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April 4, 2005

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CLERK OF COURT OF APPEALS
OF WISCONSIN

Cornelia G. Clark
Clerk, Wisconsin Supreme Court
110 E. Main St., Suite 215
Post Office Box 1688
Madison, WI 53701-1688

Re: **State v. Bill Paul Marquardt**
Appeal No. 04-0958-CR (Chippewa County No. 00-CF-104)

Dear Ms. Clark:

By order of March 11, 2005, the Wisconsin Supreme Court accepted the above-referenced case for review on certification by the Court of Appeals (District III).

Pursuant to that order, Plaintiff-Appellant State of Wisconsin hereby informs the Supreme Court that ***the State chooses to stand on the appellant's brief-in-chief*** that the State filed in the Court of Appeals in this appeal.

Accordingly, enclosed for filing are 17 copies of the State's brief-in-chief. A copy of this letter is being sent this today to Attorney John M. Brinckman, who represents Defendant-Respondent Bill Paul Marquardt.

Thank you for your attention, and please let me know if you have any questions.

Sincerely,

James M. Freimuth

James M. Freimuth
Assistant Attorney General

c: Attorney John M. Brinckman
Chippewa County Asst. Dist. Atty. Roy LaBarton Gay

STATE OF WISCONSIN

IN THE SUPREME COURT

Case No.04-1609-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

BILL P. MARQUARDT,

Defendant-Appellant.

ON CERTIFICATION FROM THE COURT OF APPEALS
FROM A JUDGMENT OF CONVICTION,
SENTENCE AND ORDER DENYING
POSTCONVICTION RELIEF ENTERED IN
THE CIRCUIT COURT FOR EAU CLAIRE COUNTY,
THE HONORABLE ERIC J. WAHL, PRESIDING

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

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STATE OF WISCONSIN

IN THE SUPREME COURT

Case No.04-1609-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

BILL P. MARQUARDT,

Defendant-Appellant.

ON CERTIFICATION FROM THE COURT OF APPEALS
FROM A JUDGMENT OF CONVICTION,
SENTENCE AND ORDER DENYING
POSTCONVICTION RELIEF ENTERED IN
THE CIRCUIT COURT FOR EAU CLAIRE COUNTY,
THE HONORABLE ERIC J. WAHL, PRESIDING

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

ISSUES PRESENTED

1. Did the trial court violate Marquardt's rights under the Fourth Amendment of the United States Constitution and Article I Section 11 of the Wisconsin Constitution where the trial court found good faith for the search of Marquardt's residence without considering whether the warrant application contained indicia of probable cause?

The trial court answered: No.

2. Did the trial court misapply the ***State v. Eason*** notion of "significant investigation" to find that the officers acted in good faith where the investigation produced nothing linking Bill Marquardt or his cabin to the death of his mother?

The trial court answered: No.

3. Was Mr. Marquardt was denied effective assistance of counsel where counsel failed to argue that the warrant application lacked indica of probable cause where the application was devoid of facts linking Marquardt's residence with the death of his mother?

The trial court answered: No.

4. Did the trial court violate Mr. Marquardts right to self representation under the Sixth Amendment to the United States Constitution where the court found Marquardt competent to stand trial but incompetent to represent himself.

The trial court answered: No.

POSITION ON ORAL ARGUMENT AND PUBLICATION

Oral argument and publication are warranted.

STATEMENT OF CASE

March 17, 2000, complaint filed charging Bill P. Marquardt with one count of cruelty to animals.(1)

March 28, 2000, Marquardt was bound over for trial.(78: 23-

24)

March 28, 2000, information filed charging Marquardt with six counts of cruelty to animals and one charge of felon in possession of a firearm.(78:24)(2)

March 30, 2000, Marquardt pled not guilty to all counts.(79:2).

March 25, 2002, Information amended to add another count of cruelty to animals, another count of possession of a firearm by a convicted felon, and one count of aggravated burglary. (3).

April 12, 2002, Marquardt pled not guilty and not guilty by reason of mental disease or defect to all charges.(83:4).

August 12, 2002, Marquardt held competent to stand trial.(28).

November 11, 2002, Marquardt moved to represent himself and trial and the court denied motion.(88:3, 18-10)(Ap.125-143)

January 10, 2003, The state conceded the issue of responsibility (89:10)

January 28, 29, and 30, 2003, trial.(91, 92, 93).

January 30, 2003, Marquardt found guilty on all counts.(49)

April 7, 2003, Marquardt found not guilty by reason of mental disease or defect.(95:2).

April 7, 2003, Marquardt committed to the Department of Health and Family Services for institutional care for 75 years.(54).

April 7, 2003, notice of intent to pursue postconviction relief filed.(55).

March 31, 2004, deadline to file postconviction relief extended to April 12, 2004.

April 13, 2004, postconviction motion filed (66).[1]

June 7, 2004, ***Machner*** hearing held.(96)

June 11, 2004, order denying postconviction relief filed.(72).

June 18, 2004, notice of appeal filed.(74).

February 8, 2005, certification filed

March 8, 2005, Supreme court accepted certification.

FACTS

On March 15, 2000, following the discovery of the body of Bill Marquardt's mother in her Chippewa County home, Sergeant John Volger of the Eau Claire County Sheriff Department requested a warrant to search Marquardt's residence in Fairchild, Wisconsin.(84:21-22,23)(Ap.144-154). The affidavit in support of the warrant asserted,

> Investigator Price reports that after finding the body of Mary J. Marquardt, he spoke with her husband, Alfred E. Marquardt. Mr. Marquardt informed him that he and Mary have a son, Bill Marquardt, who, since the

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1 Counsel's records indicate that the postconviction motion was mailed to the court on Friday, April 9, 2003 to arrive Monday, April 12, 2003. However, the Index for the Appeal Record gives April 13, 2003 as the date for the postconviction motion. The state did not raise any timeliness objections and the motion proceeding as if timely.

> location of Ms. Marquardt's body had not been seen or heard from. Alfred Marquardt further informed Investigator Price that Bill Marquardt owned with Alfred Marquardt a cabin in which Bill resided at E27505 County Highway M, Town of Fairchild, County of Eau Claire, Wisconsin.

(69: Ex 1; 23 Ex 2)(Ap. 144-145).

Eau Claire County Judge, the Honorable Benjamin Proctor, signed the warrant and later the same day, the warrant was executed by Eau Claire County Sheriff's deputies. Deputies found among other things three deceased dogs stacked in the hole of outhouse(Id: 78-79); three deceased rabbits on south side about 25 yards from the cabin in the brush (Id:80) Apparently, a twenty-two gage rifle was also found in the cabin.[2]

Two days later, Eau Claire County issued an arrest warrant and complaint charging Marquardt with one count of cruelty to animals.(1)

On March 18, 2000, Marquardt was arrested at his cabin.(90:15).Meanwhile, deputies performed another search

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2 Although, Evidence Officer Marc Christopher did not testify about the date on which the twenty-two was found, it appears to be undisputed that it was found on March 15th. (91: 57-58(Prosecutor's opening describing items found in the first search); 91: 70(Defense counsel's opening explaining police found twenty-two while Marquardt was in Gerogia; 93:91(Prosecutors closing:"On the 15th the twenty-two rifle was found.")

of the cabin. (91:82-84).

While Marquardt was still in custody, deputies performed a third search of the cabin on March 29th.(91:95). During that search, the officers found a nine millimeter handgun and two boxes of nine millimeter bullets in the cabin under the refrigerator. (91: 84,96).

Shortly after he was charged in this case, Marquardt was charged with first-degree intentional homicide in Chippewa County(80:2). Competence became an issue in that case.(Id). The parties agreed to take no further action in this case until the competence issue was settled.(80:4).

On March 11, 2002, following an evaluation and a hearing, the Honorable Eric Wahl found Marquardt competent to stand trial in this case.(81:7).

On March 25, 2002, the state filed another amended information adding another charge of cruelty to animals, another felon in possession of a weapon and an aggravated burglary.(3). Those charge arose out of an incident that happened at the Anderson house on March 9, 2000. On that day, the Andersons, who lived in the vicinity of Marquardt's

cabin, returned home to find their house broken into and their dog dead from gunshot wounds.(91:103-105,108,112).

On August 21, 2001, the court of appeals issued a decision in ***State v. Bill Paul Marquardt,*** 2001 WI APP 219, 247 Wis 2d 765, 635 N.W. 2d 188, an interlocutory appeal in the Chippewa County case, holding that there had been no probable cause for a search warrant issued on March 15, 2000, to search Marquardt's cabin and remanded the case to the Chippewa County trial court to determine whether the officers acted in good faith in searching the cabin.

On April 4, 2002, Marquardt moved, in this case, to suppress evidence seized as a result of the March 15th search on the grounds that in searching his cabin the officers did not act in good faith. (17). Since the search of the cabin turned up the evidence upon which these charges were based, the parties agreed that the court of appeals decision was applicable in this case.(84:4). At the suppression motion hearing, defense counsel agreed that

> ...the issue is controlled by ***State v. Eason*** and the two factual issues are whether the investigators engaged in a significant investigation before applying for, receiving and executing the warrant and whether the search warrant application was reviewed either by a law

> enforcement officer knowledgeable about the requirement of probable cause or by a government attorney.

(84: 4) .

At the suppression hearing, the state presented the testimony of the, Raymond Pelrine, district attorney who prepared the warrant application. Pelrine testified that the officers seeking the warrant shared information with him but he determined what to put in the warrant application.(84:11). He was not sure if he put in all the information they provided.(Id. 12). However, he did not always included all information that would support probable cause

> At the time and throughout my career my practice has always been to include only that important information that I felt was sufficient for a probable cause determination. I intentionally left out information, not exculpatory information, but left out information that you could characterize, if you will, as additional probable cause...

(84:16)

Sergeant John Volger of the Eau Claire County Sheriff's Department testified that he submitted the warrant materials to Judge Proctor. The judge asked no questions and expressed no reservations about signing it.(Id:23) The review took about ten minutes.(Id. 23).

Investigator Richard Price of the Chippewa County

Sheriff's Department, and DCI Special Agent John Rehrauer testified about the investigation into to Ms Marquardt's death.(84:27-59).

. On April 26, 2002, the trial court held that because a high number of investigators from multiple jurisdictions tried to solve the homicide over almost 48 hours, there had been a significant investigation.(84:72-73)(Ap.103-104). The court also held that there had been enough information for probable cause although it had not all been included in the affidavit.(85:75)(Ap.106) Thus, the court denied Marquardt's suppression motion. (84: 75).(Ap.106)

On November 11, 2002, Marquardt moved to represent himself at trial.(88:3).(Ap125). The court denied the motion holding Marquardt was not competent to represent himself .(88:18-19).(Ap140-141).

The trial was held from January 28 though 30, 2003. Marquardt was represented by counsel. He was found guilty on all charges(93:124-126).. Based upon the state's concession, he was committed to the Department of Family Services for 75 year.(89:10;54)(Ap.101)

ARGUMENT

I. . The trial court violated Marquardt's rights under the Fourth Amendment of the United States Constitution and Article I Section 11 of the Wisconsin Constitution where the trial court found good faith for the search of his residence without considering whether the warrant application contained indicia of probable cause.

Based upon the United States Supreme Court decision in ***United States v. Leon***, 468 U.S. 897(1984), ***State v. Eason***, 2001 WI 98,¶ 27,245 Wis.2d 206, 266, 629 N.W.2d 625, holds that "where police officers **act in objectively reasonable reliance** upon the warrant which had been issued by a detached and neutral magistrate", a good faith exception to the exclusionary rule applies.(Emphasis supplied).

Standard of Review

The State bears the burden of establishing "good faith" reliance on a search warrant. See ***Leon***, 468 U.S. at 924. Whether that burden has been met is a question of law, or constitutional fact, subject to *de novo* review. See e.g., ***United States v. Koerth***, 312 F.3d 862, 865 (7th Cir. 2002) cert

denied, 123 S. Ct 1947(2003).

Objective Good Faith

The "good faith" exception is grounded upon the officers acting in "objective good faith" as defined by the ***Leon***.

Leon involved an extensive drug investigation which focused on three suspects. The investigation started based on a tip from a confidential informant of unknown reliability. ***Leon***, 468 U.S. at 901. The informant told police that the suspects had been involved in dealing drugs in the past. Id. Follow-up police surveillance revealed several individuals leaving the suspects' residences with small packages. At least one such person was known to have a drug record. Two of the suspects flew separately from Los Angeles to Miami and were observed flying back from Miami to Los Angeles together. Other suspicious activity was observed at the suspects' residences as well as with their vehicles. Id at 901-02. Based upon the these facts, search warrants were issued. Id. at 902.

Both the district court and the court of appeals found no probable cause to support the warrants. Id. at 905

The Supreme Court accepted the Court of Appeals' conclusion that there was no probable cause based upon the facts in the affidavit. However, the court held that where the officers show objective good faith in relying on the warrant, suppression should not apply. Id. at 919.

The court held that the objective standard requires officers to have a reasonable knowledge of what the law prohibits. Id. at 919 nt 20. Subjective good faith is not enough; officers must act with an objective reasonableness. Id. at 915 nt 13. The officer cannot reasonably rely upon a warrant based upon a deliberately or recklessly false affidavit, or, a bare bones affidavit that she or he reasonably knows could not support probable cause or reasonable suspicion. Id. at 923. Officers must have reasonable grounds for believing that the warrant was properly issued. Id. at 923.

The ***Leon*** Court specified four situations where the good faith exception will not apply,

> (1)"... the magistrate or judge in issuing a warrant was misled by information in an affidavit that the affiant knew was false or would have known was false except for his reckless disregard of the truth....";
>
> (2)"the issuing magistrate wholly abandoned his judicial role... in such circumstances, no reasonably well trained officer should rely on the warrant";
>
> (3) the warrant is "based on an affidavit so lacking in indicia of probable cause as to render the official belief in it existence entirely unreasonable"
>
> (4) the warrant is "so facially deficient - i. e., in failing to particularize the place to be searched or the things to be seized - that the executing officers cannot reasonably presume it to be valid."

Leon, 468 U.S. at 923.

In applying the good faith exception, the ***Leon*** Court found the warrant in that case was supported by much more than a "bare bones" affidavit . Id at 926. The affidavit related the results of an extensive investigation focused on the three defendants. Id at 926 It appeared that the affidavit would have supported probable cause "but for" stale information of the suspects prior criminal activity and the informant's untested in reliability. Id at 904-905.[3] The Court found that a

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In fact, the ninth circuit court of appeals had found no probable clause based upon the two prong requirement of ***Aguilar v. Texas***, 378 U.S. 108 (1964), and ***Spinelli v. United States***, 393 U.S. 410 (1969). ***Leon***, 468 U.S. at 904. However, by the time ***Leon*** reached the supreme court,, ***Illinois v. Gates***, 462 U.S. 213 (1983), had already been decided. Justice Stevens posited that had the ***Leon*** court remanded the case to the ninth circuit to consider probable cause in light of the ***Gates*** holding, it is likely that the court of appeals would have found probable cause. 468 U.S. at, 961 (Stevens dissenting).Justice Brennan came to a similar

police officer might reasonably conclude that the warrant was constitutionally sound. Id at 926. As such, the officers relied in objective good faith when they executed the search warrants.

Good Faith Exception in Wisconsin

This court considered applying the ***Leon*** good faith exception in ***State v. Brady***, 130 Wis.2d 443, 388 N.W.2d 151 (1986). ***Brady*** involved a material witness warrant issued in a John Doe proceeding. Because the court found the affidavit in ***Brady*** to be devoid of facts to support probable cause for the warrant, the court declined to apply the good faith exception.

> We conclude that this case is not a proper vehicle for deciding whether to adopt a good-faith exception to the exclusionary rule. In ***Leon*** the Supreme Court expressly acknowledged that an officer would not "manifest objective good faith in relying on a warrant based on an affidavit 'so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable.'" The fourth amendment requires that the affidavit upon which the warrant was based had to contain sufficient facts to support a finding of probable cause regarding the impracticability of securing Brady's presence through a subpoena. Because the affidavit lacked indicia of probable cause regarding the impracticability of securing Brady's presence through a

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conclusion. 468 U.S. at 958.(Brennan dissenting).

> subpoena, this case does not present a question of "good faith." Therefore, ***Leon*** is not implicated. Accordingly, we do not decide whether to adopt a good-faith exception to the exclusionary rule in Wisconsin. We hold that the circuit court acted properly in suppressing the evidence discovered as a result of the illegal arrest of Brady.
>
> ***Brady***, 130 Wis.2d 453-454(Quotes and cites omitted.)

In other words, where there are no facts to support probable cause, as opposed to insufficient facts - as in ***Leon*** - the good faith exception could not apply.

In ***State v. Eason***, 2001 WI 98, 245 Wis.2d 206, 629 N.W.2d 625, this court applied the good faith exception in a case involving a no-knock search warrant. It was undisputed that probable cause existed for the warrant. Eason attacked only the authorization for a no-knock entry, arguing that the affidavit supporting the warrant failed to allege any specific information that anyone in the apartment possessed weapons, or would destroy evidence, if the officers knocked and announced their presence. Id. 2001 WI 98 at ¶ 10.

The court of appeals affirmed the suppression order and rejected the State's argument that arrests listed in the affidavit reflected the apartment occupants' willingness to use

violence.

> There is no information as to when and where those arrests took place, or whether they involved any violent acts--and, again, whether a conviction followed. The affidavit doesn't assert that either Bentley or Shannon Eason-- or any of the other occupants of the apartment--were armed; it merely offers a general statement that drug-related crimes often involve weapons.

Eason, 2001 WI 98 ¶8.

This court affirmed the finding of no reasonable suspicion to believe a no-knock search was necessary. ***Eason***, 2001 WI 98 ¶ 26. However, the Court found objective good faith, in part, because the affidavit documented a significant investigation of the two suspects by law enforcement, and the suspects' lengthy arrest record for violence. ***Eason***, 2001 WI 98 ¶ 70.

By recognizing a good faith exception, ***Eason*** mandated additional factors to those already required by ***Leon***.

> Accordingly, we require that in order for the good faith exception to apply, the State must show that the process used attendant to obtaining the search warrant included a significant investigation and a review by a police officer trained in, or very knowledgeable of, the legal vagaries of probable cause and reasonable suspicion, or a knowledgeable government attorney.

> While this process was followed in ***Leon***, the United States Supreme Court did not specifically hold that the Fourth Amendment required a significant investigation and review of the warrant application in order for the good faith exception to apply. However, we hold that Article I, Section 11 of the Wisconsin Constitution requires this process and thus affords ***additional*** protection than that which is afforded by the Fourth Amendment. Indeed, in some instances, "the Wisconsin Constitution may afford greater protection than the United States Constitution."

Eason, 2001 WI 98 ¶63. (Emphasis added)(Cites omitted)

To be clear, ***Eason*** requires both a ***Leon*** analysis as well as an analysis of the two additional factors mandated by ***Eason***. The ***Eason*** Court first considered the ***Leon*** requirements before it analyzed the two additional ***Eason*** factors .See ***Eason,*** 2001 WI 98 ¶66-70.

A. The trial court did not consider the *Leon* factors in finding good faith

In this ***Marquardt*** case, the trial court did not consider the ***Leon*** "good faith" factors; the parties mistakenly agreed that the only two factual issues to determine were the two listed in ***Eason***.

> So then the issue becomes as the Court of Appeals noted in the homicide appeal was there a good faith exception to the warrant requirement? And as Mr. Wright notes in his motion and supporting affidavit the issue is controlled by ***State v. Eason*** and *the two factual*

> *issues are whether the investigators engaged in a significant investigation before applying for, receiving and executing the warrant and whether the search warrant application was reviewed either by a law enforcement officer knowledgeable about the requirement of probable cause or by a government attorney.*

(84: 4) (Emphasis Added)

Other than the court's finding that no one alleged that Judge Proctor was "anything but a detached magistrate" (84:74), the good faith hearing transcript is devoid of any ***Leon*** analysis. Had the court first analyzed the case using the ***Leon*** factors, the court would have considered whether (1)the issuing magistrate has been knowingly misled; (2) the issuing magistrate wholly abandoned his or her judicial role; (3)the application is so lacking in indicia of probable cause as to render reliance upon it unreasonable; and (4)the warrant is so facially deficient that reliance upon it is unreasonable.

However, since defense counsel agreed that only the two additional ***Eason*** factors were involved, no evidence or argument was received regarding the third ***Leon*** factor - whether the application lacked in indicia of probable cause. As shown below, had this factor had been considered, the court would have suppressed the evidence.

The test for determining indicia of probable cause.

An objective good faith analysis as to whether a warrant application so lacking in probable cause that no officer could reasonably rely on it must be based upon the four corners of the application. ***U.S. v. Koerth***, 312 F.3d at 871. The State cannot supplement the record as it did in this case with facts not included in the affidavit and then ask the Court to find whether some "Subjective Good Faith" exists. This is clearly condemned in both ***Leon*** and ***Eason***.

> If subjective good faith alone were the test, the protections of the Fourth Amendment would evaporate, and the people would be 'secure in their persons, houses, papers, and effects,' only in the discretion of the police.

Leon, 468 U.S. at 915 Ft. Nt. 13.

* * *

> We emphasize that the standard of reasonableness we adopt is an objective one. Many objections to a good faith exception assume that the exception will turn on the subjective good faith of individual officers. "Grounding the modification in objective reasonableness, however, retains the value of the exclusionary rule as an incentive for the law enforcement profession as a whole to conduct themselves in accord with the Fourth Amendment."

Id. at 919 Ft. Nt. 20.

> (T)he officer's reliance on the magistrates probable-cause determination and on the technical sufficiency of the warrant he issues must be objectively reasonable, and it is clear that in some circumstances the officer will have no reasonable grounds for believing that the warrant was properly issued.

Id.. at 922-23.

U.S. v. Koerth, 312 F.3d at 871, specifically held that the in determining whether officers acted in good faith in relying upon a warrant that does not support probable cause, the court is limited to reviewing the information presented to the magistrate who issued the warrant.

> The ***Leon*** test for good faith reliance is clearly an objective one and it is based solely on facts presented to the magistrate. An obviously deficient affidavit cannot be cured by an officer's later testimony on his subjective intentions or knowledge.... ***Leon*** creates an exception to the exclusionary rule when officers have acted in reasonable reliance on the ruling of a judge or magistrate. **The point is that officers who present a colorable showing of probable cause to a judicial officer ought to be able to rely on that officer's ruling in executing the warrant. When the officers have not presented a colorable showing ... the reasoning of *Leon* does not apply**.

(Quotations and cites omitted).(Emphasis supplied).

In its certification to this court, the court of appeals, citing ***United States v. Dickerson,*** 975 F.2d 1245, 1250(7th Cir.1992*)* points out that the seventh circuit has been

inconsistent on this point.[4] However, ***Dickerson*** is not well reasoned. ***Dickerson***, unlike ***Koerth,*** does not even discuss the ***Leon*** bar to good faith, where the warrant application is" so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable." ***Leon*** 468 U.S. at 923. Instead of discussing whether the warrant application had an any indica of probable cause to allow an officer to reasonably rely on it, the court simply cites additional facts in the record to justify good faith. ***Dickerson,*** 975 F.2d at 1250.

Dickerson would not even pass muster under the ***United States v. Martin***, 297 F.3d 1308 (11th Cir.2002). ***Martin*** is another case the court of appeals cites for the proposition that "information known to the officer but not included in the warrant application [may] be considered when determining good faith."[5] However, ***Martin*** does not support

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4 Certification by Court of Appeals at 6.

5 Certification by Court of Appeals at 6

the state in this case.

Before considering information outside the warrant application, the ***Martin*** court rejected Martin's claims that the affidavit was so lacking in indicia of probable cause as to preclude the officer's reasonable reliance upon the warrant. ***Martin***, 297 F3d at 1315.

> Before we can examine whether the Leon good faith exception applies in this case, we must determine whether this case fits into one of the four limited sets of circumstances where the Leon good faith exception does not apply. Martin argues that two out of the four exceptions to the Leon good faith exception apply in this case - specifically, that the warrant was so devoid of probable cause that Zimbrick's belief in its validity was unreasonable and that Judge Mickle wholly abandoned his judicial role in signing off on the warrant.
>
> ***
>
> First, we address whether the affidavit underlying the search warrant was "so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable."
>
> **To answer this question we look to the face of the particular affidavit at hand in order to determine whether the warrant is so devoid of probable cause that Zimbrick's belief in its validity at the time it was issued was entirely unreasonable.**
>
> ***
>
> **The affidavit contained sufficient indicia of probable cause to enable a reasonable officer to execute the warrant thinking it valid.**

United States v. Martin, 297 F3d 1312-17(Cites omitted)(Emphasis supplied).

Following the review of the affidavit to determine whether it contained sufficient indicia of probable cause, the ***Martin*** court considered information outside of the warrant application to determine whether the officers acted in reasonable reliance on the warrant. ***Martin***. 297 F3d 1318-21. However, the ***Martin*** court made clear, a plainly deficient warrant application can not be rehabilitated by facts outside the application itself.

> An obviously deficient affidavit cannot be cured by an officer's later testimony on his subjective intentions or knowledge . . . . **To permit the total deficiency of the warrant and affidavit to be remedied by subsequent testimony concerning the subjective knowledge of the officer who sought the warrant would, we believe, unduly erode the protections of the fourth amendment.**

Martin. 297 F3d at 1319.n11.(Emphasis supplied).

Similarly, ***United States v. Hove***. 848 F.2d 137, 140 (9th Cir.1988), where the warrant application failed to link the suspect or criminal activity to the residence to be searched, held that,

> ***Leon*** does not extend, however, to allow the consideration of facts known only to an officer and not presented to the magistrate. The ***Leon*** test for good faith reliance is clearly an objective one and it is based solely on facts presented to the magistrate. **An obviously deficient affidavit cannot be cured by an officer's later testimony on his subjective intentions and knowledge.**

(Emphasis supplied).

The prohibition against curing an obviously defective affidavit with later testimony makes sense. As the United States Supreme court explained in ***Whiteley v. Warden***, 401 U.S. 560, 565 ftnt 8(1971), for purposes of probable cause,

> an otherwise insufficient affidavit cannot be rehabilitated by testimony concerning information possessed by the affiant when he sought the warrant but not disclosed to the issuing magistrate.

Given ***Whiteley***, a reasonably knowledgeable officer[6] should know that he or she may not rehabilitate an affidavit to show probable cause when probable cause is lacking. Thus, a knowledgeable officer should not expect to be allowed to show good faith by rehabilitating an affidavit that is so lacking in indicia of probable cause that one could not

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6 Both ***Eason*** and ***Leon*** require "police officers to have a reasonable knowledge of what the law prohibits." ***Eason***, 2001 WI 98 ¶ 36.(Citing ***Leon***,468 U.S. at 919 n. 20.).

reasonably rely on it. Indeed, encouraging such an expectation would undermine the requirement that an a warrant application should provide enough information to establish probable cause. ***State v. Ward***, 2000 WI 3 ¶ 26 , 231 Wis.2d 723, 604 N.W.2d 517.

1. This warrant application lacked indicia of probable cause so as to render reliance upon the warrant unreasonable.

The good faith inquiry "is confined to the objectively ascertainable question whether a reasonably well trained officer would have known that the search was illegal despite the magistrate's authorization." ***Leon,*** 468 U.S. at 922 n.23.

It is reasonable to assume that a reasonably well trained officer would know that a search warrant may be issued only when a neutral and detached magistrate finds probable cause — "a fair probability ...that evidence of a crime may be found in a particular place." ***State v. Ward,*** 2000 WI 3 ¶21, ¶23,; ***Illinois v. Gates***, 462 U.S. 213, 238(1983).

It is also reasonable to assume that a reasonably well

trained officer would know that a"probable cause determination must be based upon what a reasonable magistrate can infer from the information presented by the police. The issuing magistrate ordinarily considers only the facts set forth in supporting affidavits accompanying the warrant application." ***State v. Ward,*** 2000 WI 3 ¶26 (cites and quotation marks omitted).

The ***Leon*** analysis requires the court to look at the application for the warrant. The affidavit for the March 15th search provides only the following as to Bill Marquardt:

> Investigator Price reports that after finding the body of Mary J. Marquardt, he spoke with her husband, Alfred E. Marquardt. Mr. Marquardt informed him that he and Mary have a son, Bill Marquardt, who, since the location of Ms. Marquardt's body had not been seen or heard from. Alfred Marquardt further informed Investigator Price that Bill Marquardt owned with Alfred Marquardt a cabin in which Bill resided at E27505 County Highway M, Town of Fairchild, County of Eau Claire, Wisconsin.

In ***State v. Marquardt***, 2001 WI App 219, 247 Wis.2d 765, 635 N.W.2d 188, the Court of Appeals reviewed facts from the March 13th affidavit in support of a search of the Alfred Marquardt residence, the facts from the March 15th affidavit in support of the search of Bill Marquardt's cabin

and the State's rather extensive inferences from those facts[7]; the court of appeals concluded,

> Although these facts may lead a reasonable police officer to pursue further investigation of Marquardt, **we conclude that there is nothing in the facts to tie Marquardt to the crime, much less to tie his home to the crime**. Although the warrant-issuing judge may have been provided sufficient facts to excite an honest belief in a reasonable mind that the particular types of objects sought – including shoes, knives, and guns – could be linked with the commission of the crime, **there was no fact that suggested those items would be found in Marquardt's cabin.** We conclude that Marquardt has established that the facts are clearly insufficient to support a probable cause finding and therefore, we reject the judge's probable cause determination.

Marquardt, 2001 WI App 219 ¶19(emphasis supplied).

The March 15th, application for the search warrant contains only one fact about Bill Marquardt - that he had not been seen by his father for two days. That fact does not

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7 "In response, the State admits that the facts recited in the affidavits are "scant," but argues that they are not so thin as to be insufficient for probable cause. The State points to several facts in the affidavits: (1) Mary's telephone was off the hook the day she was killed, suggesting "that the perpetrator had been inside the residence"; (2) Mary was shot and stabbed, and no valuables were taken, suggesting the crime was an intentional homicide, as opposed to a break-in, and that the perpetrator was probably a male;(3) there were footprints at the crime scene that could be compared with footware if any are located; (4) Mary was covered with a blanket, which suggests the perpetrator knew, or was familiar with the victim; and (5) Marquardt's father stated that his son had not been heard from since Mary's body was discovered." ***Marquardt,*** 2001 WI App 219 ¶18

provide any indicia of probable cause to search Bill's residence.

In the certification, the court of appeals sets out the state's argument that the warrant applications for March 13 and March 15, taken together establish sufficient objective facts.[8] Those facts are:

> Phone busy throughout the day at the murder scene suggesting that it was off the hook and that the perpetrator had been inside the residence.
>
> The absence of any indication of a break-in or missing valuables–likely murderer knew Ms Marquardt or had a key to residence.
>
> Most homicides with a gun and knife are committed by males.
>
> Covering body suggests that perpetrator felt compassion or remorse suggesting it was not a stranger.
>
> Family members and police were unable to contact Bill following his mother's death despite substantial publicity about the crime.

With two exceptions, the only inference the state can draw from these facts is that Ms. Marquardt might have known her assailant. A second, somewhat questionable

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[8] Certification of the court of appeals at 4-5

inference is that the perpetrator was male. Assuming these inferences are reasonable, since it is likely that Ms Marquardt knew many males, i.e. friends, family and neighbors, one can not reasonably infer that evidence of her murder would be found at Marquardt's cabin.[9]

Further, regarding the fact that no one could locate Bill after Ms. Marquardt's death: Given that Ms Marquardt's body was discovered in the late afternoon of March 13th; and the warrant affidavit was prepared on the morning of March 15th.(84:7), police and family could have been looking for Bill for little more than a day. Investigator Price's pre-warrant report reflects that Alfred Marquardt told Price that Bill said on February 17th that he was leaving the country. Alfred said he had not seen Bill since then.(23: Exhibit 1)(Ap~~159-160~~ 159, 158). Special Agent Rehrauer was aware of the information in the

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9 Regarding the claim that because the body was covered with a blanket, the perpetrator must have been a friend or family member, the pre-warrant interview with Alfred Marquardt reflects that Ms Marquardt could have been wearing the blanket. When, Marquardt found the body in the garage under a blanket on March 13th, be believed that Ms Marquardt had fallen and hit her head.(23: Exhibit 1). There is no suggestion in his statement that he thought it was odd that she had a blanket on her.

report.(84:46). Rehauer testified that after meeting with Investigator Price, he and Special Agent Miller drove to Bill's cabin in the early hours of March 14th. They noted that there were no lights on and that the 1995 green Ford Thunderbird - that Alfred said that Bill was driving - was not there.(84:47-48). Rehrauer attempted to call Bill's cell phone but received a message that either the cell phone was not in service now or the party was out of the calling area.(84: 48-49). **On March 14th, Bill's neighbor, Westley Anderson told Rehrauer that he had not seen Marquardt for a week**.(84:50). Given the fact that Marquardt had said he was going to be out of the county, that he had not been seen for at least a week (well before the Ms. Marquardt's death), that his car and cell phone were not in the area, it was not at all surprising that no one could contact him. Marquardt's absence raised no inference that evidence regarding Ms. Marquardt's death would be found in his cabin

Since there was nothing in the affidavit, nor in the application for the March 13th warrant, to support probable cause that Marquardt was involved in the homicide or that his

cabin possessed evidence of the crime, this case is analogous to ***Brady***. Because there were no facts to support probable cause in ***Brady***, the good faith exception did not apply. The same is true in here. No officers, trained in the law of probable cause, could reasonably have believed that probable cause existed when none was presented to the magistrate. The third factor of ***Leon*** requires suppression of everything found on March 15th, at the Marquardt cabin

2. Information outside of the warrant application could provide no basis for good faith reliance.

The court of appeals certification outlines information the state claims police were aware of but did not put in the warrant application.[10]

> The officers learned from Marquardt's father that a phone message for Bill had been placed on the refrigerator in his parents' home the day before the murder and it was missing after the murder. That message found several days later under a jewelry box in his parents' bedroom.

The telephone message was a small piece of paper with only "O.B." and a telephone number on it.(69: Exhibit 3). One

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10 Certification of the court of appeals at 5-6.

can not reasonably infer that evidence of Ms Marquardt's murder would be located at Bill's cabin because of scrap of paper without Bill's name on it was moved from the refrigerator to his mother's jewelry box.

Marquardt's brother and sister told officers they could think of no non-relative with a motive to harm their mother and no other family member was a suspect.

Investigator Price testified that on the day of the homicide, he spoke with Bill's brother and sister, who could think of no "non-relative" with a motive to harm their mother.(84:35). Further, Price said he discovered no "reason" for Bill's siblings or father to harm Ms. Marquardt.(84:35). However, no one ever testified that Bill's brother, sister, father or anyone else said that Bill had any motive to harm Ms. Marquardt.[11]

Police were aware of a break-in and shooting of Marquardt's neighbor's dog and the fact that 9 mm. casings were found at the scene.

