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STATE OF WISCONSIN

SUPREME COURT

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

ROGER JAMES GOLLON,

Defendant-Appellant-Petitioner.

Supreme Court Case No.

_____

Court of Appeals Case No.
2023AP00086-CR

PETITION FOR REVIEW

PETITION SEEKING REVIEW OF THE JULY 27, 2023, DECISION OF THE COURT OF APPEALS, DISTRICT IV AFFIRMING THE JUNE 13, 2022 ORDER DENYING THE DEFENDANT'S MOTION TO SUPPRESS, AND THE JANUARY 6, 2023 JUDGMENT, OF THE CIRCUIT COURT FOR PORTAGE COUNTY

ANDREW MISHLOVE, ESQ.
MISHLOVE AND STUCKERT, LLC
State Bar No. 1015053

4425 North Port Washington Road
Glendale, WI 53212
(414) 332-3499
andrew@mishloveandstuckert.com

Attorneys for Defendant-Appellant-Petitioner,
Roger James Gollon

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STATEMENT OF ISSUES PRESENTED

The instant petition for review presents the following issue:

Has Wisconsin's "emergency aid exception" to the Fourth Amendment's warrant requirement has been extended beyond its constitutional limitations under *Caniglia v. Strom*, 141 S. Ct. 1596, 1600, 209 L.Ed.2d 604, 608 (2021), by the courts' impermissible conflation of the doctrine with the conceptually distinct and now derogated "community caretaker exception?"

CONCISE STATEMENT OF CRITERIA FOR REVIEW

It is well settled in both state and federal law that warrantless searches of the home are ordinarily not permitted absent the existence of a valid judicially recognized exception. *State v. Johnson*, 177 Wis. 2d 224, 231, 501 N.W.2d 876, 879 (Ct. App. 1993); *Payton v. New York*, 445 U.S. 573, 590, 100 S. Ct. 1371, 1382, 63 L.Ed.2d 639, 653 (1980). One such exception recognized by this Court is the "emergency aid exception." *State v. Boggess*, 115 Wis. 2d 443, 449-50, 340 N.W.2d 516, 521 (1983). This exception, as applied to warrantless searches of homes, formerly had a state-recognized "related – but conceptually distinct" counterpart – the "community caretaker exception." *State v. Ware*, 400 Wis. 2d 118, 127, 968 N.W.2d 752, 757 (Ct. App. 2021); *see also State v. Pinkard*, 2010 WI 81, ¶ 14, 327 Wis. 2d 346, 785 N.W.2d 592. While the "community caretaker" exception to the Fourth Amendment's warrant requirement remains valid in other contexts, in 2021, the United States Supreme Court unequivocally ruled that it was unconstitutional as applied to searches of homes. *Caniglia v. Strom*, 141 S. Ct. 1596, 1600, 209 L.Ed.2d 604, 608 (2021), accord *Ware*, 400 Wis. 2d at 127.

This change to the federal law has led to confusion between and conflation of the two doctrines by Wisconsin litigants and courts resulting either from an attempted workaround of *Caniglia*'s pronouncement that the "community caretaker exception" can no longer support a warrantless search of a home or based in a

misunderstanding of the doctrines' differences. *Ware*, 400 Wis. 2d at 127, n. 5 (describing the risk for conflation of these two principles).

In either case, this Court must now reexamine the constitutionality of Wisconsin's version of the "emergency aid exception" to the warrant requirement not as it is written, but as it is *applied*, and in doing so, must likewise draw a bright line between the two doctrines to ensure the "emergency aid exception" is limited to use only in authorized cases, and precluded from use in the type of unconstitutional posited reliance on the extended version of such exception utilized in the instant case which is, in reality, nothing more than the "community caretaker exception" veiled in an "emergency aid exception" label or, at minimum, a blended version of the two doctrines.

This Supreme Court has the authority to consider and decide such issue, as it: (1) presents real and significant questions of federal and state law; (2) must be considered for purposes of developing, clarifying, or harmonizing the law and to avoid the recurrent raising of similar issues; and (3) demonstrates that, while the court of appeals' opinion is in accord with opinions of the courts of this State, due to the passage of time or changing circumstances, such opinions are ripe for reexamination. Wis. Stats. § 809.62(1r)(a), (c)(3), and (e).

