

**FILED  
12-03-2021  
CLERK OF WISCONSIN  
SUPREME COURT**

**WISCONSIN SUPREME COURT**

**CASE No. 2020AP001559 CR**

---

**STATE OF WISCONSIN,**  
Plaintiff – Respondent

v.

**LAVERNE WARE JR.,**  
Defendant – Appellant

---

**APPEAL FROM THE CONVICTION AND SENTENCE  
AFTER A JURY TRIAL**

**The Honorable Judge Brian Pfitzinger Presiding**

**Dodge County Case 16CF408**

---

**APPELLANT’S PETITION FOR REVIEW**

---

Respectfully Submitted by:  
COVEY LAW OFFICE  
PO Box 1771  
Madison, WI 53701-1771  
Office: (608) 230-5648  
E-mail: [michaelcovey1@yahoo.com](mailto:michaelcovey1@yahoo.com)

By: Michael Covey  
State Bar ID: 1039256  
Attorney for Defendant-Appellant

**TABLE OF CONTENTS**

TABLE OF AUTHORITIES.....4

STATEMENT OF THE ISSUE PRESENTED.....5

DECISION OF THE COURT OF APPEALS.....5

STATEMENT ON THE CRITERIA FOR REVIEW.....5

STATEMENT OF THE CASE.....6

    1. The Allegations and Conviction.....6

    2. The Suppression Motion.....8

    3. The Suppression Hearings and the Circuit Court’s  
        Decision.....10

    4. The Change in the Community Caretaker Doctrine...14

    5. The Court of Appeals’ Decision and Order.....15

ARGUMENT.....16

The appellate court erred in affirming the circuit court’s denial  
of the defendant’s motion to suppress evidence after an illegal  
search.....16

    1. Standard of Review.....16

    2. The search was not valid under the emergency aid  
        doctrine.....16

    3. All physical, testimonial, and derivative evidence derived  
        from the search must be suppressed because it is tainted  
        “fruit from the poisonous tree”.....18

CONCLUSION.....20

CERTIFICATION OF THE BRIEF AND APPENDIX  
CONTENT.....21

## TABLE OF AUTHORITIES

### Wisconsin cases

<i>State v. Arias</i> , 2008 WI 84, 311 Wis. 2d 358, 752 N.W. 2d 748.....	16
<i>State v. Fonte</i> , 2005 WI 77, 281 Wis. 2d 654, 698 N.W.2d 594.....	16
<i>State v. Pinkard</i> , 2010 WI 81, 327 Wis. 2d 346, 785 N.W.2d 592.....	15, 17
<i>State v. Rome</i> , 2000 WI App 243, 239 Wis. 2d 491, 620 N.W.2d 225.....	17
<i>State v. Schlise</i> , 86 Wis. 2d 26, 271 N.W.2d 619(1978).....	19

### Federal cases

<i>Brigham City v. Stuart</i> , 547 U.S. 398, 126 S. Ct. 1943 164 L. Ed. 2d 650 (2006).....	17
<i>Cady v. Dombrowski</i> , 413 U.S. 433, 93 S. Ct. 2523, 37 L. Ed. 2d 706 (1973).....	14, 15
<i>Caniglia v. Storm</i> , 141 S. Ct. 1596 (2021).....	5, 15
<i>Murray v. United States</i> , 487 U.S. 533, 108 S. Ct. 2529 (1988).....	18, 19
<i>Wong Sun v. United States</i> , 371 U.S. 471 (1983).....	19, 20

### Additional Authority

U.S. Const. Amend. IV.....	16, 17
Wis. Const. art. I, § 11.....	16, 17

### **STATEMENT OF THE ISSUE PRESENTED**

Did law enforcement conduct an illegal search of the defendant's garage due to an erroneous application of the emergency aid exception to the Fourth Amendment's warrant requirement?

The trial court said "no". However, the trial court examined the case under the now overturned community caretaker exception.