Special Agent Rehrauer testified that on March 14th, while looking for Bill, he spoke with his neighbor, Westley

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11 The trial court's statement "We have information from the family that seemed to be united that there was only one possible explanation and that was either that Bill Marquardt did or had some information about it," is totally unsupported in the record.(84:74)(Ap.105).

Anderson.(84:50). Anderson mentioned to him that on March 9th there had been a break-in at his residence, his dog had been shot and five spent nine millimeter shell casings had been found.(84:50-51). Rehrauer also testified that Anderson identified three specific individuals as suspects in the shooting.(84:57). There is no suggestion that Marquardt was one of those suspects. Rehrauer made no attempt to question the suspects.(Id.) He made no attempt to get the shell casings from the Anderson scene to compared with the shell casings from the homicide scene.(84:58).Nor is there any suggestion, that nine millimeter shell casings are rare at crime scenes where shootings have occurred.

Richard Price, the lead detective in homicide case, testified that at the time he and Rehrauer interviewed Marquardt, after his arrest, Price was unaware of the Anderson dog shooting incident.(84:36; 92:143).

> Police were aware that Marquardt had a history of drug dealing and that he had been discovered digging up $12,000 cash from his parents' premises approximately one month before the murder.

Alfred Marquardt had told police that "Bill had been

arrested on Marijuana charges about four years ago and did go in jail in Chippewa County. Since Bill had gotten out of jail, he had cleaned up his act and was doing better."(23: (Exhibit 1)(Ap.~~160)~~ 158). Alfred had also told police that he had learned in a discussion with his wife that on February 18th, "while at the residence, Bill had gone out to the shed and dug up $12,000 cash which he had buried there some time earlier." Alfred had said he did not know where Bill had gotten the money.(Id.). (Ap 159) That Bill's mother had seen him dig up money nearly a month before her death, raises no inference that Bill had any motive to kill her. It is apparent from Alfred's statement that he had known the money was there before Bill dug it up. Had Bill been trying to hide the fact that he had the money, it is very unlikely that Ms. Marquardt would have known the exact amount Bill retrieved.

II. The trial court misapplied the notion of "significant investigation" to find that the officers acted in good faith.

Eason requires that the police engage in a significant investigation before applying for, receiving and executing the warrant. In this case, the trial court ruled that the high

number of investigators from multiple jurisdictions trying to solve the homicide for almost 48 hours constituted a significant investigation.(84: 72-75). This cannot rationally be what the ***Eason*** Court meant by significant investigation.

In finding that there had been a "significant investigation" that satisfied the ***Eason*** good faith requirement, the trial court did not look for a link between the results of that investigation and Bill Marquardt or his cabin. Nevertheless, the court found that the officers relied in good faith on a search warrant affidavit that lacked in probable cause. The court seems to have believed that as long as the investigation was "significant" in any sense of that word, the state had met the first ***Eason*** factor for good faith. However, by that reasoning, because a "significant investigation" took place after the homicide of Mary Jane Marquardt, the police would have been acting in objective good faith by applying for and executing a warrant to search any home in the county. Could that have been what the ***Eason*** court intended by "significant investigation?" Certainly not.

Both ***Eason*** and ***Leon*** illustrate that there must be a rational connection between the results of the investigation and the person or place to be searched in order for there to be good faith.[12]

In ***Eason*** case, the police investigation pointed to Clinton Bentley as a drug dealer who sold cocain from his home. It also pointed to the fact that Bentley and Shannon Eason, who apparently lived with Bentley, both had records for assault among other things.

> From the face of Officer Fahrney's affidavit, it is evident that there was a significant investigation. (Fahrney Aff. at 1-5.) Officer Fahrney was assigned to the Special Operation Bureau of the Beloit Police Department to, among other things, "investigate complaints of drug trafficking." (Fahrney Aff. at 3.) He was thus aware of confidential files kept in that unit and the two "pieces of intelligence indicating that Clinton Bentley is a drug dealer." (Fahrney Aff. at 2.) Officer Fahrney worked with a confidential informant to purchase a cocaine-like substance from Clinton Bentley, which he had subsequently tested. (Fahrney Aff. at 2.) The substance tested as cocaine. (Fahrney Aff. at 2-3.) Officer Fahrney reviewed Beloit Police records and learned that Clinton Bentley resided at 802 Bluff Street in Beloit, the location where the confidential informant had purchased the cocaine. (Fahrney Aff. at 3.) Officer Fahrney reviewed utility records, and learned that Shannon Eason was responsible for the utilities at 802 Bluff Street. Id. He also researched Clinton Bentley and

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12 ***Eason*** noted that there had been a significant investigation in ***Leon***. ***Eason*** 2001 WI 98 ¶63.

> Shannon Eason's criminal arrest records, and learned that Bentley had been arrested for aggravated assault and that Shannon Eason had multiple arrests for larceny, assault, and obstructing.

Eason 2001 WI 98 ¶70.

Similarly, in ***Leon*** the investigation centered on the three suspects whose houses were searched.

In this case, the investigation had produced nothing that linked Bill Marquardt or his cabin to the death of Mary Jane Marquadt. The only fact that related to Bill, was that Alfred Marquardt told Investigator Price that he hadn't heard or seen Bill Marquardt since the 17th of February, almost a month earlier.

There had been no "significant investigation" upon which the police could in good faith rely, when they searched Bill Marquardt's cabin.

In its certification, the court of appeals points out that the "significant investigation" requirement was adopted from a law journal article. *See* Donald Dripps, ***Living with Leon***, 95 Yale L.J. 906, 932(1986). As the court of appeals points

out

> That article focuses on what it termed the 'ugliest risk" that Leon encourages, the police manufactured anonymous tip, and suggested that well-trained officers would not seek a warrant without significant independent investigation and internal screening.[13]

Professor Dripps suggested the independent investigation criteria in context of discussing a particularly egregious case in which a warrant was based upon an anonymous informant.[14] However, the "significant investigation requirement should not be limited to the anonymous informant case.

While informants were involved in both ***Eason*** and ***Leon***, the investigations the police performed uncovered information that provided at least some indicia of probable cause that the suspects were involved in crime and that their residences were likely to contain evidence of that crime.

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13 Certification of court of appeals at 7.

14 ***State v. Wood,*** 475 So. 2d 206(La. Ct. App. 194) where trial court found good faith based upon an affidavit that said only, "I recieved information from two(2) confidential informants that the above listed items have been seen at the above location. These two (2) informants have found[sic] to be very reliable in past investigations." See Dripps at 931.

Would the Marquardt case have been that much different had an anonymous informant told the police, "Bill Marquardt murdered his mother?" In this case, police unsupported suspicion played the role of an anonymous informant. Significant investigation was necessary to connect Marquardt and the crime. It is unlikely, that Profession Dripps would find an independent investigation adequate for good faith if the evidence it produced linked no one in particular to the crime.

A significant investigation that it does produce information linking the person or place subject to the warrant with a crime, will be more likely to produce an affidavit that supports probable cause. That is ultimately what this court should want.

On the other hand, an investigation, no matter how extensive, if it produces nothing to connect the person or place to a crime, can not possibly support a belief on the part of the police that they have probable cause.

III. Marquardt was denied effective assistance of counsel where counsel failed to

argue the warrant application lacked sufficient indica of probable cause where the application was devoid of any facts linking Marquardt's residence with the death of his mother

Both the United States Constitution and the Wisconsin Constitution guarantee effective assistance of counsel. ***State v. Simpson***, 185 Wis. 2d 772, 781, 519 N.W.2d 662 (Ct.App. 1994). ***Strickland v. Washington***, 466 U.S. 688, 686 (1984), sets out a two part analysis for determining whether a defendant has been denied effective assistance of counsel under the United States Constitution. First, the defendant must show deficient performance by the defense attorney, that is, performance that falls below an objective standard of reasonableness. ***Strickland***, 466 U.S. at 688. Second, the defendant must show prejudice, that is, a reasonable probability that the result would have been different but for the counsel's deficient performance. Id. at 694. A reasonable probability is a probability sufficient to undermine confidence in the outcome. Id. However, the defendant need not show that it is more likely than not that counsel's errors caused the result. See also: ***State v. Pitsch***, 124 Wis. 2d 628, 641, 369 N.W.2d 711 (1985).

A. Counsel failed to argue that the officers' reliance on the March 15th warrant was not objectively reasonable reliance under *Leon*

1.Counsel's performance was defective.

As pointed out in Section I above, Counsel agreed that only the additional factors set out in **Eason** were to be considered in the good faith hearing.

Counsel had no strategic reason for doing so. At the ***Machner*** hearing, Counsel testified that he did not consider raising the ***Leon*** factors.(96:9-10). Counsel said that he did believe that the affidavit contained an indicia of probable cause.(Id.). However, when Counsel reviewed that affidavit in support of the application, he could not find what he believed had provided the indicia of probable cause.(96:11-12).

2. Marqaurdt was prejudiced

The ***Leon*** criteria should have been argued in the motion to suppress. Failure to do so, prevented the court from considering whether the application for the warrant was so lacking in indicia of probable cause as to render reliance upon it unreasonable. Had that factor been considered by the court, as argued above, the suppression motion most certainly would

as argued above, the suppression motion most certainly would have been granted.

IV. The trial court violated Mr. Marquardts right to self representation under the Sixth Amendment to the United States Constitution where the court found Marquardt competent to stand trial but incompetent to represent himself.

Faretta v. California, 422 U.S. 806, 819 (1975), held that a criminal defendant has a constitutional right to represent himself.

> We confront here a nearly universal conviction, on the part of our people as well as our courts, that forcing a lawyer upon an unwilling defendant is contrary to his basic right to defend himself if he truly wants to do so.

Faretta, 422 U.S. at 817.

> Although not stated in the [Sixth] Amendment in so many words, the right to self-representation — to make one's own defense personally — is thus necessarily implied by the structure of the Amendment.

Id. at 819.

> To thrust counsel upon the accused, against his considered wish, thus violates the logic of the Amendment.

Id. at 820

> An unwanted counsel "represents" the defendant only through a tenuous and unacceptable legal fiction. Unless the accused has acquiesced in such representation, the defense presented is not the defense guaranteed him by the Constitution, for, in a very real sense, it is not his defense.

Id.. at 821.

Denial of the right to represent oneself can not be harmless error, ***McKaskle v. Wiggins***, 465 U.S. 168, 178 (1984). Indeed, the denial of either the right to counsel or the right to self-representation does not require a showing of prejudice to obtain reversal. See ***Flanagan v. United States,*** 465 U. S. 259, 268. (1984).

A. The trial court improperly applied a higher standard of competence to deny Marquardt his right to represent himself than it applied to find him competent to stand trial.

Godinez v. Moran, 509 U.S. 389, 391(1993), held that the standard of competence necessary for waiving the right to counsel is no higher than the standard of competence necessary to stand trial. The court rejected the notion that a defendant who waives counsel must be more competent that a defendant who does not. Id .at 399.

The court made clear that the competence necessary to waive one's right to counsel is not the competence to represent one-self.

> [T]he competence that is required of a defendant seeking to waive his right to counsel is the competence to waive the right, not the competence to represent himself. In ***Faretta v. California***, 422 U.S. 806 (1975), we held that a defendant choosing self-representation must do so "competently and intelligently," but we made it clear that the defendant's "technical legal knowledge" is "not relevant" to the determination whether he is competent to waive his right to counsel, and we emphasized that, although the defendant "may conduct his own defense ultimately to his own detriment, his choice must be honored," Thus, while "[i]ts undeniable that in most criminal prosecutions defendants could better defend with counsel's guidance than by their own unskilled efforts," **a criminal defendant's ability to represent himself has no bearing upon his competence to choose self-representation..**

Id at 399-400(Emphasis supplied).

While in addition to finding that the defendant is competent to stand trial, where the defendant seeks to waive his or her right to counsel, the court must satisfy itself that the waiver of this constitutional rights is knowing and voluntary. Only in this sense, is there "a 'heighten' standard for waiving of the right to counsel, but it is not a higher standard of competence." Id. at 400-401.

While, ***Godinez*** noted that, "States are free to adopt

competency standards that are more elaborate than the ***Dusky*** formulation," it never suggested that a state could require a higher standard of competence for one seeking to represent him or herself than it requires for one who chooses to be represented by counsel. Id at 390. The right to self representation is as much a constitutional right as the right to counsel. See ***Faretta*** 422 U.S. 806. ***Godinez*** implies that the standard of competence to exercise either right is the same.

As the Minnesota Supreme Court has said,

> Godinez makes clear that if a defendant is competent to stand trial, the defendant is competent to waive counsel.

State v. Comacho, 561 N.W.2d 160,173(Minn.1997).

The Connecticut Supreme Court has come to the same conclusion.

> The United States Supreme Court 's opinion does not mandate a particular test for competency, explicity recognizing that "[s]tates are free to adopt competency standards that are more elaborate" that the formulation used in the federal court...A state does not , therefore, impermissibly burden the exercise of the right to self-representation by adopting a competency standard more pretective than the ***Dusky*** formulation. **Whatever standard is employed, however, it must be applied equally at the various stages of a trail to pass constitutional muster.**

State v. Day, 233 Conn. 813, 824, 661 A.2d 539(1995).

Thus, where a defendant who chooses to exercise his or her right to counsel has to meet only the standard of competence set out in ***Dusky v. United States,*** 362 U.S. 402 (1960), [15] the state can not hold the defendant who chooses to exercise his or her right to self-representation to a higher standard. Indeed, the state may not impose a greater restriction on the exercise of a federal constitutional right than the federal constitution allows. ***Mills v. Rogers,*** 457 U.S. 291(1982).

The right to counsel and the right to self representation are two sides of the same coin.

> One would naturally view the decision to proceed with counsel as the assertion of ones's right to an attorney, rather than a waiver of one's "Faretta right" to self representation. Likewise, one could perceive the decision to appear pro se as the assertion of one's Sixth Amendment "Faretta right " to self representation, rather than a waiver of one's Sixth Amendment right to counsel. These rights to counsel and self representation, though of the same constitutional caliber, are necessarily mutually exclusive. One logically cannot exercise the right to counsel and the right to self-representation simultaneously. Thus, the exercise of one need not be

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15 The ***Dusky*** is"whether [the defendant] has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding — and whether he has a rational as well as factual understanding of the proceedings against him,"

> viewed as a waiver of the other , but instead as a conscious decision to invoke one constitutional right rather than another. In this respect, it would make little sense to hold that the assertion of one's "Faretta right" to self-representation requires a higher mental functioning that the assertion of one's right to representation of counsel, since the rights are of an identical constitutional caliber and require identical decision processes.[16]

In this case, Bill Marquardt was found competent to stand trial but denied his right to represent himself. That was a denial of his sixth amendment right to self representation and is reversible error.

Apparently referring to the holdings of ***Pickens v. State***, 96 Wis.2d 549,292 N.W.2d 601 (1980), and ***State v. Klessig***, 211 Wis.2d 194,564 N.W.2d 716(1997), the state, at the motion hearing, argued that the court could hold Marquardt competent to stand trial but incompetent to represent himself.(88:10, 19). However, ***Pickens*** was decided before ***Godinez***.. Further, in ***Pickens***, as in ***Klessig***, "the validity of a heightened standard of competency for self-representation was not squarely presented ... and was not

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16 Brian R. Boch, Fourteenth Amendment — The Standard of Mental Competency to Waive Constitutional Rights Versus the Competency Standard to Stand Trial, 84 J. Crim. L. & Criminology 883, 913 (1994);

explicitly raised by the parties." ***Klessig***, 211 Wis 2d 215 at (Abrahamson CJ concurring). Neither, Klessig or Pickens asserted his right to self-representation on appeal; both had already exercised it. Each was seeking a new trial with counsel. Thus, neither ***Klessig*** nor ***Pickens*** is directly on point.

B. Marquardt was competent to represent himself under *Klessig*.

Where a defendant seeks to proceed *pro se,* ***Klessig*** instructs the trial court to engage in a colloquy with the defendant to ensure that the defendant (1) has knowingly, intelligently, and voluntarily waived the right to counsel; and (2) is competent to proceed *pro se.* Id. at 203. To ascertain whether a defendant has knowingly, intelligently and voluntarily waived the right to counsel, the trial court's colloquy must probe whether the defendant: (1) deliberately chose to proceed without counsel; (2) was aware of the difficulties and disadvantages of self-representation; (3) was aware of the seriousness of the charge or charges; and (4) was aware of the general range of penalties that a sentencing court

could impose. Id.

Mr. Marquardt, without prompting, stated the charges against him.(88: 6)(Ap.128). He was aware of the general range of penalties involved.(Id. 6-7)(Ap128-129). The court informed him that he would be held to same standards as it would hold his attorney, Mr. Rusch.(Id. 7)(Ap129).. Marquardt said he understood and hoped to work with Mr. Rusch before trial and have Rusch as stand-by counsel during trial.(Id:7-8)(Ap129-130).

To determine whether a defendant is competent to represent himself or herself, a trial court considers the defendant's (1) education; (2) literacy; (3) fluency in English; and (4) "any physical or psychological disability which may significantly affect his ability to communicate a possible defense to the jury." ***Klessig***, 211 Wis.2d at 212 In considering these factors, a trial is guided by the principle that a competency determination should not prevent persons of average ability and intelligence from self-representation unless the court can identify a specific problem or disability that might prevent a meaningful defense from being offered,

if one indeed exists. See ***Klessig***, 211 Wis.2d at 212. Technical legal knowledge is irrelevant to an assessment of a knowing exercise of the right to defend oneself. See ***Faretta***, 422 U.S. at 836.

Mr. Marquardt stated that he was 26 years old, he graduated from high school. He had earned A's and B's in all of his high school English classes and had earned straight A's his senior year of high school.(88:3-4)(Ap.125-126). He further stated that he was taking no medication and had not had any difficulty understanding what the judge had been saying in any of the hearings to date.(Id. 4)(Ap.126).

Marquardt gave a cogent reason for wanting to defendant himself:

> ...the reason I want to do the talking at my trial is, Your Honor, I have been spending every minute of every day, except when I sleep, working on my defense, and because my life is on the line here and because I'm sitting in jail and I have nothing else to do, and no lawyer can put in as much time working on this case as I have.

(Id. :5)(Ap.127)..

He understood that as long as he retained the plea of not guilty by reason of mental disease or defect that the trial

would have two phases. (Id 4-5). He argued eloquently about his competence and right to represent himself, even to the point of citing case law.

> Your Honor, every single doctor I actually talked to about my competency said I was competent, Dr. Marshall, Dr. Beebe, Dr. Minter, and another doctor in Chippewa who I didn't know his name, and a Dr. Black all says I was competent.
>
> Any doctor I talked about by insanity defense plea interview about what might have been going on three years ago has nothing to do with my competency, and plus, I think I made a timely and proper request to ask for me to have a court hearing to do the talking at my trial. My trial is not until January, and on my request to do the talking at my trial, I gave some good reasons way I want to talk at my trial.
>
> The court has to identify a specific problem or disability which may interfere with the presentation of a meaningful defense as stated in ***Pickens versus State***. You, the judge and the D.A. have not seen at this hearing or at any hearing that I have a problem or any disability that would interfere with the presentation of a meaningful defense....

(Id. 13-14)(Ap.135-136)..

Mr. Marquardt went on to explain why he was dissatisfied with his prior counsel.(Id.14)

Nevertheless, in denying Marquardt's request to represent himself, the court focused on Marquardt's lack of legal training.

> ...I assure you that you will have the opportunity to talk, if that 's in the best interest of your defense, in that you

> have an absolute constitutional right to testify, but that's different that making an opening statement, which may or may not be improper, asking cross -examination questions, which may or may not be proper, putting on your own case by calling witnesses, and handling rules of evidence.
>
> At this juncture, I 'm not persuaded that you are competent enough to do this. I don't know if we have — can have another hearing or have some — some different way of doing this, but I'm very concerned that all we would be doing is wasting everybody's time by having you start out then get into trouble.
>
> First of all, Mr. White 's a very excellent attorney, very skilled and very knowledgeable about the law, and you don't have that same vantage point because you haven't studied the law as much as he has...

(Id. 16-17)(Ap. 138-139).

The court further said,

> I don't believe you have the education, I don't think you have the training. I believe you — you've looked at this case very microscopically rather than from a broad picture.
>
> I think the fact that you rejected the advise that you've gotten from two very competent criminal trial lawyers, the fact that you're putting Mr. Rusch on the spot with by — makes me very, very concerned that you are not competent enough to do this and also, of course, the absolute seriousness of the charges and complexity of the case.
>
> This other acts evidence is very complex, so at least at this point I'm — that's my ruling. That ruling may change if we — if other information comes into play and we know exactly where we are, but I'm ruling for the moment that you must rely on your attorney to help you, to handle your defense and to do what's necessary to protect your interests.

(Id. 18-19)(Ap140-141)..

Finally, after the prosecutor pointed out that ***Pickens*** and ***Klessig*** require the court identify a specific problem or

disability that would prevent Marquardt from representing himself and that there was some disagreement about whether Marquardt was paranoid or psychotic, the court said,

> That would be at least part of the ruling because of the fact that that has been — his mental status has been put into question by a number of people, but I was more focusing on the recent, and that is watching him here in court and understanding what I consider to be a very complex case. It isn't just some simple shoplifting, but yes, I would also add that — and incorporate the reports that have been received.

(Id. : 20).

Clearly, in denying Marquardt's request to represent himself, the court was most concerned about Marquardt's technical ability to represent himself in a complex case. That is exactly what ***Faretta*** and ***Godinez*** forbids.

> Thus, while "[i]ts undeniable that in most criminal prosecutions defendants could better defend with counsel's guidance than by their own unskilled efforts," **a criminal defendant's ability to represent himself has no bearing upon his competence to choose self-representation.**

G***odinez*** 509 U.S at 399-400.(citing ***Faretta***).(Emphasis supplied.)

The court made no finding that Marquardt was psychotic or paranoid or that he had any disability prevents him from representing himself. It noted only that some reports called Marquardt's mental status into question.

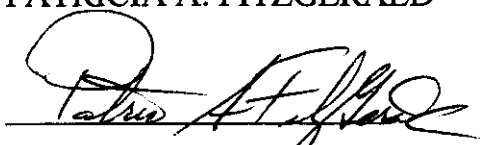
Marquardt is of at least average ability and intelligence. He clearly could express himself coherently in court. Where the court can find no specific problem or disability that would prevent him from putting on a defense, he must be allowed to represent himself

CONCLUSION

For the reasons set forth above, Mr. Marquardt asks this court to reverse his convictions and to remand to the trial court for a new trial.

April 7, 2005

PATRICIA A. FITZGERALD



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CERTIFICATION

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and ©) in that it is proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points, maximum of 60 characters per full line of body text. The length of the brief is 10989 words.

cc Wisconsin Department of Justice
Bill P. Marquardt

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Amended

STATE OF WISCONSIN, CIRCUIT COURT, EAU CLAIRE COUNTY

For Official Use

FILED
CIRCUIT COURT
JUN 02 2003
DIANA J. MILLER
CLERK OF CIRCUIT COUR

State of Wisconsin, Plaintiff,
-vs-

Bill Marquart, Defendant
Name

12-17-75
Date of Birth

Order of Commitment for Institutional Care (Not Guilty by Reason of Mental Disease or Defect)

Case No. 00CF137

THE COURT FINDS:

1. The defendant was found not guilty by reason of mental disease or defect of the following crime(s):

Crime(s)	Wis. Statute(s) Charged	Date(s) Occurred
6 Counts-Mistreatment of Animals/Cause Harm	951.02	03-13 to 3-15-00
2 Counts Felon Possess Firearm	941.29(2)(a)	03-13 to 3-15-00
1 Count of Aggravated Burglary	943.10(2)(a)	03-13 to3-15-00

2. The total maximum term of incarceration for the crime(s) is:
   ☐ life incarceration ☐ life incarceration plus _____ years. ☒ 204 years, _____ months.
3. A hearing has been conducted and the court determines that conditional release would pose a significant risk of bodily harm to the defendant or to others, or of serious property damage.
4. ☒ The involuntary administration of psychotropic medications is needed, given the legitimate needs of institutional confinement, because:
   a. The defendant poses a current risk of harm to self or others if not medicated.
   b. The administration of medication is in the defendant's medical interest, and
   c. The defendant is not competent to refuse psychotropic medication or treatment due to:
      ☒ mental illness, ☐ developmental disability, ☐ alcoholism, ☐ drug dependence, because
      ☒ the defendant is incapable of expressing an understanding of the advantages and disadvantages of accepting psychotropic medication or treatment and the alternatives; *or,*
      ☐ the defendant is substantially incapable of applying an understanding of the advantages, disadvantages and alternatives to his or her mental illness, developmental disability, alcoholism or drug dependence in order to make an informed choice as to whether to accept or refuse psychotropic medication or treatment.
5. ☐ The crime (or, if more than one, at least one of them) is a felony and the court has informed the defendant of the requirements and penalties under §941.29, Wisconsin Statutes, that possession of a firearm is a Class E felony with a penalty of a fine not to exceed $10,000 or imprisonment not to exceed 5 years, or both.

THE COURT ORDERS:

1. The defendant is committed to the Department of Health and Family Services for institutional care for:
   ☒ 75 years, 0 months, 0 days, which is not more than two-thirds of the maximum term authorized by Wisconsin Statutes, had the defendant been convicted of the offense.
   ☐ life.
   This commitment shall commence on (date) 04-07-2003. The defendant is entitled to 3yr 6mo days credit for time in custody.
2. If the defendant is not competent to refuse psychotropic medication or treatment, whoever administers the medication or treatment to the defendant shall observe appropriate medical standards.
3. The sheriff of the county shall transport the defendant to the Department's designated institution:
   _____.

BY THE COURT:

Circuit Court Judge/Clerk of Court

Eric Wahl
Name Printed or Typed

06-02-2003
Date

Distribution:
1. Court (Original)
2. District Attorney
3. Defense Attorney
4. Department of Health and Family Services - fax'd.
5. Sheriff (of county of defendant's residence)
6. §51.42 Board (of county of defendant's residence)

STATE OF WISCONSIN | CIRCUIT COURT BRANCH 2 | EAU CLAIRE COUNTY

STATE OF WISCONSIN,
Plaintiff,

vs.

Case No. 00 CF 137

BILL P. MARQUARDT,
Defendant.

ORDER DENYING
POSTCONVICTION RELIEF

For the reasons stated on the record at the hearing held on June 7, 2004, the court denies the defendant's postconviction motion on all grounds..

Dated: June 10, 2004

FILED
CIRCUIT COURT
EAU CLAIRE COUNTY

JUN 11 2004

DIANA J. MILLER
CLERK OF CIRCUIT COURT

BY THE COURT

Judge of Circuit Court

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1 to prosecute this case and obviously the homicide
2 in Chippewa County shouldn't be subject to
3 suppression.
4 THE COURT: Anything else, Mr. Wright?
5 MR. WRIGHT: Your Honor, I don't disagree
6 with Mr. White's case that you need to decide
7 whether this is good faith but, again, I would
8 urge the Court to keep in mind what good faith
9 means. It doesn't mean that the officers were
10 necessarily acting in bad faith. It means that
11 there was not a significant enough investigation
12 done with regard to specific information that
13 would tie anything that they suspected existed in
14 Bill Marquardt's cabin with the state of their
15 investigation when they applied for the warrant.
16 That's the issue of good faith. I have not asserted
17 and the standard is not that the officers acted in
18 bad faith.
19 THE COURT: Well, the difficulty these cases
20 pose for everyone involved is the fact that appellate
21 courts oftentimes are able to look at things in a
22 different light with a little more leisurely approach
23 to things, a little more thoughtful approach even to
24 things.
25 We first start off with the fact that

1 there was a significant investigation. Deputy Price
2 indicated there were approximately twenty employees
3 of multiple jurisdictions. You have the Chippewa
4 County Sheriff, Eau Claire County Sheriff. You had
5 the State investigators and I think Sergeant Vogler
6 even thought maybe the City of Chippewa Police
7 Department were involved. So you in any event
8 had different officers from different jurisdictions
9 all working what I would consider to be nearly around
10 the clock efforts.
11 Again, Deputy Price indicated that the
12 search, the forensic search ended at like
13 two-thirty a.m. They were back on the job at
14 eight o'clock the following morning so obviously
15 these people involved were working very diligently,
16 very determinedly to find out what was going on
17 here. District Attorney, former District Attorney
18 Pelrine in my judgment from watching him in that
19 capacity was an unusually thorough and detailed
20 person who did not charge out willy-nilly on
21 various cases but used a very thoughtful approach
22 and even he admitted at this point that he perhaps
23 did not include all of the information that he
24 had heard and certainly not all of the information
25 that the officer had believing that some of it

1 was redundant. That's certainly a decision that one
2 in his position would make.
3 There's been no allegation that Judge Proctor
4 was anything other than a detached magistrate
5 and in fact he is as I think everyone knows him
6 would agree that he certainly is a dutiful judge
7 who looks at these kinds of jobs very seriously.
8 Mr. Wright mentioned in the Eason case something
9 about age of information, that they had
10 information that was several months old. Well,
11 that was not the case here. We were, I know
12 it's not the proper legal term, but it's still
13 one that more or less applies, it's almost
14 a hot pursuit type situation that we have a
15 woman slain very, very severely injured prior
16 to her death. We have information from the
17 family that seemed to be united that there was
18 only one possible explanation and that was either
19 that Bill Marquardt did or had some information
20 about it. So there wasn't any other suspects that
21 made any sense at the time using again the experience
22 of the investigators.
23 Mr. Wright pointed out that certainly more
24 things could have been done in comparison. Nine
25 millimeter shell casings, further additional interviews

with neighbors of the cabin and so forth, and there's always more information that can be gathered. Anybody that's ever investigated something of that kind knows that to be true.

I was impressed with the diligence of the officers who testified, particularly Deputy Price and Special Agent Rehrauer. Clearly, they were working diligently. Clearly, they were focused on trying to get some answers to the questions and I think that this certainly meets the Eason test of good faith. I think the officers were in good faith. I think everybody was. The fact that Mr. Pelrine maybe in retrospect should have included some more information and in retrospect maybe Judge Proctor should have asked some questions or something of that kind, but I'm still satisfied when all is said and done that the good faith exception should be applied to this case. I can't believe there's any other, other way to go given the facts as I heard them here today.

And for those reasons I'm going to deny the motion. I do think that there was sufficient information available for probable cause to be bolstered. It's too bad it wasn't but we're all

now looking in hindsight so for those reasons I'm going to deny the motion and not suppress the evidence that was seized.

MR. WHITE: Thank you.

MR. WRIGHT: Thank you, Your Honor.

THE COURT: Are there any exhibits floating around? Do we have them all?

MR. WHITE: I believe we have four originals. Do you have --

THE CLERK: Yes.

(The hearing concluded at 3:47 p.m.)

You've got to decide Leon first and then you look at Eason.

That's all.

THE COURT: Well, it's always easier four years after the fact to look at things and to muse over the law and have conversations and thoughts about it, but if you go back to what was going on at the time, we had a terrible incident as far as Mr. Marquardt is concerned. I also heard Deputy Price say that Mr. Marquardt was having trouble recalling things, even the fire number of his cabin, so that was a rather heat of the moment situation. We do have a great deal of information. An investigation that was going on essentially twenty-four hours a day and information presented to Mr. Pelrine. Now, whether Mr. Pelrine didn't include all of the information or could have included more of the information for the sufficiency of the warrant we'll never know.

As Mr. White points out now in hindsight we know that the warrant wasn't valid. But I think it would be highly inappropriate to now say the police knew, they should have known and they shouldn't have carried this through. I believe that they believed at the time and under all of

the circumstances, under the very profound and horrible circumstances of this case, they exercised good faith. They were experienced officers and I find the first search to be valid.

So now what else?

MR. WHITE: I think I would agree that Ms. FitzGerald certainly is not waiving her ultimate ability to be able to advance the argument as to the fruit of the poisonous tree if the Court of Appeals would disagree with you and conclude that the first search was not valid, but I think it's a moot point at this particular juncture.

THE COURT: Well, I would certainly agree with that, that nothing is being precluded. She could have presented all kinds of evidence, but I said at the outset as far as I'm concerned anything after the first search has nothing to do with this case. If, in fact, I'm overturned, then all this would be revisited.

Now, to your point on right of self representation.

MR. WHITE: Can I just mention two points as to that issue of the fruit of the poisonous tree? I haven't argued inevitable discovery along the same lines because it's a moot point since you

found the first search to be valid, but of course the State would be advancing that and ultimately that issue would have to be determined if we ever got to that point. It's basically the opposite side of the coin of the fruit of the poisonous tree, but the only reason I mention that is to make it clear that that particular issue would be preserved if we ever revisited that point.

THE COURT: Well, preserved for both sides certainly.

Do you wish to argue the right of self representation?

MS. FITZGERALD: I believe I argued that in my brief, Your Honor. I can respond to the State's argument.

THE COURT: Well, I don't know that the State needs to argue. As far as I'm concerned all of us were concerned about Mr. Marquardt particularly at that time. I see he still remains somewhat agitated but I assume this many months later he's on some medication and is maybe showing some signs of improvement. And I sympathize with all of the lawyers. It isn't just one or two that's represented him. Mr. Marquardt had a battery of lawyers both in the Chippewa County case and

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Eau Claire County case and even today Ms. FitzGerald is trying to concentrate on everything that's going on and Mr. Marquardt is rifling through files. He's writing notes. He's practically talking out loud in her ear.

The choice was made at the time that Mr. Rusch continue to stay on the case. He did so at frankly my request because I -- as interested a client as Mr. Marquardt is, I wasn't, I was satisfied that he could not properly represent himself and that if I allowed him to do so, I would have been reversed on that ground. Mr. Marquardt is a very bright person. He has many characteristics, but I just think at this point and even more so at that point he was too emotionally involved to know how to represent himself. So I would deny that motion.

MS. FITZGERALD: Your Honor, I'd just like to clarify something for the record. While Mr. Marquardt is active over here he -- what he's writing down is totally on point. And I mean some of the things I could use, some of the things I can't. But I don't want the record to get misconstrued that he's been obstructing me. He's not.

///

THE COURT: I didn't mean to imply that and as Mr. Rusch pointed out, that sometimes he had some good ideas and sometimes he didn't, but I've never been involved in a case in any point in my career where every day a multiple page letter with multiple points -- Mr. Marquardt has very tiny writing and can get more words per page than anybody I've ever seen, and these were coming in, you know, daily with all kinds of things in it.

Right to silence. Do you want to be heard on that?

MS. FITZGERALD: I believe that I've put down what I needed.

THE COURT: All right. And, again, I don't think there was any way that Mr. Marquardt was not going to testify. Mr. Marquardt was insistent that he had information that the jury needed to hear. And though I frankly don't remember what rights were given he did have several attorneys. He did have several warnings during the course of the investigation and as far as I'm concerned if he was once again informed that he didn't have to take the stand, Mr. Marquardt would have absolutely insisted he was going to take the stand so I would

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deny that motion.