STATEMENT OF THE CASE

On March 26, 2021, at approximately 1:45 a.m., Officer Alexander Beach of the City of Stevens Point Police Department responded to a report of a vehicle accident involving a crash into a tree and a pipe or gas line in the area of Heffron and Alder Streets in the City of Stevens Point. (Tr. 10/1/21[1] 6:18-7:10, 10:5-6, 24:7-17, 24:24-25:1, 26:17-18, 40:17-25.) While neither the vehicle involved in the crash nor any of its occupants were at the scene, the car's front bumper bearing a license

[1] As used throughout, "Tr." is an abbreviation for "transcript." All further references to the transcript herein are to the October 1, 2021 transcript of the hearing on Petitioner's motion to suppress, submitted as part of the appendix to this petition.

plate was left behind. (Tr. 10:6-10, 13:14-18, 25:3-8, 30:12-14, 41:1-4.) Officer Beach searched the plate number and learned Dr. Roger James Gollon ("Petitioner"), was the registered owner of the vehicle. (Tr. 7:5-9, 10:11-16, 25:9-12, 30:18-22, 41:5-8.)

Based on that search, Officer Beach, accompanied by Deputy Selvey of the Portage County Sheriff's Department, traveled to the address on the registration file – Petitioner's nearby home – reportedly to conduct a welfare check as well as to further investigate the crash. (Tr. 7:25-8:1, 8:24-9:4, 13:6-13, 14:12-17, 23:10-13, 31:6, 39:5-15.) They were later joined by Sergeant Michael Long and then-trainee Officer Josh McLouth, each also of the City of Stevens Point Police Department. (Tr. 11:4-7, 24:2-9, 26:23-27:14, 31:1-9, 41:9-42:5.) At that time, investigating law enforcement personnel did not have any information regarding the number of occupants in the vehicle, whether anyone had been injured in the crash, who was driving, or what had caused the crash. (Tr. 13:14-24, 22:6-25, 23:12-13, 32:3-11, 46:18-21.)

Officer Beach knocked on the front door of the home and rang the doorbell without response despite there being a light on in the back of the home. (Tr. 8:22-23, 9:8-11, 17:13-20, 27:14-15.) He then observed, by looking through the window of the front door, what appeared to be someone laying on the floor with their feet sticking out into the hallway. (Tr. 9:12-18, 10:20-21, 18:24-19:17, 28:18-19, 32:12-15, 42:24-43:1, 45:6-9.) He continued to knock and ring the doorbell while shining a light into the home. (Tr. 10:23-25, 19:22, 28:21.) Officer McLouth continued to look into the windows and door near the front of the house. (Tr. 42:13-14, 43:12-21, 46:24-47:7.)

While Officer Beach was at the front door attempting to garner the attention of the person he observed inside the home, Deputy Selevy and Sergeant Long began to search other, private portions of Petitioner's property – or curtilage – with Detective Selvey searching around the side of the house and Sergeant Long searching around the closed garage and looking inside through a window. (Tr.

10:23-25, 11:12-17, 17:24-18:18, 19:20-21, 20:23-21:10, 27:19-20, 28:7-12, 31:20-21, 32:16-18, 33:8-9, 35:1-38:2.) Sergeant Long observed a vehicle inside of the garage which matched the description of the vehicle involved in the accident they were investigating. (Tr. 11:13-23, 18:8-11, 20:15-17, 28:2-3, 36:6-8.) He reported his observations to the other investigating officials, prompting Officer Beach to continue to try to bang on the front door to contact the person inside the house. (Tr. 20:15-19, 28:4-18, 33:5-7, 34:10-14, 44:9-21.)

After an unknown amount of time passed, the person observed inside the home then stood up and walked away, out of the line of sight of Officers Beach and McLouth. (Tr. 14:6-8, 19:25-20:9, 21:19-22:3, 44:3-5, 47:6-7.) Later, the Petitioner opened the house's front door (Tr. 11:25-12:6, 28:21-22, 44:6-8.) and was questioned by the police. They opined had an odor of alcohol on his breath. (Tr. 12:7-12, 28:24-28.) As part of this process, Petitioner accompanied the investigators to his garage and granted him authorization to enter; Petitioner's vehicle was located inside with a missing front bumper and a piece of cedar on it. (Tr. 12:22-13:5, 29:1-18.)