### **DECISION OF THE COURT OF APPEALS**

The Court of Appeals affirmed the trial court's decision, yet under the emergency aid exception. The appellate court held that law enforcement had a reasonable basis to conclude there was a person in the defendant's garage in need of immediate aid.

### **STATEMENT ON CRITERIA FOR REVIEW**

The United States Supreme Court overturned Wisconsin's community caretaker exception for warrantless searches of residences in *Caniglia v. Strom*, 141 S. Ct. 1596 (2021). However, this decision still allows for the emergency aid exception.

The instant case is Wisconsin's first published decision post *Caniglia* which examines the application of the emergency aid doctrine to the search of a residence. Although the issue presented is not one of the enumerated criteria for review under Wisconsin Statute § 809.62(1r), the Wisconsin Supreme Court has an opportunity to provide guidance to attorneys statewide on the application of the emergency aid doctrine to residences.

## STATEMENT OF THE CASE

### 1. The Allegations and Conviction

The criminal complaint alleges as follows: On 12/04/16, Vernon Mickey reported a possible homicide at 100 We Go Trail in Fox Lake, Dodge County, WI. (R.1 at 2) Mickey stated he lived at the residence with his girlfriend, Marjorie Jones, and her son, Laverne Ware Jr. *Id.* Mickey reported seeing a lot of blood in the garage of the residence, but he did not see a body. *Id.* Mickey stated that Ware's girlfriend was missing since "last night", and he believed it was her blood. *Id.* Ware's girlfriend was subsequently identified as S.D.<sup>1</sup> *Id.*

Deputy Kevin Homan and Sergeant Joseph Nicholas of the Dodge County Sheriff's Office both responded to the residence. *Id.* S.D's body was found in a blue Ram pickup truck parked in the residence's attached garage. *Id.* S.D. appeared to have died several hours earlier as some of the blood inside the vehicle had dried. *Id.* at 3. Significant efforts were taken to conceal the truck in the garage. *Id.*

Mickey later gave additional statements to law enforcement. He stated there was a family gathering (at the residence) after a funeral. *Id.* at 5. After the gathering ended, Ware and S.D. left the residence. *Id.* Mickey stated he later saw the truck in the garage with blood under it. *Id.* Mickey described a conversation between him, Jones, and Ware. *Id.* Ware stated "he ain't going to leave no witnesses." *Id.* Mickey said Ware made numerous comments and threats which implicated Ware as the murderer. *Id.* at 5 – 10. Mickey described Ware's relationship with S.D. as volatile. *Id.* at 8. Mickey stated Ware and S.D. were cousins. *Id.*

---

<sup>1</sup> S.D. was sometimes referred to as S.J. in the record. Some of her loved ones referred to her using a different last name.

The complaint charged Ware with one count of Hiding a Corpse. However, the Information added four additional counts; First Degree Intentional Homicide, Incest, and two counts of Possession of a Firearm by a Felon. (R.17 at 1 – 2) Ware’s attorneys filed a motion to suppress nearly all the evidence in the case, arguing that S.D.’s body was discovered after an illegal search of the garage. (R.99 at 1 – 19) The court held a motion hearing on 02/28/28. (R.563 at 107 – 247) The court scheduled a second hearing to finish the witness testimony, but Ware’s attorneys withdrew from the case. (R.591 at 1 – 17) This caused a significant delay. The second part of the evidentiary hearing was held on 09/19/18. (R.565 at 1 – 108) After further briefing the court denied Ware’s motion to suppress in an oral decision dated 11/02/18. (R.566 at 5 – 21) The court also denied Ware’s motion to reconsider in a written decision issued on 12/11/18. (R.208 at 1 – 2)

After a two-week jury trial Ware was convicted on all counts. The court essentially sentenced Ware to life imprisonment, allowing him to petition for extended supervision on 12/04/76. (R.530 at 1 – 5) The court sentenced Ware to an additional 18 years of consecutive initial confinement on the other counts. *Id.*

Ware appeals his conviction and sentence, arguing that nearly all the evidence in this case should have been suppressed as fruit from the poisonous tree after an illegal search due to improper application of the community caretaker doctrine. Additional facts are provided below.