If you have anything to add, Mr. White, --

3 MR. WHITE: Can I just make two quick
4 points? The first one has to do with just for the
5 record on this issue of the right to self
6 representation. It's clear that there is a
7 difference of opinion among the three of us in
8 essence as to the appropriate standard. Ms. FitzGerald
9 advanced her position that if a person's competent
10 to stand trial, then by definition that person
11 is competent to represent himself. My position
12 is is that Klessig at 211 Wis. 2d 194, which is
13 referred to by Ms. FitzGerald, specifically
14 disagrees with that. The Supreme Court at footnote
15 seven specifically addresses that point and says
16 that states can and Wisconsin has adopted a higher
17 standard of competency as to self representation. I
18 understand her argument she set forth but I just
19 wanted to note that at least on that particular issue
20 that that's the State's position.
21 As to this issue of the claimed violation
22 of defendant's right to silence we've already
23 addressed through the testimony of Mr. Rusch this
24 issue of the Lilly Murphy reference and opening
25 the door. Even if Mr. Rusch hadn't opened the

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door as he quite plainly had as you concluded, the questions that were asked whether it would have been that question or the questions about when Mr. Marquardt told Detective Price or asked the question is this about the animal thing, I asked the question when he asked that question did he say anything about missing animals or cabin break-in. That wasn't a comment on his constitutional right against self incrimination as protected by the Fifth Amendment. The case of Anderson vs. Charles at 447 U.S. 404, a 1980 U.S. Supreme Court case pointed out that a defendant who voluntarily speaks after Miranda hasn't been induced to remain silent and then went on to point out that as to the subject matter of his statement he has not remained silent at all. So if he chooses to make statements and ask questions clarifying those statements, that's not a comment on his right to silence. That's questions about the nature of his statements. You can't at the same time waive Miranda to help yourself and then insulate yourself from having a prosecutor ask questions to clarify those things. That's obviously in dispute but the State's position is that the case of Anderson vs. Charles and numerous other cases such as U.S. vs. Whalen, W-H-A-L-E-N,

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at 940 F.2d 1027, a 7th Circuit case from 1991 stands for that proposition.

3 The final point that I would make on
4 the Miranda issue is that even if you would for
5 some reason disagree with my position on that just
6 as with these other issues of other acts evidence
7 and the right to present a defense, the Court could
8 and should invoke the doctrine of harmless error
9 to conclude that the issues were so miniscule in
10 the greater picture that the State could prove
11 that they had no likely outcome on the verdict in
12 this case.

13 THE COURT: Well, I agree with that and
14 I also agree when we get to these points we're
15 looking at everything under a microscope and we
16 have no idea the jury paid any attention to any
17 particular piece of evidence. Jurors react to the
18 whole trial and base decisions on whatever they
19 observe. So all these things, whether Mr. Marquardt
20 could remember the exact time seems really rather
21 immaterial, but anyway.

22 Right to put on a defense. I'm not sure
23 what you're talking about there, Ms. FitzGerald.

24 MS. FITZGERALD: I just want to make one
25 comment about the right to silence. It seems to me

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the jury, and I don't have the questions right in front of me, but it seems to me the jury asked questions about that evidence. I'll have to check.

Okay. In this instance Mr. Rusch wanted to ask Ms. Westaby about evidence, the fact that she on March 13th she had seen a blue truck pull out of the Marquardt property and kind of cut her off and headed down the road, pulled out really fast. Pete Heacox was off work on March 13th. One of the theories of the defense was that the rifle was taken from the Marquardt house, the twenty-two game shotgun was taken from the Marquardt house and brought to Bill's cabin on the 13th while Bill meanwhile was away.

Now, the Court would not allow Mr. Rusch to ask Ms. Westaby about the date. He was put in a position where he had to ask about the first part of March. So he couldn't connect those two things up. And there was -- for the jury I'm sure they didn't have a clue why Ms. Westaby testified because she was talking about the first part of March and then we had a very specific date on the 13th that Pete Heacox was out of work. We also had Mr. Marquardt's testimony, Bill's testimony

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that he had seen the gun at his parent's house on the 12th.

Now, at least, at least regarding the possession of the gun that was vital evidence. There was no way that they could show that Pete, that anybody was at the Marquardt house on the 13th.

THE COURT: Can you refresh my recollection?

MR. WHITE: Sure.

THE COURT: I don't recall --

MR. WHITE: Yes. And, Your Honor, I'm in the same position you are. We did this trial a year and a half ago and I have to confess I spent a considerable amount of time reviewing Ms. FitzGerald's brief and then going back and reviewing all these things and that did bring specifically into mind exactly what happened here.

What happened was Mr. Rusch initially asked the question of Alfred Marquardt about whether there had been a break-in at his residence on March 13th. I immediately objected. We got the jury out of the courtroom and we had a relatively long colloquy about the fact that first of all there was no break-in on March 13th. There was no evidence of a break-in. Secondly, what happened on March 13th was he killed his mother.

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2 I initially sought to introduce evidence of the
3 Chippewa County homicide as other acts evidence
4 here.
5 MS. FITZGERALD: Your Honor, he hasn't been
6 found guilty of --
7 THE COURT: I understand, but now that
8 Mr. White brings that up, my concern was that
9 the jury might infer that he had been convicted
10 and we were trying to keep the homicide separate
11 from this case and so the -- and I remember now
12 that there was no testimony of a break-in. That
13 was Mr. Rusch's characterization and that was
14 the day they found Mrs. Marquardt. And I was
15 concerned at the time that if we started in on
16 that avenue then these two cases were going to
17 start pouring into each other which I thought
18 would very severely damage Mr. Marquardt's right to
19 a fair trial.
20 MR. WHITE: My point at that juncture
21 was that I had conceded I wouldn't use the
22 Chippewa County homicide and there was much in
23 that case that would have benefited me. The only
24 reason I chose not to use it was I didn't want
25 an other acts issue up on appeal, but as you may
recall there is DNA evidence specifically tying

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him in to that crime. The evidence in the Chippewa County case is arguably more compelling than here. And my position in the brief I submitted on other acts evidence initially here was proof of that case necessarily proves this one. I let that issue go because I didn't want the appeal issue, but it was entirely unfair then to have the defense in this case mischaracterize what happened on March 13th as a break-in to leave the impression that hmm, there was a break-in, maybe a gun was stolen, maybe it was planted at his house and then to bar me from introducing the evidence of what really happened on March 13th.

So then by the time we got around to Ms. Westaby after that improper testimony about the break-in, my point was, Judge, you cannot allow them to bring up this issue of a claimed break-in on March 13th, then to have Ms. Westaby testify she saw some car on March 13th without opening the door to me bringing in all the Chippewa County homicide evidence that implicated him. You reached the conclusion that that was not a fair result here and, quite frankly, it would have been more harmful to the defendant than good because there would have been no way in

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2 fairness to allow in the Westaby testimony as
3 proffered and that claimed break-in testimony as
4 proffered without bringing in all the Chippewa County
5 stuff which would have opened the floodgates so
6 whether you conclude that the evidence was
7 irrelevant because of your earlier ruling, I think
8 the point is pretty clear that we had already
9 crossed that bridge before trial and they couldn't
10 just pick and choose out of the Chippewa County
11 case what they wanted.
12 MS. FITZGERALD: Your Honor, but we were
13 not at this point for Ms. Westaby -- she wasn't
14 testifying about a break-in. She was simply
15 testifying about somebody pulling out in front of
16 her.
17 THE COURT: Except that would have followed
18 the -- maybe had Mr. Rusch used a different phrase
19 than break-in we wouldn't have gotten into that
20 mess, but anyway, that was the problem. That was
21 the word that was used and that was the place
22 we were stuck with. And I did as a bit of a
23 compromise offer to let Ms. Westbee be -- Westaby
24 rather, be cross-examined, did best as I could
25 without opening the floodgates so again if that's
error, it seemed to me and still seems to me that

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3 the defense was far better off having it stand the
4 way it did rather than let Mr. White get into all
5 the other matters.
6 So, again, if that's error, then I would
7 suggest in the run of a weeklong trial that not --
8 it would be harmless error.
9 The character, trait evidence. I think
10 that spoke for itself that this man was going to
11 the mall, he was buying animals that he was going
12 to give for pets or whatever. It turned out then
13 they were later killed and I believe this was
14 important as was argued at the time that people
15 remembered him. People remembered these trips
16 because of some of the things that Mr. Marquardt did
17 or said.
18 So if you wish to be heard further or
19 Mr. White wishes to add something --
20 MS. FITZGERALD: Well, Your Honor, I would
21 like to point out that in closing argument the
22 prosecution also pointed out to the jury that
23 Mr. -- well, they -- granted, he said just because
24 he's strange you can't convict him, but he
25 certainly pointed out the fact that Mr. Marquardt's
bizarre actions in other ways and also that this
crime was bizarre. Now, it seems to me that's

just like saying somebody does bad things, therefore, he did this bad thing. I don't see, I don't see a distinction there and the statute talks about character evidence. It doesn't talk about being, you know, -- it's not necessarily just simply other wrongs.

THE COURT: They weren't presented as other wrongs. They were presented as why these people would remember these transactions because I'm sure if you went down to the local cab company and said that, asked them about various trips to Oakwood Mall, you would have by and large most of them saying I don't have any recollection of anything that occurred that day other than what notes I took, other than in this case Mr. Marquardt was saying and doing things to cause attention to himself.

Do you have anything to add to that?

MR. WHITE: I think you're correct, Your Honor. I mean my point during the trial was exactly what you say and also the point of motive here. There was no clear cut motive as to why someone would shoot a number of dogs and rabbits after spending good money on them and then stuffing them down an outhouse hole. The entirety of his

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behavior in that context in connection with those animals, with the cabdrivers, with the clerks and with other people was directly relevant proof as you say as to the credibility of their testimony and their ability to recall and also I think on the issue of motive.

THE COURT: I may have already indicated the way I feel about effective assistance of counsel. I'll let you be heard if you wish, Ms. FitzGerald, more to that point. This Court is well familiar with Brian Wright. Brian Wright appears here frequently. Brian Wright as far as I'm concerned is always very zealously and fairly and honestly representing clients. I've never heard a critical comment from my colleagues, from the DA or anybody else about Mr. Wright.

I did not know Mr. Rusch prior to this and Mr. Rusch and I did clash from time to time and I'm convinced that we did so because he was perhaps and sometimes in my judgment more zealous than I wanted him to be on certain issues. Mr. Marquardt is a very difficult client to represent and Mr. Rusch did the very best I think he could.

And, frankly, it bothered me today when

you brought in the investigator and I said are you saying that Mr. Rusch would lie and Mr. Marquardt like he's doing now is just nodding his head vigorously. Mr. Rusch did everything I think humanly possible to defend this man. And I don't know what more he could have done. And they may have had some disagreements over what should have been offered and what should have been done. Mr. Rusch is an experienced lawyer. He as far as I know has represented a number of criminal clients over a number of years. I still don't know him other than the single dealings with him in this case but I always have trouble when now after the fact and in the cool light of the day and so forth we can all look back and say somebody should have done that or somebody should have done that. Lawyers make decision and they make them sometimes under great stressful moments and if they are in error, then we drop out this, that he was ineffective. I don't think Mr. Rusch was in any way, shape or form that he was ineffective. That may not be Mr. Marquardt's view, but it certainly was my view with someone who was trying to preside over a trial the most fair way I could possibly do that.

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1 October, and the second matter to be addressed is the
2 issue of whether or not Mr. Marquardt will be allowed
3 to represent himself.
4 It appears as if Mr. Marquardt is seeking
5 leave of court to represent himself during the guilt
6 portion of this case with the provision that Mr. Rusch
7 be stand-by counsel, and I assume we would probably
8 need to address that matter first.
9 MR. RUSCH: Your Honor, if I may, I also
10 respectfully point out there is defense motions in
11 limine and defense supplemental motions in limine, and
12 my understanding and desire that the court would also
13 address those defense motions.
14 THE COURT: Okay. Well, it does seem to me
15 the first thing we have to determine is Mr.
16 Marquardt's ability to represent himself which, frankly,
17 terrifies me. I don't know why you want to do this.
18 I wouldn't do it if I were -- with my education and
19 training, I wouldn't represent myself. How old are
20 you?
21 THE DEFENDANT: Twenty-six.
22 THE COURT: And how much schooling have you
23 had?
24 THE DEFENDANT: I graduated from high
25 school, Your Honor.

THE COURT: When you went to high school, did you take any legal classes at all?

THE DEFENDANT: No, but I was -- got all As and Bs in my English classes, and I was a straight A student my senior year of high school, and I'm pretty good at English and I can say words clearly and --

THE COURT: It's more than that, though, Mr. Marquardt, than saying words clearly. Are you currently taking any medications?

THE DEFENDANT: Nope.

THE COURT: And you understood what I've been saying to you at these hearings that we've had?

THE DEFENDANT: Yup.

THE COURT: And because you've been in custody, you haven't been consuming any alcohol or anything of that kind?

THE DEFENDANT: No, sir.

THE COURT: One of the problems that I've been having with your letters that you've written to me is I'm not sure I understand when you say I want to represent myself during the first part of the trial and things of this kind.

How do you see a trial unfolding? First of all, have you ever been to a trial before?

THE DEFENDANT: No, but I think there's two

1 phases in a trial if you have a not guilty by mental
2 disease plea as one of your pleas, and I'm not even
3 sure if I want that plea anymore. I'm still deciding
4 on it, but the reason why I want to do the talking at
5 my trial is, Your Honor, I have been spending every
6 minute of every day, except when I sleep, working on
7 my defense, and because my life is on the line here
8 and because I'm sitting in jail and I have nothing
9 else to do, and no lawyer can put in as much time
10 working on this case as I have.
11 THE COURT: When you work on this case,
12 what do you work on?
13 THE DEFENDANT: I just work on the witness
14 questions, my evidence lists and how to explain
15 evidence and why this evidence proves I did not commit
16 these crimes, and I work on the witnesses' questions
17 and ask the right questions to witnesses that prove
18 that I did not commit this crime, and I know more
19 about this case and more about the truth than anybody,
20 so I would know how to handle any argument that comes
21 up at trial and ask the right questions to defend
22 myself at the trial, I think.
23 And me doing the talking, I can make sure
24 that all the stuff that proves my innocence gets said
25 because I told Rusch some very good facts that prove

1 my innocence, and he never wrote anything down, and it
2 didn't seem like he cared about the facts very much,
3 and I was going to give Rusch a 180-page argument of
4 my defense at trial to read, and Rusch said he had no
5 time to read it and did not take it, even, but I think
6 Rusch is a lot better attorney than Hertel and Wright
7 put together, but still, I think I want to defend
8 myself to make sure all the facts that prove my
9 innocence are said.
10 And I've been spending a lot of time on
11 this case, working on my questions, trying to perfect
12 them and my statements, my opening statement and final
13 statement of trial, and --
14 THE COURT: What do you understand you've
15 been charged with in this court?
16 THE DEFENDANT: I gotten charges against me
17 in Eau Claire here. I got seven cruelty to animals
18 charges. I got two felon in possession charges, and I
19 got one aggravated burglary charge.
20 THE COURT: What do you understand the
21 maximum penalties that you're facing?
22 THE DEFENDANT: I think the felon in
23 possession of a firearm charge, I think, has to be at
24 least seven years, up to seven years in prison, and
25 then I got repeater charges on them, and cruelty to

1 animal charges I think is at least up to five years in
2 prison for each one, and I got repeater charges on
3 those, and the burglary charge, I'd probably say it's
4 -- I don't know how many years in prison that is. I
5 never looked.
6 THE COURT: You understand that if I permit
7 this, I'm going to have to hold you to the same
8 standards I would hold Mr. Rusch or Mr. White? If you
9 ask objectionable questions, I'm going to have to
10 sustain those objections, and jurors sometimes get
11 kind of agitated when they see that some questions
12 aren't being asked properly.
13 THE DEFENDANT: Yes, Your Honor. I want to
14 spend a lot of time with Rusch, if Rusch would want to
15 do that with me, like to go over every single question
16 for every witness I got, and I want to go over every
17 single sentence I got of my statements with Rusch if
18 he would let me.
19 And at the trial, I would like Rusch to be
20 sitting and listening to everything that's said and
21 like -- like tap me on the shoulder if the D.A. asks
22 me -- tries to present any illegal evidence or ask
23 illegal question or something, and I want Rusch to
24 like give me statutes or something to say that he
25 can't use it, and I want Rusch to ask me, if I testify

1 on the stand, I want Rusch to ask me my questions I
2 got for me.
3 THE COURT: How many witnesses do you think
4 you're going to call?
5 THE DEFENDANT: I don't know. I know I'm
6 going to have at least 30 witnesses I'm going to talk
7 to, but I think they're pretty much the same witnesses
8 the D.A. is going to call, so I'm not sure how many
9 witnesses it's going to be 'cause the D.A. is probably
10 going to call most of the same witnesses.
11 And -- and I still want Rusch to be
12 prepared to do the talking, though, because he has to
13 ask me all my questions and in case something changes
14 my mind, but I don't think there's anything going to
15 change my mind, but I still want him to be prepared in
16 case something changes my mind but --
17 THE COURT: Mr. Rusch, do you have any
18 comments on this?
19 MR. RUSCH: No, Your Honor, I don't.
20 THE COURT: Have you looked through any of
21 the materials he's presented?
22 MR. RUSCH: I have examined -- pardon me,
23 have I looked through the materials that my client has
24 given me?
25 THE COURT: Well, the -- yes, the

1 questions, the 180-page argument and all those things,
2 have you looked at those?
3 MR. RUSCH: Your Honor, there is voluminous
4 material that my client has furnished to his prior
5 attorneys, and the material that he offered me I felt
6 was duplicitous to the material he'd already
7 furnished. It's the document, I think the court may
8 already have seen it, and so I believe that I am
9 familiar with it or at least the tenor of it.
10 THE COURT: You've had conversations with
11 him about the wisdom of him representing himself?
12 MR. RUSCH: Briefly.
13 THE COURT: Mr. White, do you have any
14 comments on this?
15 MR. WHITE: It seems to me that one of two
16 things needs to be done here, either you will conclude
17 that based on the standards set forth in Klessig, that
18 he should not be allowed to represent himself because
19 you come to the conclusion that there is a problem
20 with a disability that prevents him from meaningly --
21 or meaningfully putting forth a defense in this case.
22 THE COURT: Of course it's difficult to do
23 without knowing -- without first seeing how he
24 approaches it, is it not? I realize that the Klessig
25 case requires this determination in advance, and I

1 think we certainly have to make a determination in
2 advance.
3 I'm also mindful of the fact that Judge
4 Cameron has found him incompetent to stand trial on
5 the charges in Chippewa County. So we even have a
6 disagreement based on, I think, the same or similar
7 materials as to whether he's competent or incompetent.
8 MR. WHITE: Right, and I guess my take on
9 that is, with input from Mr. Rusch, you very well
10 could reach a conclusion that Mr. Marquardt, I believe
11 you're competent to assist counsel and sufficiently
12 competent to face criminal charges, but I do not
13 believe that you can meaningfully represent yourself
14 because of all of the information that's provided to
15 you.
16 As we discussed at earlier hearings and I
17 alluded to in my brief letter in response to this
18 issue, I believe you have now five to seven competency
19 evaluations in the record here, starting back from the
20 time when charges were initially issued to, most
21 recently, early this summer.
22 So based on all that information, you may
23 conclude that Mr. Marquardt, although competent to
24 stand trial, suffers from a significant enough mental
25 problem that he will not be able to meaningfully

1 defend himself without assistance of counsel, even
2 with stand-by counsel. So --
3 THE COURT: Well, I understand I could do
4 that. The question that I'm having is are you taking
5 a position?
6 MR. WHITE: I would like -- I would like to
7 know what Mr. Rusch's position is because he's in a
8 unique position to be able to tell you, I believe, my
9 client can competently represent himself, and that's
10 what I guess I'm waiting to hear, whether Mr. Rusch
11 has any input on that particular point.
12 THE COURT: I thought he just said he
13 didn't have a position.
14 MR. WHITE: Well, I guess he said he didn't
15 have a position, but he didn't say he doesn't have any
16 information to provide for you. I mean Mr. Rusch is
17 in a difficult position of, in essence, almost being
18 forced to take a neutral stand formally as to the
19 motion, but he may be able to provide you with some
20 information as to whether he believes Mr. Marquardt is
21 competent enough to proceed without counsel.
22 THE COURT: But it also seems to me,
23 particularly given the seriousness of the charges,
24 that it would be a rare situation where you would find
25 somebody competent to defend themselves. As I just

1 indicated, I wouldn't do it, I'm sure you wouldn't do
2 it. I don't know about you, Mr. Rusch --
3 MR. RUSCH: I wouldn't.
4 THE COURT: We all know the old adage we've
5 been hearing since we've, you know, probably before we
6 went to law school, that the person who represents
7 himself has a fool for a client, and I'm particularly
8 concerned over Mr. Marquardt's kind of microscopic
9 review of all of these things, whether he's detached
10 enough to make any sense out of the charges and to put
11 the state to its burden of proof.
12 So I would invite your comment. In fact, I
13 believe it's essential for me to know what you feel
14 from working with him.
15 MR. RUSCH: Your Honor, I need, if I may,
16 your assistance in guidance for how I'm to answer
17 because I think my first duty is to advocate my
18 client's position. The court is aware of the law.
19 It's been cited by the state in its
20 reference, the Klessig decision, which starts with the
21 premise that an individual has a constitutional right
22 to represent himself; that the issue whether it's a
23 wise decision is largely immaterial. The question is
24 does an individual meet at that time the bare bones
25 issue of competency.

1 And if I'm to answer the question, seems to
2 me that I need to, in effect, be disclosing to the
3 court privileged material, and I see a conflict
4 between candidly responding to the court's inquiry and
5 my other duties.
6 THE COURT: Yes, Mr. Marquardt?
7 THE DEFENDANT: Your Honor, every single
8 doctor I actually talked to about my competency said I
9 was competent. Dr. Marshall, Dr. Beebe, Dr. Minter,
10 another doctor in Chippewa who I didn't know his name,
11 and a Dr. Black all says I was competent.
12 Any doctor I talked to about my insanity
13 defense plea interview about what might have been
14 going on three years ago has nothing to do with my
15 competency, and plus, I think I made a timely and
16 proper request to ask for me to have a court hearing
17 to do the talking at my trial. My trial is not until
18 January, and on my request to do the talking at my
19 trial, I gave some good reasons why I want to talk at
20 my trial.
21 The court has to identify a specific
22 problem or disability which may interfere with the
23 presentation of a meaningful defense as stated in
24 Pickens versus State. You, the judge and the D.A.
25 have not seen at this hearing or at any hearing that I

1 have any problem or any disability that would
2 interfere with the presentation of a meaningful
3 defense.
4 You can look at that last competency
5 hearing I had with Wright and you can see I can
6 provide a meaningful defense and ask meaningful
7 questions, even.
8 And I just -- my life is on the line here,
9 and I just think that I just spent more time than
10 anybody on this case, and I'm more willing to fight
11 than anybody, and I mean I had Harry Hertel, and Harry
12 Hertel goes to me, I'm not going to mention anything
13 at your trial and I'm just going to do an insanity
14 plea, and I told him, Harry Hertel, well, I did not
15 commit these crimes, and Harry Hertel goes nothing,
16 didn't say anything, and I never talked to Harry
17 Hertel again.
18 Then I had Brian Wright, and Brian Wright
19 goes my insanity plea interview can't be used for my
20 competency. Then a month later he goes oh, he's using
21 this insanity plea interview to say I'm not competent,
22 and I just really -- I'm pretty intelligent, and I
23 think I can do a good job because my life's on the
24 line here, and I just want to make sure all of the
25 facts that prove my innocence are said, and there's a

1 lot of facts and there's going to be a lot of stuff to
2 be talked about if Chippewa charges -- or Chippewa's
3 evidence is to be used in this Eau Claire charges, and
4 then the trial is going to be over twice as long.
5 I'm prepared to argue this, and I got my
6 evidence list and witness list already made out, and
7 I'll have Rusch to help me, and I want to spend a lot
8 of time with Rusch, and I might even change my mind
9 and have Rusch do the talking, but I'm pretty sure I
10 want to do the talking right now. And I'm -- my
11 life's on the line here, and I just want to do the
12 talking to --
13 THE COURT: That's why it's so important,
14 your life is, in fact, on the line, and it's also of
15 critical importance that first of all, nobody wants to
16 try this case more than once, and so any decision I
17 make about this is very important because if higher
18 courts disagree with my decision, then that's the
19 remedy, we come back and we do it all again at great
20 expense.
21 Law isn't argued. Law is persuasion, and
22 you can stand and argue all you want, but that isn't
23 the point of it. Likewise, working night and day
24 isn't the point of it. There's no question that
25 that's what you've been doing. I understand that.

1 I've gotten numerous letters from you about
2 various matters. That also isn't -- isn't helpful.
3 If Mr. Rusch takes your case -- I'm sorry, do you
4 pronounce it Rusch or Rusch?
5 MR. RUSCH: Rusch, Your Honor, rhymes with
6 bush.
7 THE COURT: Pardon?
8 MR. RUSCH: It rhymes with Bush.
9 THE COURT: Rusch, all right, I'm sorry. I
10 assure you that you will have the opportunity to talk,
11 if that's in the best interests of your defense, in
12 that you do have the absolute constitutional right to
13 testify, but that's different than making an opening
14 statement, which may or may not be improper, asking
15 cross-examination questions, which may or may not be
16 proper, putting on your own case by calling witnesses,
17 and handling the rules of evidence.
18 At this juncture, I'm not persuaded that
19 you are competent enough to do this. I don't know if
20 we have -- can have another hearing or have some --
21 some different way of doing this, but I'm very
22 concerned that all we would be doing is wasting
23 everybody's time by having you start out and then
24 get into trouble.
25 First of all, Mr. White's a very excellent

1 attorney, very skilled and very knowledgeable about
2 the law, and you don't have that same vantage point
3 because you haven't studied the law as much as he has.
4 Yes?
5 THE DEFENDANT: I'm very confident about my
6 statements, and I'm pretty sure that I can prove
7 myself innocence, Your Honor. I know or I've -- I
8 just want to do this because I know I can do it, and I
9 have a very good opening statement and a good final
10 statement, and some of the defenses are -- well, since
11 Mr. White already knows some of my defenses, I mean
12 the handgun that killed my mom and killed the cabin's
13 -- neighbor's dogs was killed while I was sitting in
14 jail, and that's a big defense I'm going to argue in
15 and call in witnesses and ask questions about that,
16 and there's lots of other arguments that be very good
17 to argue on, and I think nobody can write an opening
18 statement like I can.
19 My final statement is just -- I think
20 nobody can do a better final statement than I can, and
21 I just -- I don't want -- I can't take no more an
22 answer. I really --
23 THE COURT: At this point you're going to
24 have to, Mr. Marquardt. I'm just not satisfied that
25 this is anything but -- it would be a dreadful

1 mistake, even the fact that you've got a closing
2 statement prepared when the evidence isn't in. A
3 closing statement is something you do after the
4 evidence is in and after we know what was -- what the
5 jury has heard and what the jury hasn't heard.
6 THE DEFENDANT: Yeah. My final statement's
7 just what I know of already, and I know quite a bit,
8 and that's why I want to read over all the police
9 reports and stuff, and I always add onto it during the
10 trial, I'll be adding all kinds of new stuff to it.
11 What do I have to do to prove that I can do
12 the talking because under law, I should -- you have to
13 find a reason that -- that would say that I cannot
14 provide a meaningful defense under law, and it's -- my
15 life's on the line here. I don't think --
16 THE COURT: I don't believe you have the
17 education, I don't think you have the training. I
18 believe you -- you've looked at this case very
19 microscopically rather than from a broad picture.
20 I think the fact that you rejected the
21 advice that you've gotten from two very competent
22 criminal trial lawyers, the fact that you're putting
23 Mr. Rusch on the spot with by -- makes me very, very
24 concerned that you are not competent enough to do this
25 and also, of course, the absolute seriousness of the

1 charges and the complexity of the case.
2 This other acts evidence is very complex,
3 so at least at this point I'm -- that's my ruling.
4 That ruling may change if we -- if other information
5 comes into play and we know exactly where we are, but
6 I'm ruling for the moment that you must rely on your
7 attorney to help you, to handle your defense and to do
8 what's necessary to protect your interests.
9 And I'm sure that he will go through
10 everything you've prepared, and if he believes that
11 it's of benefit to your defense, then he will make use
12 of it. I'm confident that that's true, including your
13 opening statement you made. He may make your opening
14 statement in total.
15 Let's get to the other acts portion.
16 MR. WHITE: If we could, just one final
17 point, Your Honor. I think the, to make the record
18 clear, the Pickens case and then subsequently Klessig
19 does require the court to identify the specific
20 problem with the disability from which it concludes
21 that a defendant cannot meaningfully defend himself.
22 I assume your conclusion in this case is
23 that based on all of the opinions in this case,
24 including the first one from Dr. Marshall, that there
25 is some evidence of possible psychosis.

1 There was a disagreement as to whether he
2 was psychotic or not, whether he's paranoid, but
3 there's certainly evidence to support some conclusions
4 that there's a distorted thought process, and whether
5 you deal with Dr. Minter saying he's competent and Dr.
6 Marshall saying he's competent or the people who say
7 he's incompetent, that's pretty much true across the
8 board.
9 So I assume based on those sorts of things,
10 you're concluding that he cannot meaningfully defend
11 himself?
12 THE COURT: Thank you. That would be at
13 least part of the ruling because of the fact that that
14 has been -- his mental status has been put into
15 question by a number of people, but I was more
16 focusing on the recent, and that is watching him here
17 in court and understanding what I consider to be a
18 very complex case. It isn't just some simple
19 shoplifting, but yes, I would also add that -- and
20 incorporate the reports that have been received.
21 THE DEFENDANT: That's the reason why I
22 want to do it because it's a complex case, Your Honor.
23 Sorry for speaking out, but that's -- 'cause it's
24 impossible to do it by memory.
25 THE COURT: Well, I've made my decision on

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1 this at this point, Mr. Marquardt, so you're going to
2 have to live with it for at least today and at least
3 talk it over with your lawyer, and if you want to take
4 a different approach or have another hearing on the
5 matter, I'm willing to do that.
6 THE DEFENDANT: Thank you, Your Honor.
7 THE COURT: Now, where are we on the --
8 MR. WHITE: I think the remaining points
9 are the issues raised by Mr. Rusch and the issue of
10 the other acts evidence in the form of the Chippewa
11 County case.
12 I'll let Mr. Rusch explain to the court
13 exactly what he would like to do as far as the other
14 issues, what issues he still thinks are in need of
15 resolution.
16 MR. RUSCH: Well, Your Honor, perhaps we
17 could just take up the state's motion on other acts.
18 I think that's the perhaps -- perhaps the single most
19 important and complex.
20 THE COURT: Sure.
21 MR. RUSCH: Your Honor, if I may, I would
22 like to state this in opposition. The court has
23 already alluded to the fact that the other acts
24 evidence is the alleged homicide in Chippewa County.
25 I have had marked as Exhibit 1 a copy of

PLT/DEF EX# 2
DATE: 4-26-02
CASE: 00CF137

RLP

STATE OF WISCONSIN)
) SS.
COUNTY OF EAU CLAIRE)

APPLICATION FOR SEARCH WARRANT AND SUPPORTING AFFIDAVIT

John Vogler, being first duly sworn on oath, hereby makes application to this court for a warrant to search the premises described as: a cabin, storage building, pumphouse, and out-house located at E27505 County Highway M, in the Town of Fairchild, County of Eau Claire, and State of Wisconsin, more particularly described as all single story wood-frame, brown in color buildings. The requested search is for the following described property and things, to-wit:

1. Any and all ammunition and firearms.
2. Any and all clothing containing hair, blood, fibers or other things linking Mary J. Marquardt, deceased, to such clothing.
3. Any hair, blood, fibers, or other things linking Mary J. Marquardt, deceased, to the premises at E27505 County Highway M.
4. Any knives.
5. Any shoes.
6. Any documents, periodicals, receipts, bills or other things having date or other indication to show the presence of any person in the premises at E27505 County Highway M on or after March 13, 2000.

Affiant knows the contents of this application and supporting affidavit, and the statements herein are true of his own knowledge, save as to such as are herein stated on information and belief, and as to those, he believes them to be true.

This affiant applies for issuance of a search warrant upon the following grounds:

1. The property above-described was used as means of committing a crime.
2. The property above-described constitutes evidence which tends to show a crime has been committed, or tends to show that a particular person has committed a crime.

The facts tending to establish the foregoing grounds for issuance of a search warrant are as follows:

This affidavit is based upon information provided by Fellow Officers Barnier of the Eau Claire County Sheriff's Department and Price of the Chippewa County Sheriff's Department.

Affiant reports that on March 15, 2000, he received a copy of an affidavit for search warrant sworn and executed in Chippewa County on March 13, 2000, with respect to the suspected homicide of Mary J. Marquardt. A copy of said affidavit and search warrant is attached and hereby incorporated by reference.

Investigator Price reports that after finding the body of Mary J. Marquardt, he spoke with her husband, Alfred E. Marquardt. Mr. Marquardt informed him that he and Mary have a son, Bill Marquardt, who, since the location of Ms. Marquardt's body had not been seen or heard from.

Alfred Marquardt further informed Investigator Price that Bill Marquardt owned with Alfred Marquardt a cabin in which Bill resided at E27505 County Highway M, Town of Fairchild, County of Eau Claire, Wisconsin.

Investigator Price further reports that in examining the body of Mary J. Marquardt and the scene where she was found, it appeared as though among the wounds incurred by her was a knife wound. Also at the scene, officers were able to locate a number of footprints that may be suitable for comparison with the shoes that made them.

Investigator Barnier reports that in checking Eau Claire County tax rolls, he learned that a cabin, storage building, pumphouse, and out-house located at E27505 County Highway M, Town of Fairchild, Eau Claire County, are owned by Alfred and Bill Marquardt.

WHEREFORE, Affiant requests a search warrant be issued, commanding John Vogler and other law enforcement personnel to search the above-described premises for the described property and things and to seize said property and things and keep said property and things in custody until the same can be dealt with according to law.

Affiant

Subscribed and sworn to before me a.m.
this 15 day of March, 2000. 11:59 (time)

BY THE COURT:

STATE OF WISCONSIN
COUNTY OF EAU CLAIRE
CIRCUIT COURT

SEARCH WARRANT

WHEREAS, John Vogler, has this said day on oath, made application to the said Court applying for issuance of a search warrant to search the premises described as: a cabin, storage building, pumphouse, and out-house located at E27505 County Highway M, in the Town of Fairchild, County of Eau Claire, and State of Wisconsin, more particularly described as all single story wood-frame, brown in color buildings. The requested search is for the following described property and things, to-wit:

1. Any and all ammunition and firearms.
2. Any and all clothing containing hair, blood, fibers or other things linking Mary J. Marquardt, deceased, to such clothing.
3. Any hair, blood, fibers, or other things linking Mary J. Marquardt, deceased, to the premises at E27505 County Highway M.
4. Any knives.
5. Any shoes.
6. Any documents, periodicals, receipts, bills or other things having date or other indication to show the presence of any person in the premises at E27505 County Highway M on or after March 13, 2000.