When they arrived at Petitioner's residence, the City of Stevens Point Police Department officers were wearing operational body cameras which recorded their investigation; the Portage County Sheriff's Department deputies did not wear any recording devices. (Tr. 14:18-15:10, 30:1-3.) However, only portions of the recorded footage from the officers' body cameras was ever made available by the City of Stevens Point Police Department; neither Officer Beach nor Sergeant Long's recordings were made part of the record without an explanation as to why they were not produced. (Tr. 48:6-49:13.)

As a result of this investigation, on April 13, 2021, Petitioner was cited in the Circuit Court for Portage County with, *inter alia,* operating a motor vehicle while under the influence as a second offense in violation of Wis. Stats. § 346.63(1)(a).

On July 22, 2021, by and through undersigned counsel, Petitioner moved the court to suppress the evidence derived by law enforcement based on their unlawful

entry onto the curtilage of his premises in violation of his Fourth Amendment right to be free from unreasonable search and seizure in his home. The State responded, admitting a warrantless entry to the curtilage of Petitioner's home, but asserting that it fell within the "community caretaker exception" to the general prohibition on warrantless searches. An evidentiary hearing was convened on the motion on October 1, 2021, and on June 13, 2022, the Honorable Thomas B. Eagon, Circuit Court Judge, denied the motion to suppress, indicating that he found no Fourth Amendment because the officers' actions were reasonable and "did not violate the defendant's reasonable expectation of privacy." In his order, a copy of which is submitted as part of the appendix to this petition, Judge Eagon did not offer any legal citations in support of his holding, but did note that he found the "community caretaker exception" relied upon by the State in their briefing to be inapplicable to the facts of the instant case, especially because intervening case law, *Caniglia v. Strom,* 141 S. Ct. 1596 (2021), had unequivocally clarified that the "community caretaker exception" does not authorize the warrantless search of a residence.

Thereafter, on January 6, 2023, Petitioner pled no contest to operating a motor vehicle while under the influence as a second offense. A copy of the circuit court index in Case No. 2021CT00090 reflecting each of these actions on the case is also submitted as part of the appendix to this petition.

Petitioner timely appealed to the Court of Appeals, District IV, from the judgment imposed upon him, as well as the circuit court's order denying his motion to suppress. *State v. Gollon,* Appeal No. 2023AP000086-CR. In doing so, he argued that (1) the circuit court erred by failing to find that law enforcement illegally entered the curtilage of Petitioner's home; (2) law enforcement did illegally enter the home's curtilage; and (3) the circuit court also erred by failing to find that shining a flashlight into a home at 2:00 a.m., while other officers entered the home's curtilage, constituted an illegal search. Regarding the legality of the entry onto the curtilage, Petitioner further argued that the officers' entry was not only presumptively illegal, but it also could not be saved by their purported reasonable

suspicion of wrongdoing, as such standard falls well below the probable cause which is necessary to support a warrantless search, and even if probable cause were present, the second requirement for a warrantless search – i.e., the existence of qualifying exigent circumstances – was absent herein. As to the other components of the officers' search, Petitioner argued the officers' actions in using their flashlights to aid them in observing the interior of his home while repeatedly knocking at his door for an extended period of time at 2:00 a.m., all while their cohorts illegally entered and traversed Petitioner's property and peered into his windows, were an unreasonable application of the "knock-and-talk" investigative technique and, therefore, likewise rendered the balance of their search illegal and violative of his Fourth Amendment rights. He continued, noting that these remaining portions of the search were also incapable of being saved by the existence of probable cause and exigency, as they were not present in the instant case. On these grounds, Petitioner concluded that all evidence subsequently discovered should have been suppressed.