## 2. The Suppression Motion

Ware's motion to suppress asserted Sgt. Joe Nicholas conducted an illegal search of Ware's garage and sought to suppress all primary and derivative evidence obtained as a result of the search. (R.99 at 1) In his initial 911 call, Mickey reported there was a possible body in the garage. *Id.* at 2. However, he never checked for an injured person after he saw the blood. *Id.* There was no other corroborating evidence, such as a cry for help, to support a claim that anyone needed immediate medical assistance. *Id.*

Deputy Kevin Homan responded to the scene. *Id.* He noticed one set of footprints from around the front door. *Id.* He looked in the window and saw a person watching television. *Id.* Homan knocked on the door and Jones answered. *Id.* Jones was cooperative, but seemed very confused, and had no information about the blood in the garage. *Id.* There was no indication that anyone needed assistance. *Id.* There were no signs of a struggle, nor were there any cries for help, nor any indication that anything was out of order. *Id.* In an attempt to get more information, Homan went to Kwik Trip to meet with Mickey and Officer Jason White. *Id.* at 2 – 3. Mickey told the officers he believed the blood was S.D.'s and that he hadn't seen her since the prior night. *Id.* at 3.

Sgt. Nicholas waited outside the residence while Homan attempted to get more information from Mickey. During this time Nicholas did not hear any unusual sounds or see any evidence indicating someone in the house needed immediate assistance. *Id.* Mickey and the other two officers soon returned, and Jones let them all back in the residence. *Id.* However, Jones did not give permission for anyone to look in the garage. *Id.* She insisted on a warrant. *Id.* Nicholas informed Jones they were going to secure the home and that everyone had to leave while a warrant was obtained. *Id.* At



this point, the only information officers had for a warrant was an uncorroborated claim there might be blood in the garage. *Id.*

Nicholas exited the home to speak with Sheriff Dale Schmidt. *Id.* Nicholas reported that “given the circumstances”, he would check to see whether he needed to render first aid. *Id.* Yet after Nicholas reentered the home, Ware came out from a hallway and was detained in a squad car. *Id.* Nicholas walked in the kitchen to see the door which Mickey has reportedly looked through to the garage. *Id.* at 3 – 4. Nicholas noted there was only a metal windowless door. *Id.* at 4. Nicholas instructed Mickey to show him where he looked to see the blood. *Id.* Mickey complied, went to the door, unlocked the deadbolt, and opened it. *Id.* Nicholas looked through a large-windowed storm door and saw blood dripping from the passenger door of the truck. *Id.* Nicholas subsequently discovered S.D. and immediately recognized she was deceased. *Id.*

The motion argued that Nicholas was not exercising a bona fide community caretaker function and that he did not have an objectively reasonable basis to believe a member of the public needed assistance. *Id.* at 5. Additionally, the motion argued there were no exigent circumstances to justify the warrantless search. *Id.* at 11. Furthermore, the motion argued that all physical and testimonial evidence from the unlawful search, as well as derivative evidence tainted by the search must be suppressed. *Id.* at 11 – 12. When Nicholas finally sought a warrant, he testified that he saw the blood and a deceased female. *Id.* at 15. The judge granted the warrant based on the information gained from the unlawful search. *Id.* at 18. Without this unlawfully gained evidence, Mickey’s uncorroborated claims were not sufficient to provide probable cause for the search warrant. *Id.*

### **3. The Suppression Hearings and the Circuit Court's Decision**

At the initial evidentiary hearing on 02/28/18, the court ruled that Ware had standing to challenge the search based on Ware's testimony and the preliminary hearing. (R.563 at 123:25 – 124:2) Ware testified that he owned the property and was present at the property during the search. *Id.* at 119:8 – 13. Ware did not consent to the search. *Id.* at 119:14 – 16.