WHEREAS, the application and supporting affidavit of John Vogler, was duly presented and read by the Court, and being fully advised in the premises,

NOW, THEREFORE, the Court finds that probable cause exists for the issuance of a search warrant upon the following grounds:

1. The property above-described was used as means of committing a crime.
2. The property above-described constitutes evidence which tends to show a crime has been committed, or tends to show that a particular person has committed a crime.

The Court further finds that probable cause exists to believe that the above-described property and things are at the above-described premises.

NOW, THEREFORE, YOU JOHN VOGLER AND OTHER LAW ENFORCEMENT PERSONNEL ARE HEREBY COMMANDED TO SEARCH THE ABOVE-DESCRIBED PREMISES FOR THE ABOVE-DESCRIBED PROPERTY AND THINGS, AND TO SEIZE SAID PROPERTY AND THINGS, AND RETURN THIS WARRANT WITHIN 48 HOURS BEFORE THE SAID COURT TO BE DEALT WITH ACCORDING TO LAW.

Dated this 15th day of March, 2000.

BY THE COURT:

STATE OF WISCONSIN
CIRCUIT COURT
COUNTY OF EAU CLAIRE

RECEIPT, INVENTORY AND RETURN

I,_____, received the attached search warrant issued by the Honorable_____, on _____, 19__, and have executed it as follows:

Pursuant to said warrant, on _____, 19__, at _____o'clock __M., I searched the (premises)(motor vehicle) described in the warrant, and left a true and correct copy of said warrant (with) (in) (at):

_____

I took into custody property named in said warrant and listed below:

_____

_____

_____

_____

_____

_____

_____

_____

_____

_____

_____

_____

(None of the items set forth in the search warrant were found).

I shall (retain) or (deliver) custody of said property as directed by the Court order.

_____
Affiant

State of Wisconsin **Circuit Court** **Chippewa County**

State of Wisconsin

Chippewa County

AFFIDAVIT FOR SEARCH WARRANT

Inv. Dick Price being duly sworn on oath, states as follows:

That the affiant and has reason to believe that on the 13th day of March, 2000, in Chippewa County, in and upon certain premises, in the Township of Eagle Point in said County, occupied by Alfred E. Marquardt, DOB 07/30/1946 and more particularly described as follows:

A single family dwelling, white in color, with a two car attached garage, and three vehicles on the property, two located in the garage and one in the drive way, two out buildings one being a metal pole building, the other being a wooden frame unattached garage, the residence being located at 11766 State Hwy 178, Chippewa Falls.

There are now located and concealed certain things, to-wit:

Shell casings, fire arms, finger prints, hairs, fibers, gun powder residue, and blood stains and samples.

Which things may constitute evidence of a crime, to-wit: Intentional homicide, contrary to Section 940.01 of the Wisconsin Statutes.

That the facts tending to establish the grounds for the issuance of a search warrant are as follows:

Inv. Price reports that on March 13, 2000, Chippewa County Sheriff's Dispatch received a 911 call from 11766 State Hwy 178, Chippewa Falls, Township of Eagle Point. The caller identified himself as Alfred E. Marquardt, DOB 07/30/1946. Marquardt reported that his wife was apparently dead at the residence.

Price continued that he responded to the Marquardt home and met with Marquardt. Marquardt relayed that he had left home at about 7 AM that morning and tried to call home about 11:50. The phone was busy and remained so the remainder of the day. Marquardt stated that he left work early and returned home because of the busy phone and upon arrival, found his wife, Mary J. Marquardt covered with a blanket in the garage. She was cold and unresponsive and appeared to have a head wound.

Price reports that a shell casing, tentatively identified as 9 mm, was observed on the premises.

State of Wisconsin **Circuit Court** **Chippewa County**

WHEREFORE, said affiant prays for a search warrant to be issued to SEARCH said premises FOR said items and bring the same, if found, and the person in whose possession the same is found, before said Court to be dealt with according to law.

Officer

Subscribed in sworn to me this 13th day of March, 2000.

Title: District Attorney

My commission is permanent/ expires _____.

State of Wisconsin **Circuit Court** **Chippewa County**

State of Wisconsin

Chippewa County

SEARCH WARRANT

The State of Wisconsin, to the sheriff or any constable or any peace officer of Chippewa County:

Whereas, Inv. Dick Price has this date complained in writing and under oath to said Court, that on the 13th day of March, 2000 in Chippewa County and upon certain premises and Chippewa County, Wisconsin, more particularly described as follows:

A single family dwelling, white in color, with a two car attached garage, and three vehicles on the property, two located in the garage and one in the drive way, the residence being located at 11766 State Hwy 178, Chippewa Falls.

There are now located and concealed certain things, to-wit:

Shell casings, fire arms, finger prints, hairs, fibers, gun powder residue, and blood stains and samples.

Which things may constitute evidence of a crime, to-wit: Intentional Homicide, contrary to Section 940.01 of the Wisconsin Statutes.

The Court having read in the AFFIDAVIT FOR SEARCH WARRANT, and attachments if any, and the AFFIDAVIT FOR SEARCH WARRANT does in fact establish probable cause.

Now, therefore in the name of the State of Wisconsin, you are commanded forthwith to search said premises for said things, and if the same or any portion thereof are found, to bring the same and said persons in possession, before this court to be dealt with according to law. Additionally, you are commanded to return of this WARRANT within 48 hours to this court, also to be dealt with according to law.

Dated this 13th day of MARCH 2000, time 8:57 ~~am~~/pm.

BY THE COURT,

Thomas Sazama

Chippewa County Circuit Court Judge

This warrant executed at 1050 am/pm, 13 day of March, 2000.

State of Wisconsin **Circuit Court** **Chippewa County**

State of Wisconsin

Chippewa County

RETURN OF OFFICER

I hereby certify that in pursuit of the attached WARRANT, I searched for the said things therein described, at the place therein mentioned, and found the following things, to-wit:
[Describe any items discovered and attach and note supplemental pages if necessary]

Filed this _____ day of _____,2000, time _____ am/pm.

_____
Officer

STATE OF WISCONSIN)
) SS.
COUNTY OF EAU Claire)

APPLICATION FOR ORDER SEALING SEARCH WARRANT, SUPPORTING AFFIDAVIT/ORDER AND RELATED DOCUMENTS

John Vogler, being first duly sworn on oath, hereby makes application to this court for an order authorizing the sealing of the attached application for search warrant, search warrant, supporting affidavit and warrant return, and this application and order, until further order of the court.

Affiant states that he is an investigator employed by the Eau Claire Sheriff's Department. In that capacity, affiant assisted officers of the Chippewa County Sheriff's Department, and State of Wisconsin Division of Criminal Investigation in efforts to investigate the death of Mary J. Marquardt on or about March 13, 2000, in Chippewa County, Wisconsin. As part of those investigative efforts, a search warrant was executed in Chippewa county on March 13, 2000, as well as the attached application for search warrant for premises located in Eau Claire county, Wisconsin. Information contained in the affidavit in support of both search warrants, includes information not disclosed to the public. Affiant, therefore, requests that an order sealing the attached search warrant, application, affidavit, and return be issued in order to prevent premature disclosure which would jeopardize the further investigation of the homicide investigation described in said documents. Such an order is necessary to maintain the secrecy recognized in Section 968.21 Wis.Stats.:

> "A search warrant shall be issued with all practicable secrecy, and the complainant, affidavit or testimony upon which it is based shall not be filed with the clerk or made public in any way until the search is executed."

Consequently, it is requested that the Court execute the attached order sealing this application for search warrant, search warrant, and related documents.

John M Vogler
Affiant

Subscribed and sworn to before me
this 15 day of March, 2000. 11:59 a.m (time)

BY THE COURT:

Bruce Bratton

ORDER

Based upon the application of John Vogler, it is hereby ordered that the search warrant, return, and all supporting documents with respect to a warrant issued by this court, for premises in the City and County of Eau Claire, Wisconsin, is hereby ordered sealed and the contents of said search warrant and supporting documents shall not be disclosed by any person until further order of the court.

Dated this 15th day of March, 2000.

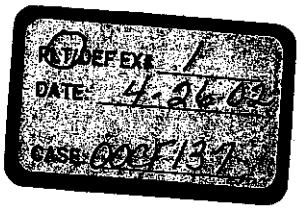
BY THE COURT:

Circuit Court
Eau Claire County

CHIPPEWA COUNTY SHERIFF'S DEPARTMENT
SUPPLEMENTARY INVESTIGATION REPORT

COMPLAINT #: **200003538**

NATURE OF COMPLAINT: **#1, HOMICIDE**



DEPUTY: **RICHARD P. PRICE, #2597**

OTHER PERSONS MENTIONED/INVOLVED:

ALFRED E. MARQUARDT, M/W DOB 07/30/1946
11766 STH 178
CHIPPEWA FALLS, WI 54729

ON 03/13/2000 AT ABOUT 1710 HOURS, I MADE CONTACT WITH A PERSON WHO IDENTIFIED HIMSELF TO ME AS ALFRED E. MARQUARDT, M/W, DOB 07/30/1946. I INTRODUCED MYSELF TO MR. MARQUARDT AND ASKED IF HE WOULD BE WILLING TO SPEAK WITH ME REGARDING WHAT HAD HAPPENED AT THE RESIDENCE. ALFRED STATED THAT HE WOULD AND WE PROCEEDED TO MY UNMARKED PATROL VEHICLE PARKED ALONG STATE HWY 178, NEAR HIS RESIDENCE. ONCE INSIDE OF MY PATROL VEHICLE, I AGAIN INTRODUCED MYSELF TO MR. MARQUARDT, INFORMING HIM THAT I WAS A DEPUTY SHERIFF WITH THE CHIPPEWA COUNTY SHERIFF'S DEPARTMENT. ALFRED STATED THAT HE UNDERSTOOD. I ASKED ALFRED IF HE OWNED THE RESIDENCE LOCATED AT THIS ADDRESS OF 11766 STATE HWY 178, CHIPPEWA FALLS. HE STATED THAT HE AND HIS WIFE MARY JANE OWNED THE RESIDENCE. I ASKED ALFRED IF HE KNEW THE CONDITION OF THE VICTIM AND HE STATED THAT HIS WIFE WAS DEAD. AT ABOUT THAT TIME, I READ ALFRED A CHIPPEWA COUNTY SHERIFF'S DEPARTMENT ADVISE OF RIGHTS FORM. I MADE A CHECK NEAR EACH OF THE FIVE PARAGRAPHS AFTER RECEIVING A VERBAL ACKNOWLEDGEMENT THAT ALFRED UNDERSTOOD THE CONTENT OF EACH PARAGRAPH. I READ THE RIGHTS WAIVER PARAGRAPH TO ALFRED AND ASKED IF HE WOULD CARE TO SPEAK WITH ME AT THIS TIME AND HE STATED THAT HE WOULD. BEFORE MY INTERVIEW WITH ALFRED, I ASKED THAT HE INITIAL EACH OF THE FIVE PARAGRAPHS AND SIGN HIS NAME TO INDICATE THAT HE UNDERSTOOD THE CONTENT OF THIS FORM. ON 03/13/2000 AT 1725 HOURS, ALFRED COMPLETED THAT PORTION OF THIS FORM.

AFTER COMPLETING THIS FORM, I ASKED ALFRED FOR PERSONAL INFORMATION REGARDING CORRECT SPELLING OF HIS NAME, DATE OF BIRTH AND ADDRESS. ALFRED PROVIDED THIS INFORMATION ALONG WITH INFORMATION REGARDING HIS WIFE MARY JANE. I ASKED ALFRED WHO LIVED AT THE RESIDENCE WITH HE AND HIS WIFE AND HE STATED THAT THEY LIVED THERE ALONE. I ASKED ALFRED IF HE HAD ANY CHILDREN AND HE STATED THAT HE DID. ALFED STATED THAT HE HAD THREE CHILDREN WITH HIS WIFE MARY JANE. THE CHILDREN ARE: DAUGHTER SHEILA, ABOUT 35 YEARS OLD, MARRIED AND LIVES IN ELK MOUND; A SON GENE, ABOUT 29 YEARS OLD, MARRIED AND LIVES IN CHETEK; AND A YOUNGEST SON BILL, WHO IS NOT MARRIED AND LIVES IN AUGUSTA.

WHEN I ASKED ALFRED IN DETAIL WHAT HE HAD DONE TODAY STARTING WITH THE TIME HE GOT OUT OF BED, ALFRED STATED THAT HE AWOKE AND GOT OUT OF BED AT ABOUT 0630 HOURS ON THIS DATE. HE DRESSED AND DID HIS MORNING CLEAN UP AND WENT TO THE KITCHEN FOR BREAKFAST. ALFRED STATED THAT HIS WIFE MARY JANE WAS UP AT THAT

TIME AND IN THE KITCHEN DRESSED. HE HAD A BREAKFAST THAT CONSISTED OF A BOWL OF CEREAL, TOAST WITH JELLY AND A CUP OF COFFEE. ALFRED STATED THAT HIS WIFE MARY JANE JUST HAD A CUP OF COFFEE. ALFRED STATED THAT AFTER BREAKFAST, HE WALKED DOWNSTAIRS AND OUT TO THE DRIVEWAY. HE STARTED THE COMPANY TRUCK, WHICH HE KEEPS AT HOME, AND NOTICED THAT HIS WIFE HAD GONE DOWN THE DRIVEWAY TOWARDS STATE HWY 178 TO RECOVER THE GARBAGE CAN AND RECYCLE BIN. ALFRED STATED THAT HE WAVED AT HIS WIFE ON HIS WAY DOWN THE DRIVEWAY AND LEFT THE HOUSE AT ABOUT 0710 HOURS.

ALFRED TOLD ME THAT HE WAS EMPLOYED AS A SUPERVISER AT THE CENEX PIPELINE TERMINAL LOCATED AT 3827 STATE HWY 53 IN THE TOWNSHIP OF HALLIE. AFTER LEAVING HIS RESIDENCE, HE PROCEEDED DIRECTLY TO THE TERMINAL BY DRIVING SOUTH ON STATE HWY 178 TO STATE STREET IN CHIPPEWA AND DOWN THE NSP HILL. FROM THERE, ALFRED DROVE SOUTH ON STATE HWY 124 TO PETERSON ROAD WHERE THE TERMINAL IS LOCATED. ALFRED THOUGHT HE ARRIVED AT WORK BETWEEN 7:15 AND 7:20 AM. ALFRED STATED THAT THERE ARE ONLY TWO PEOPLE WHO WORK AT THE CENEX TERMINAL INCLUDING HIMSELF AS SUPERVISER AND ONE CO-WORKER, JOE TILLER. JOE TILLER WAS LATER IDENTIFIED AS JOSEPH M. TILLER, M/W, DOB 07/04/1973. ALFRED STATED THAT HE WAS NOT SURE OF THE EXACT TIME THAT JOE HAD ARRIVED AT WORK.

ALFRED STATED THAT HE TOOK A CAN OF SOUP TO WORK WITH HIM TO EAT AT LUNCH. ALFRED BROKE FOR LUNCH AT ABOUT 1150 HOURS AND WENT TO THE BREAK ROOM AT THE TERMINAL. WHILE HEATING HIS SOUP, HE ATTEMPTED TO TELEPHONE HIS WIFE AT HOME. ALFRED STATED THAT HE DOES THIS NEARLY EVERY DAY. ALFRED STATED THAT WHEN HE ATTEMPTED TO CALL HOME AT 11:50 AM, THE TELEPHONE LINE WAS BUSY. ALFRED ATE LUNCH AND AGAIN ATTEMPTED TO CALL HIS WIFE AT ABOUT 12:30. THE LINE WAS STILL BUSY AND ALFRED THEN RETURNED TO WORK. ALFRED MADE A THIRD ATTEMPT TO TELEPHONE HIS WIFE AT ABOUT 2:00 PM AND THE PHONE WAS STILL BUSY.

ALFRED STATED THAT HE WAS CONCERNED THAT HE WAS NOT ABLE TO REACH HIS WIFE AND SUSPECTED THAT SHE MAY HAVE LEFT THE PHONE OFF THE HOOK. ALFRED STATED THAT HE LEFT WORK AT ABOUT 4:05 PM AND MADE ONLY ONE STOP ON HIS WAY HOME. ALFRED STATED THAT HE STOPPED AT THE CHIPPEWA POST OFFICE TO DROP OFF BILLING INFORMATION FOR CENEX. ALFRED PROCEEDED HOME IN HIS COMPANY VEHICLE AND ARRIVED THERE AT ABOUT 4:15 TO 4:20 PM. ALFRED PARKED THE TRUCK IN THE DRIVEWAY ON THE EAST SIDE OF THE RESIDENCE AND WALKED AROUND THE GARAGE TO THE WEST SIDE SERVICE DOOR. ALFRED STATED THAT HE DOES THAT IN THE EVENT THAT HIS DOG IS OUTSIDE SO HE CAN BRING THE DOG IN WITH HIM. ALFRED STATED THAT HE ENTERED THE GARAGE WITH HIS KEY THROUGH THE WEST SERVICE DOOR AND TURNED ON THE GARAGE INTERIOR LIGHT. AT THAT TIME, HE SAW A MAROON OR BURGANDY COLORED BLANKET LAYING ON THE FLOOR NEAR THE SERVICE DOOR THAT CONNECTED THE GARAGE TO THE RESIDENCE. HE THOUGHT THE BLANKET'S PRESENCE ON THE GARAGE FLOOR WAS UNUSUAL AND WALKED TO THE BLANKET. ON PICKING UP ONE CORNER OF THE BLANKET, HE SAW A FOOT AND SHOE. ALFRED STATED THAT HE QUICKLY WENT TO THE OTHER END OF THE BLANKET AND PICKED UP THE CORNER WHERE HE SAW HIS WIFE'S FACE. ALFRED STATED THAT HE PICKED UP HER ARM AND HAND AND NOTED THAT IT WAS COLD AND THAT SHE WAS UNRESPONSIVE. ALFRED STATED THAT THERE WAS A LARGE AMOUNT OF BLOOD ON THE FLOOR NEAR HIS WIFE'S HEAD. HE SUSPECTED THAT SHE MAY HAVE SLIPPED ON THE FLOOR, FALLEN AND HIT HER HEAD. ALFRED SUSPECTED SHE MAY HAVE BEEN DEAD AS SHE WAS COLD TO THE TOUCH AND UNRESPONSIVE.

ALFRED STATED THAT HE ENTERED THE RESIDENCE THROUGH THE SERVICE DOOR AND PROCEEDED UP STAIRS TO THE KITCHEN AREA. ON THE TABLE IN THE KITCHEN WAS THE WHITE CORDLESS PHONE WHICH WAS STILL POWERED ON. ALFRED PICKED UP THIS PHONE

AND CLEARED IT, THEN DIALED 911 FOR ASSISTANCE. ON REACHING THE SHERIFF'S DEPARTMENT, HE REQUESTED AN AMBULANCE FOR HIS WIFE. WHILE SPEAKING TO THE SHERIFF'S DEPARTMENT DISPATCHER, HE WALKED FROM THE KITCHEN INTO THE MASTER BEDROOM. IN THE BEDROOM, ALFRED STATED THAT HE NOTICED THAT HIS READING GLASSED WERE ON THE FLOOR AND THOUGHT THAT WAS UNUSUAL. ALFRED STATED THE LAST TIME HE HAD SEEN THOSE GLASSES, THEY WERE ON TOP OF HIS CHEST OF DRAWERS NEAR THE BED.

I ASKED ALFRED WHAT HAPPENED NEXT AND HE REPLIED THAT AT THIS TIME HE RECOGNIZED THAT THE BLANKET ON THE FLOOR COVERING HIS WIFE WAS THE BLANKET FROM THE MASTER BED. WHILE STILL SPEAKING WITH THE DISPATCHER, ALFRED WENT BACK TO THE BASEMENT AREA. ALFRED STATED THAT THE FAMILY DOG, A MEDIUM SIZE WHITE PURE BRED, HAD MESSED THE FLOOR. ALFRED TOOK THE DOG OUTSIDE AND TIED HIM ON LEASH NEAR THE PATIO. ALFRED THEN RETURNED TO THE BASEMENT AREA WHERE HE CLEANED UP THE DOG MESS, THROWING THE DOG FECES OUTSIDE NEAR THE PATIO AREA. HE WIPED UP THE REMAINING MESS, THROWING THE PAPER TOWELING/TOILET PAPER INTO THE DOWNSTAIRS TOILET. ALFRED THEN QUICKLY RINSED HIS HAND AND RETURNED TO THE GARAGE AREA WHERE HIS WIFE WAS LAYING. I ASKED ALFRED WHY HE CLEANED UP THE DOG MESS AT THAT TIME AND HE STATED THAT HE WOULD HAVE BEEN EMBARRASSED IF SOMEONE SAW THE MESS.

AT ABOUT THIS TIME, THE AMBULANCE ARRIVED AND THE SHERIFF'S DEPARTMENT DISPATCHER TOLD HIM THAT HE COULD HANG UP THE PHONE. ALFRED STATED THAT HE PUSHED THE BUTTON AND PLACED THE PHONE ON TOP OF THE ROOF OF THE BLACK LINCOLN NEAR HIS WIFE'S BODY. HE OPENED THE EAST SIDE SERVICE DOOR AND LET THE AMBULANCE PEOPLE IN. ALFRED STATED THAT THEY WERE ONLY INSIDE A FEW MOMENTS AND THEN THEY WENT BACK OUT TO CALL THE SHERIFF'S DEPARTMENT. ALFRED STATED THAT AT THAT TIME, HE WENT OUTSIDE WITH THE AMBULANCE PEOPLE. A SHORT TIME LATER, A UNIFORMED DEPUTY ARRIVED.

I ASKED ALFRED IF HE HAD ANY OTHER PETS ASIDE FROM THE DOG THAT HAD MESSED THE FLOOR. ALFRED STATED THAT HE HAS CATS WHICH HE THINKS MAY HAVE GOTTEN OUT OF THE RESIDENCE WHEN HE HAD THE GARAGE DOOR OPEN. ALFRED RECALLS THAT WHEN HE LEFT FOR WORK, THE ANIMALS WERE IN THE HOUSE. I ASKED ALFRED IF ANYTHING APPEARED DISTURBED OR OUT OF PLACE AND HE SAID THAT OTHER THAN THE BLANKET AND THE READING GLASSES HE DID NOT RECALL ANYTHING IN THE HOUSE. I ASKED ALFRED IF HE HAD NOTICED ANYTHING DISTURBED OR OUT OF PLACE IN THE GARAGE. ALFRED STATED THAT WHEN HE DISCOVERED THAT THE PERSON UNDER THE BLANKET WAS HIS WIFE, HE RECALLED THAT SHE WAS LEANING PARTLY AGAINST A WOODEN STEP LADDER. THE STEP LADDER WAS TIPPED AT AN ANGLE AND ALFRED WAS CONCERNED THAT THE LADDER WOULD FALL. ALFRED MOVED THE LADDER FROM ITS POSITION TO THE WALL NEAR THE WEST SIDE SERVICE DOOR.

I ASKED ALFRED IF THEY WERE EXPECTING ANY GUESTS OR HAD GUESTS RECENTLY AND HE STATED THAT THEY WERE NOT EXPECTING ANYONE TODAY. OTHER THAN FAMILY MEMBERS, ALFRED STATED THAT NO ONE HAD BEEN THROUGH THE HOUSE IN THE RECENT PAST. I ASKED ALFRED IF THE SERVICE DOORS OF THE GARAGE AND THE RESIDENCE ARE CUSTOMARILY LOCKED WHEN HIS WIFE WAS HOME ALONE AND HE REPLIED THAT THEY ARE. ALFRED STATED THAT THE DOORS ARE KEPT LOCKED WHETHER THEY ARE IN THE HOUSE OR GONE. I ASKED ALFRED IF THE SERVICE DOOR TO THE PATIO WAS OPEN WHEN HE ARRIVED HOME AND HE STATED THAT HE BELIEVED IT HAD BEEN LOCKED WHEN HE PLACED THE DOG OUTSIDE. I ASKED ALFRED IF HE WAS SURE THAT THE WEST SIDE SERVICE DOOR WAS LOCKED WHEN HE ARRIVED AND HE STATED THAT HE IS NOT 100% SURE AS HE ALWAYS ASSUMES THE DOOR IS LOCKED, HE INSERTS THE KEY AND WORKS THE LOCK USING THE

KEY. I ASKED IF THE SERVICE DOOR BETWEEN THE GARAGE AND RESIDENCE WAS LOCKED WHEN HE WENT IN AND HE STATED THAT AGAIN HE WAS NOT SURE AS HE INSERTS THE KEY AND WORKS THE LOCK USING THE KEY.

I ASKED ALFRED IF HE COULD DESCRIBE WHAT HE SAW ON ENTERING THE HOUSE. ALFRED STATED THAT ON ENTERING THE RESIDENCE, HE COULD TELL BY THE SMELL THAT THE DOG HAD MESSED IN THE HOUSE. AS HE ENTERED THE HOUSE, HE NOTICED NOTHING OUT OF PLACE. HE PROCEEDED UPSTAIRS AND THOUGHT IT WAS UNUSUAL THAT THE TELEPHONE WAS ON THE TABLE, POWERED ON, RATHER THAN BEING ON THE TELEPHONE CRADLE ON THE KITCHEN WALL. ON ENTERING HIS BEDROOM, HE FIRST NOTICED THAT HIS GLASSES WERE OUT OF PLACE BY BEING ON THE FLOOR. ALFRED STATED THAT THE BED WAS NOT MADE AND APPEARED TO BE IN THE SAME CONDITION IT HAD BEEN IN WHEN HE AND HIS WIFE GOT OUT OF IT. THE CEREAL BOWL AND COFFEE CUPS THAT HE AND HIS WIFE USED WHERE STILL ON THE KITCHEN TABLE ALONG WITH THE SAUCER THAT HE USED FOR HIS TOAST. I ASKED IF HE COULD RECALL WHETHER THE LIGHTS IN THE RESIDENCE WERE OFF OR ON AND HE REPLIED THAT HE DID NOT KNOW FOR SURE, BUT HE THOUGHT THEY WERE OFF. I ASKED IF THE RADIO OR TV WERE ON AND HE STATED THAT THEY WERE OFF. I ASKED IF HE COULD RECALL ANYTHING THAT WAS THERE WHEN HE LEFT AND MAY HAVE BEEN REMOVED SINCE HE LEFT AND HE STATED THAT EVERYTHING LOOKS RIGHT. HE DOESN'T THINK THAT ANYTHING WAS MISSING.

I ASKED ALFRED IF HE KNEW WHAT TIME FRAME HIS WIFE MADE THE BED AND CLEARED THE KITCHEN DISHES AWAY AND HE STATED HE WAS NOT SURE. I ASKED ALFRED IF HE KNEW WHETHER HIS WIFE HAD EATEN BREAKFAST. ALFRED REPLIED THAT WHILE HE ATE BREAKFAST, HIS WIFE DRANK A CUP OF COFFEE. AND THAT HE DID NOT SEE HER EAT ANYTHING FOR BREAKFAST.

I ASKED ALFRED WHEN HE AND HIS WIFE LAST HAD CONTACT WITH THEIR CHILDREN. ALFRED REPLIED THAT HE LAST SAW HIS DAUGHTER SHEILA, HER HUSBAND AND FAMILY ON SATURDAY NIGHT THE 11TH FOR SUPPER. I ASKED ALFRED IF IT WAS MARCH 11TH AND HE STATED THAT IT WAS. HE ALSO RECALLED SEEING HIS SON GENE ON THE 11TH. ALFRED CONTINUED BY SAYING THAT HE ALSO SPOKE WITH GENE AND HIS WIFE ON SATURDAY THE 11TH. I ASKED ALFRED WHEN HE HAD LAST SPOKE WITH HIS SON BILL AND HE STATED THAT HE HAD LAST SEEN BILL SHORTLY BEFORE HIS WIFE'S BIRTHDAY. AFTER A BRIEF HESITATION, ALFRED STATED THAT HIS SON BILL ARRIVED HOME FOR HIS WIFE'S BIRTHDAY AT ABOUT 11:00 PM ON FEBRUARY 17TH. ALFRED STATED THAT HIS SON BILL SPENT THE NIGHT AND WAS TOLD LATER BY HIS WIFE THAT BILL HAD AGAIN LEFT ON THE MORNING OF THE 18TH AT ABOUT 11:00. ALFRED STATED THAT HE HAD NOT SEEN OR HEARD FROM BILL SINCE THAT TIME. I ASKED ALFRED IF HE KNEW WHERE HIS CHILDREN CURRENTLY LIVED AND HE STATED THAT HE DID. ALFRED STATED THAT HIS OLDEST DAUGHTER SHEILA LIVES IN ELK MOUND, HIS MIDDLE SON GENE LIVES IN CHETEK, AND BILL IS STAYING AT THE CABIN IN AUGUSTA. I ASKED ALFRED IF HE HAD CONTACTED HIS CHILDREN SINCE HE DISCOVERED HIS WIFE'S INJURIES AND HE STATED THAT HE HAD NOT.

I ASKED ALFRED IF THERE WAS ANYTHING ABOUT HIS CHILDREN THAT I SHOULD KNOW ABOUT. ALFRED STATED THAT HIS YOUNGEST SON BILL HAS HAD A PROBLEM WITH LAW ENFORCEMENT IN THE PAST. BILL HAD BEEN ARRESTED ON MARIJUANA CHARGES ABOUT FOUR YEARS AGO AND DID GO TO JAIL IN CHIPPEWA COUNTY. SINCE BILL HAD GOTTEN OUT OF JAIL, HE HAD CLEANED UP HIS ACT AND WAS DOING BETTER. ALFRED STATED THAT ABOUT MID SUMMER 1999, BILL MOVED OUT OF HIS HOUSE AND INTO THE CABIN IN AUGUSTA. I ASKED ALFRED IF BILL HAD A TELEPHONE AND HE REPLIED THAT HE WAS USING A CELL PHONE AT THE CABIN. ALFRED COULD NOT PROVIDE AN ACCURATE ADDRESS FOR THAT CABIN. I ASKED ALFRED IF HE COULD GIVE ME DIRECTIONS TO IT AND HE STATED THAT IT WAS ABOUT 5OR 6 MILES FROM STATE HWY 12 ON COUTNY TRUNK HWY M, NEAR THE FIRE

TOWER. IT WAS A DARK HOUSE WITH A LONG DRIVEWAY ON THE SOUTH SIDE OF THE ROAD.

I ASKED ALFRED IF HE COULD DESCRIBE HIS LAST VISIT WITH BILL. AFTER SOME HESITATION, ALFRED STATED THAT ON THE EVENING OF THE 17TH WHEN BILL CAME TO THE HOUSE, HE HAD SHAVED HIS HEAD. BILL TOLD HIS PARENTS THAT THEY ARE AFTER ME AGAIN AND THAT HE HAD TO GET OUT OF THE COUNTRY. ALFRED DESCRIBED BILL AS VERY UPSET. ALFRED STATED THAT BILL WAS STILL AT THE HOUSE WITH HIS WIFE WHEN HE LEFT FOR WORK IN THE MORNING AND WHEN HE RETURNED HIS WIFE TOLD HIM THAT BILL HAD LEFT ABOUT 11:00. SOME TIME LATER, ALFRED LEARNED IN A DISCUSSION FROM HIS WIFE THAT WHILE AT THE RESIDENCE, BILL HAD GONE OUT TO THE SHED AND DUG UP $12,000 CASH WHICH HE HAD BURIED THERE SOME TIME EARLIER. I ASKED ALFRED IF HE KNEW WHEN BILL HAD BURIED THE MONEY OR WHERE HE HAD GOTTEN IT FROM AND HE STATED THAT HE DID NOT KNOW.

I ASKED ALFRED IF HE KNEW WHERE BILL CURRENTLY WORKED AND HE STATED THAT HE DID NOT KNOW. ALFRED THOUGHT HE MAY BE UNEMPLOYED AT THIS TIME. I ASKED ALFRED WHERE BILL LAST WORKED AND HE TOLD ME THAT BILL HAD BEEN EMPLOYED AT THE SUPER AMERICA STATION IN OSSEO. HE AND HIS WIFE HAD STOPPED THERE NEAR THE FIRST OF THE YEAR AND DISCOVERED THAT BILL WAS NO LONGER EMPLOYED THERE. HE AND HIS WIFE LATER WENT TO THE CABIN AND NOTICED THAT THE BROWN BRONCO THAT BILL OWNED WAS PARKED AT THE CABIN. ALFRED STATED THAT HE ALSO OWNS A GREEN THUNDERBIRD THAT WAS NOT AT THE CABIN. THEY KNOCKED AT THE DOOR BUT FOUND THE CABIN LOCKED AND NO ONE ANSWERED.

ALFRED STATED THAT HE AND HIS WIFE HAD BEEN TO THE CABIN SINCE THAT TIME ON THEIR MOTORCYCLE. ALFRED STATED THAT HE DID NOT RECALL THE DATE OR TIME OF THAT VISIT. WHILE AT THE CABIN, THEY WERE ABLE TO SPEAK WITH BILL BRIEFLY. ALFRED STATED THAT BILL WAS VERY AGITATED AND DID NOT APPEAR TO WANT THEM AT THE CABIN. BILL ESCORTED HIS MOTHER FROM THE CABIN AND THEY LEFT SHORTLY THEREAFTER. I ASKED ALFRED IF BILL HAD GIVEN THEM AN EXPLANATION FOR HIS BEHAVIOR AND HE STATED THAT HE HAD NOT. HIS WIFE WAS VERY CONCERNED FOR BILL'S WELFARE AND THAT SOMEONE MAY ATTEMPT TO HARM HIM. I ASKED ALFRED WHY HE THOUGHT SOMEONE WOULD HARM HIS SON AND HE STATED THAT WAS WHAT BILL HAD TOLD HE AND HIS WIFE WHEN HE VISITED ON FEBRUARY 17TH. I ASKED ALFRED IF HE KNEW WHO BILL WAS CONCERNED ABOUT AND HE STATED THAT HE HAD NO IDEA.

I ASKED ALFRED IF ANY OF HIS FRIENDS STOPPED AT THE HOUSE AND HE STATED THAT THEY DID NOT. I ASKED ALFRED IF HE KNEW WHO HIS SON'S FRIENDS WERE AND HE STATED THAT HE DID NOT KNOW. I ASKED ALFRED WHERE HIS SON WOULD GO IF HE WAS NOT AT THE CABIN AND HE STATED THAT HE DID NOT KNOW.

