. (20:1). It argued that law enforcement had probable cause to arrest Ms. Gajewski for an OWI violation when she attempted to go back inside her home. (20:1-3).

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[2] A copy of this video was transmitted to this court along with the electronic components of the appellate record. (*See* 60:1). While the video doesn't catch everything that happened on the night in question, it is crucial evidence for this court to consider in determining the legality of Ms. Gajewski's arrest.

On July 27, 2017, the circuit court issued an oral ruling. (54:1; App. 139) The court ruled on the *Miranda* issue only. The court concluded that Ms. Gajewski was in custody when Stroik prevented her from going inside her home. (54:4; App. 142). The court also concluded that she was not read her *Miranda* warnings once in custody, thus, any statements Ms. Gajewski made during her custodial interrogation would have to be suppressed. (54:4; App. 142). The court then asked the parties to submit further briefing on the unlawful arrest issue—and specifically asked the parties to address how *State v. Weber*, 2018 WI 64, 372 Wis. 2d 202, 887 N.W.2d 554, and the "hot pursuit" doctrine more broadly, apply to this case. (54:5-9; App. 143-47).

The State submitted a single page brief on *Weber*, arguing that Stroik and Goetsch were in hot pursuit of Ms. Gajewski for committing obstruction of an officer. (22:1).

Ms. Gajewski responded by arguing, first, that the majority opinion in *Weber* is not binding law; second, that Stroik and Goetsch did not have probable cause to arrest her for OWI or obstruction; and third, that there was no hot pursuit because Ms. Gajewski had the right to refuse to speak with the officers and go inside her home. (23:1-3).

On August 24, 2017, the circuit court held a second oral ruling. This time, the court ruled on the suppression of the results of the blood draw taken after Ms. Gajewski's arrest. (55:2; App. 150). First,

the court concluded the porch where Ms. Gajewski was arrested was the curtilage of her home. (55:8; App. 156). Next, the court concluded that Ms. Gajewski was obstructing the officers because she was lying about her whereabouts that evening. (55:7; App. 155). And finally, the court concluded the officers were pursuing Ms. Gajewski onto her porch for obstruction of an officer—that is, they were in hot pursuit when they entered the curtilage of her home, without a warrant, and arrested her. (55:8; App. 156). At the hearing, defense counsel asked the court to clarify what exigent circumstance existed to justify the entry and arrest. (55:9; App. 157). The court pointed to the officers' suspicion of Ms. Gajewski's involvement in a drunk driving incident, her symptoms of intoxication, and the dissipation of alcohol in her bloodstream. (55:9; App. 157).

After this ruling, Ms. Gajewski filed a motion to reconsider. (26:1). She argued that because she was on her porch, law enforcement needed probable cause and exigent circumstances to enter onto her porch and arrest her. (26:1-2). Because law enforcement had neither probable cause nor exigent circumstances, she contended, the entrance onto her porch and the ensuing arrest were unlawful—necessitating suppression of their fruits. (26:1-3). Ms. Gajewski also pointed out that the court did not determine an exigent circumstance in the original ruling because dissipation of alcohol in a drunk driving suspect's bloodstream is not itself an exigent circumstance. (26:3).

On January 11, 2018, the circuit court held its final motion hearing. (56:1; App. 160). It held that law enforcement had probable cause to arrest for obstruction and that law enforcement did not need a warrant to arrest her on her porch. (56:5-10; App. 164-69).

The court's eventual denial of the motion to suppress evidence derived from Ms. Gajewski's unlawful arrest is the subject of this appeal.

After the court denied suppression, Ms. Gajewski entered a plea of no contest to operating while intoxicated – fourth offense. (59:12; App. 184). The court withheld sentence and placed Ms. Gajewski on three years of probation. (59:14; App. 186).

STATEMENT OF THE FACTS

The relevant facts are largely undisputed. The testimony at the suppression hearing established the following. After midnight on August 28, 2016, Officer Marcus Goetsch of the Athens Police Department received a call from dispatch that an eyewitness had seen a car stopped on Corlad Road. (53:4; App. 104). The eyewitness described the driver as a woman in a blue Saturn who may have been intoxicated. (53:5; App. 105).

As Goetsch approached the location, he stopped a woman driving a blue Saturn but did *not* believe she was the driver he was looking for. (53:5;

App. 105). The woman said she had also seen a car parked on Corlad Road. (53:5; App. 105). Goetsch continued to drive down Corlad Road and did not see a car matching the eyewitness's description. (53:5; App. 105).