Homan testified that on 12/04/16, he was dispatched to 100 We Go Trail due to a possible homicide. *Id.* at 142:16 – 143:8. Homan arrived at 4:16 pm approximately 10 – 12 minutes after being dispatched. *Id.* at 145:18 – 147:21. Homan was surprised when Jones answered the door because he expected whoever was supposed to be there was dead. *Id.* at 149:18 – 150:10. Jones was cooperative and answered Homan's questions. *Id.* at 150:11 – 16. Jones indicated she was alone and was described as super nice. *Id.* at 150:17 – 23. Jones indicated that Ware was not present and did not live at the residence. *Id.* at 151:5 – 18. Homan left the residence, encountered Nicholas, and went to Kwik Trip to meet with White and Mickey. *Id.* at 151:20 – 24. After he returned to the residence, Jones let all three officers and Mickey inside, although Nicholas stayed outside initially due to a phone call. *Id.* at 154:25 – 155:15. Ware then came around the corner down the hallway. *Id.* at 155:18 – 24. Ware had his arms outstretched, palms forward, with a cigarette in one hand. *Id.* at 156:10 – 25. Homan testified he was extremely surprised because Jones had stated she was the only one there. *Id.* at 157:5 – 14.

Homan recalled receiving information indicating Ware and his girlfriend had recently been going at it, meaning having difficulties. *Id.* at 157:15 – 158:10. Homan stated that Jones was clearly not agreeing to a search of the residence and she

wanted the officers to get a warrant. *Id.* at 158:11 – 17. Ware had appeared at the point they were securing the residence. *Id.* at 158:18 – 159:6. Homan testified he was concerned as Jones had not been truthful to him. *Id.* at 159:7 – 17. This made Mickey's statements appear to be more true. *Id.* at 159:18 – 20.

On cross, Homan stated that he was the first law enforcement officer at the scene. *Id.* at 161:17 – 24. When he arrived, there were no tire tracks in the snow in the driveway. *Id.* at 161:25 – 162:2. Homan saw one set of footprints, and they were not coming down the driveway. *Id.* at 163:14 – 20. There was no blood on the ground, nor was there blood splatter on the garage door. *Id.* at 164:19 – 22. There were no signs of any struggle. *Id.* at 165:7 – 14. There were no reports of any gunshots from dispatch. *Id.* at 166:8 – 10. Homan heard nothing noteworthy. *Id.* at 165:25 – 166:4. While inside the residence, Homan did not see any blood, weapons, or contraband. *Id.* at 168:11 – 18. He did not smell any gunpowder. *Id.* at 168:19 – 24. Homan stated he never heard any cries for help during the time he was in the home. *Id.* at 180:24 – 181:2. Homan did not ask Ware for permission to search the residence. *Id.* at 181:3 – 5.

Officer White testified he responded to the Kwik Trip to meet with Mickey. *Id.* at 189:8 – 24. Mickey stated that he believed something had happened to S.D., adding he saw blood, but not a body. *Id.* at 190:3 – 13. White saw nothing out of the ordinary when he arrived at the residence. *Id.* at 205:13 – 206:17.

Sheriff Dale Schmidt testified that he spoke with Nicholas on the radio; and Nicholas stated they were trying to get in the residence but not getting consent. *Id.* at 212:5 – 20. Schmidt asked Nicholas if there were community caretaker issues. *Id.* at 213 at 2 – 13. Nicholas responded something to

the effect of “we’ll use that.” *Id.* at 213:14 – 16. On cross, Schmidt stated he made the statements about community caretaker without the benefit of being present at the residence. *Id.* at 218:11 – 19.