I ASKED ALFRED IF HE HAD RECEIVED ANY VISITS OR CALLS FROM HIS SONS FRIENDS. ALFRED REPLIED THAT HE DID REMEMBER THAT HIS WIFE HAD TAKEN A TELEPHONE MESSAGE FROM ONE OF BILL'S FRIENDS THAT IDENTIFIED HIMSELF TO HER AS "OB". ALFRED DID NOT KNOW IF OB WAS TWO INITIALS OR A NAME. ALFRED STATED THAT HIS WIFE TOLD HIM THAT OB WANTED TO KNOW WHERE BILL WAS. BILL APPARENTLY HAD LEFT AN OLDER THUNDERBIRD THAT HE OWNED IN OB'S YARD OR PARKING LOT. HIS WIFE WROTE DOWN OB'S TELEPHONE NUMBER AND LEFT IF BEHIND A MAGNET ON THE KITCHEN REFRIGERATOR. I ASKED ALFRED WHY SHE HAD DONE THAT AND HE STATED THAT IT WAS TO REMIND HER THAT WHEN BILL ARRIVED TO GIVE HIM THE MESSAGE. I ASKED ALFRED IF THE MESSAGE WAS STILL ON THE REFRIGERATOR AND HE STATED THAT IT STILL WAS. I LATER CHECKED THE REFRIGERATOR AND DISCOVERED THAT THE MESSAGE HAD BEEN REMOVED.

I ASKED ALFRED IF HE KNEW WHETHER ALL OF THE VEHICLES KEPT AT HIS RESIDENCE WERE

STILL THERE. ALFRED STATED THAT HE DRIVES THE COMPANY TRUCK TO AND FROM WORK AND THE ONLY TWO AUTOS THAT HE OWNS ARE THE TRUCK AND A RECENTLY PURCHASED BLACK LINCOLN WHICH WERE IN THE GARAGE. ALFRED STATED THAT THEY HAD RECENTLY PURCHASED THE LINCOLN AND THAT THEY STILL OWED $20,000 ON IT.

ALFRED STATED THAT HE AND HIS WIFE HAD RECENTLY PURCHASED A NEW MOTORCYLCE THAT WAS IN ONE OF THE OUT BUILDINGS. ALFRED STATED THAT HE HAD NOT GONE TO THE OUT BUILDING TO CHECK IF THE VEHICLE WAS STILL THERE.

I ASKED ALFRED WHO HAD KEYS TO HIS RESIDENCE. ALFRED STATED THAT THERE ARE ONLY THREE SETS OF KEYS TO THE RESIDENCE; ONE SET IS KEPT BY HIMSELF, ONE SET IS KEPT BY HIS WIFE, AND ONE SET IS KEPT BY HIS SON BILL. EACH SET OF KEYS UNLOCKS ALL THE DOORS OF THE HOUSE AND THE OUT BUILDINGS. WHEN I ASKED ALFRED IF HE HAD RECENTLY CHANGED LOCKS, HE STATED THAT HE HAD NOT.

I ASKED ALFRED IF HE HAD ANY WEAPONS OR VALUABLES IN THE HOUSE. ALFRED STATED THAT HE ONLY OWNS A FEW WEAPONS AND THEY ARE MOSTLY LONG GUNS. ALFRED STATED THAT HE HAS A 303 BRITISH RIFLE, TWO 30-30 LEVER ACTION RIFLES, ONE 16-GUAGE SHOTGUN, ONE .22 PISTOL WITH A NINE INCH BARREL IN A WESTERN REVOLVER STYLE, AND TWO PELLET PISTOLS. THESE GUNS ARE KEPT IN A GUN CABINET IN THE MASTER BEDROOM. ALFRED STATED THAT HE HAD LIMITED AMMUNITION AVAILABLE IN THE HOUSE, BUT COULD NOT RECALL HOW MUCH OF WHAT TYPE.

I ASKED ALFRED IF HE KEPT VALUABLES IN THE HOUSE. ALFRED STATED THAT THERE ARE NO REAL VALUABLES IN THE HOUSE TO SPEAK OF. ALTHOUGH, HE DOES HAVE A COMBINATION SAFE IN THE RESIDENCE, IT ONLY CONTAINS TWO OR THREE HUNDRED DOLLARS CASH. THERE IS A PENNY COLLECTION AND TWO HAND SAFES THAT HE KEEPS IMPORTANT PAPERS IN. AS FOR JEWELERY, HIS WIFE DID NOT HAVE EXPENSIVE JEWELERY AND ALFRED WAS UNABLE TO ESTIMATE THE VALUE OF THE JEWELERY. ALFRED CONTINUED THAT ONE OF THE HAND SAFES, ALONG WITH PAPERS, ALSO CONTAINS A WEDDING RING AND WATCH. ALFRED COULD NOT PROVIDE A VALUE FOR THESE ITEMS EITHER. ALFRED STATED THAT OTHER THAN THOSE ITEMS THAT HE HAD TOLD ME ABOUT, HE'S ONLY AWARE OF A CHECKBOOK AND CREDIT CARDS THAT HIS WIFE KEEPS IN HER WALLET. THE PURSE SHOULD BE IN THE BEDROOM.

ALFRED STATED THAT HE AND HIS WIFE DO NOT GAMBLE AND DO NOT GO TO BARS AND TAVERNS. ALFRED STATED THAT BOTH HE AND HIS WIFE ARE NOT DRINKERS, BUT DO ON OCCASION HAVE A GLASS OF WINE. ALFRED STATED THAT THEY WORK VERY HARD AND SAVE THEIR MONEY TO BUY THINGS THAT THEY ENJOY SUCH AS MOTORCYCLES AND THE NEW LINCOLN. I ASKED ALFRED IF HE AND HIS WIFE WERE ON ANY MEDICATIONS AT THIS TIME AND HE REPLIED THAT HE IS ON MEDICATION FOR HIGH BLOOD PRESSURE AND CHOLESTEROL. ALFRED STATED THAT HE ALSO HAS A PROBLEM WITH HIS STOMACH AND TAKES AN ANTACID FOR THAT. TO THE BEST OF ALFRED'S KNOWLEDGE, HIS WIFE HAS NO MEDICAL PROBLEMS AT THIS TIME AND IS NOT ON ANY TYPE OF MEDICATION.

I ASKED ALFRED IF HE HAD ANY PLACE THAT HE WOULD BE ABLE TO SPEND THE NIGHT. ALFRED STATED THAT HE WASN'T SURE AND HE WOULD HAVE TO CALL AROUND. I ASKED ALFRED IF HE HAD TOLD HIS CHILDREN WHAT HAD HAPPENED AND HE STATED THAT HE DID NOT. I ASKED ALFRED IF HE WOULD BE ABLE TO STAY WITH ONE OF THE CHILDREN AND HE STATED THAT YES HE THOUGHT SO. I ASKED ALFRED IF HE WOULD LIKE MY ASSISTANCE IN MAKING CONTACT IN NOTIFICATION TO FAMILY MEMBERS AND HE SAID YES. I MADE TELEPHONE CONTACT BY CELLULAR PHONE WITH HIS SON GENE AND HIS DAUGHTER SHEILA AND REQUESTED THAT THEY COME TO THE SHERIFF'S DEPARTMENT AND MEET ME. ALFRED RECOVERED THE FAMILY DOG THAT HE HAD TIED OUTSIDE AND WE TOOK THE DOG TO THE

SHERIFF'S DEPARTMENT WITH US. ALFRED STATED THAT THE FAMILY CAT SHOULD BE OK AT THE HOUSE. I TOLD ALFRED THAT THE FAMILY DOG THAT WAS TIED OUTSIDE SEEMED PARTICULARILY VICIOUS TO ME AS IT BARKED AND LURCHED AT ME WHEN I WALKED BY IT EARLIER. ALFRED STATED THAT THE FAMILY DOG IS GETTING QUITE OLD AND HE IS NOT CERTAIN THAT THE DOG WOULD NOT BITE A STRANGER. ALFRED STATED THAT THE DOG SHOULD BE OK IF HE SAT IN THE BACK SEAT WITH IT. ALFRED THEN RECOVERED THE DOG AND WE PROCEEDED TO THE SHERIFF'S DEPARTMENT.

NO FURTHER ACTION TAKEN AT THIS TIME. END OF REPORT.

OFFICER: RICHARD P. PRICE

DATE: 03-20-2000

SUPERVISOR:

COPIES TO:

MMG MARCH 20, 2000 @ 1141 HOURS

STATE OF WISCONSIN

IN THE SUPREME COURT

DISTRICT III

CASE NO. 04-0958-CR

STATE OF WISCONSIN,
Plaintiff- Appellant,

v.

BILL PAUL MARQUARDT
Defendant- Respondent.

ON CERTIFICATION FROM THE COURT OF APPEALS
FROM SUPPRESSION ORDERS
ENTERED IN THE CIRCUIT COURT
FOR CHIPPEWA COUNTY,
THE HONORABLE RODERICK A. CAMERON, PRESIDING

BRIEF AND APPENDIX OF DEFENDANT-RESPONDENT

John Brinckman
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I

THE GOOD FAITH EXCEPTION TO THE EXCLUSIONARY RULE IN WISCONSIN

In State v. Eason, 245 Wis.2d 206, 2001 WI 98 (2001), the Wisconsin Supreme Court adopted a good faith exception to the exclusionary rule. The Wisconsin rule is based on the United States Supreme Court decision United States v. Leon, 468 U.S. 897, 104 S. Ct. 3405 (1984) in which the U.S. Supreme Court first recognized a good faith exception. The Wisconsin rule adds two factors over and above the four situations described in Leon where good faith will not be found.

To properly understand the Wisconsin "Good Faith" exception, it is first necessary to understand the concept of "Objective Good Faith" as defined by the U.S. Supreme Court. To do this, it is necessary to properly analyze the Leon decision.

Leon involved an extensive drug investigation which focused on three suspects. The investigation initiated as a result of a

tip from a confidential informant of unknown reliability. The investigation provided the officers with information that the suspects may have involved themselves in past drug dealings. Follow-up police surveillance provided observations of several individuals leaving the suspects' residences with small packages. At least one such person was known to have a drug record.

Two of the suspects flew separately from Los Angeles to Miami and were observed flying back from Miami to Los Angeles together. Other suspicious activity was observed at the suspects' residences, as well at times with their vehicles. Id. at 901-02. Based upon the above facts provided within an affidavit, search warrants were issued.

The defendants filed suppression motions in District Court. In finding no probable cause to support the Search Warrants, the District Court reasoned:

> I just cannot find this warrant sufficient for a showing of probable cause.
>
> * * *

> There is no showing of the reliability and credibility of the informant as not being established.
>
> Some details given tended to corroborate, maybe, the reliability of {the informant's} information about the previous transaction, but if it is not a stale transaction, it comes awfully close to it; and all the other material I think is as consistent with innocence as it is with guilt.
>
> So I just do not think this affidavit can withstand the test. I find, then, that there is no probable cause in this case for the issuance of the search warrant…
>
> Id. at Ft. Nt. 2.

The Court of Appeals for the Ninth Circuit upheld the District Court's finding of no probable cause in its decision:

> To the extent that the affidavit set forth facts demonstrating the basis of the informant's knowledge of criminal activity, the information included was fatally stale. The affidavit, moreover, failed to establish the informant's credibility.
>
> * * *
>
> The officer's independent investigation neither cured the staleness nor corroborated the details of the informant's declarations.

The U.S. Supreme Court affirmed the Ninth Circuit, holding that after removing the stale facts as well as those facts relating to the unreliable informant, the warrant application

lacked probable cause. However, the Supreme Court noted that with the inclusion of the stale information and the facts from an informant with unknown credibility, the warrant application was supported by more than a bare bones affidavit. The Court held that officers could be found to be acting in objective good faith if they rely on a search warrant signed by a neutral magistrate and supported by an affidavit comprised of stale information and information from an untested informant, provided the aggregate amounts to probable cause, even if probable cause is missing after removing the stale and unreliable information. Id. at 919.

The objective standard requires officers to have a reasonable knowledge of what the law prohibits. Id. at 919. Subjective good faith by the officers is irrelevant. According to Leon, police officers must at a minimum understand the thresholds of probable cause, although they will not be judged to second guess a magistrate on issues of staleness and reliability of informants. Id. at 915, 919, 923.

The Leon Court pointed out four situations where the good faith exception will not apply.

> Suppression therefore remains an appropriate remedy if the magistrate or judge in issuing a warrant was mislead by information in an affidavit that the affiant knew was false or would have known was false except for his reckless disregard of the truth[;]
>
> The exception we recognize today will also not apply in cases where the issuing magistrate wholly abandoned his judicial role…[;]
>
> Nor would an officer manifest objective good faith in relying on a warrant based on an affidavit "so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable [;]"
>
> Finally, depending on the circumstances of the particular case, a warrant may be so facially deficient—i.e., in failing to particularize the place to be searched or the things to be seized—that the executing officers cannot reasonably presume it to be valid.
>
> Id. at 923. (bracketed material added; citations omitted).

In applying the principles of the good faith exception, the Leon Court found the warrant application to be supported by much more than a "bare bones" affidavit. The concept of "much more than a bare bones affidavit" was directly related to the fact that probable cause was present in the affidavit if one considered the stale information of prior criminal activity by the suspects along with other relevant facts from an

unreliable informant. The Court found that a police officer might reasonably conclude that the warrant was constitutionally sound as to probable cause. Furthermore, the affidavit related suspicious observations of the three defendants made during an extensive investigation after the original tip. As such, the U.S. Supreme Court found that the officers relied in objective good faith when they executed the search warrants.

After the Leon decision, the first time the Wisconsin Supreme Court was asked to recognize a good faith exception to the exclusionary rule occurred in State v. Brady, 130 Wis.2d 443, 388 N.W.2d 151 (1986). Brady involved a Court ordered material witness warrant under circumstances where the supporting affidavit provided probable cause that the witness was material, but did not provide a basis for finding probable cause that the witness would not appear by subpoena. A material witness arrest warrant needs a showing of both and it cannot be issued in violation of the fourth amendment's prohibition against unreasonable searches and seizures. See Bacon v. United States, 449 F.2d 933, at 942-43 (9th Cir. 1971).

In declining to adopt the Leon good faith exception in Brady, this Court found that the affidavit lacked indicia of probable cause regarding the impracticability of securing Brady's presence through a subpoena. This Court therefore held that this case does not present a question of "good faith.

The Court reasoned:

> Relying upon the Supreme Court's decision in *United States v. Leon, supra,* however, the state argues that even if the arrest was illegal, suppression of the evidence is an inappropriate remedy because the officers acted in good-faith reliance upon the material witness arrest warrant in arresting Brady. *Leon* created a good-faith exception to the exclusionary rule. The exception applies in situations in which the exclusion of evidence would not promote the exclusionary rule's purpose, which is to deter police conduct in violation of the fourth amendment. 104 S.Ct. at 3412-22. The state urges us to adopt *Leon* and to overrule our holding in *Hoyer v. State*, 180 Wis. 407, 193 N.W. 89 (1923), in which we adopted an exclusionary rule based upon the Wisconsin Constitution. Brady contends that this case is inappropriate for consideration of a good-faith exception to the exclusionary rule because the record does not support a finding that the police acted in good faith.
>
> . . .
>
> We conclude that this case is not a proper vehicle for deciding whether to

> adopt a good-faith exception to the exclusionary rule. In *Leon* the Supreme Court expressly acknowledged that an officer would not "manifest objective good faith in relying on a warrant based on an affidavit 'so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable.' " *Leon*, 104 S.Ct. at 3422 [quoting *Brown v. Illinois*, 422 U.S. 590, 611, 95 S.Ct. 2254, 45 L.Ed.2d 416 (1975) (Powell, J., concurring in part)]. The fourth amendment requires that the affidavit upon which the warrant was based had to contain sufficient facts to support a finding of probable cause regarding the impracticability of securing Brady's presence through a subpoena. Because the affidavit lacked indicia of probable cause regarding the impracticability of securing Brady's presence through a subpoena, this case does not present a question of "good faith." Therefore, *Leon* is not implicated. Accordingly, we do not decide whether to adopt a good-faith exception to the exclusionary rule in Wisconsin. We hold that the circuit court acted properly in suppressing the evidence discovered as a result of the illegal arrest of Brady. The order of the circuit court is affirmed.

Id. at 454.

This Supreme Court made it clear in Brady that if within the four walls of the affidavit, no indicia of probable cause exist, the case does not present the question of "good faith". This Court in Brady did not suggest that when we are dealing with the third Leon circumstance, which is also the situation applicable to the case at hand:

> Nor would an officer manifest objective good faith in relying on a warrant based on an affidavit "so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable [;]"
>
> Leon at 923,

that the State has a right to a post-search evidentiary hearing to try and fix the affidavit by supplementing it with subjective knowledge of what the officers might have known before the execution of the search, but didn't include within the affidavit. The very language of Leon precludes an evidentiary hearing in the above situation because the test focuses on whether "official belief in (probable cause is) entirely unreasonable" because it's "so lacking". It's an objective test.

The Leon Court articulated four situations where the good faith exception will not apply. The third situation analyzed above precludes an evidentiary hearing. The other three situations described in Leon call for an analysis of facts surrounding the issuance of the warrant and as such, might require an evidentiary hearing.

The first situation in Leon is:

> Suppression therefore remains an appropriate remedy if the magistrate or judge in issuing a warrant was mislead by information in an affidavit that the affiant knew was false or would have known was false except for his reckless disregard of the truth[;]

Since an affiant will not likely disclose what is false or misleading in his affidavit, the first Leon situation necessarily contemplates an evidentiary hearing. It was established long before Leon that a defendant is entitled to an evidentiary hearing under Franks v. Delaware, 438 U.S. 154, 98 S.Ct. 2674 (1978) to show that probable cause would be lacking in an affidavit but for false or misleading information.

The second Leon circumstance where good faith will not apply is:

> The exception we recognize today will also not apply in cases where the issuing magistrate wholly abandoned his judicial role...[;]

Again, the affidavit will not disclose situations where the judge or magistrate abandons his/her judicial roles. The language necessarily requires an evidentiary hearing to give it meaning. The burden is on the defendant in an evidentiary

hearing to show where the magistrate has abandoned his judicial role.

Finally, the fourth Leon circumstance which eliminates good faith as an issue is:

> Finally, depending on the circumstances of the particular case, a warrant may be so facially deficient—i.e., in failing to particularize the place to be searched or the things to be seized—that the executing officers cannot reasonably presume it to be valid.

The language in this paragraph specifically requires an analysis of "depending on the circumstances of the particular case". The Leon Court specifically contemplated situations where the language of the Warrant might appear unclear as to the place to be searched or the things to be seized, but in reality there is no ambiguity. This might include a situation where the description of the place to be searched is crystal clear in all details except for perhaps a street number being off by one digit. An evidentiary hearing would be allowed to show that only one house fit the description, the color was right, the name on the mail box was correct, the expected cars were in the driveway, the landscaping was as indicated on the

warrant and the suspect was in the front yard; thus eliminating whatever vagueness might exist but for a typographical error on the warrant.

In all three of the other Leon situations, the very language contemplates a possible need for an analysis of the surrounding facts. However, the third Leon circumstance which is applicable to the case at hand is the only situation which necessarily rules out an analysis of additional information in determining whether "good faith" is a factor.

The State is asking for such a vehicle where bad memory would replace the objective certainty required by Leon.[1] Such a procedure would make the determination of "objective good faith" dependant upon the subjective hindsight of the testifying witnesses for the State. Brady correctly avoided such an interpretation of Leon.

---

[1] In this case, the State attempted to argue that prior to the first search of Marquardt's cabin, the police and DCI agents "substantially narrowed the focus of the investigation to the defendant as the most likely suspect." (332:10) However, no police report substantiates this claim and a statement made by the Sheriff after the first search of Marquardt's cabin refutes the subsequent claim. (330:3-4).

In State v. Eason, 245 Wis.2d 206, 629 N.W.2d 625, 2001 WI 98 (2001), the Wisconsin Supreme Court applied a "good faith exception" for the first time. The case involved a no-knock search warrant. Probable cause clearly existed for the issuance of the search warrant. But Eason attacked that part of the search warrant that authorized a no-knock entry. He argued that the affidavit supporting the warrant did not justify a no-knock search. The affidavit failed to allege any specific information that someone in the apartment might possess weapons, or would destroy evidence, if the officers knocked and announced their presence. Id. at 220.

The trial court had reviewed the search warrant, including Officer Fahrney's affidavit, and concluded that the "affidavit for [the] search warrant fails to allege the requisite reasonable suspicion to justify the issuance of a no knock search warrant." Although the affidavit pointed out arrests of the suspects for aggravated assaults and obstruction, the affidavit did not provide any information regarding convictions. The trial court suppressed all of the evidence obtained during the execution of the search warrant. The State appealed.

The court of appeals agreed with the defendant that the affidavit did not sufficiently indicate that knocking and announcing would have been dangerous to the officers. The court of appeals also rejected the State's argument that arrests listed in the affidavit reflected the apartment occupants' willingness to use violence.

> There is no information as to when and where those arrests took place, or whether they involved any violent acts--and, again, whether a conviction followed. The affidavit doesn't assert that either Bentley or Shannon Eason--or any of the other occupants of the apartment--were armed; it merely offers a general statement that drug-related crimes often involve weapons.

Id. at 222.

Our Supreme Court in Eason affirmed the finding of no reasonable suspicion to believe a no-knock search was necessary. However, due to the significant investigation by law enforcement of the two suspects, coupled with a lengthy arrest record for violence of the two suspects, all documented within the affidavit, the Court found objective good faith.

When our Supreme Court recognized a good faith exception, it went further than just adopting the Leon rule. Before good faith in a Wisconsin Court may be found, courts must find

two additional elements to exist after ruling out the four Leon situations where objective good faith will not be found.

> Accordingly, we require that in order for the good faith exception to apply, the State must show that the process used attendant to obtaining the search warrant included a significant investigation and a review by a police officer trained in, or very knowledgeable of, the legal vagaries of probable cause and reasonable suspicion, or a knowledgeable government attorney. [FN29] While this process was followed in *Leon*, the United States Supreme Court did not specifically hold that the Fourth Amendment required a significant investigation and review of the warrant application in order for the good ***649** faith exception to apply. [FN30] However, we hold that Article I, Section 11 of the Wisconsin Constitution requires this process and thus affords ***additional protection*** than that which is afforded by the Fourth Amendment. Indeed, in some instances, "the Wisconsin Constitution may afford greater protection than the United States Constitution." ***258** *State v. Hansford*, 219 Wis.2d 226, 242, 580 N.W.2d 171 (1998); *see also* *Hoyer v. State*, 180 Wis. 407, 193 N.W. 89. [FN31]

Id. at 257. (Emphasis added)

A.

LEON ANALYSIS OF MARQUARDT

In the case at hand, an analysis of the third Leon situation where objective good faith will not be found requires that we look to the four walls of the two affidavits in support of the March 15th, 2000 search warrant of Marquardt's cabin. The first affidavit was the same affidavit used to secure a search warrant of the victim Mary Marquardt's residence on the day of her murder. (Appendix 101) This affidavit does not make reference to the defendant Bill Marquardt whatsoever.

The second affidavit was prepared specifically for the search of Bill Marquardt's cabin and provides only the following:

> Investigator Price reports that after finding the body of Mary J. Marquardt, he spoke with her husband, Alfred E. Marquardt. Mr. Marquardt informed him that he and Mary have a son, Bill Marquardt, who, since the location of Ms. Marquardt's body had not been seen or heard from. Alfred Marquardt further informed Investigator Price that Bill Marquardt owned with Alfred Marquardt a cabin in which Bill resided at E27505 County Highway M, Town of Fairchild, County of Eau Claire, Wisconsin.

The Court of Appeals has previously reviewed this case on the issue of whether these two affidavits together comprise

probable cause that Bill Marquardt was involved in the homicide or whether evidence of the homicide might be found in his cabin. State v. Marquardt, 247 Wis.2d 765, 635 N.W.2d 188, 2001 WI App 219, (Wis. App. 2001). In finding neither, the Court of Appeals remanded to the trial court for a good faith hearing.

> If the circuit court ultimately concludes that the good faith exception to the exclusionary rule is inapplicable, the court must issue a suppression order with respect to the March 15 search. In that case, the court must also determine the facts surrounding the subsequent searches to determine if they were tainted by the initial unlawful search of Marquardt's residence and if so, issue a suppression order consistent with its findings.
>
> Id. at ¶ 23.

The Court of Appeals considered all the facts from all of the affidavits and held:

> Although these facts may lead a reasonable police officer to pursue further investigation of Marquardt, *we conclude that there is nothing in the facts to tie Marquardt to the crime, much less to tie his home to the crime.* Although the warrant-issuing judge may have been provided sufficient facts to excite an honest belief in a reasonable mind that the particular types of objects sought – including shoes, knives, and guns – could be *linked with the commission of the crime,* there was *no*

> *fact that suggested those items would be found in Marquardt's cabin.* We conclude that Marquardt has established that the facts are clearly insufficient to support a probable cause finding and therefore, we reject the judge's probable cause determination.
>
> Id. at ¶ 19.

To analyze objective good faith under Leon, we must examine the two affidavits supporting the March 15th, 2000 search warrant. They consist of only one fact regarding the defendant. Marquardt has not been seen by his father since the homicide. We are left with an affidavit that contains nothing regarding Bill Marquardt being involved or finding evidence at his cabin. The third factor of Leon requires suppression of everything found on March 15th 2000 search at the Marquardt cabin. [2]

It should be noted that unlike Leon, Marquardt's affidavit doesn't provide probable cause before eliminating parts of the affidavit for staleness, unreliable informants or the like.

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[2] If a good faith hearing had been held regarding the Leon factors, specifically the first one where false statements are used by law enforcement in the affidavit, then the only fact in the affidavit regarding Marquardt, that Marquardt's father had not seen his son since the homicide two days earlier, might have itself resulted in a finding that good faith doesn't apply in this situation. Officers knew that Marquardt's father had actually said that Marquardt had not visited him since February 17th, 2000, almost a month before the homicide. (322:2). At no time did Marquardt's father suggest this to be unusual.

Taken in a light most favorable to the State while considering all of the facts of both affidavits, there was no single fact in the affidavit to support probable cause that Marquardt was involved in the homicide or that his cabin possessed evidence of the crime. This case is analogous to Brady.

When the analysis of our case starts with the Leon situations, we don't even reach the additional two factors incorporated by Eason. There simply is no objective good faith.

It should be pointed out that in the good faith hearing in the Eau Claire County collateral criminal case against Marquardt, the court never properly analyzed the Leon situations. Nevertheless, he State in this Chippewa County appeal tries to make much of the fact that on April 26, 2002, Eau Claire County Judge Eric J. Wahl concluded that the officers acted in good faith.

At the Eau Claire "good faith" hearing, then defense counsel for Marquardt "stipulated" with the prosecutor that the only two factors for consideration of good faith were the two Eason factors. (327:6). After testimony, defense counsel

argued that good faith only required objectively reasonable reliance by police officers on the affidavit and the application and preparation of the search warrant by someone with experience. (327:63) This is far from what is required under Leon and Eason. It appears from defense counsel's stipulation, questioning and argument at the hearing that counsel may never have even read Leon or Eason prior to the hearing. He was not familiar with necessary facts from the Chippewa County homicide case to properly cross- examine officers at the good faith hearing. He certainly was ineffective, an issue not reached below but discussed during the State attempts to require the Chippewa County Judge Cameron to invoke the Doctrine of Offensive Issue Preclusion and accept Eau Claire County's finding of good faith. (326:1) Chippewa County Judge Cameron noted that the Leon factors were not properly raised in the Eau Claire hearing and correctly rejected Issue Preclusion. (326:1).

For the above reasons, this counsel objected to any use of the Eau Claire County "good faith" hearing below and continues to object to its use in this appeal. (306).

B.

LEON'S PROGENY ON WHETHER THE STATE IS ENTITLED TO AN EVIDENTIARY HEARING FOR THE THIRD LEON SITUATION.

As demonstrated above, the very language of Leon itself rules out an evidentiary hearing on the issue of "object good faith" as to the third Leon situation. Although case law exists on both sides of the issue, the analysis behind the cases allowing for an evidentiary hearing is flawed.

The State cites a Federal 8th Circuit case, U.S. v. Martin, 833 F.2d 752 (8th Cir. 1987) for the proposition that the State may supplement the record before the Court determines objective good faith under the third Leon situation. Martin relied on Anderson v. Creighton, 483 U.S. 635, 640, 107 S.Ct. 3034, 97 L.Ed.2d 523 where a good faith evidentiary hearing was held as authority for its conclusion. But Anderson was a qualified immunity 4th Amendment case. Officers were being sued

civilly for an illegal search. Anderson's Fourth Amendment right had not been clearly established at the time of the search. "Clearly established" for qualified immunity purposes means that the contours of the right must be sufficiently clear that a reasonable officer would understand that what he was doing violated that right. His very action need not previously have been held unlawful, but in the light of pre-existing law its unlawfulness must be apparent. *E.g.,* Anderson v. Creighton, 483 U.S. 635, 640, 107 S.Ct. 3034, 97 L.Ed.2d 523.

In the context of that civil suit, and for purposes of determining qualified immunity, the United States Supreme Court used a "subjective good faith" analysis that allowed for the looking at the totality of the circumstances outside of the affidavit. Anderson's holding did not extend to criminal cases. To the extent that the 8th Circuit has attempted to replace "objective good faith" with "subjective good faith" in a criminal setting, Martin was decided wrong and it is inconsistent with the U.S. Supreme Court holding in Leon. Other cases have since cited Martin for its holding.

This exact same issue has just been addressed in our Seventh Circuit Court of Appeals with the opposite conclusion. In U.S. v. Koerth, 312 F.3d 862, (7th Cir. 2002), Circuit Judge Coffey writing the decision for the unanimous Court held:

> The *Leon* test for good faith reliance is clearly an objective one and it is based solely on facts presented to the magistrate. An obviously deficient affidavit cannot be cured by an officer's later testimony on his subjective intentions or knowledge.... *Leon* creates an exception to the exclusionary rule when officers have acted in reasonable reliance on the ruling of a judge or magistrate. The point is that officers who present a colorable showing of probable cause to a judicial officer ought to be able to rely on that officer's ruling in executing the warrant. When the officers have not presented a colorable showing ... the reasoning of *Leon* does not apply.
>
> *Hove*, 848 F.2d at 140 (internal citations omitted). *See also* *Bynum*, 293 F.3d at 212 (Michael, J., dissenting) ("In sum, the Government cannot establish an officer's objective good faith under *Leon* by producing evidence of facts known to the officer but not disclosed to the magistrate."); *Baker*, 894 F.2d at 1149-50.
>
> As a final matter, because the probable-cause determination is based solely on the information presented during the warrant application process, we note that the district judge properly refused to consider documents that were not presented to warrant-issuing Judge Cameron and were cited by the Government for the first time at the suppression hearing in federal court.

The seventh circuit decision is correct. Under Leon, the State in our case is not entitled to an evidentiary hearing on the third situation. The affidavits fail to show any probable cause. Objective good faith is not an issue.

C.

EASON ANALYSIS OF MARQUARDT

The first Eason additional factor requires that the police investigators engaged in a "significant investigation" before applying for, receiving and executing the warrant. Eason offers little assistance as to what it anticipated the term "significant investigation" mean. However, the facts of both Eason and Leon which it based its decision on, support the conclusion that a "significant investigation" actually result in finding additional facts regarding the target that help support probable cause that the target committed the crime or somewhere possesses evidence of the crime.

It is first necessary to determine what Eason meant by the term "significant investigation". The Webster Dictionary definition of "significant" (found online at Webster.com) is:

> 1 : having meaning; *especially* : SUGGESTIVE <a *significant* glance>
>
> 2 a : having or likely to have influence or effect : IMPORTANT <a *significant* piece of legislation>; *also* : of a noticeably or measurably large amount <a *significant* number of layoffs> <producing *significant* profits> b : probably caused by something other than mere chance <statistically *significant* correlation between vitamin deficiency and disease>

Some meanings of the word are qualitative whereas others are quantitative. A qualitative analysis of "significant investigation" suggests a nexus between the results of the investigation and the person to be seized or place to be searched before good faith is present. On the other hand, a quantitative analysis of "significant investigation" allows mere size or duration of an investigation alone to justify good faith.

If a quantitative meaning of "significant investigation" was all that was intended by the Eason Court, then for example, a five year drug investigation involving numerous officers from numerous municipalities could justify finding good faith in requesting a warrant for every residence in the county. We

would have a five-year investigation and many investigators. That's significant, from a quantitative point of view.

But a quantitative definition denies Due Process as to a particular defendant. The concern is that the word "significant" cannot be defined in terms of size or length of time alone, without a significant nexus between the investigation and the person or place to be searched. The investigation must provide significant results that point to the suspect. Otherwise, the term is meaningless.

Due Process requires that the means chosen to affect a valid objective bear a rational relationship to the purpose sought to be achieved. *State v. Joseph E.G.*, 2001 WI App 29, ¶ 13, 240 Wis.2d 481, 623 N.W.2d 137. State v. Jorgensen, 650 N.W.2d 322, (Wis.App.2002). This means that if the factor of "significant investigation" is to pass constitutional muster, it must be defined qualitatively.

When considering this factor in the context of Marquardt, the affidavit is void of any reference to any significant investigation whatsoever. In Leon and Eason, the Courts

found that the affidavits in support of the search warrants themselves demonstrated qualitatively significant investigations focusing on the defendants. The affidavits described the investigations that included suspicious surveillance sightings, findings of criminal record checks and other relevant activities, focusing on the defendants over a significant period of time. This is not the case in Marquardt. The affidavits in Marquardt are void of any investigation of Bill Marquardt before the first search of his residence.

The State argues in an offer of proof in support of its "significant investigation" that before the issuance of the first search warrant, on March 14th, 2000, DCI agents learned from a Wesley Anderson that a few days earlier, someone shot his dog with a nine-millimeter bullet. Crimes involving guns often involve 9mm's. Anderson lives some distance away from Bill Marquardt on the opposite side of the road. (330:8). The State claims this to be a factor in justifying the March 15th, 2000 search warrant. However, Anderson already provided police with a different suspect with a motive for the crime prior to the first Marquardt search. (334:7). Anderson never considered Marquardt a suspect. Any possible

connection between this dog shooting and the Marquardt homicide did not occur until ***after*** the March 15th, 2000 search of Marquardt's cabin when police learned for the first time that Marquardt's dogs had been shot.

The State argues that footprints were found for comparison purposes and that this fact was in the March 15th application. This is not a meaningfully significant fact given most all people wear shoes. (State's brief: 27).

The State finds it significant that the victim was found covered with a blanket. The State argues it might suggest that the perpetrator knew the victim. Since the homicide occurred in March, it might suggest that the perpetrator was covering up the time of death by keeping the body warmer longer. It also might simply mean that the victim was wearing the blanket around her at the time she was killed. However, no significant investigation commenced against Bill Marquardt as a result of this observation.