Shortly after, Goetsch received an update from dispatch that the reported car was now traveling northbound on Iron Bridge Road. (53:6; App. 106). Goetsch turned around to travel northbound on Iron Bridge Road, but saw nothing. (53:6; App. 106). Goetsch then received a second update from dispatch that the suspicious car was traveling eastbound on Schweizer Road. (53:6; App. 106). Goetsch began to travel eastbound on Schweizer Road when he approached an "Amish gentlemen," who said he had observed "a car" pull into "a residence"[3] on the south side of Schweizer Road. (53:7; App. 107).

Goetsch pulled into the driveway the Amish man had pointed out, but saw nothing and left. (53:7; App. 107). After continuing down Schweizer Road, still seeing nothing, Goetsch drove back to the driveway he'd already visited. (53:7; App. 107). As he approached it again, he noticed tire tracks pulling in. (53:7, 16; App. 104, 116). About 10 minutes after the original call from dispatch, Goetsch again pulled into the driveway. (53:7; App. 107). This time, Goetsch observed a blue Saturn parked in the backyard. (53:7;

[3] The exchange between the "Amish gentleman" and Goetsch remained vague at the suppression hearing. (53:7, 16; App. 107, 116).

App. 107). The driveway and the blue Saturn belonged to Ms. Gajewski.

Ms. Gajewski's home is a single-wide trailer home with two doors, one facing the road and one facing the backyard, both with porches attached. (53:9, 10, 16-17, 23; App. 109-10, 116-17, 123). When Goetsch arrived at her residence this second time, he left his car to go "check on" the blue Saturn in the backyard. (53:7-8; App. 107-08). As he approached, Goetsch was greeted by Ms. Gajewski's two large dogs. (53:8; App. 108). Goetsch decided to return to his car and wait for back up from the Sheriff's department. (53:8; App. 108). As he waited, Ms. Gajewski came outside of her home to retrieve her dogs. (53:8; App. 108). Goetsch said he needed to speak with her, but Ms. Gajewski went back inside, through the back entrance, without saying a word. (53:8; App. 108).

A few minutes later, Deputy Brandon Stroik of the Marathon County Sheriff's Department arrived. (53:22; App. 122). Shortly after his arrival, Stroik approached Ms. Gajewski's back entrance and knocked on her door. (53:9, 16-17, 23; App. 109, 116-17, 123). Goetsch waited at the other entrance (the one facing the road). (53:9; App. 109). Ms. Gajewski did not initially open the door. (53:9; App. 109). Stroik then walked away from the door and approached the blue Saturn. (53:24; App. 124). At that point, Ms. Gajewski opened her door and stepped onto her porch. (53:24; App. 124). Both Stroik and Goetsch returned to the back entrance to speak

with her. (53:10, 24; App. 110, 124). They stood on the ground. (53:10, 24; App. 110, 124).

Stroik began to inquire into Ms. Gajewski's evening. (53:11; App. 111). Stroik smelled alcohol and thought Ms. Gajewski seemed intoxicated. (53:25; App. 125). Goetsch did not smell alcohol, but also observed signs of intoxication. (53:13; App. 113). Ms. Gajewski consistently denied driving that evening, then decided to end the conversation and go inside. (53:25; App. 125). Stroik commanded Ms. Gajewski to stop, stepped onto her porch and grabbed her, then told her to stop resisting or she would be tased. (53:13, 25-26, 31; App. 113, 125-26, 131). Goetsch also stepped onto the porch, grabbing Ms. Gajewski by the arm she was using to hold onto her door. (53:13; App. 113). Stroik placed Ms. Gajewski in handcuffs, led her out of the doorway, off of her porch, down through her yard, and to his squad car. (53:14, 26; App. 114, 126). Ms. Gajewski was under arrest. (54:4; App. 142).

At the suppression hearing, the State had Goetsch describe what happened on the porch. (53:11; App. 111). Goetsch stated he knew Ms. Gajewski's denials were false and confronted her about whether she was the one he'd pulled over earlier that night. (53:12; App. 112). Goetsch claimed that it was this confrontation that prompted Ms. Gajewski to "run" inside. (53:12; App. 112). By contrast, Stroik testified that when he arrested Ms. Gajewski, he was unaware that Goetsch recognized Ms. Gajewski from pulling her over earlier in the night. (53:31; App. 131).

Goetsch filled Stroik in on that detail *after* the arrest took place, when Stroik began arranging a show up with the eyewitness who called in the blue Saturn. (53:28, 31; App. 128, 131).