The State replied, again admitting law enforcement's warrantless intrusion onto the curtilage of the Petitioner's home, but arguing that it was permitted under the "emergency aid exception," based on the existence of an immediate need to provide assistance to a person due to an actual or threatened injury which necessitated immediate entry into an area where Petitioner would otherwise have a reasonable expectation of privacy. In making this argument, they claimed that this was the exception they had originally intended to argue in their response to Petitioner's motion to suppress, but they had erroneously identified it as the now-defunct "community caretaker exception" instead.

In an unpublished July 27, 2023, one-judge opinion, the Honorable Brian W. Blanchard, Circuit Court Judge, affirmed the circuit court's order on the motion to suppress and, in turn, the judgment in Case No. 2021CT00090. *Gollon,* No. 2023AP000086-CR at ¶ 53. More specifically, Judge Blanchard found that "all of the conduct of police officers that Gollon challenges was lawful, despite the absence

of a warrant, and did not violate his Fourth Amendment protection to be secure in his house from unreasonable searches and seizures … because all of the conduct either falls within the scope of a proper exercise of the knock-and-talk investigative technique or within the emergency aid exception to the Fourth Amendment's warrant requirement." *Gollon,* No. 2023AP000086-CR at ¶¶ 2, 26.

Petitioner now brings this instant petition seeking this Court's review of the adverse decision issued by the court of appeals in Appeal No. 2023AP000086-CR. Wis. Stats. § 809.62(1g).

ARGUMENT

In Wisconsin, the court of appeals is an "error correcting court," while this Supreme Court is a "law-developing or policy-making court." *State v. Camden*, 2013 WI App 84, ¶ 7, 348 Wis. 2d 763, 833 N.W.2d 873, citing *State v. Schumacher*, 144 Wis. 2d 388, 407, 424 N.W.2d 672 (1988). Therefore, this Court has the discretionary authority to review opinions issued by the appellate courts of this State not merely to rectify errors within such holdings (Wis. Stats. § 809.62(d)), but also where the questions of presented by an intermediate appellate court's holding meet one or more statutorily prescribed criteria including, *inter alia*, when a significant question of federal or state constitutional law is presented, the status of state law requires clarity or further development because if it is not considered, similar issues will be recurrently raised, or existing state law is ripe for reexamination. Wis. Stats. § 809.62(1r)(a), (c)(3) and (e). The instant petition for review presents questions of a "special and important" nature (Wis. Stats. § 809.62(1r)) which also fall within these very categories, warranting their consideration by this Court.

The "Community Caretaker" and "Emergency Aid" Exceptions to the Fourth Amendment Warrant Requirement

Both the Wisconsin and the federal constitutions guarantee persons the right to be free from unreasonable searches and seizures. U.S. Const., amend. IV; Wis.

Const., art. I, § 11. Therefore, law enforcement must generally obtain a warrant to search or seize an individual's person or property. *State v. Secrist*, 224 Wis. 2d 201, 210 n.7, 589 N.W.2d 387, 391 (1999); *California v. Carney*, 471 U.S. 386, 390-91 (1985). However, both state and federal law likewise recognize that, under certain circumstances, exceptions to the general warrant requirement may apply. One such exception is the "community caretaker exception." *Pinkard*, 2010 WI 81 at ¶ 14; *Cady v. Dombrowski*, 413 U.S. 433, 93 S. Ct. 2523, 37 L.Ed.2d 706 (1973). Another exception is the "emergency aid exception." *Kentucky v. King*, 563 U.S. 452, 460, 131 S. Ct. 1849, 1856, 179 L.Ed.2d 865, 875 (2011); *Boggess*, 115 Wis. 2d at 449-50.