The State claims it significant that the supporting affidavit for the March 15th, 2000 search of Marquardt's cabin included a

statement attributed to Alfred Marquardt that Bill Marquardt hadn't been seen since the discovery of the victim's death. Alfred Marquardt never made this statement regarding the defendant as written in the application. (322:2) Law enforcement knew that Alfred said he last saw his son on February 17th, 2000, almost a month before the homicide. Alfred never suggested it to be unusual to go a month without seeing his son. Alfred actually told investigators "Bill would be gone a lot for periods of time." (330:6) In fact, Alfred told police he had almost no contact with Bill between the first of the year 2000 and the homicide. (330:5). If anything, this part of the investigation made it less likely that Bill Marquardt was involved, as it provided an innocent explanation as to why he had not been seen since the homicide.

The State puts much weight on testimony from the Eau Claire good faith hearing as showing a "substantial investigation". Despite Eau Claire defense counsel being unfamiliar with the relevant law and unfamiliar with the facts in the homicide case, this counsel must respond to the State's brief. Many of the factual assertions being made by the State in its appeal of

the Chippewa County case were not argued in this trial court below. They have their basis solely in the Eau Claire County good faith hearing transcript.

The Chippewa County court did not allow an evidentiary hearing to supplement this record with police reports demonstrating that either the testimony in the Eau Claire hearing was inconsistent with contemporaneous reports made by the investigators, or that the testimony is simply wrong. Since the Chippewa County Circuit Judge Roderick A. Cameron made his rulings without an evidentiary hearing and specifically denied effect to the Eau Claire hearing, it is improper for the State to use that transcript in this hearing. If this Court believes that the transcript can be considered in this appeal, then this counsel wishes to move this Court to remand for the purpose of an Ineffective Assistance of Counsel hearing regarding Eau Claire defense counsel or in the alternative, an evidentiary hearing in Chippewa County to demonstrate the numerous factual errors in the Eau Claire County good faith hearing.

The State finds it significant that Investigator Price testified in the Eau Claire hearing that the defendant's family could think of no "non-relative" with a motive to harm their mother. (State's brief: p.30) Fact of the matter is Investigator Price never testified that way. (327: 28).

> Q. Did either of those two individuals (brother and sister) or Alfred Marquardt give you any indication that any non-relative may have a motive to do harm to Ms. Marquardt?
>
> R. No.

None of the family members knew of any one including the defendant that might have committed this crime. Furthermore, the question asked of Price at the hearing doesn't even guarantee that the police specifically asked family members what non-relatives might have done this.

Special Agent Rehrauer testified at the Eau Claire hearing that there was television coverage of the homicide for two days before the search warrant application. Despite this publicity, he couldn't locate the defendant. However, the investigators knew that Alfred Marquardt said his son might

have been out of the area for some time because someone was after him. (33:4; 313:8).

The State points out that Rehrauer also testified at the Eau Claire hearing about a possible motive for Bill to kill his mother, which he learned while interviewing Alfred. The State cites this as "external indicia of probable cause known to the applying officers but omitted from the application." (State's brief: 29-30) Rehrauer testified that he learned from Alfred that his wife had "*discovered* [Marquardt] digging up twelve thousand dollars in cash from the Marquardt premises earlier in the year." (327:56) (Emphasis added)

According to Rehrauer's own report, that's not what Alfred said. Alfred told Rehrauer that on his wife's birthday, Bill went out to the shed to get some money that he kept stored there. (330:6) After Bill left, his wife call Alfred to tell him Bill took some of Bill's money from the shed. She did not know whether Bill had taken all of his money stored in the shed. There is no inference of a "discovery" by Bill's mother for the first time that Bill was storing money in the shed, as suggested by the State. Rehrauer's report makes it clear that

Bill and both his parents were well aware of Bill's use of the shed to keep his money. Her observation would not be a motive to kill.

Since the Eau Claire County defense counsel was only representing Marquardt on the cruelty to animals charge in Eau Claire County, it is easy to see why defense counsel was unable to impeach the officer's testimony at its good faith hearing. Most of the incorrect testimony adduced by the State at the Eau Claire hearing came from facts learned through the Chippewa County homicide investigation.

What is disturbing is that the State introduced the above testimony regarding the "discovery" by Mrs. Marquardt to supplement the record with facts allegedly known by officers before the March 15th, 2000 search warrant, but not included in the affidavit. Problem is Rehrauer's conversation with Alfred Marquardt regarding the alleged motive took place in November of 2000, about eight months after the initial search of the cabin. (330:6; top of report indicates 11/17/00). The State is trying to recreate history at the Eau Claire "Good Faith" hearing as to what was known before the first search of

Marquardt's cabin. The Eau Claire defense counsel was probably not able to properly impeach Rehrauer with the timing of the statement because his report pertained to the homicide investigation, not the cruelty to animal investigation. This counsel again objects to the use of that transcript.

There is no "significant investigation" as to Marquardt. The record demonstrates that many officers worked on the case for two days before requesting the warrant. (A total of 44 hours including sleeping hours). But the record does not demonstrate that the officers investigated Bill Marquardt or that any evidence was found whatsoever linking Marquardt to the homicide during that time. The only fact known was that the defendant's father Alfred Marquardt had not seen Bill Marquardt in almost a month. (322:2)

So even if the Court were to reach an Eason analysis, the first Eason factor would still require suppression of all evidence discovered in the March 15th, 2000 search of Marquardt's home.

II

THE INEVITABLE DISCOVERY DOCTRINE DOES NOT APPLY IN MARQUARDT

Otherwise excludable fruits of an illegal search may be admitted into evidence if the tainted fruits would have been inevitably discovered by other lawful means. *See* Nix v. *Williams*, 467 U.S. 431, 444, 104 S.Ct. 2501, 81 L.Ed.2d 377 (1984). In the context of search and seizure law, "inevitable discovery" has a specific meaning. It does not apply whenever it is obvious that the police could have and would have legally obtained evidence if they had not first obtained it illegally. Rather, the State must establish: (1) a reasonable probability that the evidence in question would have been discovered by lawful means but for the police misconduct; (2) that the leads making the discovery inevitable were possessed by the government at the time of the misconduct; and (3) that prior to the unlawful search, the government was also actively

pursuing some alternate line of investigation. *State v. Lopez*, 207 Wis.2d 413, 427-28, 559 N.W.2d 264 (Ct.App.1996).

Under the exclusionary rule, if a law enforcement officer conducts an unconstitutional search, then the fruits of that search will normally be excluded from evidence. *See Wong Sun v. United States*, 371 U.S. 471, 484, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963); *State v. Armstrong*, 223 Wis.2d 331, 361, 588 N.W.2d 606 (1999). However, the inevitable discovery doctrine provides that otherwise excludable fruits of an illegal search may be admitted into evidence if the tainted fruits would have been inevitably discovered by other lawful means. *See* Nix v. Williams, 467 U.S. 431, 444, 104 S.Ct. 2501, 81 L.Ed.2d 377 (1984); State v. Washington, 120 Wis.2d 654, 664, 358 N.W.2d 304 (Ct.App.1984), *aff'd on other grounds,* 134 Wis.2d 108, 396 N.W.2d 156 (1986).

At the trial court level, the State contended that the evidence illegally discovered in the searches of Marquardt's home as well as the evidence discovered in his vehicle after his arrest would inevitably have been discovered through lawful means within 10 days or so of when the evidence was illegally

seized. (327:3) To arrive at this conclusion, the State put forth a number of propositions, some unsupported by the facts and some speculative at best. (332:9-13)

However, for purposes of this appeal, the State has abandoned its prior theory of inevitable discovery and now argues a new theory not argued below. It now argues that there was no police misconduct. If this is the State's position, then inevitable discovery is inapplicable. This is because police misconduct is a prerequisite to invoking the doctrine of inevitable discovery. If there was no police misconduct, inevitable discovery doesn't apply.

Secondly, the State now argues that the list of alleged facts from the Eau Claire Good Faith Hearing constitute pre-existing leads. As previously demonstrated, the Eau Claire County Good Faith transcript is filled with errors and should not be used in this appeal. The trial court below in this case refused to honor it. Some of its facts were obtained months after the first search of Marquardt's home, but purported to be pre-existing knowledge. This is precisely the reason that the State should not be allowed to supplement the record. The

officers either have bad memories as to what was said and when it was said or they have intentionally bolstered the record with misrepresentations.

However, in response to the State's argument of pre-existing leads, our position is that there were no credible pre-existing leads. It is simply implausible that if these allegations were known before the first search, none of them made there way into the application for the March 15th search. The State's arguments show desperation.

The State argues from the Eau Claire good faith hearing transcript that a message for Bill Marquardt on the refrigerator was moved to the bedroom beneath a jewelry box on the day of the murder suggesting Bill Marquardt was there that day. According to police reports, Alfred Marquardt first found that note under the jewelry box a couple of weeks after the murder. He did not know when it was moved. This does not provide the State with a pre-existing lead.

Marquardt is prepared to argue against "inevitable discovery". It seems senseless to do so since the state has

abandoned those arguments. But since Marquardt is not guaranteed a further rebuttal brief, Marquardt will demonstrate why "inevitable discovery" is inapplicable using the State's arguments at the trial level. (332:9-13).

Below, the State claimed that prior to its first illegal search of Marquardt's residence, the police and DCI agents were involved in a substantial investigation that had substantially narrowed down to the defendant as the most likely suspect. (332:10) However, the affidavit in support of that first search warrant of Marquardt's residence was void of even one fact showing probable cause that Marquardt was connected to the crime. This is an unlikely scenario if a substantial investigation focusing on Marquardt provided facts supporting the claim prior to the search.

Secondly, according to the Chippewa Harold Archived Newspaper article dated Thursday, March 16, 2000, Sheriff Doug Ellis held two press conferences on Wednesday March 15, 2000. (330:3-4) The first press release was at 4:20 p.m. asking the public to assist in locating Bill Marquardt. This was about one hour after the illegal search of Marquardt's

home was complete. The second press release came at 9:47 p.m. elevating Marquardt to "suspect" based upon information that "came to light late in the afternoon Wednesday." Sheriff Ellis further said in his press release that "other suspects had not been ruled out." This demonstrates that Marquardt did not even become a suspect much less the prime suspect until after the first search.

Next, the State notes that Bill Marquardt's finger and palm prints were eventually found at his parent's residence. The State argues that this would not be expected since he hadn't been at the home for almost a month. The State provides no evidence that fingerprints last less than a month. Depending on surrounding circumstances, prints can remain indefinitely.

Next, the State points out that investigators were aware that one of Bill Marquardt's neighbor's home a few houses down across the street was burglarized on March 9, 2000. A dog was shot inside the home with a 9mm shell.

From this, the State concludes that the 9mm shell casings from the homicide and the dog killing would inevitably have

been compared by the crime lab due to the close proximity of the defendant's residence to the dog killing, the closeness in time of the two offenses and the finding of 9mm casings at each. Apparently, *inevitably* the crime lab would provide an opinion that the same weapon was used for both crimes. With this opinion and the other information above, a valid warrant would have *inevitably* been issued to search Marquardt's residence.

For unarticulated reasons the State concluded "a high probability exists" that all of the same evidence would have *inevitably* been discovered pursuant to a valid search warrant. The State concluded without explanation that this would have occurred within five to ten days of the initial illegal search.

The first concern with the State's theory below was their conclusion it would have been inevitable that the 9mm casings from the Anderson dog shooting in Eau Claire County would be compared with the 9mm casings from the Chippewa County homicide. 9mm casings are common in crimes involving guns. The two crimes occurred over forty miles apart in different counties. The crimes were very different.

One involves the killing of a human, whereas the other involves the killing of an animal. The Anderson dog killing was a forced entry break-in whereas there was no evidence of a break-in in the Marquardt homicide. Ms. Marquardt was stabbed in the neck with a knife in addition to being shot in the head. The Anderson dog was not stabbed. There was no apparent motive or *modus operandi* tying the two crimes together. Not one fact was known to the police to connect Marquardt to either crime. In fact, the State has not shown any evidence that Bill Marquardt even knew the Andersons or ever had any dealings with them. Furthermore, the police had a different suspect for the Anderson dog shooting. It is not likely authorities would have requested a comparison of the 9mm casings without the benefit of the illegal search first.

On the other hand, it is easy to see how and why the 9mm casings were compared after the police illegally searched Marquardt's residence on March 15, 2000. The police discovered evidence of dogs and rabbits shot and stabbed to death at Marquardt's cabin. Once the authorities had this information, Marquardt became a suspect of both crimes. The 9mm casing comparisons became an obvious next step.

The next problem with the State's theory below was that, assuming the crime lab eventually compared the 9mm casings from the Marquardt homicide with the Anderson dog killing casings showing the same gun was used for both, a valid search warrant would issue to search Marquardt's residence. These facts still fall short of probable cause to believe Bill Marquardt committed either crime or that evidence of a crime would be found at his cabin. Given what Alfred Marquardt told the police on the day of his wife's homicide about Bill Marquardt's contemporaneous concerns that someone was after him and he needed to leave the country coupled with what the police knew about Marquardt's prior drug dealings, evidence that both crimes involved the same gun would likely suggest that Bill Marquardt may have had an enemy in the drug world that was out to send him a message. This theory at least provides a motive for each crime. However, it does not render it probable that Bill Marquardt committed these two very different crimes, each without any apparent motive.

Assuming *arguendo* that a valid search warrant would have eventually been granted, the State suggests that "a high

probability exists" that all of the evidence would have been legally discovered within five to ten days. This is unreasonable to conclude.

Even with the benefit of the tainted evidence obtained on March 15, 2000, as well as the March 18, 2000 illegal arrest and second illegal search of Marquardt's residence, investigators still did not send the Anderson dog shooting evidence to the crime lab for comparison until March 20, 2000. (330). It is first preposterous to conclude that the investigators would have followed the same "time line" in sending the Anderson evidence to the crime lab for comparison without the benefit of the fruits of the two illegal searches. Without the benefit of the tainted evidence and given the presence of an alternate prime suspect for the dog shooting, it could have been months if ever before a comparison was made.

Secondly, the State cannot sustain a burden of showing that any of the evidence found on March 18, 2000 would have been present at some undisclosed point in the future. After Marquardt returned home on March 18, 2000 to his cabin that

was unsecured and searched through, photographs taken by police on both the 15th and 18th of March show that Marquardt started moving items out of his cabin into his car. (330:9-10). Photos show Marquardt's Play Station moved from his cabin [9] to the back seat of his vehicle [10]. Even without the photos showing Marquardt moving items from his cabin, it is impossible to predict what evidence might have remained in even a twenty-four hour period, much less an indefinite time period into the future.

The State needs to establish three elements before the "Inevitable Discovery Doctrine" can apply. The first is that a reasonable probability exists the evidence in question would have been discovered by lawful means "but for" the police misconduct. While counsel has not found any case law that defines "reasonable probability" in terms of "time", it appears that Courts which have found the "Inevitable Discovery Doctrine" to apply have done so under circumstances where the inevitable legal seizure is time-wise contemporaneous to the illegal seizure and under circumstances where the defendant can no longer move the evidence.

The "Inevitable Discovery Doctrine" was introduced in Nix v. Williams, 467 U.S. 431, 432-33 (1984). In Nix, the report of a missing ten-year-old girl triggered a massive search that began before the defendant's arrest and continued *without interruption* until the defendant led the authorities to the body. The police had violated the defendant's Sixth Amendment rights by improperly persuading him to confess to the murder of a young girl after he was in custody and had refused to speak without counsel present. The United States Supreme Court concluded that because the independent search party was proceeding towards the place where the body was located, the search teams would have continued the search, and the body inevitably would have been found had the defendant not told the police where the body was. Id. at 449. In Nix, the "massive search" was contemporaneous to the defendant leading authorities to the body.

In United States v. Jones, 72 F.3d 1324, 1330 (7th Cir.1995), the 7th Circuit Federal Court of Appeals held that under the inevitable discovery rule, $299 of genuine currency found during a pat-down search of a defendant before he was arrested should be admitted as evidence. The Court found that

since the police had completed their search of the defendant's house without searching the defendant personally, they had probable cause to arrest him based on the presence of counterfeiting equipment, and that the subsequent pat-down search conducted at the time of arrest would have produced the currency. The legal search would have occurred within moments of the illegal search of defendant.

In State v. Lopez, 559 N.W.2d 264 (Wis. App., 1996), during the execution of the search warrant, police located a freezer in the basement that was locked. In order to avoid prying it open, police asked Lopez where the key was located. Although Lopez was in custody, the police had not yet read him his *Miranda* warnings; nevertheless, Lopez told the officer where it was hidden. Police found a large quantity of marijuana in the freezer. The trial court determined that since there were no *Miranda* warnings given, the statement itself should be suppressed. However, the trial court refused to suppress the evidence because it found that "if nothing had been said the officer would have gone down and either found the key or... taken the nearest pry bar and sprung the door." The Court concluded that the evidence would have inevitably

been discovered and as such was admissible. In Lopez, the legal ability to search the freezer was contemporaneous to the illegally obtained information as to where the key was hidden and since the defendant was in custody, he couldn't move the evidence.

In State v. Kennedy, 134 Wis.2d 308, 396 N.W.2d 765, (Wis.App. 1986), the doctrine was applied to a search of an impounded vehicle in which a vodka bottle was discovered. It is clear that an inventory search of vehicle would have been conducted anyway. But the search was conducted pursuant to a defective search warrant because the police possessed the warrant and believed it to be valid. If a warrant had not been obtained, a routine inventory search would have occurred *at the same time and in the same manner* as the illegal search. During the inventory search, the unconcealed vodka bottle would have been discovered and seized, and it would have been admissible in evidence. Since the vehicle was impounded, the defendant had no ability to move the bottle. These facts established that the vodka bottle would have been inevitably discovered by lawful means.

The defense is unable to locate any case in which the "inevitable" discovery was not contemporaneous to the "illegally tainted" discovery, especially under circumstances as here where the defendant was free to rid his cabin of all the evidence found in the matter of hours. The more time separating the illegal discovery from a subsequent legal discovery, the less likely the same evidence will still be present when the suspect has access to the evidence. There is no reasonable probability that the evidence would eventually have been discovered "but for" the illegal first search.

Second, the State must show that the government at the time of the misconduct possessed the leads making the discovery inevitable. The defense argues herein that "but for" the knowledge acquired by the investigators during the first two illegal searches, the State possessed insufficient leads to conclude that a discovery of any evidence inculpating Marquardt was inevitable. As demonstrated above, the State's theory heavily relies on speculative reasoning as well as totally ignoring the "staleness" issues involved with a

theoretical "inevitable discovery" at some unascertainable point in the future.

Finally, the State must also demonstrate that prior to the unlawful search; the government was also actively pursuing some alternate line of investigation. What was it? The State has not alleged one. This is a necessary element for the State to show in order to prove "inevitability".

In State v. Parker, 646 N.W.2d 854 (Ct. App. 2002), officers had responded to a call from a proprietor of a motel that indicated she found what appeared to be cocaine inside on of the motel rooms while she was cleaning the room. The officers were aware that they had no search warrant. So instead of the officers obtaining a search warrant, they asked the proprietor to bring the cocaine to them. This constituted an illegal seizure because the proprietor became an agent of the officers when she started obeying their requests.

The State in Parker argued that since the officers had probable cause to immediately obtain a warrant and legally seize the cocaine, the evidence should be admissible through

the "inevitable discovery doctrine". The State argued that the third prong of this test was satisfied because "there is nothing to indicate that a search warrant would not have been applied for and obtained by the police officers [if the officers had not instead obtained the evidence illegally]." In rejecting the State's argument, the Court of Appeals held in Parker that this assertion does not show that the police were "actively pursuing some alternate line of investigation" which would have led to the legal seizure of the evidence. The State has an affirmative burden to show an actual alternate investigation. Therefore, the inevitable discovery doctrine did not apply.

There was no alternative line of investigation in the case at hand either. Inevitable discovery is not applicable.

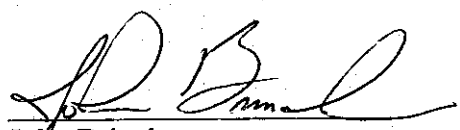
III

CONCLUSION

In conclusion, neither the Good Faith exception to the exclusionary rule or the Doctrine of Inevitable Discovery applies to Marquardt. Suppression is required.

Dated At La Crosse, Wisconsin: May 4, 2005.

Respectfully submitted,



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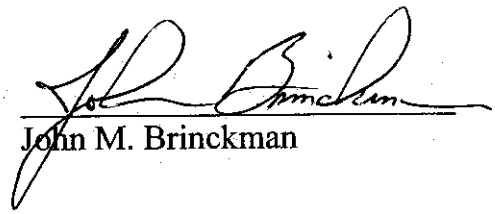
FORM AND LENGTH CERTIFICATION

I certify that this brief conforms to the rules contained in Wis. Stat. §(Rule) 809.19(8)(b) and (c) in that it is:

Proportional serif font: Minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of a minimum 2 points, maximum of 60 characters per full line of body text. The length of this brief is 9,542 words.

Dated this 4th day of May, 2005.



John M. Brinckman

APPENDIX

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State of Wisconsin **Circuit Court** **Chippewa County**

State of Wisconsin

Chippewa County

AFFIDAVIT FOR SEARCH WARRANT

Inv. Dick Price being duly sworn on oath, states as follows:

That the affiant and has reason to believe that on the 13th day of March, 2000, in Chippewa County, in and upon certain premises, in the Township of Eagle Point in said County, occupied by Alfred E. Marquardt, DOB 07/30/1946 and more particularly described as follows:

A single family dwelling, white in color, with a two car attached garage, and three vehicles on the property, two located in the garage and one in the drive way, two out buildings one being a metal pole building, the other being a wooden frame unattached garage, the residence being located at 11766 State Hwy 178, Chippewa Falls.

There are now located and concealed certain things, to-wit:

Shell casings, fire arms, finger prints, hairs, fibers, gun powder residue, and blood stains and samples.

Which things may constitute evidence of a crime, to-wit: Intentional homicide, contrary to Section 940.01 of the Wisconsin Statutes.

That the facts tending to establish the grounds for the issuance of a search warrant are as follows:

Inv. Price reports that on March 13, 2000, Chippewa County Sheriff's Dispatch received a 911 call from 11766 State Hwy 178, Chippewa Falls, Township of Eagle Point. The caller identified himself as Alfred E. Marquardt, DOB 07/30/1946. Marquardt reported that his wife was apparently dead at the residence.

Price continued that he responded to the Marquardt home and met with Marquardt. Marquardt relayed that he had left home at about 7 AM that morning and tried to call home about 11:50. The phone was busy and remained so the remainder of the day. Marquardt stated that he left work early and returned home because of the busy phone and upon arrival, found his wife, Mary J. Marquardt covered with a blanket in the garage. She was cold and unresponsive and appeared to have a head wound.

Price reports that a shell casing, tentatively identified as 9 mm, was observed on the premises.

State of Wisconsin **Circuit Court** **Chippewa County**

WHEREFORE, said affiant prays for a search warrant to be issued to SEARCH said premises FOR said items and bring the same, if found, and the person in whose possession the same is found, before said Court to be dealt with according to law.

Officer

Subscribed in sworn to me this 13th day of March, 2000.

Title: District Attorney

My commission is permanent / expires _____.

State of Wisconsin **Circuit Court** **Chippewa County**

State of Wisconsin

Chippewa County

SEARCH WARRANT

The State of Wisconsin, to the sheriff or any constable or any peace officer of Chippewa County:

Whereas, Inv. Dick Price has this date complained in writing and under oath to said Court, that on the 13th day of March, 2000 in Chippewa County and upon certain premises and Chippewa County, Wisconsin, more particularly described as follows:

A single family dwelling, white in color, with a two car attached garage, and three vehicles on the property, two located in the garage and one in the drive way, the residence being located at 11766 State Hwy 178, Chippewa Falls.

There are now located and concealed certain things, to-wit:

Shell casings, fire arms, finger prints, hairs, fibers, gun powder residue, and blood stains and samples.

Which things may constitute evidence of a crime, to-wit: Intentional Homicide, contrary to Section 940.01 of the Wisconsin Statutes.

The Court having read in the AFFIDAVIT FOR SEARCH WARRANT, and attachments if any, and the AFFIDAVIT FOR SEARCH WARRANT does in fact establish probable cause.

Now, therefore in the name of the State of Wisconsin, you are commanded forthwith to search said premises for said things, and if the same or any portion thereof are found, to bring the same and said persons in possession, before this court to be dealt with according to law. Additionally, you are commanded to return of this WARRANT within 48 hours to this court, also to be dealt with according to law.

Dated this 13th day of MARCH 2000, time 8:57 ~~am~~/pm.

BY THE COURT,

Thomas Sazama

Chippewa County Circuit Court Judge

This warrant executed at 1050 am/pm, 13 day of March, 2000.

State of Wisconsin **Circuit Court** **Chippewa County**

State of Wisconsin

Chippewa County

RETURN OF OFFICER

I hereby certify that in pursuit of the attached WARRANT, I searched for the said things therein described, at the place therein mentioned, and found the following things, to-wit:
[Describe any items discovered and attach and note supplemental pages if necessary]

Filed this _____ day of _____,2000, time _____ am/pm.

_____
Officer

STATE OF WISCONSIN)
) SS.
COUNTY OF EAU Claire)

APPLICATION FOR ORDER SEALING SEARCH WARRANT, SUPPORTING AFFIDAVIT/ORDER AND RELATED DOCUMENTS

John Vogler, being first duly sworn on oath, hereby makes application to this court for an order authorizing the sealing of the attached application for search warrant, search warrant, supporting affidavit and warrant return, and this application and order, until further order of the court.

Affiant states that he is an investigator employed by the Eau Claire Sheriff's Department. In that capacity, affiant assisted officers of the Chippewa County Sheriff's Department, and State of Wisconsin Division of Criminal Investigation in efforts to investigate the death of Mary J. Marquardt on or about March 13, 2000, in Chippewa County, Wisconsin. As part of those investigative efforts, a search warrant was executed in Chippewa county on March 13, 2000, as well as the attached application for search warrant for premises located in Eau Claire county, Wisconsin. Information contained in the affidavit in support of both search warrants, includes information not disclosed to the public. Affiant, therefore, requests that an order sealing the attached search warrant, application, affidavit, and return be issued in order to prevent premature disclosure which would jeopardize the further investigation of the homicide investigation described in said documents. Such an order is necessary to maintain the secrecy recognized in Section 968.21 Wis.Stats.:

> "A search warrant shall be issued with all practicable secrecy, and the complainant, affidavit or testimony upon which it is based shall not be filed with the clerk or made public in any way until the search is executed."

Consequently, it is requested that the Court execute the attached order sealing this application for search warrant, search warrant, and related documents.

John M. Vogler
Affiant

Subscribed and sworn to before me
this 15 day of March 2000. 11:59 a.m. (time)

BY THE COURT:

ORDER

Based upon the application of John Vogler, it is hereby ordered that the search warrant, return, and all supporting documents with respect to a warrant issued by this court, for premises in the City and County of Eau Claire, Wisconsin, is hereby ordered sealed and the contents of said search warrant and supporting documents shall not be disclosed by any person until further order of the court.

PLT/DEF EX# 2
DATE 4-26-02
CASE DOCF137

RLP

STATE OF WISCONSIN)
) SS.
COUNTY OF EAU CLAIRE)

APPLICATION FOR SEARCH WARRANT AND SUPPORTING AFFIDAVIT

John Vogler, being first duly sworn on oath, hereby makes application to this court for a warrant to search the premises described as: a cabin, storage building, pumphouse, and out-house located at E27505 County Highway M, in the Town of Fairchild, County of Eau Claire, and State of Wisconsin, more particularly described as all single story wood-frame, brown in color buildings. The requested search is for the following described property and things, to-wit:

1. Any and all ammunition and firearms.
2. Any and all clothing containing hair, blood, fibers or other things linking Mary J. Marquardt, deceased, to such clothing.
3. Any hair, blood, fibers, or other things linking Mary J. Marquardt, deceased, to the premises at E27505 County Highway M.
4. Any knives.
5. Any shoes.
6. Any documents, periodicals, receipts, bills or other things having date or other indication to show the presence of any person in the premises at E27505 County Highway M on or after March 13, 2000.

Affiant knows the contents of this application and supporting affidavit, and the statements herein are true of his own knowledge, save as to such as are herein stated on information and belief, and as to those, he believes them to be true.

This affiant applies for issuance of a search warrant upon the following grounds:

1. The property above-described was used as means of committing a crime.
2. The property above-described constitutes evidence which tends to show a crime has been committed, or tends to show that a particular person has committed a crime.

The facts tending to establish the foregoing grounds for issuance of a search warrant are as follows:

This affidavit is based upon information provided by Fellow Officers Barnier of the Eau Claire County Sheriff's Department and Price of the Chippewa County Sheriff's Department.

Affiant reports that on March 15, 2000, he received a copy of an affidavit for search warrant sworn and executed in Chippewa County on March 13, 2000, with respect to the suspected homicide of Mary J. Marquardt. A copy of said affidavit and search warrant is attached and hereby incorporated by reference.

Investigator Price reports that after finding the body of Mary J. Marquardt, he spoke with her husband, Alfred E. Marquardt. Mr. Marquardt informed him that he and Mary have a son, Bill Marquardt, who, since the location of Ms. Marquardt's body had not been seen or heard from.

Alfred Marquardt further informed Investigator Price that Bill Marquardt owned with Alfred Marquardt a cabin in which Bill resided at E27505 County Highway M, Town of Fairchild, County of Eau Claire, Wisconsin.

Investigator Price further reports that in examining the body of Mary J. Marquardt and the scene where she was found, it appeared as though among the wounds incurred by her was a knife wound. Also at the scene, officers were able to locate a number of footprints that may be suitable for comparison with the shoes that made them.

Investigator Barnier reports that in checking Eau Claire County tax rolls, he learned that a cabin, storage building, pumphouse, and out-house located at E27505 County Highway M, Town of Fairchild, Eau Claire County, are owned by Alfred and Bill Marquardt.

WHEREFORE, Affiant requests a search warrant be issued, commanding John Vogler and other law enforcement personnel to search the above-described premises for the described property and things and to seize said property and things and keep said property and things in custody until the same can be dealt with according to law.

Affiant

Subscribed and sworn to before me a.m.
this 15 day of March, 2000. 11:59 (time)

BY THE COURT:

STATE OF WISCONSIN
COUNTY OF EAU CLAIRE
CIRCUIT COURT

SEARCH WARRANT

WHEREAS, John Vogler, has this said day on oath, made application to the said Court applying for issuance of a search warrant to search the premises described as: a cabin, storage building, pumphouse, and out-house located at E27505 County Highway M, in the Town of Fairchild, County of Eau Claire, and State of Wisconsin, more particularly described as all single story wood-frame, brown in color buildings. The requested search is for the following described property and things, to-wit:

1. Any and all ammunition and firearms.
2. Any and all clothing containing hair, blood, fibers or other things linking Mary J. Marquardt, deceased, to such clothing.
3. Any hair, blood, fibers, or other things linking Mary J. Marquardt, deceased, to the premises at E27505 County Highway M.
4. Any knives.
5. Any shoes.
6. Any documents, periodicals, receipts, bills or other things having date or other indication to show the presence of any person in the premises at E27505 County Highway M on or after March 13, 2000.

WHEREAS, the application and supporting affidavit of John Vogler, was duly presented and read by the Court, and being fully advised in the premises,

NOW, THEREFORE, the Court finds that probable cause exists for the issuance of a search warrant upon the following grounds:

1. The property above-described was used as means of committing a crime.
2. The property above-described constitutes evidence which tends to show a crime has been committed, or tends to show that a particular person has committed a crime.

The Court further finds that probable cause exists to believe that the above-described property and things are at the above-described premises.

NOW, THEREFORE, YOU JOHN VOGLER AND OTHER LAW ENFORCEMENT PERSONNEL ARE HEREBY COMMANDED TO SEARCH THE ABOVE-DESCRIBED PREMISES FOR THE ABOVE-DESCRIBED PROPERTY AND THINGS, AND TO SEIZE SAID PROPERTY AND THINGS, AND RETURN THIS WARRANT WITHIN 48 HOURS BEFORE THE SAID COURT TO BE DEALT WITH ACCORDING TO LAW.

Dated this 15th day of March, 2000.

BY THE COURT:

STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2004AP1609-CR

STATE OF WISCONSIN,
Plaintiff-Respondent,

v.

BILL P. MARQUARDT,
Defendant-Appellant.

ON CERTIFICATION BY THE COURT OF APPEALS
TO REVIEW A CRIMINAL COMMITMENT ORDER
AND A POST-COMMITMENT ORDER
ENTERED IN THE CIRCUIT COURT
FOR EAU CLAIRE COUNTY,
THE HONORABLE ERIC J. WAHL, PRESIDING

BRIEF AND APPENDIX
OF PLAINTIFF-RESPONDENT

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STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2004AP1609-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

BILL P. MARQUARDT,

Defendant-Appellant.

ON CERTIFICATION BY THE COURT OF APPEALS
TO REVIEW A CRIMINAL COMMITMENT ORDER
AND A POST-COMMITMENT ORDER
ENTERED IN THE CIRCUIT COURT
FOR EAU CLAIRE COUNTY,
THE HONORABLE ERIC J. WAHL, PRESIDING

BRIEF AND APPENDIX
OF PLAINTIFF-RESPONDENT

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

As in most cases accepted by this court on certification, both oral argument and publication appear warranted.

INTRODUCTION
TO ISSUES PRESENTED

Consolidated appeals.

By orders of March 8 and 11, 2005, this court accepted certification of two criminal appeals arising in different counties but involving the same defendant and an overlapping suppression issue.

Present appeal: In Eau Claire County Case No. 00-CF-137 (Appeal No. 2004AP1609-CR), Defendant Bill Marquardt has been criminally committed for seven counts of mistreating animals by use of a dangerous weapon, one count of armed burglary and two counts of possession of a firearm by a felon (54). The State is respondent in this appeal, and this brief is submitted in response to a new brief-in-chief that Marquardt has filed in this court.

Companion appeal: In Chippewa County Case No. 00-CF-104 (Appeal No. 2004AP0958-CR), Marquardt stands charged with first-degree intentional homicide and possession of a firearm by a felon. That case is in a pretrial posture. The State is appellant in the Chippewa County case and, in this court, the State chose to stand on the brief-in-chief that it filed in the court of appeals.

Conflicting suppression rulings.

Some evidence in both prosecutions stems from execution of a search warrant on March 15, 2000, at Marquardt's Eau Claire cabin and outbuildings:

- In the Chippewa County case, the trial court suppressed evidence discovered during execution of the warrant on March 15, 2000. In doing so, the Chippewa County court rejected the State's arguments that the "good faith" doctrine saved lack of probable cause in the warrant application or, alternatively, that the evidence is admissible under the "inevitable discovery" doctrine.

- In the present Eau Claire County case, the trial court concluded that "good faith" saved lack of probable cause in the warrant and, therefore, the court did not address the State's alternative argument based on the "inevitable discovery" doctrine (84:72-76).

Marquardt's issues on this appeal.