When he learned that Goetsch recognized Ms. Gajewski, Stroik called off the show up and sought to administer field sobriety tests. (53:27; App. 127). Ms. Gajewski refused, so Stroik handcuffed her and told her she was under arrest for operating while intoxicated. (53:27-28; App. 127-28). (As a matter of law, as noted earlier, Ms. Gajewski was already under arrest. (54:4; App. 142)). Stroik then put Ms. Gajewski in the back of his squad car and drove her to the hospital for a blood draw. (53:27, 28; App. 127-28). On the way, he pulled over to issue Ms. Gajewski an OWI citation and to read her the informing-the-accused form. She consented to the blood draw, and testing revealed a blood alcohol content of 0.268. (4:3; 53:28; App. 128).

Ms. Gajewski was never charged with or convicted of obstructing an officer.

ARGUMENT

Ms. Gajewski's arrest in the curtilage of her home was not supported by a warrant or by any exception to the warrant requirement. Her arrest was therefore unlawful, and the evidence derived from it should be suppressed.

A. Introduction and standard of review.

In the middle of the night, the police pulled into Ms. Gajewski's driveway because the car parked in her backyard matched the description of the car in a drunk driving tip. In order to question Ms. Gajewski about her involvement with this car, the police had to knock on her door after 1:00 in the morning and wait for her to step onto the porch. After denying driving that night, Ms. Gajewski wanted to end the late-night questioning and go back inside her home. But the police didn't let her. Though they had no warrant for her arrest, they climbed up onto her porch, grabbed her, and arrested her for operating while intoxicated.

Since the police entered the curtilage of Ms. Gajewski's home without a warrant and arrested her, her arrest is presumptively unconstitutional. The State can only rebut this presumption by proving, first, that the police had probable cause to believe Ms. Gajewski had committed a jailable offense, and second, that exigent circumstances necessitated prompt action. *See Payton v. New York*,

445 U.S. 573, 589-90, 601-03 (1980); *State v. Ferguson*, 2009 WI 50, ¶29, 317 Wis. 2d 586, 767 N.W.2d 187. The State cannot meet either burden here. Her arrest was illegal.

This court will review its illegality in two steps. *State v. Rodriguez*, 2001 WI App 206, ¶6, 247 Wis. 2d 734, 634 N.W.2d 844. The circuit court's findings of fact will only be overturned if they are clearly erroneous. *Id*. However, this court will independently determine whether the historical or evidentiary facts justify a warrantless entry. *Id*.

B. Ms. Gajewski's warrantless arrest in the curtilage of her home was unconstitutional.

The Fourth Amendment condemns unreasonable seizures "by the plain language" of its first clause. U.S. Const. amend. IV. *See Payton*, 445 U.S. at 585. The Fourth Amendment's warrant requirement is a "fundamental safeguard" against such seizures. *Rodriguez*, 247 Wis. 2d 734, ¶8. And that warrant requirement has special force in the home; the United States Supreme Court has long recognized "the right of a man to retreat into his own home and there be free" from the danger of unjustified governmental intrusions. *Payton*, 445 U.S. at 590. (quoting *Silverman v. United States*, 365 U.S. 505, 511 (1961)).

As recognized in *Payton,* warrantless arrests in public places are valid when supported by probable cause. *Id*. at 587. But "a greater burden is placed …

on officials who enter a home or dwelling without consent" to make an arrest. *Id*. at 587 (quoting *Dorman v. United States*, 435 F.2d 385, 389 (D.C. Cir. 1970)). That "greater burden" is to obtain a warrant. *Id*. at 588.

The physical entry of the home or its equivalent is the "chief evil against which the wording of the Fourth Amendment is directed." *Id*. at 585. Thus, "[t]o be arrested in the home involves not only the invasion attendant to all arrests, but also an invasion of the sanctity of the home, which is too substantial an invasion to allow without a warrant." *Id*. at 588-89. Consequently, a police officer's warrantless entry into a home to make an arrest is presumptively unlawful. *State v. Kryzaniak*, 2001 WI App 44, ¶15, 241 Wis. 2d 358, 624 N.W.2d 389 (citing *Welsh v. Wisconsin*, 466 U.S. 740, 748-49 (1984)). The evidence derived from an unlawful warrantless entry must be suppressed. *See Wong Sun v. United States*, 371 U.S. 471, 483-487 (1963).