The "emergency aid exception" has been held to apply to warrantless searches of homes by this Court and the United States Supreme Court alike. *King*, 563 U.S. at 460, citing *Brigham City v. Stuart*, 547 U.S. 398, 403, 126 S. Ct. 1943, 1947, 164 L.Ed.2d 650, 657 (2006); *Boggess*, 115 Wis. 2d at 450. However, the United States Supreme Court had never similarly extended the "community caretaker exception" to searches of homes. *Pinkard*, 2010 WI 81 at ¶ 98 (citing *Colorado v. Bertine*, 479 U.S. 367, 107 S. Ct. 738, 93 L.Ed.2d 739 (1978), *South Dakota v. Opperman*, 428 U.S. 364, 96 S. Ct. 3092, 49 L.Ed.2d 1000 (1976), and *Cady*, 413 U.S. 433). Nonetheless, in 1977, this Court extended this exception to searches of the curtilage of a home, and in 2010, further expressly found that such exception was likewise applicable to law enforcement's warrantless entry into the interior of the home. *Bies v. State*, 76 Wis. 2d 457, 471-72, 251 N.W.2d 461, 468-69 (1977); *Pinkard*, 2010 WI 81 at ¶ 26. Many years later, and while Petitioner's motion to suppress was pending in the circuit court, in 2021, the United States Supreme Court directly considered the question of whether such extension of this exception was constitutionally sound. It concluded it was not. *Caniglia v. Strom*, 141 S. Ct. 1596, 1600, 209 L.Ed.2d 604, 608 (2021), accord *Ware*, 400 Wis. 2d at 127. While this holding did not have a deeply substantial effect on federal law, as no such extension of the exception had been authorized prior to that time, the impact

on Wisconsin was significant, as it was left in the unique position of being one of the few states who had permitted residential searches under the doctrine. *See*, e.g., *Pinkard*, 2010 WI 81 at ¶ 20, n. 6 (describing that, while Wisconsin was "not alone" in extending the exception to searches of residences, a short list of other states had reached similar conclusions, and of those states, several had not gone as far as to reach the same decision as this Court).

Since that time, Wisconsin litigants and courts, including those involved in the instant case, have conflated the former "community caretaker exception" with the still constitutional, "related – but conceptually distinct" – "emergency aid exception" to the warrant requirement. *Ware*, 400 Wis. 2d at 127, n. 5. While the principles were always at risk for conflation (*see*, e.g., *Pinkard*, 2010 WI 81 at ¶ 26, n. 8), this issue has become more pronounced since the Supreme Court's holding in *Caniglia*, and the current application of the "emergency aid doctrine" in Wisconsin, including in this case, could better be described as a blended "community aid" or "emergency caretaker" exception which has no basis in the law.

Therefore, while the "emergency aid" doctrine remains valid in theory, in actual application and practice, it falls short of compliance with constitutional requirements, requiring it be brought back up to par and restricted in a manner which ensures it satisfies such stringent mandates. To effect as much, this Court must both bring clarity to what constitutes a proper application of the still-valid "emergency aid" exception to the Fourth Amendment's warrant requirement in a residential setting in light of the changes to the law made following *Caniglia*, as well as identify and limit the type of undue extension of such doctrine due to its conflation with the "community caretaker" exception as occurred in this case.

Conflation of the Exceptions: The Written "Emergency Aid" Exception Versus its Application in Practice

This Court has repeatedly recognized that its "emergency aid" and "community caretaker" exceptions to the warrant requirement are particularly

vulnerable to the threat of conflation. *Ware*, 400 Wis. 2d at 127, n. 5 ("Wisconsin's community caretaker case law should not be conflated with cases applying the emergency aid exception."); *Pinkard*, 2010 WI 81 at ¶ 26, n. 8 ("Some courts have mistakenly conflated the community caretaker exception and the emergency exception to the warrant requirement of the Fourth Amendment. [Citations.] […] However, the exceptions are not one in the same."); *see also Macdonald v. Town of Eastham*, 946 F. Supp. 2d 235, 242 (D. Mass. 2013) (discussing the "widely-shared confusion between and among the distinct doctrines of community caretaking [and] emergency aid"); *State v. Neighbors*, 299 Kan. 234, 328 P.3d 1081 (2014) (addressing the jumbling of community caretaking function and the emergency aid exception); *State v. Deneui*, 2009 SD 99, 775 N.W.2d 221, 232 (S.D. 2009) ("Some courts treat these exceptions [to the warrant requirement] interchangeably. Others declare that the community caretaker exception applies, but then use law applicable to … the emergency doctrine.")