In its certification, the court of appeals identified three issues relating to the "good faith" exception to the exclusionary rule and three issues relating to the "inevitable discovery" doctrine. All of these issues concern the admissibility of evidence discovered during execution of the search warrant on March 15, 2000.

In the companion Chippewa County appeal, the State, as appellant, addresses both "good faith" and "inevitable discovery."

In this Eau Claire County appeal, Marquardt addresses only the "good faith" issues. The State nevertheless reprises its alternative argument on "inevitable discovery" as set forth in its brief-in-chief in the Chippewa County appeal. However, because the Eau Claire County trial court did not address "inevitable discovery," this court could remand that question for further development should it decide not to apply the "good faith" exception.

Also, if this court were to reject the State's arguments on *both* "good faith" and "inevitable discovery," remand then would be necessary to determine the scope of the "taint" from execution of the warrant on March 15, 2000. Neither trial court addressed what "derivative" evidence would have to be suppressed.

Finally, in this Eau Claire County appeal, Marquardt raises one non-certified issue: whether he was wrongly denied the right of self-representation at his

Eau Claire County trial. The State addresses this issue in Argument III. of this brief.[1]

STATEMENT OF THE CASE

On January 30, 2003, after a three-day trial, an Eau Claire County jury found Defendant Marquardt guilty of ten crimes stemming from the following incidents (49; 93:124-27):

- Between March 6 and March 15, 2000: Six counts of mistreating animals by use of a dangerous weapon (a .22-caliber rifle) for shooting to death three puppies and three rabbits that Marquardt recently had bought, plus one count of possession of a firearm by a felon (3:1-3; 93:72-74); and

- March 9, 2000: One count of armed burglary and one count of mistreating an animal by use of a dangerous weapon (a 9mm handgun) for breaking into the residence of neighbor Wesley Anderson and shooting to death the family dog, plus one count of possession of a firearm by a felon (3:3-4; 93:74).

Marquardt stipulated that in 1996, he was convicted of a felony of possession with intent to deliver marijuana (91:186).

On April 7, 2003, the prosecutor conceded that Marquardt should be found not guilty by reason of mental disease or defect (95:2, 20-21), and Judge Eric J. Wahl committed Marquardt for institutional care not exceeding seventy-five years (54; 95:40-41).

---

[1]Marquardt has *not* briefed four other issues that he raised in the court of appeals, and the State assumes, therefore, that he is abandoning them. In any event, the State's responses to those unbriefed issues appear in Arguments III. to VI. of the State's brief in the court of appeals.

Marquardt unsuccessfully sought a new guilt phase of trial (66; 71; 72; 96:52-78) and now appeals from the commitment and post-commitment orders (74).

As noted, by orders of March 8 and 11, 2005, this court accepted the court of appeals' certification of this appeal.

STATEMENT OF FACTS: TRIAL TESTIMONY

Pre-March 2000.

In June 1999, Bill Marquardt, age twenty-four, moved into a small cabin that his father, Alfred, had helped him to buy in a "secluded rural area" (91:76) of the Town of Fairchild (92:29-30). Adjacent to the cabin are an outhouse and storage shed (91:75-77).

Marquardt said he quit his job in the fall of 1999 and that in mid-February 2000, he met "Lillie Murphy," who, he said, told her that she was from St. Paul and was "on the run" from authorities (93:9-11). He said Lillie lived with him until March 12, 2000 (93:10-11, 43).

Marquardt's father, Alfred, said Marquardt did not want his parents to visit him, once pushing his mother out of the cabin (92:38-39). Alfred described the cabin as "a mess," with music tapes scattered near the door (92:39-40). He said the music collection had been Marquardt's "pride and joy" (92:59-60).

March 6, 2000.

Cab driver Ronald Lewis said that on March 6, 2000, he drove Marquardt to a mall (91:131-32), where Marquardt said he was going "to pick up a cat for his mother's birthday" (91:133). According to Lewis, Marquardt "wore his jacket over his head," claiming to

have "sunburn on his head," although Marquardt wore the jacket normally after exiting the cab (91:133-35).

Pet store clerk Denise Woodford identified Marquardt as the man who used the name "Dan Schmitt" and a Chippewa Falls address to buy two rabbits (92:14-15). She said Marquardt told her that he was buying the rabbits "for his mother's birthday" (92:14).

Marquardt acknowledged that his mother's birthday is February 19 (93:47), two weeks before his purchase. He said he actually bought the rabbits for Lillie (93:12). He said he does not like to use his real name or address in business dealings or at motels, "[because] I'm a private person" (93:13, 46).

Cab driver Lewis said that just before he dropped off Marquardt at home, three dogs (not Marquardt's) ran across the road, prompting Marquardt to say "he had to get rid of them because they were killing the animals out at his cabin" (91:135-36). Marquardt denied making such comment (93:46). Marquardt said he later bought a third rabbit, one with "better colors" (93:50-51).

March 8, 2000.

Pet store clerk Angela Buck identified Marquette as the man who, on March 8, 2000, used the name "Scott Mueller" and a Chippewa Falls address to buy a sheltie puppy (91:123-25). Marquardt said he bought the sheltie for Lillie (93:13-14), but that Lillie "wanted a bad ass dog . . . like a pit bull or rottweiler" (93:14-15).

March 9, 2000.

Wesley Anderson and his family are neighbors of Marquardt (91:103, 111). Anderson said he only spoke to Marquardt when Marquardt moved into the cabin (91:111). Marquardt said he did not know the Andersons (93:17).

At 4:00 p.m. on March 9, 2000, seventeen-year-old Taylor Anderson came home to find the front door window "shot out" and a blood trail from the kitchen to a bedroom (91:103-05). On the bedroom floor lay Rexi, the family's two-year-old dog, dead from gunshot wounds (91:105, 108, 121; 92:22). Other than bullet holes, the residence had not been damaged or ransacked, and nothing had been taken (91:108-09).

Inside the residence, officers recovered five bullet casings (91:21), which a Crime Lab expert matched to a 9mm handgun found on March 29, 2000, under the refrigerator in Marquardt's cabin (91:84; 92:89-90). Wesley Anderson said Marquardt would know of Rexi, because Anderson's wife regularly walked the dog past Marquardt's cabin (91:112-13, 120).

Wesley Anderson said that a year earlier, his children had "a run-in" on the bus with a Carl Thurmond (91:109-10, 115-16, 122, 149). Thurmond told a deputy that he once "kidding[ly]" threatened to shoot a neighbor's dog (92:229). Thurmond said he disliked Anderson for not allowing Thurmond to hunt on Anderson's property (92:235-36). He said that on March 9, 2000, he worked from 6:00 a.m. to 2:15 p.m. and thereafter was with his aunt and mother (92:236-37).

Cab driver Robin Ashley said that on the afternoon of March 9, 2000, she gave a man a ride to a Fall Creek car dealership (91:212-14). She said the man wore sunglasses, claimed he had "sunburned" his head and wore a hooded sweatshirt (91:214). Marquardt said that on March 9, he bought "a blue car" and that when he returned to his cabin, he noticed squad cars at the Anderson residence and learned of the break-in and shooting of the Anderson dog (93:18-19).

March 10, 2000.

Stacy Adams of the Eau Claire County Humane Association said that on March 10, 2000, a man using the name "Chris Powell" applied to adopt a dog (91:176-79). She said the application was denied the next day, noting that it lacked a phone number and that the applicant's address did not exist (91:177-81, 185). Marquardt admitted making the application (93:49-50).

March 11, 2000.

Nina Eisold testified that on March 11, 2000, she sold two male pit bull puppies to Marquardt (91:166-69). She said Marquardt "did not want to have any [follow-up] contact with me" (91:168-69) and "rushed" through the sale (91:171-73). Marquardt said he bought the pit bull puppies for Lillie (93:15-16).

March 15, 2000.

At 1:00 p.m. on March 15, 2000, deputies executed a search warrant at Marquardt's cabin and outbuildings (91:74-76). The cabin's interior was "a complete mess" (91:89-81). Deputies found pet store receipts, directions to the humane association and a dog care manual (91:81-82). Marquardt was not home.

Inside the outhouse, stacked on top of each other in the "hole," were the remains of Marquardt's two pit bulls and sheltie (91:78-79; 93:51-52). Each puppy had been shot (91:187-88) and "had open wounds on the neck area" (91:79), described as "stab or cutting" wounds (91:199). Beneath the puppies was a gun case for a 9mm handgun (91:78-79, 95). Bullet fragments from the pit bull puppies appeared to be .22-caliber (91:200-01). Inside the storage shed, deputies found a bloodstained tarpaulin and a .22-caliber bullet casing (91:77). Some of the blood appeared viscous (92:199-201).

Twenty-five yards from the cabin were the remains of Marquardt's three pet rabbits (91:80; 93:50). They, too, had been shot and "had open [neck] wounds" (91:80).

March 18, 2000.

Marquardt said he arrived home early on March 18, 2000, from a trip to Florida that began March 12 (93:21-27). He said the cabin's front door was "broken off its hinges" and his CDs, VCRs and a coffee table were "smashed" (93:27, 48). He said Lillie was gone and the puppies were not in the storage shed, where he noticed stains on the carpet (93:27-28). He said he did not call the police, "[b]ecause I was dead tired and I don't like police much" (93:65).

Marquardt said he awoke at 10:00 a.m. and heard deputies say they had an arrest warrant for him for cruelty to animals (93:29-30). Marquardt said a tear gas can was tossed into the cabin before he could dress (93:30).

When arrested, Marquardt was carrying a "folding knife" (92:203). Inside the cabin, against a wall, was a .22-caliber rifle (91:101-02; 92:32). Marquardt's father, Alfred, said he had bought the rifle for Marquardt when Marquardt was in high school (92:30, 43). An officer said Alfred had reported on March 15 that Marquardt had the .22 rifle at the cabin (92:103-04, 108).

Deputies also found a box of .22-caliber bullets in a backpack in the bedroom (91:82-83). The bullets were the same brand as the .22-caliber casing found in the storage shed (91:83). Eleven bullets were missing from the box (91:82). The backpack had not been in the cabin during the search three days earlier (91:85). Deputies also found a live 9mm bullet on the kitchen floor (91:83-84).

Marquardt's father said he boarded the cabin's front door and windows on the night of March 18 and padlocked the door a few days later (92:64-66).

March 29, 2000.

On March 29, 2000, deputies conducted a third search of Marquardt's cabin (91:84). They moved a refrigerator and found the aforementioned 9mm handgun "lodged" beneath it (91:84), along with two boxes of 9mm bullets (91:96). Marquardt denied knowing of the handgun (93:32).

Marquardt's subsequent statements.

Tony Lovelien testified that in November 2002, while he was a cellmate of Marquardt, Marquardt confessed to shooting "two dogs and . . . a rabbit . . . with a twenty-two caliber gun" (91:153). According to Lovelien, Marquardt said he had had "sexual intercourse" with the animals and shot them "so they wouldn't tell on him" (91:153). Lovelien said Marquardt also mentioned "[s]omething about a dog at a neighbor's place" (91:154). Marquardt denied making such comments (93:37-38).

Investigator Price said Lovelien told him of Marquardt's statements on November 14, 2002, noting that the use of a .22 rifle to kill Marquardt's pets had not been made public (92:124-25, 136). Investigator Price said Lovelien received no "concessions" or "benefit" for the information (92:124; *see also* 91:154-55, 159).

Marquardt's defense testimony.

Marquardt offered alibi testimony for the period of March 12 to March 18, 2000.

Marquardt said that on March 12, he went to his parents' home, accompanied by Lillie, to dig up money he had buried (93:19-20). He said he showed her the .22 rifle there (93:21). Marquardt said he then left alone for Florida and stayed overnight in Madison, sleeping at a stranger's house (93:21-23).

Marquardt said that on March 13, he drove to Aurora, Illinois, with a man named "Mia," and stayed alone at a Budget Inn in Salem, Illinois, under the name "Corey Peters" (93:24, 66). He said he then drove alone to Valdosta, Georgia, arriving on March 14, and took his 1995 green Thunderbird "out of storage," switching from a "red station wagon" (93:24).

Marquardt said that on March 15, he met a friend named Eddie Rams in Florida and stayed at a resort in the Florida Keys (93:25-26, 57). He said that on March 16, he dropped off Eddie in Orlando and stayed overnight at a hotel in Tifton, Georgia (93:26). He said he drove back to his cabin the next day, arriving on the early morning of March 18 (93:26-27). Officers found receipts suggesting Marquardt was in Florida on March 15-16 and in Georgia on March 17 (91:206-07; 92:191).

Finally, Peter Heacox said that in 1996, he had been to the residence of Marquardt's parents and that he disliked Marquardt because Marquardt may have "snitched" on him (92:165-66). Heacox did not work on March 13, 2000 (92:166-69, 176-77). Susan Westaby said that while driving on a morning in March 2000, a blue S-10 truck backed out "over the lawn" at the Alfred Marquardt residence but she did not see the driver (92:174).

ARGUMENT

I. OFFICERS ACTED IN OBJECTIVELY REASONABLE RELIANCE ON THE MARCH 15 WARRANT, SO THAT THE "GOOD FAITH" EXCEPTION TO THE EXCLUSIONARY RULE APPLIES.

A. Introduction.

By search warrant issued March 15, 2000, for Marquardt's cabin and outbuildings (the "March 15 warrant"), officers sought evidence of Marquardt's involvement in the homicide of his mother on March 13, 2000, in Chippewa County (23:Ex. 2). During execution of the March 15 warrant, officers discovered the remains of Marquardt's three dogs and three rabbits (91:78-79).

In a published decision filed August 21, 2001, on Marquardt's interlocutory appeal in Chippewa County, the court of appeals concluded that the March 15 warrant was not supported by probable cause, and it remanded "for a determination of whether the good faith exception to the exclusionary rule applies." *State v. Marquardt*, 2001 WI App 219, ¶ 2, ¶ 20, 247 Wis. 2d 765, 635 N.W.2d 188 (*see* R-Ap. 101-112).

Before the Chippewa County court ruled on the remanded issue of "good faith," Marquardt moved in the present case to suppress evidence derived from the March 15 warrant (17). On April 26, 2002, Judge Wahl conducted an evidentiary hearing and found "good faith" for the March 15 warrant (84:72-76).

On this appeal, Marquardt argues:

(1) That Judge Wahl improperly failed to apply the "objectively reasonable reliance" standard of *United States v. Leon*, 468 U.S. 897, 919 (1984), in determining "good faith" (Marquardt's brief at 10-34), and that defense

counsel was ineffective for not making such argument (Marquardt's brief at 39-42); and

(2) That the added "good faith" requirement of a "significant investigation" under *State v. Eason*, 2001 WI 98, ¶ 74, 245 Wis. 2d 206, 629 N.W.2d 62, was not met (Marquardt's brief at 34-39).

For the reasons that follow, this court should reject Marquardt's arguments.[2]

B. The "good faith" exception.

1. General principles.

Evidence obtained through a search warrant is admissible in evidence – despite inadequate probable cause or technical insufficiency – so long as officers acted in "objectively reasonable" reliance on it. *Leon*, 468 U.S. at 919; *Eason*, 245 Wis. 2d 206, ¶ 74.

The good-faith inquiry "is confined to the objectively ascertainable question whether a reasonably well trained officer would have known that the search was illegal despite the magistrate's authorization," and it is determined by examining "all of the circumstances." *Leon*, 468 U.S. at 922 n.23.

In *Leon*, the Supreme Court identified four situations in which "good faith" should *not* be recognized, and Marquardt focuses on one of those: where the affidavit is "'so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable.'" *Leon*, 468 U.S. at 923 (brackets added; citation omitted).

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[2]Although the State's argument on "good faith" in this Eau Claire County appeal necessarily resembles its "good faith" argument in the Chippewa County appeal, some additional points and recent authorities on the subject have been included in this brief.

In recognizing a "good faith" exception to the exclusionary rule under the state constitution, this court adopted the "negative" standards of *Leon* and added two "affirmative" standards:

> [T]he State [must also] show that the process used in obtaining the search warrant included [1] a significant investigation and [2] a review by either a police officer trained and knowledgeable in the requirements of probable cause and reasonable suspicion, or a knowledgeable government attorney.

Eason, 245 Wis. 2d 206, ¶ 74.

Whether the State has shown "good faith" is a question of law subject to *de novo* review. *See, e.g.*, *United States v. Koerth*, 312 F.3d 862, 865 (7th Cir. 2002), *cert. denied*, 123 S.Ct. 1947 (2003).

A court reviewing the *original* determination of probable cause for a search warrant is confined to the record that was before the issuing magistrate but also examines the totality of the circumstances in that record. *State v. Jones*, 2002 WI App 196, ¶ 26, 257 Wis. 2d 319, 651 N.W.2d 305. The reviewing court must "accord great deference to the determination made by the warrant-issuing magistrate." *Id.* at ¶ 21.

Moreover, in the context of "good faith," the focus is on the reasonableness of *police* reliance on the magistrate's determination of probable cause. *See Leon*, 468 U.S. at 992. Thus, "the degree of police deference to the magistrate which is perceived by courts as reasonable under *Leon exceeds significantly* that 'great deference' owed the magistrate by reviewing courts." 1 Wayne R. LaFave, *Search & Seizure* § 1.3(f) at 97-98 (4th ed. 2004) (emphasis added; footnote omitted). In short, "[a]n officer's decision to obtain a warrant is *prima facie* evidence that he or she was acting in good faith." *Koerth*, 312 F.3d at 868; *see also Leon*, 468 U.S. at 921 n.21.

2. In determining "good faith," the reviewing court should be able to consider indicia of probable cause known to the applying officers but omitted from the warrant application.

Some courts hold that in determining whether indicia of probable cause for a warrant are so lacking as to preclude "good faith," the reviewing court is bound by the warrant application. *See United States v. Hove*, 848 F.2d 137, 140 (9th Cir. 1988); *People v. Miller*, 75 P.3d 1108, 1116-17 (Colo. 2003); *State v. Klosterman*, 683 N.E.2d 100, 103-04 (Ohio Ct. App. 1996); *Janis v. Commonwealth*, 472 S.E.2d 649, 653-54 (Va. Ct. App. 1996).

Other courts – apparently a slight majority – hold that the reviewing court *may* consider external indicia supportive of probable cause known to the applying officers but omitted from the warrant application. *See United States v. Martin*, 297 F.3d 1308, 1318-19 (11th Cir.), *cert. denied*, 537 U.S. 1076 (2002); *see also United States v. Marion*, 238 F.3d 965, 969-70 (8th Cir. 2001); *United States v. Danhauer*, 229 F.3d 1002, 1007 (10th Cir. 2000); *United States v. Dodd*, 349 F.Supp.2d 1039, 1050-51 (W.D.Tex. 2004); *Moya v. State*, 981 S.W.2d 521, 525-26 (Ark. 1998); *People v. Lim*, 85 Cal. App. 4th 1289, 1297-98 (2001); *Moore v. Commonwealth*, 2005 WL 635048 at *2 (Ky. March 17, 2005); *State v. Davidson*, 618 N.W.2d 418, 427 (Neb. 2000).[3]

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[3]*See generally* Recent Case, *Eleventh Circuit Holds That Courts May Look Beyond the Text of a Warrant When Determining Whether An Officer Reasonably Relied Upon the Warrant -- United States v. Martin*, 297 F.3d 1308 (11th Cir. 2002), 116 Harv. L. Rev. 1185, 1185 & n.8 (2003) (hereafter "Recent Case," stating that "the holding in *Martin* is now the majority rule").

Seventh Circuit decisions appear to go both ways. *See Koerth*, 312 F.3d at 869 (limited to warrant application); *United States v. Dickerson*, 975 F.2d 1245, 1250 (7th Cir. 1992) (includes external indicia of probable cause), *cert. denied*, 507 U.S. 932 (1993). The Sixth Circuit has recognized, but left open, the question. *See United States v. Carpenter*, 360 F.3d 591, 597 (6th Cir. 2004).

For several reasons, this court should adopt the view that in determining "good faith," a reviewing court *may* consider external indicia supportive of probable cause and known to the applying officers but omitted from the warrant application – at least so long as the warrant application itself is more than "bare bones."

- First, both the United States Supreme Court in *Leon* and the Wisconsin Supreme Court in *Eason* envisioned that an after-the-fact analysis of "good faith" reliance on a search warrant would entail consideration of evidence outside of the warrant application.

For example, the first two *Leon* "exceptions" to good faith – whether the applying officer lied and whether the issuing magistrate abandoned his or her role – inherently require consideration of evidence external to the warrant application. *Leon*, 468 U.S. at 923. The same is true of the two *Eason* factors: "[W]e expect that there will be testimony offered at the ["good faith" hearing] on questions concerning significant investigation and review by a knowledgeable police officer or government attorney." *Eason*, 245 Wis. 2d 206, ¶ 71 n.34

With respect to the *Leon* "exceptions" to good faith, the Supreme Court observed that "all of the circumstances – including whether the warrant application had previously been rejected by a different magistrate – may be considered." *Leon*, 468 U.S. at 922 n.23; *see also Anderson v. Creighton*, 483 U.S. 635, 641 (1987) ("whether it was objectively legally reasonable to conclude that a given search was supported by probable

cause . . . will often require examination of the information possessed by the searching officers"). Indeed, if good faith with respect to probable cause depended solely on the warrant application, there would have been no need for the court of appeals to remand for a "good faith" determination.[4]

- Second, a reviewing court's consideration of external indicia *supportive of* probable cause and known to the applying officers comports with the purpose of the exclusionary rule to deter police violations of the Fourth Amendment. *See United States v. Taxacher*, 902 F.2d 867, 872 (11th Cir. 1990), *cert. denied*, 499 U.S. 919 (1991).

There is no incentive for an officer seeking to comply with the "probable cause" requirement by applying for a warrant to omit information supportive of probable cause. Omission of a fact supportive of probable cause may be just as inadvertent (and important) as omission of a fact particularizing a place to be searched, a circumstance in which courts uniformly take into account external information known to executing officers to uphold the search. *See, e.g.*, *United States v. Procopio*, 88 F.3d 21, 28 (1st Cir.), *cert. denied*, 519 U.S. 1046 (1996), and 519 U.S. 1138 (1997); *United States v. Owens*, 848 F.2d 462, 464-66 (4th Cir. 1988); *United States v. Gahagan*, 865 F.2d 1490, 1496-99 (6th Cir.), *cert. denied*, 492 U.S. 918 (1989).

- Third, it "would make no sense" in a "good faith" analysis to preclude reviewing courts from considering omissions "*favorable* to a probable cause

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[4]In *State v. Brady*, 130 Wis. 2d 443, 388 N.W.2d 151 (1986), this court was *not* squarely faced with deciding whether external indicia supportive of probable cause may be considered in the analysis of "good faith." It simply declined to entertain a "good faith" analysis, because the warrant affidavit "lacked [any] indicia of probable cause regarding the impracticability of securing [the defendant's] presence through a subpoena." *Id.* at 454 (brackets added).

finding" and known to the warrant applicants. *Lim*, 85 Cal. App. 4th at 1297-98 (emphasis in original). In such cases, if the issuing magistrate had correctly *denied* the warrant application for lack of probable cause, the applying officers – who already possessed the favorable, omitted information – could have corrected the insufficiency in short order in a subsequent application, without risking loss of the sought-after evidence.

"[I]n an ideal system[,] an unreasonable request for a warrant would be harmless, because no judge would approve it." *Malley v. Briggs*, 475 U.S. 335, 345 (1986). But, "[p]enalizing the officer for the magistrate's error, rather than his own, cannot logically contribute to the deterrence of Fourth Amendment violations." *Leon*, 468 U.S. at 921.

In a "good faith" analysis, precluding consideration of external indicia of probable cause for the warrant would *not* "further the purpose[] of the exclusionary rule" to deter police misconduct in conducting searches and seizures. *Leon*, 468 U.S. at 918. Conversely, precluding consideration of such external indicia of probable cause may actually tend to discourage warrant applications:

> Under a *Martin* rule [allowing, in a "good faith" analysis, consideration of external indicia supportive of probable cause], police officers who enter into the warrant process can expect uncovered evidence to be admissible as long as their actions are reasonable, even if the information they include in the warrant would not by itself convince a reviewing court that the officer reasonably believed probable cause to be present, while evidence retrieved from an otherwise permissible warrantless search would be excluded unless the search was supported by probable cause.

Recent Case, 116 Harv. L. Rev. at 1188-89 (footnotes omitted).

Conversely, "good faith" would not save a warrant based on insufficient probable cause where the only external information supportive of probable cause resulted

from execution of the invalid warrant itself or otherwise was discovered *after* the warrant was sought. *See Whiteley v. Warden*, 401 U.S. 560, 567 n.11 (1971). In a "good faith" analysis, what matters is what the officers knew *before* they sought the warrant, and the State bears the burden of so proving. *Leon*, 468 U.S. at 924.[5]

- Fourth, some courts that have excluded external information *supportive of* probable cause from "good faith" analyses have commingled the standard of "objecttive reasonableness" with the officer's "subjective" beliefs in seeking the warrant. *See, e.g.*, *Hove*, 848 F.2d at 140; *Klosterman*, 683 N.E.2d at 104. Although an officer's subjective beliefs are irrelevant, "objective reasonableness," which the State must prove, typically depends on information external to the warrant application. See *Leon*, 468 U.S. at 924 ("the prosecution should ordinarily be able to establish good faith without a substantial expenditure of judicial time").

The Supreme Court's words in *Anderson v. Creighton* also support the proposition that *external* indicia supportive of probable cause *are* relevant to the determination of "objective reasonableness" in the analysis of good faith:

> [T]he determination whether it was *objectively* legally reasonable to conclude that a given search was supported by probable cause . . . will often require examination of the information possessed by the searching officials. . . . [T]his does *not*

[5]In *Whiteley*, 401 U.S. at 565 n.8, the Supreme Court observed that "an otherwise insufficient affidavit cannot be rehabilitated" by information known to the warrant applicant but not disclosed to the magistrate. This is simply a restatement of established law limiting review of the *original* determination of probable cause in a warrant application to the record before the issuing magistrate. *Whiteley* was decided in 1971, thirteen years before *Leon*, and *Whiteley* says nothing about the scope of review in a "good faith" analysis. Indeed, if *Whiteley* so limited "good faith" review, then all of the many aforementioned courts that permit consideration of external indicia supportive of probable cause in determining "good faith" would be patently wrong.

> reintroduce into qualified immunity analysis the [forbidden] inquiry into officials' subjective intent.

Anderson, 483 U.S. at 641 (emphasis added). *Anderson* relied on *Malley v. Briggs*, 475 U.S. at 342, which, in turn, relied on *Leon*.

As the court of appeals suggests at page 6 of its certification in the present case, "it is possible to have *objective*, verifiable information [supportive of probable cause] excluded from a warrant application" (emphasis added). Information known to the applying officer but omitted from the warrant application may be no less "objective" than information contained in the application. An inquiry into *why* the applicant omitted the information or believed the application was sufficient, would be "subjective," and such considerations are properly excluded from the "objective" analysis of good faith.

For all of the foregoing reasons, this court should conclude that in determining "good faith," a reviewing court *may* consider external indicia supportive of probable cause and known to the applying officers but omitted from the warrant application.

C. Application of "good faith" to the present case.

1. Based solely on the March 15 warrant application, officers could reasonably rely in good faith on the issuing judge's finding of probable cause.

The March 15 warrant was sought within forty-eight hours after discovery of the March 13 homicide of Marquardt's mother (23:Ex. 2 at 2). The warrant application incorporates the affidavit and warrant issued March 13 in Chippewa County to search the buildings and

vehicles at the residence of Marquardt's parents (23:Ex. 2 at 1, 8).

Read together, the affidavits for the March 13 and March 15 warrants are *not* so lacking in indicia of probable cause as to preclude objectively reasonable reliance on them in connecting Marquardt to the homicide. In turn, the links to Marquardt made his cabin and outbuildings likely repositories for the warrant's enumerated items. Specifically, the following information, taken together, identifies Marquardt as the probable perpetrator:

- First, the affidavit of March 13 indicates that at 11:50 a.m. that day, the phone "was busy and remained so the remainder of the day" at the residence of Marquardt's parents, prompting Marquardt's father to come home early from work (23:Ex. 2 at 6). This information reasonably suggests that the phone was off the hook, likely in relation to the homicide of Marquardt's mother. In turn, it reasonably suggests that the perpetrator had been inside the residence. In the absence of any indication of a break-in or missing valuables, it suggests that Mrs. Marquardt allowed the perpetrator inside or that the perpetrator had a key for the residence – in effect, that the perpetrator was a relative or friend.

- Second, the March 13 affidavit reports that Marquardt's mother had "a head wound" and that a 9mm shell casing was found "on the premises," suggesting that she had been shot (23:Ex. 2 at 6). The March 15 affidavit reports that "among the wounds incurred by [the victim] was a knife wound" (23:Ex. 2 at 2). This information reasonably suggests that the killing was intentional and that homicide was "*the*" motive of the perpetrator. The affidavit contains no information suggesting a break-in, missing valuables or sexual trauma to the victim. This information further suggests that Mrs. Marquardt knew her killer.

- Third, the fact of homicide by use of a gun and a knife also reasonably suggests that the perpetrator was

male. *See, e.g.*, Marina Angel, *Abusive Boys Kill Girls Just Like Abusive Men Kill Women: Explaining the Obvious*, 8 Temp. Pol. & Civ. Rts. L. Rev. 283, 290 (1999) ("The statistics show that males kill in overwhelming numbers compared to females, and they kill with firearms").

- Fourth, the March 15 affidavit states that officers at the homicide scene "were able to locate a number of footprints that may be suitable for comparison with the shoes that made them" (23:Ex. 2 at 2). Coupled with the foregoing information and reasonable inferences, this statement reasonably suggests that *male* footwear made the prints and that comparisons might definitively include or exclude suspects.

- Fifth, and significantly, the affidavit of March 13 states that the victim was found "covered with a blanket in the garage" (23:Ex. 2 at 6). In a residential homicide, such conduct strongly suggests that the perpetrator felt compassion for the victim or remorse for the killing, *because he intimately knew the victim, and vice versa*. The case law supports this conclusion. *See, e.g., Thiel v. Schuetzle*, 200 F.3d 1120, 1122 (8th Cir. 1999) (victim's body "was found covered with a blanket, which was circumstantial evidence that the murderer was a family member or friend"); *Commonwealth v. Lodge*, 727 N.E.2d 1194, 1200 (Mass. 2000) ("the jury could have inferred that it was the defendant, not an intruder, who had taken the time to cover the victim's body," where the victim was the defendant's girlfriend).

- Sixth, the March 15 affidavit states that Alfred Marquardt reported having a son, Bill, "who, since the location of [the] body had not been seen or heard from" (23:Ex. 2 at 1). A reasonable inference is that Alfred thought it unusual not to have had contact with Marquardt in light of publicity of the homicide. Although Marquardt implies that this statement was misleading (Marquardt's brief at 29-30), he did not request a hearing under *Franks v. Delaware*, 438 U.S. 154, 155-56 (1978), to test it.

Moreover, Investigator Price explained at the post-commitment hearing that Alfred suggested he had seen Marquardt after February 17, 2000, but could not recall exactly when (96:27-30).

To reiterate, "[t]he threshold showing necessary to a determination [that] . . . an officer relied in good faith upon a search warrant *pales considerably next to that required for a finding of probable cause*." *Guerra v. State*, 897 P.2d 447, 458 (Wyo. 1995) (emphasis added). To preclude "good faith," the warrant application must be entirely "'*devoid*' of factual support." *Id.* (citation omitted; emphasis in original). It must amount to a "'bare bones'" application, *Leon*, 468 U.S. at 926, consisting of "wholly conclusory statements" from which a magistrate could not independently determine probable cause. *United States v. Wilhelm*, 80 F.3d 116, 121 (4th Cir. 1996).

In the present case, the warrant application was meatier than "bare bones." It set forth multiple facts, giving rise to multiple inferences that filled in gaps in the indicia of probable cause identifying Marquardt as the probable killer. "The purpose behind the constitutional requirement of obtaining a search warrant is not to deny law enforcement officers the support of the usual inferences that reasonable individuals may draw from the evidence." *State v. Ward*, 2000 WI 3, ¶ 28, 231 Wis. 2d 723, 604 N.W.2d 517.

Finally, the fact that an Eau Claire County judge found probable cause and that a Chippewa County judge initially upheld that determination further supports the application of "good faith" in the present case:

> Although a police officer may not rely entirely on the magistrate's finding of probable cause, . . ., in cases where, as here, the courts can not agree on whether the affidavit is sufficient, it would

> be unfair to characterize the conduct of the executing officers as bad faith.

United States v. Martin, 833 F.2d 752, 755 (8th Cir. 1987), *cert. denied*, 494 U.S. 1070 (1990); *see also United States v. Corral-Corral*, 899 F.2d 927, 939 (10th Cir. 1990).

2. Even if the warrant application itself was insufficient, good faith still applies, based on *additional* evidence of probable cause known to the applying officers.

For the foregoing reasons, the warrant application contained sufficient indicia of probable cause for "good faith." At a minimum, it was more than "bare bones" so as to permit consideration of *external* indicia of probable cause known to the applying officers but omitted from the application. When such external indicia of probable cause are considered, a finding of "good faith" is beyond dispute. Testimony from the "good faith" hearing supplies such indicia.

- First, Investigator Price testified that in his interview of Alfred Marquardt on the day of the homicide, Alfred said Marquardt's mother had attached a phone message for Marquardt to the refrigerator in the house (84:33). Investigator Price said the message was gone when he checked the refrigerator that same night and that it turned up "a day or two days later under a jewelry box in the bedroom" (84:34). This information reasonably suggests that Marquardt had been in the house on the day of the homicide.

- Second, Investigator Price also testified that on the day of the homicide, he spoke with Marquardt's brother and sister, who could think of no "non-relative" with a motive to harm their mother (84:35). Investigator

Price said he discovered no "reason" for Marquardt's siblings or father to harm their mother (84:35).

- Third, Special Agent John Rehrauer testified that in the forty-four hours between the homicide's discovery and the March 15 warrant application there was television coverage of the homicide, as well as publicity stemming from interviews of neighbors (84:51-52). He said that despite such publicity, he was unsuccessful in contacting Marquardt, either at Marquardt's cabin or on Marquardt's cellular phone (84:48-49).

- Fourth, Agent Rehrauer said that on March 14, he learned from Marquardt's neighbor, Wesley Anderson, that on March 9, during a break-in at the neighbor's residence, the neighbor's dog had been shot (84:50). According to the agent, officers had found "five spent nine millimeter shell casings" in the neighbor's residence (84:51) – the same caliber as the shell casing found at the scene of Mrs. Marquardt's homicide. This commonality and similar time frame, coupled with Marquardt's close personal and physical ties to the two crime scenes, immensely enhanced his status as a suspect in both shootings.

- Fifth, Agent Rehrauer said he was aware of Marquardt's "prior history of being involved in drug dealings" and learned from Marquardt's father that Marquardt's mother had "discovered [Marquardt] digging up twelve thousand dollars in cash from the Marquardt premises earlier in the year" (84:53). This information reasonably suggested a possible motive for Marquardt to harm his mother, surmising that she may have challenged his conduct or threatened to tell the authorities.