1. Ms. Gajewski's attached porch is curtilage and is afforded the same protections as her home.

It is well settled that "[t]he protection provided by the Fourth Amendment to a home also extends to the curtilage of a residence." *State v. Dumstrey*, 2016 WI 3, ¶23, 366 Wis. 2d 64, 873 N.W.2d 502. The United States Supreme Court regards the area "immediately surrounding and associated with the home" as curtilage. *Oliver v. United States*,

466 U.S. 170, 180 (1984). Because the curtilage of one's home is 'intimately linked to the home, both physically and psychologically," one's reasonable expectation of privacy is at its highest when standing on their curtilage. *Florida v. Jardines*, 569 U.S. 1, 7 (2013). (quoting *California v. Ciraolo*, 476 U.S. 207, 213 (1986)).

A porch is part of a home's curtilage. *See id*. at 11-12. "The front porch is the classic exemplar of an area adjacent to the home and 'to which the activity of home life extends.'" *Id*. at 7. (quoting *Oliver*, 466 U.S. at 182).

When Ms. Gajewski stepped onto her porch in the middle of the night, her reasonable expectation of privacy remained intact. Indeed, the porch she stepped onto was *behind* her home—even more hidden from public view than the traditional front porch the United States Supreme Court has deemed plainly curtilage. (53:9, 16-17, 23-24; App. 109, 116-17, 123-24).

Law enforcement thus needed a warrant to step onto Ms. Gajewski's porch without her consent. It is undisputed that they did not get one.

2. The police had to have probable cause plus exigent circumstances to justify their warrantless arrest of Ms. Gajewski in the curtilage of her home.

All warrantless arrests are "per se unreasonable under the Fourth Amendment, subject only to a few, carefully delineated exceptions that are jealously and carefully drawn." *Rodriguez*, 247 Wis. 2d 734, ¶8. The State must prove one of the applicable exceptions existed in order to overcome the strong presumption of unreasonableness. *State v. Smith*, 131 Wis. 2d 220, 228, 388 N.W.2d 601 (1986) (overruled on other grounds by *State v. Felix*, 2012 WI 36, 339 Wis. 2d 670, 811 N.W.2d 775).[4]

To overcome the presumption that Ms. Gajewski's arrest in the curtilage of her home was unconstitutional, the State bore the heavy burden of proving that the police had both probable cause to believe she had committed a jailable offense and exigent circumstances. *Id*. at 228. It proved neither.

Probable cause. Probable cause plays two roles in the inquiry. First, it's a requirement: no arrest, with or without a warrant, is valid without

[4] *Felix* overruled *Smith*'s holding that an unconstitutional arrest won't always warrant exclusion of a signed written statement or buccal swab derived from the arrest.

probable cause. Second, when it's present, its specifics influence law enforcement's capacity to rely on exigent circumstances as an excuse for presumptively unconstitutional behavior: "the extent to which law enforcement is permitted to rely on exigent circumstances for a warrantless entry of a home has a relationship to the seriousness of the offense" for which the police have probable cause. *Ferguson*, 317 Wis. 2d 586, ¶25. The United States Supreme Court held in *Welsh* that the reasonableness of police conduct accompanied by probable cause "is lessened when the underlying offense is minor." *Welsh*, 466 U.S. at 750.

In Wisconsin, the special presumption against warrantless, in-home arrests for minor crimes has been interpreted as establishing a distinction between jailable and nonjailable offenses. *Ferguson*, 317 Wis. 2d at ¶28-29. Exigent circumstances can only justify a warrantless, in-home arrest when the police have probable cause for a jailable offense. *Id*.

Probable cause to arrest, "as the very name implies, deals with probabilities." *Draper v. United States*, 358 U.S. 307, 313 (1959). To meet the probable cause threshold, the "facts and circumstances within [the arresting officer's] knowledge" must be sufficient "to warrant a man of reasonable caution in the belief that [a jailable] offense has been or is being committed." *Id*. (quoting *Carroll v. United States*, 267 U.S. 132, 162 (1925)).

Here, the police did not have probable cause to arrest Ms. Gajewski for a jailable offense.

At the suppression hearing, Stroik testified that he arrested Ms. Gajewksi for operating while intoxicated. (53:11, 25; App. 111, 125). There are two problems with relying on this offense to fulfill the probable cause requirement. First, as far as Goetsch and Stroik knew at the time of arrest, they were arresting Ms. Gajewski for a first-offense OWI. (53:27-28; App. 127-28). In Wisconsin, a first-offense OWI is civil—not criminal, and not jailable. *See* Wis. Stat. § 346.65(2)(am)(1). Second, Stroik, the arresting officer, didn't know enough to have probable cause to arrest Ms. Gajewski for *any* OWI when he arrested her on her porch. As Stroik's testimony shows, he developed probable cause only after Ms. Gajewski was brought to Stroik's squad car, as that's when Goetsch told him he saw Ms. Gajewski driving earlier. (53:27-28; App. 127-28). In short, Stroik's warrantless arrest was not justified by probable cause for OWI: a first-offense OWI is not jailable, and Stroik lacked the facts needed to support probable cause even for that.