Sgt Joe Nicholas testified about his conversation with Schmidt. Nicholas testified that Schmidt said there was no community caretaker issue. *Id.* at 234:3 – 16. When Nicholas hung up with Schmidt, he did not feel there was sufficient information to conclude there was somebody in the residence that was harmed. *Id.* at 235:20 – 24. Additionally, Jones did not want law enforcement walking around her house. *Id.* at 236:21 – 23. Nicholas stated Mickey’s information seemed very concrete and there was a safety concern when Ware suddenly came around the corner. *Id.* at 238:14 – 22. Ware was removed from the residence. *Id.* at 239:2 – 3.

Nicholas asked Mickey to show him where he had seen the blood from his vantage point. *Id.* at 240:22 – 25. Mickey opened the doorway that led into the garage and Nicholas saw the blood. *Id.* at 241:1 – 11. Nicholas went up to the vehicle, found S.D., and then secured the residence. *Id.* at 241:12 – 242:1

The hearing was continued to 09/19/18. (R.565 at 1 – 108) On cross, Nicholas stated Jones had denied consent to search her residence at least two times. *Id.* at 33:8 – 13. While at the scene, Nicholas did not hear any screaming or yelling. *Id.* at 33:14 – 17. Nicholas did not see any blood nor any signs of a physical struggle. *Id.* at 33:14 – 34:11. Jones’ demeanor was friendly and cooperative. *Id.* at 34:18 – 35:1. Nicholas admitted he did not ask Jones where S.D. was. *Id.* at 38:1 – 4. Nicholas did not ask Jones to put him in touch with someone who may know where S.D. was, nor did he ask for a phone number to call her. *Id.* at 38:5 – 10. Nicholas further testified that when he spoke with Schmidt about the community

caretaker function, Nicholas said “we’ll definitely use that.” *Id.* at 41:4 – 42:11. Ware’s attorney questioned Nicholas on his police report, which stated that after his call with Schmidt, Nicholas intended to check the garage to see if he needed to render first aid. Nicholas testified he was formulating what he would be doing. *Id.* at 46:8 – 24. A few seconds after his call with the sheriff, Ware appeared at the house. *Id.* at 51:4 – 8. On redirect, Nicholas testified after his call with the sheriff, he intended to get a warrant. *Id.* at 57:10 – 58:2. Yet that plan changed when Ware presented himself. *Id.* at 58:3 – 8.

Finally, the defense recalled Homan as a witness. Homan testified that during his initial contact with Jones, Homan did not make any phone calls or contact S.D.’s family. *Id.* at 81:14 – 19. Homan did not ask dispatch for any information to see if S.D. had had a vehicle, or other address. *Id.* at 81:20 – 23. Homan testified that when Ware appeared, he was cooperative, made no threats, and had no weapons. *Id.* at 82:14 – 25. Ware did not seem agitated, and he did not appear to have any injuries. *Id.* at 83:12 – 22.

Judge Pfitzinger made his oral decision on 11/02/18. (R.566 at 5:6 – 21:13). He made multiple findings of fact consistent with the above-stated testimony. *Id.* at 8:10 – 14:22. The court relied on the fact that Jones gave false information to the sheriff’s deputies. *Id.* at 15:10 – 12. Additionally, the sheriff’s department knew that guns had been in the home and at some point earlier, Ware and S.D. had been involved in a domestic dispute. *Id.* at 15:13 – 16. The sheriff’s deputies were not aware of the nature and / or the extent of the injuries that S.D. or another individual may or may not have been received in the garage. *Id.* at 15:25 – 16:7. Upon Ware’s appearance, there was reason to be suspicious of the information which Jones had provided. *Id.* at 16:8 – 12.