"While both exceptions generally relate to situations with persons in need of assistance justifying warrantless searches…," primary distinction was identified in *Pinkard* as follows: "The community caretaker exception does not require the circumstances to rise to the level of an emergency to qualify as an exception to the Fourth Amendment's warrant requirement." 2010 WI 81 at ¶ 26, n. 8; *Ware,* 400 Wis. 2d at 127, n. 5. This is because the "two doctrines have different 'intellectual underpinnings'" with the "community caretaker [exception] focus[ing] more on the *purpose* of police action [and] the emergency aid exception focus[ing] more on the *urgency* of the police action." *Ware,* 400 Wis. 2d at 127, n. 5 (citations omitted).

Therefore, in Wisconsin, the "emergency aid" exception applies only where an officer "reasonably believes that a person within [the searched area] is in need of immediate aid or assistance" due to "actual or threatened injury" and "'immediate entry'" into the searched area is necessary to render such aid. It further requires that the searching officer's actions be "motivated solely by a perceived need to render immediate aid or assistance, not by a need or desire to obtain evidence for a possible

prosecution." *Boggess,* 115 Wis. 2d at 450-52, citing *State v. Pires,* 55 Wis. 2d 597, 604, 201 N.W.2d 153 (1972). In the context of residential searches, this Court has historically deemed circumstances qualifying for this exception to ordinarily include situations in which law enforcement has been alerted by the public that a person on the searched property were amidst a known ongoing medical emergency. *See,* e.g., *Pires,* 55 Wis. 2d 597 (officers informed of a woman amidst a psychiatric event and a deceased infant within a home); *Boggess,* 115 Wis. 2d 443 (officers informed several minors had suffered significant physical injuries in a home); *State v. Kraimer,* 99 Wis. 2d 306, 298 N.W.2d 568 (1980) (officers informed of a deceased woman in a home where several minor children were present).

Conversely, the "community caretaker" exception in this State formerly applied to residential searches where "'a police officer [was] serving as a community caretaker to protect persons and property'" and as long as the officer's caretake function was "bona fide" – even if he was also acting in an investigative capacity – and a sufficient public interest exists, such exception could apply. *State v. Matalonis*, 2016 WI 7, 366 Wis. 2d 443, 463, 465-66, 875 N.W.2d 567, 576, citing *Pinkard*, 2010 WI 81 at ¶¶ 14, 29 and *State v. Kramer*, 2009 WI 14, ¶ 30, 315 Wis. 2d 414, 759 N.W.2d 598. Application of this exception to residential searches was ordinarily upheld by this Court where officers responded to routine investigative calls during which they largely independently formed concerns about the wellbeing of the occupants of a residence, causing them to extend their search to confirm no persons were suffering from possible injuries. *See,* e.g., *Pinkard,* 2010 WI 81 (officers responded to a call of persons being asleep in a home near drugs and, upon finding the door open and receiving no response, entered to check the occupants' welfare); *Matalonis*, 2016 WI 7 (officers responded to a "medical call" and, upon finding a badly injured man and a substantial amount of blood, traced it back to its source at another blood-covered residence, whereat they engaged in a search for other injured parties); *Bies,* 76 Wis. 2d 457 (officer investigating a noise complaint in a garage entered the curtilage of a home to investigate its source); *State*

v. Horngren, 2000 WI App 177, 238 Wis. 2d 347, 617 N.W.2d 508 (police dispatched to and entered an apartment based on a reported suicide threat); *State v. Ferguson*, 2001 WI App 102, 244 Wis. 2d 17, 629 N.W.2d 788 (officers responding to a call reporting a fight found several highly intoxicated teenagers in the home, causing them to search the rest of the apartment for other heavily intoxicated minors whose safety might be in jeopardy).

However, under these circumstances the lines between the two exceptions may become blurred, causing courts, like the court of appeal herein, to fall prey to the type of threatened confusion and conflation the two doctrines warned against by this Court. This was not an apparent emergency. Rather law enforcement responded to a call for a routine traffic accident without any reported or apparent injuries (Tr. 22:6-12, 32:6-8). Officers, dually motivated by conducting a welfare check and further investigating the accident (Tr. 13:11-13, 23:10-13, 27:1-3), went to the home of the vehicle's owner, where they observed someone lying on the floor, but with no visible injuries. They did not attempt to gain immediate access to him through entry into the home, but rather they continued to try to gain his attention from outside, while other officers continued their criminal investigation by intruding onto the home's curtilage.