The circuit court, meanwhile, held that Stroik[5] had probable cause to arrest Ms. Gajewski for obstruction of an officer because she'd lied to Stroik

[5] While the circuit court spoke in generalities about the officers involved in this case, what is relevant to the legality of the arrest under review is the information known to—and the conduct of—the arresting officer, Stroik. Stroik is the officer who violated Ms. Gajewski's constitutional rights.

about her whereabouts. (56:10; App. 169). That determination was wrong. Again, at the time of arrest, Stroik did not know Goetsch had seen Ms. Gajewski driving. (53:14, 27; App. 114, 127). Therefore, Stroik wouldn't have had reason to believe Ms. Gajewski was lying. This conclusion is supported by the fact that neither Goetsch nor Stroik testified that they arrested Ms. Gajewski for anything other than an OWI, or had probable cause to arrest for anything other than an OWI. (53:27; App. 127). Similarly, Ms. Gajewski was never charged with or convicted of obstructing an officer. As the officers themselves realized, Ms. Gajewski's arrest was not supported by probable cause to arrest her for obstruction.

Exigent circumstances. The State also has the burden of proving the presence of exigent circumstances. *State v. Richter*, 2000 WI 58, ¶29, 235 Wis. 2d 524, 612 N.W.2d 29. Wisconsin recognizes four categories of exigent circumstances: (1) hot pursuit of a suspect; (2) threat to the safety of others; (3) risk of evidence destruction; and (4) likelihood the suspect will flee. *Id.* at ¶29 (quoting *Smith*, 131 Wis. 2d at 228). The first category is the subject of the next section; this section addresses the second, third, and fourth kinds of exigency.

All of these categories—including hot pursuit—reflect narrowly defined, fact-specific, "exceptional" circumstances where it would be "contrary to public policy to bar law enforcement officers at the doorstep." *See Johnson v. United States,* 33 U.S. 10,

14 (1948); *Smith*, 131 Wis. 2d at 228. As the United States Supreme Court has held, the exigent circumstances doctrine applies in an "emergency or dangerous situation" (*Payton*, 445 U.S. at 583), where speed is essential (*see Warden v. Hayden*, 387 U.S. 294, 298-99 (1967); *United States v. Santana*, 427 U.S. 38, 42 (1976)).

But the doctrine is not an open invitation for police to avoid obtaining a warrant. The police conduct must still be reasonable. *Smith*, 131 Wis. 2d at 230. "When an officer undertakes to act as his own magistrate, he ought to be in a position to justify it by pointing to some real immediate and serious consequences if he postponed action to get a warrant." *McDonald v. United States*, 335 U.S. 451 (1948) (J. Jackson, concurring). Courts reviewing whether exigent circumstances (excepting hot pursuit) justified a warrantless in-home arrest must therefore apply an objective test that centers on reasonableness: "'Whether a police officer under the circumstances known to the officer at the time [of entry would] reasonably [believe] 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.'" *Richter*, 235 Wis. 2d at ¶30. In other words, an exigent circumstance requires: (1) a compelling need for official action; and (2) no time to secure a warrant. *Michigan v. Tyler*, 436 U.S. 499, 509 (1978) (citing *Warden*, 387 Wis. 2d 294); *Missouri v. McNeely*, 569 U.S. 141, 150 (2013).

This test requires that each case of alleged exigency be evaluated on its own facts. *McNeely*, 569 U.S. at 145. Therefore, this court must consider the totality of the circumstances to determine the presence of an exigent circumstance that could justify Ms. Gajewski's warrantless arrest. *Id.*

Based on the totality of the circumstances in this case, Stroik could not have reasonably believed that any delay caused by procuring a warrant to arrest Ms. Gajewski would have placed anyone in grave danger, risked destruction of evidence, or increased the likelihood of Ms. Gajewski's fleeing.

First, the testimony given at the suppression hearing shows neither Goetsch nor Stroik saw a threat to their lives or anyone else's life in the time period surrounding Ms. Gajewski's arrest.

Second, neither officer testified to any facts demonstrating a risk that important evidence would have been destroyed had they not acted immediately. The circuit court originally found the dissipation of evidence of intoxication as an exigency, but correctly retracted that determination in response to the motion to reconsider. (56:9; App. 168); *see also McNeely*, 569 U.S. at 155-165. The only evidence relevant to obstruction, meanwhile, would be testimony from the police, like they provided at the suppression hearing—not anything at risk of destruction.