The court ultimately found that all three prongs of the community caretaker analysis had been met and that the circumstances pointed to exigent circumstances. *Id.* at 16:13 – 21:13. The court found that the intrusion was minimal given the safety concern. *Id.* at 19:24 – 20:11. The court was concerned about the discussion between Nicholas and Schmidt prior to the search. *Id.* at 20:21 – 23. However, the court did not believe that Nicholas or Schmidt had any preconceived intent to thwart the Fourth Amendment. *Id.* at 20:23 – 21:4. The court stated it did not appear that Nicholas was actually moving towards a search under the community caretaker theory until Ware appeared.

Ware's attorneys filed a motion to reconsider. (R.204 at 1 – 4) The motion argued that Nicholas made the decision to make a search immediately after his call with Schmidt and before Ware's appearance. *Id.* at 2. Nicholas testified that once Ware presented himself, it concreted that decision. *Id.* Nicholas' own police report indicated that he made the decision to search right after his call with Schmidt. *Id.* at 2 – 3. The court denied the motion to reconsider in a written decision. (R.208 at 1 – 2). The court relied on Nicholas' testimony that after the call with Schmidt, he did not form the intent to search the residence and that his actions after the call supported this testimony. *Id.* Ware appealed.

#### **4. The Change in the Community Caretaker Doctrine**

In *Cady v. Dombrowski*, the United States Supreme Court held that a warrantless search of an impounded vehicle for an unsecured firearm did not violate the Fourth Amendment. *Cady v. Dombrowski*, 413 U.S. 433, 93 S. Ct. 2523, 37 L. Ed. 2d 706 (1973). The Court reached that conclusion observing that police officers who patrol the public highways are often called to discharge noncriminal

“community caretaking functions”. *Id.* at 441, 93. S. Ct. 2523, 37 L. Ed. 2d 706.

In *State v. Pinkard*, the Wisconsin Supreme Court held that the community caretaker doctrine applied to searches inside homes. *State v. Pinkard*, 2010 WI 81, ¶¶ 20, 28, 327 Wis. 2d 346, 785 N.W.2d 592. That precedent was overturned in *Caniglia v. Strom*, 141 S. Ct. 1596 (2021). The Court held that an officer’s caretaker duties did not by itself justify warrantless searches and seizures in the home. *Id.* at 1598. The Court argued “What is reasonable for vehicles is different from what is reasonable for homes.” *Id.* at 1600. The State correctly conceded in the instant case that “...under *Caniglia*, the community caretaking doctrine cannot justify the officer’s entry into Ware’s garage.” (State’s supplemental letter page 2)

The State argues that the emergency aid doctrine still justifies the search of Ware’s garage. *Id.* at 3. *Caniglia* did not overrule this doctrine. In fact, several Justices expressly stated that warrantless searches of the home can occur for the purpose of rendering medical attention. *Caniglia v. Strom*, 141 S. Ct. at 1600 – 1604. Ware contends that there was not enough evidence to justify the search under the emergency aid doctrine.

### **5. The Court of Appeals’ Decision and Order**

In a decision and order dated November 4, 2021, the Court of Appeals affirmed the lower court’s decision. However, rather than relying on the community caretaker exception, the appellate court concluded the search was justified under the emergency aid exception to the Fourth Amendment’s warrant requirement. (COA Decision ¶ 2)

The appellate court stated that Sergeant Nicholas was justified in relying on Mickey’s statements to officers, as

citizen informants are generally considered the most reliable source of informant. *Id.* at ¶ 25. Additionally, the appellate court reasoned that Ware's presence at the residence corroborated Mickey's version of events. *Id.* Furthermore, based on Mickey's statements, Nicholas could reasonably infer that a victim in the garage was the source of that blood. *Id.* at ¶ 26. Moreover, Nicholas could also reasonably believe that the person in the garage may still be alive, and that swift action was necessary to assist that person. *Id.* at ¶ 27. Finally, the appellate court held that even though Nicholas had not personally observed any indications of an ongoing medical emergency, the corroborated information from an informant may justify a warrantless search of a home under the emergency aid exception. *Id.* at ¶ 30.