Unfortunately, this already present threat of conflation – as well as the risks it poses – has only been amplified by the United States Supreme Court's holding which invalidated the holdings of this Court in *Bies* and *Pinkard*. While federal courts, as well as the courts of many states, were not at risk for such conflation either prior to the *Caniglia* decision or after it, as they had only been applying one of these two exceptions to the warrantless searches of homes (i.e., the still-valid one), Wisconsin has found itself left in the unique position of needing to untangle its two principles which have become inexorably intertwined over the years to ensure all warrantless searches are supported by a constitutionally sound exception.

Not only must this error be rectified for purposes of ensuring clarity in Wisconsin law and harmony between state and federal law, but the doctrine's limits

must also be revisited and solidified by this Court to reduce the now elevated risk of harm posed by this Court allowing the confusion or conflation of these principles to continue. Prior to the Supreme Court's holding in *Caniglia,* the risk of harm resulting from the erroneous application of one doctrine versus the other was less than at present. Previously, as long as one of the two exceptions applied, a warrantless search would be found valid under the Fourth Amendment, and even if the one applied by the parties or court was the incorrect one. *See,* e.g., *State v. Payano-Roman*, 2006 WI 47, ¶¶ 31-33, n.8, 290 Wis. 2d 380, 714 N.W.2d 548 (where two possible exceptions to the warrant requirement were relied upon by the government, as long as "at least one exception to the warrant requirement is present," the search will be upheld as valid). However, since the change in the law, the threat of harm resulting from an erroneous application of the law has substantially increased, as now only one such exception will allow the court to reach the conclusion that a contested search was valid, while the other will be deemed unconstitutional, requiring the fruits of such search be suppressed. *Johnson*, 177 Wis. 2d at 231. Accordingly, the threat of harm which may result from the erroneous application of these exceptions provides further support for the conclusion that, in this post-*Caniglia* world, this Court must more strictly define the limits of the "emergency aid exception" to ensure it is only applied in those cases which it is constitutionally permitted.

This Court Must Clarify the Proper Use of the "Emergency Aid" Exception to Bring it Into Conformity with Federal Law

Not only does Wis. Stats. § 809.62(1r) authorize this Supreme Court to review the questions raised herein, but this Court has a long history of exercising its discretionary authority to hear cases for the purpose of "keeping Wisconsin and federal constitutional [search and seizure] law … in step" with one another. *State v. Dearborn*, 2010 WI 84, ¶ 27, 327 Wis.2d 252, 786 N.W.2d 97. In fact, in *State v. Fry*, 131 Wis. 2d 153, 172, 388 N.W.2d 565, 573 (1986) (disapproved on other grounds), this Court lauded itself on its ability to "consistently and routinely conform[] the law of search and seizure under the state constitution to that developed by the United States Supreme Court under the Fourth Amendment." Because *Caniglia* was a clear change to federal law to which Wisconsin must conform, this longstanding tradition must continue with this Court's consideration of the instant matter.

Moreover, since the United States Supreme Court's decision in *Caniglia*, many other state supreme courts have revisited the status of their law to offer more definitive explanations of the differences between the two doctrines at issue herein and to clarifying what, under today's law, constitutes a constitutional, valid exception to the warrant requirement within their respective jurisdictions. *See,* e.g., *Ex Parte Byrd*, No. 1210155 (Ala. Nov. 10, 2022) (Alabama Supreme Court accepted certiorari review of an appellate opinion involving a warrantless residential search supported, in part, but its formerly recognized residential "community caretaker" exception, and in other part by its "emergency assistance" doctrine and used the opportunity to identify the limits of the "emergency assistance doctrine"); *State v. Torres*, 989 N.W.2d 121, 123 (Iowa 2023) and *State v. Abu Youm*, 988 N.W.2d 713, 715 (Iowa 2023) (the Iowa Supreme Court expressly noted that they granted review of these two cases to "harmonize *Caniglia* ... with cases allowing police to enter private residences without a warrant to render emergency assistance"); *State v. Samuolis*, 344 Conn. 200, 278 A.3d 1027 (2022) (Connecticut