Finally, there was no reason to believe Ms. Gajewski was going anywhere other than inside her home. It was late at night, Ms. Gajewski was hesitant enough to leave her home that she stayed on her porch, and she told the police she wanted to go inside. (53:24-25; App. 124-25).

Under these circumstances, the police had ample time to obtain a warrant to lawfully arrest Ms. Gajewski. They could not have reasonably believed that an exigency existed.

Hot pursuit. In the State's second round of briefing, it argued "hot pursuit" as the justification for the police's warrantless entry and arrest. (22:1).

The hot pursuit doctrine is a muddled area of law that requires a careful read of relevant cases. Traditionally, hot pursuit has been conflated with other categories of exigency. *See e.g., Santana*, 427 U.S. 38 (holding that the police were in hot pursuit when they warrantlessly entered the home to prevent the imminent destruction of evidence); *Warden*, 387 U.S. 294 (holding that officers' pursuit of a defendant into his home, without a warrant, was justified because the suspect posed a threat to safety—not because the police were in hot pursuit).[6]

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[6] For an example of how other jurisdictions have conflated hot pursuit with the traditional exigencies discussed earlier, *see State v. Bolte*, 115 N.J. 579 (1989) (holding that "if the threat to public safety is substantial, the "hot pursuit" of a

Recognizing the frequent coexistence of hot pursuit and a separate exigency, a number of states have held hot pursuit alone insufficient to justify a warrantless entry. *See, e.g.*, *State v. Markus*, 211 So. 3d 894, 909-10 (Fla. 2017) (hot pursuit alone did not justify the warrantless entry because the defendant did not pose a danger to the lives of others, the evidence of the minor offense was located outside of the home, and the defendant was not at risk of fleeing); *State v. Dugan*, 276 P.3d 819, 835-36 (Kan. Ct. App. 2012) (holding that hot pursuit alone does not create an absolute exception to the warrant requirement, especially when the pursuit is for a minor offense without aggravating circumstances implicating broader law enforcement or safety concerns); *City of Seattle v. Altschuler*, 766 P.2d 518, 520-21 (Wash. Ct. App. 1989) (holding that hot pursuit alone did not justify the warrantless entry to arrest for the minor offense of disorderly conduct); *State v. Bowe*, 557 N.E.2d 139, 141 (Ohio Ct. App. 1988) (relying on *Warden* to hold that hot pursuit cannot justify the warrantless entry of defendant's home without evidence that the police or others are in danger).

Conversely, the lead opinion in a Wisconsin Supreme Court case recently found that hot pursuit is an exigent circumstance that can, on its own, justify a warrantless entry of a home. *See Weber*, 235 Wis. 2d 524, ¶3. Regardless of the jurisdiction's

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defendant who poses a threat to public safety may in certain contexts constitute an exigent circumstance").

specific rule, however, courts—even in Wisconsin—rarely find a true hot pursuit and use it, even in part, to justify a police officer's warrantless entry into the home.

Hot pursuit is defined as the "immediate or continuous pursuit of [a suspect] from the scene of the crime." *Welsh*, 466 U.S. at 753. Courts have applied the hot pursuit doctrine *only* to this very narrow factual scenario:

> (1) an officer observes or is immediately informed that a crime has occurred (*see Richter*, 235 Wis. 2d 524, ¶33),
>
> (2) the officer attempts to arrest the suspect at or near the scene of the crime (*see Santana*, 427 U.S. at 42),
>
> (3) but because the suspect flees the scene and retreats into his or her home before the arrest can occur (*see id.*),
>
> (4) the officer immediately makes a warrantless home entry to complete the arrest (*see id.*).

This factual scenario was not present here. The ways the facts of this case depart from the hot pursuit fact pattern become clear with a close look at the main hot pursuit cases that bind this court.

In the United States Supreme Court's seminal hot pursuit case, *Santana*, the Court found that the police were in a "true"[7] hot pursuit when they entered Santana's home without a warrant to prevent the likely immediate destruction of important evidence for her arrest and conviction. *Santana*, 427 U.S. at 43. In the Court's analysis, the first question was "whether, when the police first sought to arrest Santana, she was in a public place." *Id.* at 42. This is because a warrantless arrest of a person in a public place can be justified with proper probable cause. *United States v. Watson*, 423 U.S. 411 (1976). The court held that because Santana did not have an expectation of privacy in the doorway of her home,[8] the police intended to first arrest her in public. *Santana*, 427 U.S. at 44. It was not until she

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[7] In Footnote 3, the *Santana* Court recognized that *Warden* stands for the proposition that the police may enter a home without a warrant when they have probable cause and exigent circumstances, but that *Warden* did not involve a "true" hot pursuit.