## ARGUMENT

**The appellate court erred in affirming the circuit court's denial of the defendant's motion to suppress evidence after an illegal search.**

### 1. Standard of Review

In reviewing the denial of a motion to suppress evidence, the Court of Appeals will uphold a circuit court's findings of historical fact unless they are clearly erroneous. *State v. Fonte*, 2005 WI 77, ¶ 11, 281 Wis. 2d 654, 698 N.W.2d 594. However, the Court of Appeals will independently review a circuit court's application of constitutional principles to those facts. *State v. Arias*, 2008 WI 84, ¶ 11, 311 Wis. 2d 358, 752 N.W.2d 748.

### 2. The search was not valid under the emergency aid doctrine

The United States and Wisconsin Constitutions protect against unreasonable searches and seizures in their homes and



provide requirements for a warrant. U.S. Const. Amend. IV; Wis. Const. art. I, § 11. “The federal and state constitutions do not protect against all searches and seizures, but only unreasonable searches and seizures.” *State v. Pinkard*, 2010 WI 81, ¶ 13, 327 Wis. 2d 346, 785 N.W.2d 592 (internal quotations omitted). Subject to a few well-delineated exceptions, warrantless searches are deemed per se unreasonable under the Fourth Amendment. *Id.*

In *Brigham City v. Stuart*, the United States Supreme Court held that police may enter a home without a warrant when they have an objectively reasonable basis for believing that an occupant is seriously injured or imminently threatened with such injury. *Brigham City v. Stuart*, 547 U.S. 398, 126 S. Ct. 1943, 164 L. Ed. 2d 650 (2006). In *Brigham*, officers responded to a loud house party complaint at about 3:00 a.m. *Id.* at 400 – 401. Officers observed two juveniles drinking beer in the back yard. *Id.* at 401. Officers saw through a screen door an altercation taking place in the kitchen, where four adults were attempting to restrain a juvenile. *Id.* During the melee, one of the adults was spitting blood in a sink while the juvenile was held up against the refrigerator with enough force to move the appliance across the floor. *Id.*

Wisconsin adopted a two-part test to determine whether the emergency aid exception applies. [U]nder the totality of circumstances, a reasonable person would have believed that: (1) there was an immediate need to provide aid or assistance to a person due to actual or threatened physical injury; and (2) that immediate entry into an area in which a person has a reasonable expectation of privacy was necessary in order to provide that aid or assistance. See COA Decision ¶ 22, citing *State v. Rome*, 2000 WI App 243, ¶ 16.

In the instant case, none of the officers saw anything amiss when they arrived at Ware’s residence. There was no

sign of any disturbance. There was no yelling or screaming. (R.565 at 33:14 -17) There was no blood or signs of a physical struggle. *Id.* at 33:14 – 34:11. There were no signs of any recent activity by the garage door such as tire tracks or foot prints. (R.563 at 161:25 – 162:2) No one had reported any gunshots. *Id.* at 166:8 – 10. Even when Ware appeared, he was cooperative, made no threats, and carried no weapons. (R.565 at 82:14 – 25) Ware did not seem agitated and he did not appear to have any injuries. *Id.* at 83:12 – 22. In sum, even with the surprise appearance of Ware at the scene, there was no indication of any ongoing medical emergency that would justify the application of the emergency aid doctrine.

The Court of Appeals correctly asserts that there was no requirement for Nicholas to personally observe indications of an ongoing emergency. (COA Decision ¶ 30) Nicholas did not have to hear a cry for help for the emergency aid doctrine to apply, although the lack of such a cry is certainly relevant to the analysis. Yet the only corroborating evidence for Mickey’s assertions was Ware’s appearance in a house that he owned. The circumstances of Ware’s appearance many have raised suspicion, but under the totality of the circumstances, there was still not enough evidence to assume that a victim needed emergency medical aid.