Supreme Court differentiated between the "community caretaker" and "emergency" exceptions post-*Caniglia*, and clarified when the latter applies); *State v. Teulilo*, No. 101385-0 (Wash. June 8, 2023) (Washington Supreme Court considered the application of the "community caretaker" and "emergency aid" exceptions to residential searches post-*Caniglia*, and clarified where the still-valid exception applies); *see also State v. Towner*, 169 Idaho 773, 780, n. 1, 503 P.3d 989, 996 (2022) (indicating that, while it would not address the impact of *Caniglia* on state law in the case before, it would leave defining the scope of the Idaho's warrant requirement exceptions post-*Caniglia* "for another day" indicating it found such question worthy of Supreme Court review).

Because this Court has a long-held tradition of ensuring the search and seizure laws of this state remain consistent with federal law, and many other state supreme courts have found this very issue deserving of their attention for that very reason, the same result must be reached on the instant inquiry presented herein. This Court must exercise its discretion to hear and determine the Fourth Amendment issues presented by this petition for review.

CONCLUSION

The circuit and appellate courts of this state have allowed the application of Wisconsin's "emergency aid" doctrine to warrantless residential searches to be extended beyond its intended metes and bounds through its convolution with the "community caretaker" exception, rendering it valid on paper but unconstitutional in practice based on recent changes to federal law. This issue, which presents real and significant questions of federal and state law, requires consideration for the purpose of development and clarification of current law to avoid continued misapplication of the exception in the future, and given the United States Supreme Court's recent holding in *Caniglia v. Strom*, 141 S. Ct. 1596, 209 L.Ed.2d 604, is ripe for reexamination by this Court. Wis. Stats. § 809.62(1r)(a), (c)(3), and (e).

Therefore, this Court should and must exercise the discretion imparted upon it to grant the instant petition for review and consider the "special and important" concerns raised herein. Wis. Stats. § 809.62(1r).

Dated this 17th day of August 2023.

Respectfully submitted,
Electronically signed by

/S/ *Andrew Mishlove*

ANDREW MISHLOVE, ESQ.
MISHLOVE AND STUCKERT, LLC
State Bar No. 1015053

4425 North Port Washington Road
Glendale, WI 53212
(414) 332-3499
andrew@mishloveandstuckert.com

Attorneys for Defendant-Appellant-Petitioner,
Roger James Gollon

CERTIFICATION BY ATTORNEY

Pursuant to Wis. Stats. § 809.19(8)(g), I hereby certify that this petition for review conforms with the rules contained in Wis. Stats. §§ 809.19(8)(b) and (bm) and 809.62(4) for a petition for review produced with a proportional serif font. The length of this petition for review is 6,447 words, exclusive of the appendix, as calculated by Microsoft word processing software.

I further certify that this petition for review complies with Wis. Stats. § 809.62(2) in that it contains, in the prescribed order: (1) a statement of the issues the petitioner seeks to have reviewed, the method or manner of raising the issues in the court of appeals and how the court of appeals decided the issues; (2) a table of contents; (3) a concise statement of the criteria relied upon to support the petition; (4) a statement of the case; and (5) an argument amplifying the reasons relied on to support the petition.

I further certify that this petition for review is supported by an appendix which complies with Wis. Stats. § 809.62(2)(f) and that contains, at a minimum: (1) the decision and opinion of the court of appeals; (2) 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; (3) any other portions of the record necessary for an understanding of the petition; and (4) copies of all unpublished opinions cited under Wis. Stats. § 809.23(3)(a) or (b), if any.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names 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.

I further certify that, pursuant to Wis. Stats. § 809.801(5)(b), I have submitted an electronic copy of this petition for review, including the appendix, using the designated electronic filing system, and that this electronic petition and appendix

submitted therewith is identical in content and format to the printed form of the petition filed on or after this date.

A copy of this certificate has been served with the paper copies of this petition for review filed with the court and served on all opposing parties.

Dated this 17th day of August 2023.

Electronically Signed by:

/S/ *Andrew Mishlove*

ANDREW MISHLOVE, ESQ.
MISHLOVE AND STUCKERT, LLC
State Bar No. 1015053

Attorneys for Defendant-Appellant-Petitioner