[8] The court held that Santana was not standing in the curtilage of her home when in her doorway. In determining this, the court applied the *Katz* "reasonable expectation of privacy" test, stating that because her doorway was practically on the sidewalk and very visible to the public, she did not have a reasonable expectation of privacy. *Santana*, 427 U.S. at 42. (citing *Katz v. United States*, 389 U.S. 347 (1967)). This is different from the doorway of Ms. Gajewski's home in many ways: her doorway was attached to her porch, it did not face a roadway or public sidewalk, and it could not be seen by the public. The *Jardines* conclusion that a porch constitutes curtilage, not the *Santana* doorway holding, controls. *Jardines*, 569 U.S. at 5-8.

retreated into her home, after the police had begun to approach her that the hot pursuit began. *Id*. at 42-43. The Court approved the police entry into Santana's home, finding that the following facts generated a justifiable hot pursuit: (1) the police had probable cause to believe she possessed the drugs and money they were looking for before entering her home, (2) the arrest had been set in motion in a public place, (3) Santana attempted to thwart the police's lawful attempt to arrest her by retreating into her home, and finally, (4) the police did not obtain a warrant before entering her home to arrest Santana because "there was a realistic expectation that any delay would result in destruction of evidence." *Id.* Notably, this last factor is an exigency in and of itself—apart, that is, from the hot pursuit doctrine.

Almost two decades later, the Wisconsin Supreme Court held in *Richter* that law enforcement's warrantless entry into a trailer home, to which Richter had fled from the scene of a burglary, was justified by the exigent circumstance of hot pursuit and the threat to the safety of others. 235 Wis. 2d 524, ¶2. When holding that hot pursuit justified the warrantless entry, the court found that: (1) the police were informed of a burglary as it happened, (2) the police were immediately dispatched and arrived at the trailer home that had been burglarized, where they intended to arrest Richter, but (3) were informed that Richter had fled into a nearby trailer home in attempt to escape arrest, so (4) police went to the nearby trailer home and entered without a warrant to arrest Richter. *Id*.,¶36.

The court also determined that Richter posed a serious danger to the lives of others based on the facts available to the officer from the burglary report. *Id*., ¶41. Similar to *Santana*, the police were in immediate and continuous pursuit of a suspect (that is, hot pursuit) when they entered a private home to complete an arrest—and similar to *Santana*, there was a secondary exigent circumstance to justify the warrantless entry. *Id*.

Recently, in *Weber*, the Wisconsin Supreme Court issued a fractured decision on the hot pursuit doctrine. The facts of the case were as follows. Upon observing a driver with broken brake light cross the fog line, an officer activated his emergency lights in attempt to pull the driver over. *Weber*, 372 Wis. 2d 202, ¶4. The driver slowed for about 100 feet, turned into a driveway, and pulled into a garage attached to a house. *Id*. The officer followed the driver into the garage, pulled the driver out of the doorway of his home, and arrested him inside the garage. *Id*., ¶¶5-6. Although four justices found no Fourth Amendment violation, they did not agree on why. Three justices (one of whom authored the lead opinion) concluded that the police were justified in making a warrantless entry into the driver's garage by the exigent circumstance of "hotly pursuing" a fleeing suspect who had committed a jailable offense. *Id*., ¶45. These justices found no other exigency present. One justice, writing separately, concluded that the driver consented to the warrantless entry. *Id*., ¶46 (J. Kelly, concurring). The other three justices rejected both rationales completely and concluded the arrest was

unconstitutional. *Id*., ¶86 (J. A.W. Bradley, dissenting); *Id*., ¶139 (J. R. Bradley, dissenting).

These divisions mean *Weber* does not articulate a binding rule—or even binding guidance—on the hot pursuit doctrine. *Marks'* "narrowest grounds" rule governs fragmented opinions such as the one in *Weber*. *Marks v. United States* 430 U.S. 188 (1977). When the opinion does not enjoy a "single rationale explaining the result" by four or more Justices, "the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds." *Id*. at 193-94. But when there is no single rationale that can "represent a common denominator of the Court's reasoning," there is no particular standard that binds lower courts. *Id*. at 194. *See also State v. Dowe*, 120 Wis. 2d 192, 193-94 , 352 N.W.2d 660 (1984); *Howes v. Deere & Co.*, 71 Wis. 2d 268, 274 (1976); *State v. Griep*, 2015 WI 40, ¶36, 361 Wis. 2d 657, 863 N.W.2d 567. That is the case with *Weber*.