**3. All physical, testimonial, and derivative evidence derived from the search must be suppressed because it is tainted “fruit from the poisonous tree.”**

The exclusionary rule prohibits admissibility of both tangible and intangible evidence and also excludes derivative evidence via the fruit of the poisonous tree doctrine, if it “is the product of the primary evidence, or that it is otherwise acquired as an indirect result of the unlawful search, up to the point at which the connection with the unlawful search becomes so attenuated as to dissipate the taint. *Murray v. United States*,

487 U.S. 533, 536 – 537, 108 S. Ct. 2529 (1988). The fruit of the poisonous tree doctrine “in its broadest sense, can be regarded and has been in fact applied as a device to prohibit the use of any secondary evidence which is the product of or which owes its discovery to illegal government activity.” *State v. Schlise*, 86 Wis.2d 26, 45, 271 N.W.2d 619 (1978) and *Wong Sun v. United States*, 371 U.S. 471 (1983). Information used as probable cause to obtain a search warrant must be “wholly unconnected” from the illegal search. *Murray*, 487 U.S. at 535. Thus, if “information gained from the illegal entry affected either the law enforcement officers’ decision to seek a warrant or the magistrate’s decision to grant it,” all of the evidence, “both seen and unseen,” must be suppressed. *Id.*, at 540.

In the instant case, the officers did not make any attempt to obtain a search warrant prior to the illegal search. Although the testimony indicates they were securing the house, there was no attempt to draft a warrant or any supporting documents prior to the illegal search.

Moreover, as argued above, even had they sought to obtain a search warrant, there was not enough evidence for it to be granted. Again, there was only Mickey’s uncorroborated claim that he saw blood. He did not see a body. Mickey did not attempt to look to see whether there was a body. Moreover, the statements which Mickey provided prior to the illegal search did not provide crucial details which could have supported a warrant. For example, Mickey did not make any statement indicating he saw or heard any disturbance, much less a gunshot. He merely speculated that something must have happened to S.D.

Of course, a search warrant for the vehicle was obtained. But that was a direct and immediate consequence of the illegal search. Once the body was discovered, there was probable cause for any number of warrants. Yet at that point,

any testimony or affidavit in support of the warrant(s) was unquestionably tainted by the fruits of the illegal search of the garage. Since Mickey's claims did not provide probable cause for the search warrant, all primary and derivative evidence obtained as a result of Nicholas' unlawful search of the garage are "fruits of the poisonous tree" and must be suppressed under *Wong Sun v. United States*, 371 U.S. 471 (1983).

### CONCLUSION

There were no exigent circumstances that justified the illegal search of Ware's garage. The circumstances of the search did not support the application of the now overturned community caretaker exception nor the emergency aid exception to the warrant requirement. Therefore, Ware moves this Honorable Court to vacate the conviction and sentence, reverse the circuit court's denial of the suppression motion, and remand the matter back to the circuit court.

Respectfully submitted this 3<sup>rd</sup> day of December 2021.

---

Electronically signed by Attorney Michael Covey  
Attorney For the Defendant – Appellant  
State Bar ID: 1039256

**CERTIFICATION OF THE BRIEF  
AND APPENDIX CONTENT**

I hereby certify that this brief conforms to the rules contained in s. 809.19(8)(b), (bm), and (c) for a brief. The length of this brief is 5238 words.

I hereby certify that filed concurrently with this brief, but as a separate document, is an appendix that complies with s. 809.62(2)(f) and contains at a minimum: (1) a table of contents; (2) the decision and opinion of the court of appeals; (3) the judgments, orders, findings of fact, conclusions of law and memorandum decisions of the circuit court and administrative agencies necessary for an understanding of the petition; (4) any other portions of the record necessary for an understanding of the petition; (5) a copy of any unpublished opinion cited under s. 809.23(3)(a) or (b).

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 the notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

---

Electronically signed by Attorney Michael Covey