Given *Weber*'s lack of binding guidance, it remains true that neither the Wisconsin appellate courts nor the United States Supreme Court have held that hot pursuit justifies a warrantless entry on its own. *See Santana*, 427 U.S. at 43; *Richter*, 235 Wis. 2d 524, ¶55. Thus, although *Richter* analyzed the hot pursuit in that case separate from the other exigency involved, it remains unclear whether hot pursuit can ever be a standalone justification for a warrantless, in-home arrest. *Id*., ¶31.

This court must determine whether any exigency overcame the presumption of unreasonableness attached to all warrantless, in-home arrests. *Welsh*, 466 U.S. at 750. It would chart new territory to rely exclusively on hot pursuit.

Regardless, the case at hand is far more similar to *Welsh* than to the hot pursuit cases—and *Welsh* is indisputably binding. In *Welsh*, the United States Supreme Court refused to justify a warrantless entry based on the hot pursuit doctrine. 466 U.S. at 754-55. As here, a witness observed a car on the road and suspected the driver was intoxicated, but the driver caused no damage to any person or property. *Id.* at 742. As here, the police arrived on scene after the suspect had already left. *Id.* at 743. As here, the police had little information about the suspect, but enough to lead them to the suspect's home. *Id.* And as here, the police entered the suspect's home and arrested him—without a warrant—for, as far the police knew, a first-offense OWI. *Id.*

Welsh held that the warrantless, nighttime entry into Welsh's home to arrest him for a nonjailable traffic offense violated the Fourth Amendment. *Id.* at 754-55. The Court explained: "[B]efore government agents may invade the sanctity of the home, the government must demonstrate exigent circumstances that overcome the presumption of unreasonableness that attaches to all warrantless home entries." *Id.* at 750. The government failed to do so in *Welsh*, and the State failed to do so here.

First, the police did not have probable cause to arrest Ms. Gajewski for a jailable offense before they entered the curtilage of her home. And even if the police had probable cause to arrest Ms. Gajewski for obstruction, this offense was not serious or dangerous—especially in comparison to the armed robbery and drug distribution in *Warden* and *Santana*. Second, her arrest began while she was standing in the curtilage of her home, not in public or at the scene of the OWI. Third, Ms. Gajewski was not fleeing or attempting to thwart a lawful arrest. Ms. Gajewski was simply moving from the curtilage of her home to the inside—from one spot in which she has a reasonable expectation of privacy to another. And finally, the police entered the curtilage of her home to arrest her—without a warrant, without probable cause of a jailable offense, and without any exigency (separate from, or in combination with, any hot pursuit).

For all of these reasons, the officers that charged onto Ms. Gajewski's porch and forcibly arrested her violated the Fourth Amendment.

C. The evidence rooted in Ms. Gajewski's illegal arrest should be suppressed.

The exclusionary rule is a remedy courts apply to deter unlawful police conduct, including misconduct prohibited by the Fourth Amendment. *State v. Dearborn*, 2010 WI 84, ¶36, 327 Wis. 2d 252, 786 N.W.2d 252. Its application results in the suppression of evidence obtained as a result of the

unlawful police conduct. *Ferguson*, 317 Wis. 2d 586, ¶21.

The key evidence supporting the OWI charge against Ms. Gajewski (her blood test results) derived from her unconstitutional arrest. *State v. Phillips*, 218 Wis. 2d 180, 204, 577 N.W.2d 794 (1998). Thus, like the un-Mirandized statements the circuit court has already suppressed in this case, Ms. Gajewski's blood test results—and all other evidence stemming from her unlawful arrest—should be suppressed.

CONCLUSION

For all the reasons set forth, the circuit court improperly denied Ms. Gajewski's motion to suppress the fruits of the illegal entry into the curtilage of her home and the illegal arrest that followed. She asks this court to vacate the judgment of conviction and remand the case to the circuit court with instructions to grant suppression.

Dated and filed by U.S. Mail this 25th day of September, 2020.

Respectfully submitted,

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CERTIFICATION AS TO FORM/LENGTH

I hereby certify that this brief conforms to the rules contained in § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 6,563 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 and filed by U.S. Mail this 25th day of September, 2020.

Signed:

MEGAN ELIZABETH LYNEIS
Assistant State Public Defender

CERTIFICATION AS TO APPENDIX

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

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

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.

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APPENDIX

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