- Finally, Agent Rehrauer said he supplied the foregoing information to Eau Claire County Sergeant John Vogler and then-Eau Claire County District Attorney Raymond Pelrine for purposes of seeking the March 15 warrant (84:54-55). Attorney Pelrine drafted the warrant application (84:7-17), and Sergeant Vogler presented it to

Judge Proctor (84:21-22). In effect, the investigating officers presented *all* of their evidence *supportive of* probable cause to a prosecutor for inclusion in the warrant application.

Prosecutorial consultation in the drafting of a search warrant is "indicative of objective good faith." *Taxacher*, 902 F.2d at 872. As the Seventh Circuit recently observed, "volumes of case law encourage this sort of cooperation between the prosecutor and law-enforcement officers" and support the application of good faith. *United States v. Merritt*, 361 F.3d 1005, 1012 (7th Cir. 2004) (collecting examples). In fact, the Supreme Court in *Leon* applied the "good faith" exception in part because officers had consulted with three deputy prosecutors before submitting what proved to be deficient warrants. *Leon*, 468 U.S. at 903-04 n.4.

In sum, regardless of whether "good faith" analysis includes indicia of probable cause known to the applying officers but omitted from the warrant application, the *Leon* requirement of "objectively reasonable" reliance was met in the present case.

Effective assistance of counsel. The foregoing analysis necessarily puts to rest Marquardt's alternative claim that his trial counsel was ineffective at the remand hearing on "good faith" for arguing only *Eason* and not *Leon* (Marquardt's brief at 39-42). Because the *Leon* requirement of "objectively reasonable" reliance was met, Marquardt cannot show prejudice from his trial counsel's apparent failure to argue *Leon* (17; 84:4). *See State v. Simpson*, 185 Wis. 2d 772, 784, 519 N.W.2d 662 (Ct. App. 1994) (counsel cannot be ineffective for not pursuing a suppression motion that would fail).

D. The two additional *Eason* requirements for "good faith" also were met.

1. Officers conducted a "significant investigation" in advance of the warrant application of March 15, 2000.

Testimony at the "good faith" hearing also demonstrates satisfaction of the two additional *Eason* requirements – namely, (1) "a significant investigation," and (2) "a review by . . . a knowledgeable government attorney." *Eason*, 245 Wis. 2d 206, ¶ 74.

First, the post-remand testimony details "a significant investigation," *id.*, in the forty-four hours between the homicide and March 15 warrant application.

Meaning. What constitutes "a significant investigation" in this context? In *Eason*, 245 Wis. 2d 206, ¶ 63, this court adopted the "significant investigation" factor from a law review article – Donald Dripps, *Living With Leon*, 95 Yale L. J. 906, 932 (1986). The author explains:

> The *independent* investigation element would help combat the ugliest risk that *Leon* encourages, the police-manufactured anonymous tip. . . . A warrant application supported by independent police work reduces the risk of intruding on innocent privacy in two ways. First, a particularly extravagant tip may be rejected if the independent investigation fails to corroborate the informant. Second, by attaching some cost even to the use of [a reliable informant], an independent investigation requirement would discourage warrant applications based on mere suspicion.

Id. (emphasis added; footnotes omitted).

Where, as in this case, a warrant application does *not* depend upon an anonymous tip or an informant, "significant investigation" presumably means some independent police action reasonably aimed at identifying the location of the suspected evidence sought to be obtained.

In this regard, the sheer number of officers or manhours devoted to an investigation should *not* be the sole determinant of whether it is "significant." The nature of the investigative activities also must be considered.

On the other hand, it is illogical in the analysis of "good faith" to interpret "significant investigation" as requiring significant *results.* If a warrant application contains probable cause – that is, significant "results" implicating a suspect or identifying a location at which evidence is expected – a "good faith" inquiry into an officer's reasonableness in relying on the warrant will be unnecessary. Moreover, if significant *results* were part of the "good faith" analysis, it would make even greater sense to permit consideration of *external* indicia of probable cause known to the applying officers but omitted from the warrant application.

Application. Regardless of a precise definition of "significant investigation," the record in the present case reflects such an investigation in advance of the March 15 warrant application, both quantitatively and qualitatively:

- Within an hour after discovery of the Chippewa County homicide on March 13, 2000, Investigator Price interviewed the victim's husband, Alfred, for four to five hours (84:28-29), reducing the interview to an eight-page report (23:Ex. 1; 84:28).

- That same evening, Investigator Price obtained a search warrant for the victim's residence, resulting in the collection of evidence that included a shell casing and latent fingerprints on the door of the garage where the victim was found (23:Ex. 1).

- That same evening, Investigator Price also interviewed Marquardt's brother and sister to discover possible suspects (84:34-35).

- The next day, March 14, an autopsy was performed, ruling out sexual assault and confirming that the victim died from a gunshot wound to the head and a stab wound to the throat (84:50).

- That same day, State Justice Department agents traveled to Marquardt's cabin and spoke to Marquardt's neighbor, Wesley Anderson, discovering that a few days earlier, someone had shot Anderson's dog with the same caliber bullet used to shoot Mrs. Marquardt (84:50).

- That same day, Agent Rehrauer also attempted to locate Marquardt by cell phone and by interviewing Marquardt's former employer, and an effort was begun to obtain Marquardt's cell phone records (84:48-50).

- On March 15, Investigator Price and Agent Rehrauer met with Eau Claire County Sergeant Vogler and District Attorney Pelrine to convey information in support of applying for the March 15 warrant (84:9, 25-26, 54-55). Investigator Price said that up to that point, twenty law-enforcement officers had been pursuing the investigation (84:43).

The March 15 warrant application made good sense in view of information that had been quickly obtained, the fact that a homicide had occurred and the fact that the most probable suspect could not be found. The foregoing information readily satisfied the first *Eason* requirement for "good faith" under the Wisconsin Constitution – a significant investigation in advance of the warrant application.

2. A knowledgeable prosecutor drafted the warrant application.

Second, to complete the analysis, the *Eason* "good faith" requirement that an experienced officer or prosecutor review the warrant application likewise was met, and Marquardt does not argue differently.

Officers from Eau Claire County and the State Department of Justice met with District Attorney Pelrine, who drafted the March 15 warrant application (84:7-12). Attorney Pelrine had been a prosecutor for more than a decade and had drafted many warrants that withstood challenge (84:8, 19).

E. Summary.

For the foregoing reasons, this court should conclude – in accordance with the Eau Claire County trial court – that officers acted in objectively reasonable reliance on the March 15 warrant, so that the "good faith" exception to the exclusionary rule applies.

If this court agrees, its analysis of the suppression issue need proceed no further. If this court disagrees, then the State respectfully asks the court to consider the State's alternative argument based on "inevitable discovery" set forth in Argument II., which follows.

II. ALTERNATIVELY, EVIDENCE SEIZED WITH THE MARCH 15 WARRANT IS ADMISSIBLE UNDER THE "INEVITABLE DISCOVERY" DOCTRINE.

A. Introduction.

On postconviction review in the present case, the prosecutor offered "inevitable discovery" as an alternative justification for admitting evidence seized under the March 15 warrant (96:62-63), and Marquardt suggested that the invalid warrant tainted other evidence (96:33, 49). Because the trial court found "good faith," it did not address these potential issues (96:33, 62-63).

In his brief-in-chief to this court, Marquardt addresses only the "good faith" issues. The State nevertheless reprises its alternative argument on "inevitable discovery" set forth in its brief-in-chief in the Chippewa County appeal. In a nutshell, if the March 15 warrant had been denied for lack of probable cause, the additional external indicia of probable cause *already known* to the applying officers (but omitted from the application) reasonably would have led to another, valid warrant – and the discovery of the same evidence – *before* Marquardt returned to his cabin on March 18.

Because the Eau Claire County trial court did not address "inevitable discovery," however, this court could remand that question for further development should it decide not to apply the "good faith" exception.

B. Governing principles.

"[T]he fruits of an illegal search nonetheless may be admitted if [they] inevitably would have been discovered by lawful means." *State v. Schwegler*, 170 Wis. 2d 487, 499, 490 N.W.2d 292 (Ct. App. 1992); *Nix v. Williams*, 467 U.S. 431, 447 (1984). To gain admission of

evidence under this doctrine of "inevitable discovery," the State must satisfy three criteria by a preponderance of the evidence, *Nix*, 467 U.S. at 444, namely:

> (1) a reasonable probability that the evidence in question would have been discovered by lawful means but for the police misconduct, (2) that the leads making the discovery inevitable were possessed by the government at the time of the misconduct, and (3) that prior to the unlawful search the government also was actively pursuing some alternate line of investigation.

State v. Lopez, 207 Wis. 2d 413, 427-28, 559 N.W.2d 264 (Ct. App. 1996); *see also State v. Knapp*, 2003 WI 121, ¶133, 265 Wis. 2d 278, 666 N.W.2d 881.

If evidence inevitably would have been discovered lawfully, "then the deterrence rationale [of the exclusionary rule] has so little basis that the evidence should be received. Anything less would reject logic, experience and common sense." *Nix*, 467 U.S. at 444.

Application of the "inevitable discovery" doctrine presents a question of law, or constitutional fact, subject to independent review. *See State v. Anderson*, 160 Wis. 2d 307, 315, 466 N.W.2d 201 (Ct. App.), *rev'd on other grounds*, 165 Wis. 2d 441, 477 N.W.2d 277 (1991).

C. Application of the "inevitable discovery" doctrine to the present case.

In the present case, the State has met all three requirements for application of the "inevitable discovery" doctrine to permit into evidence the fruits of the March 15 warrant, including derivative evidence seized three days later when Marquardt was arrested (and thereafter).

Reasonable probability of discovery. With respect to the first "inevitable discovery" criterion, no police "misconduct" rendered the fruits of the March 15 warrant

inadmissible. Omitting evidence *supportive* of probable cause from a warrant application is not "misconduct." Indeed, to reiterate, that is why it makes eminent sense to consider such omitted evidence in the analysis of "good faith."

If the March 15 warrant had been denied for lack of probable cause, the State's *additional* evidence (omitted from the application) reasonably would have led to another warrant *in such short order* that the evidence in question still would have been available for discovery. This is true, moreover, regardless of whether the results of ballistics analyses had been completed before March 18, when Marquardt first returned to his cabin and was arrested.

As noted, in addition to the indicia of probable cause contained in the March 15 warrant application, the applying officers also knew the following information on March 15 that was omitted from the application:

- The removal from the refrigerator of a phone message for Marquardt, coupled with the absence of a break-in, suggested that Marquardt had been in his parents' house on the day of the homicide (84:33-34).

- Investigator Price had ruled out Marquardt's siblings and father as suspects after talking to them (84:35).

- Bill Marquardt could not be found in the two days after the homicide, despite publicity of the homicide and the likelihood that Marquardt had been at his parents' house on the day of the homicide (84:48-52).

- On March 9, four days before the homicide, Marquardt's neighbor's dog had been shot with the same caliber bullet that had killed Marquardt's mother (84:50-51). Also, Marquardt's cell phone records, obtained March 16, reflected several calls to the local

humane society and to a pet store on March 9 and 10 (84:40-41).

- And, a budding motive for Marquardt to kill his mother could be found in facts that his mother recently had caught him digging up $12,000 in cash and that Marquardt had a history of "involve[ment] in drug dealings" (84:53).

If the March 15 warrant had been denied for lack of probable cause, officers immediately would have reexamined the sum of their collected data and made sure that the foregoing information was included in another warrant application. This additional information, in turn, would have supplied probable cause for a valid search warrant, and because officers had this additional information on March 15, a second application invariably would have been made *before* March 18, when Marquardt first returned to his cabin and was arrested. In effect, the evidence found at the cabin and outbuildings and incidental to Marquardt's arrest would still have been present for discovery pursuant to a second warrant containing additional evidence establishing probable cause.

This is a *stronger* situation for application of "inevitable discovery" than where police simultaneously undertake an illegal warrantless search while applying for a warrant that would have been issued and executed successfully had police waited for it. Yet, in the latter situation, "inevitable discovery" has been "readily applied." 3 Wayne R. LaFave, Jerold H. Israel & Nancy J. King, 3 *Criminal Procedure* § 9.3(c) at 356 (2d ed. 1999) (collecting cases).

<u>*Preexisting leads*</u>. As discussed, officers already possessed the additional indicia of probable cause omitted from the March 15 warrant application that inevitably would have led in short order to a second warrant if the original warrant had been denied for lack of probable cause. In effect, such additional information constitutes

preexisting "leads" for purposes of satisfying the second "inevitable discovery" criterion.

Also, although the ballistics and fingerprint analyses had not been completed by the time of the March 15 warrant application, the raw material for such additional "leads" – the shell casings and latent prints – also were in the officers' possession at that time.

Alternate lines of investigation. Finally, because the additional indicia of probable cause reasonably would have led in short order to a second warrant application, the "alternate lines of investigation" criterion of the "inevitable discovery" doctrine also has been met.[6]

Moreover, the fact that the ballistics and fingerprint analyses were completed within five to ten days after Marquardt's arrest on March 18 suggests that these lines of investigation were being pursued independently of the other indicia of probable cause on which the original warrant application was brought. The only uncertainty is whether quicker Crime Lab results might have been obtained if the March 15 warrant had been denied. But, as discussed, those results are unnecessary for application of the "inevitable discovery" doctrine in light of the additional indicia of probable cause already in the officers' possession *before* March 18, 2000.

The "inevitable discovery" doctrine focuses "on what would have happened if the illegal search had not aborted the lawful method of discovery." *United States v. Markling*, 7 F.3d 1309, 1318 n.1 (7th Cir. 1993), *cert. denied*, 514 U.S. 1010 (1995). Its purpose is to "put[] police in the same, not a worse, position tha[n] they would

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[6]Viewed slightly differently, the existence of additional, but omitted, indicia of probable cause sufficient for a second warrant also could be characterized as "independent sources" for such a successive warrant application. *See Murray v. United States*, 487 U.S. 533, 542 (1988); *State v. Lange*, 158 Wis. 2d 609, 624-26, 463 N.W.2d 390 (Ct. App. 1990).

have been if no police error or misconduct had occurred." *Nix*, 467 U.S. at 443.

In the present case, the "inevitable discovery" doctrine provides an alternative basis for admitting evidence discovered during execution of the March 15 search warrant and all derivative evidence.

III. THE TRIAL COURT PROPERLY DENIED MARQUARDT'S REQUEST TO REPRESENT HIMSELF AT TRIAL.

A. Introduction.

Marquardt also seeks a new trial on the ground that he was wrongly denied his constitutional right to represent himself at trial (Marquardt's brief at 42-54).

On August 8, 2000, after hearing conflicting expert testimony, the trial court found Marquardt competent to stand trial (86:81-82).

On November 11, 2002, two months before trial, Marquardt sought to exercise his right to self-representation (88:2). After undertaking a colloquy with Marquardt, and citing *State v. Klessig*, 211 Wis. 2d 194, 564 N.W.2d 716 (1997), the trial court denied the request (88:3-19), noting "the absolute seriousness of the charges[,] . . . the complexity of the case" and evidence of Marquardt's mental illness (88:18-20). The court opined:

> I'm particularly concerned over Mr. Marquardt's kind of microscopic review of all of these things, whether he's detached enough to make any sense out of the charges and to put the [S]tate to its burden of proof.

(88:12.)

On appeal, Marquardt argues:

(1) That the trial court improperly held him to a standard of competence for self-representation higher than the standard of competence to stand trial (Marquardt's brief at 43-48); and

(2) That in any event, he was competent to represent himself at trial (Marquardt's brief at 48-54).

For the reasons that follow, the trial court properly exercised its discretion in denying Marquardt's request to represent himself.

B. The trial court applied the proper test for determining Marquardt's competence to represent himself.

The state and federal constitutions give a criminal defendant the right to conduct his or her own defense. *See Klessig*, 211 Wis. 2d at 203; *Faretta v. California*, 422 U.S. 806, 819 (1975).

When a defendant seeks to proceed *pro se* at trial, the trial court must insure that the defendant "(1) has knowingly, intelligently and voluntarily waived the right to counsel, and (2) is competent to proceed pro se." *Klessig*, 211 Wis. 2d at 203; *see also* Wis. JI-Criminal SM-30A (1987).

With respect to "competence" for self-representation, the Supreme Court has said "States are free to adopt competency standards that are more elaborate than the . . . formulation" for determining competence to stand trial. *Godinez v. Moran*, 509 U.S. 389, 402 (1993). This court has read *Godinez* as permitting Wisconsin to use "a higher standard for determining whether a defendant is competent to represent oneself than for determining whether a defendant is competent to stand

trial." *Klessig*, 211 Wis. 2d at 212 (reaffirming *Pickens v. State*, 96 Wis. 2d 549, 557, 292 N.W.2d 601 (1980)).

Although *Klessig* apparently represents a "minority" interpretation of *Godinez*, other states have construed *Godinez* similarly. *See, e.g., People v. Lego*, 660 N.E.2d 971, 973, 978-79 (Ill. 1993); *Commonwealth v. Simpson*, 689 N.E.2d 824, 831 (Mass. App. Ct. 1998). At worst, the *Klessig* interpretation is debatable. *See Brooks v. McCaughtry*, 380 F.3d 1009, 1012-13 (7th Cir. 2004) (holding that *Klessig* does *not* violate *Godinez*); *see generally* Jennifer W. Corinis, *A Reasoned Standard for Competency to Waive Counsel After Godinez v. Moran*, 80 Boston U. L. Rev. 265, 270 (2000) ("urg[ing] courts to accept *Godinez*'s invitation to adopt higher standards" for competence to proceed *pro se* than the standard for competence to stand trial).

Because *Klessig* does not unequivocally violate Marquardt's federal constitutional right to self-representation, the trial court was bound to follow *Klessig*, and Marquardt advances no persuasive reason to overturn *Klessig*.

In Wisconsin, "competence" for self-representation is determined by the following considerations:

> [T]he circuit court should consider factors such as "the defendant's education, literacy, fluency in English, and any physical or psychological disability which may significantly affect his ability to communicate a possible defense to the jury." . . . [T]he competency determination should not prevent persons of average ability and intelligence from representing themselves unless "a specific problem or disability can be identified which may prevent a meaningful defense from being offered, should one exist."

Klessig, 211 Wis. 2d at 212 (citations omitted). Because the determination of a defendant's competence for self-representation "rest[s] to a large extent upon the judgment and experience of the trial judge," *id.*, "the trial court must

be given sufficient latitude to exercise its discretion in such a way as to insure that substantial justice will result." *Pickens*, 96 Wis. 2d at 569.

An improper denial of the right to self-representation, however, would be reversible error. *See McKaskle v. Wiggins*, 465 U.S. 168, 177-78 n.8 (1984).

C. Application to Marquardt.

For alternative reasons, the trial court reasonably denied Marquardt's request to represent himself at trial.

No valid waiver of counsel. First, Marquardt did not waive the right to counsel with adequate comprehension of the dangers of self-representation. *See Klessig*, 211 Wis. 2d at 203.

When defense counsel questioned Marquardt's understanding of the incriminating evidence facing him, Marquardt replied: "[T]hat's why we have to have a lawyer to argue my defense and stuff" (86:20). Marquardt repeatedly suggested his need for counsel throughout the hearing:

- "Well, I'm going to have an attorney to argue my innocence" (86:21).
- "I don't think I should have ever been charged with what happened at the neighbor's house and that's what my defense attorney is going to argue" (86:22).
- "And I'll have a defense attorney to argue my innocence" (86:23).
- "I was just suggesting to the lawyer that just have me testify I love animals and stuff . . . [M]y defense attorney's going to argue for me to try to prove my innocence" (86:27).

- "I need a lawyer now, defense lawyer[,] so [trial] can't happen tomorrow" (86:34).

At the time of the hearing on his competency to stand trial, Marquardt had discharged two previous lawyers (86:34). By the close of the hearing, he had discharged a third attorney (86:81-82).

Three months later, Marquardt returned to court with a fourth attorney, Attorney Robert P. Rusch, and asked to be allowed to represent himself (88:3). Marquardt explained that he had drafted "a 180-page argument of my defense" (88:5), and when the court told Marquardt that he would have to follow the same rules of evidence that attorneys must follow, Marquardt replied:

> I want to spend a lot of time with [Attorney] Rusch, . . . like to go over every single question for every witness [of which Marquardt said he had "at least 30" (88:8)], and I want to go over every single sentence I got of my statements with Rusch. . . .
>
> And at the trial, I would like Rusch to be sitting and listening to everything that's said and . . . like tap me on the shoulder if the D.A. . . . tries to present any illegal evidence or ask illegal questions or something.

(88:7.) Marquardt added, "I still want Rusch to be prepared" (88:8), because "I might even change my mind and have Rusch do the talking, but *I'm pretty sure* I want to do the talking right now" (88:15; emphasis added). Marquardt, age twenty-six, said he has a high school education and admitted having no legal training (88:3-4).

On this record, Marquardt did not unequivocally waive his right to counsel with adequate appreciation of the dangers of self-representation. For this reason alone, the trial court properly rejected Marquardt's request to represent himself.

Lack of competence. Second, in any event, the trial court also reasonably concluded that Marquardt was

not "competent" to proceed *pro se* due to mental illness that "may prevent a meaningful defense from being offered." *Klessig*, 211 Wis. 2d at 212.

At the same time that Marquardt faced ten charges in the present case, he was facing a homicide charge in Chippewa County (80:2). In both cases, defense counsel raised the issue of Marquardt's competency to stand trial, and in the Chippewa County case, Marquardt had been found incompetent (80:2-8; 82:9-10; 86:5).

In the present case, two psychiatrists – who, in 2002, had examined Marquardt or reviewed Marquardt's records – opined that Marquardt was not competent to stand trial due to mental illness (86:38-60). Their testimony supports the trial court's conclusion that Marquardt was not competent to represent himself.

Dr. Patricia Jens, with whom Marquardt refused to speak (86:39), opined that Marquardt "suffers from a mental illness that interferes with his ability not only to cooperate with" counsel but also to appreciate the charges against him (86:40-41). She explained:

> I believe that Mr. Marquardt suffers from a delusional [system] which leaves him living in a world where he believes everything that's going on around him is part of a plot to frame him and as such he cannot appreciate that these are serious charges, that these things have occurred, that there is evidence which indicates he has committed these crimes. He simply can't get beyond his belief that the legal system is framing him.

(86:41-42.) Dr. Jens concluded that Marquardt is so delusional that "[h]e cannot plan a defense strategy that is realistic and, therefore, he is not competent" (86:43).

Dr. Ralph Underwager opined that Marquardt suffers from paranoid schizophrenia, founded on a delusional system of "command hallucinations" (86:56-57). He noted that Marquardt professed to be "the [prophet] foretold by Nostradamus[] to provide the gift

that will save the world" (86:56-57). He suggested that Marquardt's mental illness causes him to view anyone who challenges his perceptions – including defense attorneys – as "the enemy" (86:60).

Finally, not only did Marquardt equivocate about the need for counsel, but he could not make up his mind on whether to plead not guilty by reason of mental disease or defect ("NGI"), even after the prosecutor conceded that the State would not contest an NGI plea (83:3-5; 89:10-11, 20-24; 94:2-19; 95:2).

On this record, the trial court reasonably concluded that Marquardt was not competent to proceed *pro se*. For this reason, as well as for an inadequate waiver of counsel, the trial court properly denied Marquardt's request to represent himself.

CONCLUSION

For the reasons set forth, this court should affirm the criminal commitment and post-commitment orders.

Dated at Madison, Wisconsin: April 21, 2005.

Respectfully submitted,

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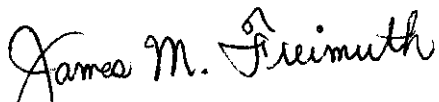

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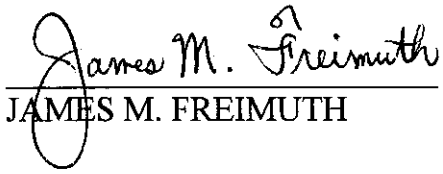
CERTIFICATION

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is: proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line. The length of the brief is 10,864 words.



JAMES M. FREIMUTH

APPENDIX OF RESPONDENT

	Pages
State v. Marquardt, 2001 WI App 219, 247 Wis. 2d 765, 635 N.W.2d 188 (Decision on Marquardt's interlocutory appeal in Chippewa County, based on same March 15, 2000, warrant at issue in present case)	101-112

Briefs and Other Related Documents

Court of Appeals of Wisconsin.

STATE of Wisconsin, Plaintiff-Respondent,
[FN<<dagger>>]

FN<<dagger>> Petition for cross-review denied Nov. 27, 2001.

v.
Bill Paul MARQUARDT,
[FN<<dagger>><<dagger>>] Defendant-Appellant.

FN<<dagger>><<dagger>> Petition for review denied Nov. 27, 2001.

No. 01-0065-CR.

Submitted on Briefs June 11, 2001.
Opinion Released Aug. 21, 2001.
Opinion Filed Aug. 21, 2001.

Defendant charged with first-degree intentional homicide and possession of a firearm by a felon moved to suppress evidence. The Circuit Court, Chippewa County, Roderick A. Cameron, J., denied motion, and defendant appealed. The Court of Appeals, Cane, C.J., held that: (1) facts set forth in warrant affidavit were clearly insufficient to give rise to probable cause justifying issuance of search warrant for defendant's residence; (2) reversal and remand for determination as to applicability of good faith exception to exclusionary rule was required; (3) defendant effectively conceded existence of probable cause for warrantless search of his car; (4) defendant's car remained "readily mobile" following his arrest; (5) application of the automobile exception to the warrant requirement is not limited to vehicles found in public places; and (6) fact that officers could have secured search warrant for defendant's car did not render automobile exception inapplicable.

Affirmed in part, reversed in part, and remanded for further proceedings.

West Headnotes

[1] Searches and Seizures ⚷ 23
349k23
Fourth and Fourteenth Amendments to the United States Constitution and the equivalent provision of the state constitution guarantee citizens freedom from unreasonable searches and seizures. U.S.C.A. Const.Amends. 4, 14; W.S.A. Const. Art. 1, § 11.

[2] Searches and Seizures ⚷ 201
349k201
Question whether police conduct violated the constitutional guarantee against unreasonable searches and seizures is a question of constitutional fact. U.S.C.A. Const.Amends. 4, 14; W.S.A. Const. Art. 1, § 11.

[3] Criminal Law ⚷ 1158(4)
110k1158(4)
On review of a trial court's ruling on a motion to suppress based on allegedly unreasonable search and seizure, the Court of Appeals gives deference to the trial court's findings of evidentiary or historical fact, but determines the question of constitutional fact independently.

[4] Searches and Seizures ⚷ 104
349k104
[4] Searches and Seizures ⚷ 113.1
349k113.1
Search warrant may issue only when a neutral and detached magistrate or judge finds probable cause to believe that evidence of a crime may be found in a particular place. U.S.C.A. Const.Amend. 4; W.S.A. Const. Art. 1, § 11.

[5] Searches and Seizures ⚷ 113.1
349k113.1
Whether there is probable cause justifying the issuance of a search warrant is determined by examining the totality of the circumstances. U.S.C.A. Const.Amend. 4; W.S.A. Const. Art. 1, § 11.

[6] Searches and Seizures ⚷ 113.1
349k113.1
Probable cause determination in connection with the issuance of a search warrant must be based upon what a reasonable judge can infer from the information presented by the police. U.S.C.A. Const.Amend. 4; W.S.A. Const. Art. 1, § 11.

[7] Searches and Seizures ⚷ 113.1
349k113.1
In considering an application for a search warrant, an issuing judge ordinarily considers only the facts set forth in supporting affidavits accompanying the warrant application. U.S.C.A. Const.Amend. 4;

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W.S.A. Const. Art. 1, § 11.

[8] Criminal Law ⚷ 1158(4)
110k1158(4)

It is the duty of the reviewing court, reviewing a trial court's ruling on a motion to suppress, to ensure that the judge issuing the search warrant had a substantial basis to conclude that probable cause existed. U.S.C.A. Const.Amend. 4; W.S.A. Const. Art. 1, § 11.

[9] Criminal Law ⚷ 1158(4)
110k1158(4)

In reviewing a trial court's ruling on a motion to suppress, the reviewing court must consider whether, objectively viewed, the record before the judge issuing the warrant provided sufficient facts to excite an honest belief in a reasonable mind that the objects sought are linked with the commission of a crime, and that they will be found in the place to be searched. U.S.C.A. Const.Amend. 4; W.S.A. Const. Art. 1, § 11.

[10] Criminal Law ⚷ 1158(4)
110k1158(4)

In reviewing a trial court's ruling on a motion to suppress, the reviewing court accords great deference to the determination made by the warrant-issuing judge. U.S.C.A. Const.Amend. 4; W.S.A. Const. Art. 1, § 11.

[11] Searches and Seizures ⚷ 196
349k196

Issuing judge's determination that probable cause existed for the issuance of a search warrant will stand unless the defendant establishes that the facts are clearly insufficient to support a probable cause finding. U.S.C.A. Const.Amend. 4; W.S.A. Const. Art. 1, § 11.

[12] Searches and Seizures ⚷ 114
349k114

Facts set forth in affidavit in support of search warrant application were clearly insufficient to give rise to probable cause justifying issuance of search warrant for defendant's residence; although facts arguably supported an honest belief that particular objects sought, including shoes, knives, and guns, could be linked with commission of the crime, nothing linked those objects to defendant's residence other than statement of victim's husband, defendant's father, that defendant had not been heard from since day of murder. U.S.C.A. Const.Amend. 4; W.S.A. Const. Art. 1, § 11.

[13] Criminal Law ⚷ 1181.5(7)
110k1181.5(7)

Finding that issuing judge had lacked probable cause to issue search warrant for murder defendant's residence required reversal and remand, for determination as to applicability of good faith exception to exclusionary rule and, should the trial court find the exception inapplicable, for examination of facts surrounding subsequent searches to determine whether they were tainted by initial unlawful search. U.S.C.A. Const.Amend. 4; W.S.A. Const. Art. 1, § 11.

[14] Searches and Seizures ⚷ 25.1
349k25.1

[14] Searches and Seizures ⚷ 60.1
349k60.1

Warrantless searches of homes are presumptively unreasonable, but searches of vehicles are not. U.S.C.A. Const.Amend. 4; W.S.A. Const. Art. 1, § 11.

[15] Searches and Seizures ⚷ 60.1
349k60.1

Unique nature of automobiles sets them apart from other areas protected from warrantless searches under the Fourth Amendment. U.S.C.A. Const.Amend. 4.

[16] Searches and Seizures ⚷ 62
349k62

Under current federal law, the warrantless search of a vehicle does not offend the Fourth Amendment if there is probable cause to search the vehicle; and the vehicle is readily mobile; issues concerning whether the police could have obtained a warrant prior to searching are not relevant to the analysis. U.S.C.A. Const.Amend. 4.

[17] Constitutional Law ⚷ 18
92k18

State Supreme Court is free to interpret the state constitution in a manner that affords greater protections than the federal Constitution.

[18] Criminal Law ⚷ 1130(6)
110k1130(6)

Murder defendant effectively conceded existence of probable cause for warrantless search of his vehicle, on his interlocutory appeal from denial of his motion to suppress evidence seized therefrom, where defendant did not challenge probable cause before the circuit court or in his brief on appeal, and only briefly and obliquely addressed the issue in his reply brief. U.S.C.A. Const.Amend. 4; W.S.A. Const. Art. 1, § 11.

[19] Criminal Law ⚷ 1130(5)
110k1130(5)

Murder defendant waived appellate review of his contention that his car was no longer "readily

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mobile," within scope of automobile exception to warrant requirement, following his arrest, by failing to raise such issue before circuit court or to cite to authority for such proposition on interlocutory appeal. U.S.C.A. Const.Amend. 4; W.S.A. Const. Art. 1, § 11.

[20] Searches and Seizures ⚷ 60.1
349k60.1

Murder defendant's car remained "readily mobile," within scope of automobile exception to warrant requirement, following defendant's arrest; defendant's arrest would not have prevented other unknown individuals from moving his car. U.S.C.A. Const.Amend. 4; W.S.A. Const. Art. 1, § 11.

[21] Searches and Seizures ⚷ 60.1
349k60.1

Justification to conduct a warrantless search pursuant to the automobile exception to the warrant requirement does not vanish once the car has been immobilized. U.S.C.A. Const.Amend. 4; W.S.A. Const. Art. 1, § 11.

[22] Searches and Seizures ⚷ 60.1
349k60.1

Application of the automobile exception to the warrant requirement is not limited to vehicles found in public places. U.S.C.A. Const.Amend. 4; W.S.A. Const. Art. 1, § 11.

[23] Searches and Seizures ⚷ 60.1
349k60.1

State constitution did not go beyond scope of Fourth Amendment to impose public place requirement for application of automobile exception to warrant requirement, absent an explicit indication that the state Supreme Court interpreted the applicable provision of the state constitution differently than the Fourth Amendment. U.S.C.A. Const.Amend. 4; W.S.A. Const. Art. 1, § 11.

[24] Searches and Seizures ⚷ 66
349k66

Fact that officers could have secured search warrant for murder defendant's car, either before towing it or before searching it at police station, did not render automobile exception to warrant requirement inapplicable. U.S.C.A. Const.Amend. 4; W.S.A. Const. Art. 1, § 11.

****190 *770** On behalf of the defendant-appellant, the cause was submitted on the briefs of James B. Connell of Crooks, Low, Connell & Rottier, S.C. of Wausau.

On behalf of the plaintiff-respondent, the cause was submitted on the brief of James E. Doyle, attorney general, and James M. Freimuth, assistant attorney general.

****191 *771** Before CANE, P.J., HOOVER, P.J., and PETERSON, J.

¶ 1 CANE, C.J.

In this interlocutory appeal, Bill Paul Marquardt appeals from an order (1) denying his motion to suppress evidence seized pursuant to a search warrant for his home; (2) denying his request for a *Franks* [FN1] hearing; and (3) denying his motion to suppress evidence from a warrantless search of his vehicle.

FN1. *Franks v. Delaware,* 438 U.S. 154, 98 S.Ct. 2674, 57 L.Ed.2d 667 (1978).

¶ 2 We conclude first that there was insufficient probable cause to justify the search warrant for Marquardt's home. Because our supreme court recently adopted the good faith exception to the exclusionary rule, *see State v. Eason,* 2001 WI 98, ¶ 74, 245 Wis.2d 206, 629 N.W.2d 625, we reverse that portion of the court's order and remand for a determination of whether the good faith exception to the exclusionary rule applies in this case. Second, we do not address Marquardt's request for a *Franks* hearing because we have concluded that there was insufficient probable cause to support the search warrant. Finally, we conclude that the automobile exception to the Fourth Amendment search warrant requirement applies to the warrantless search of Marquardt's vehicle. Thus, we affirm that portion of the court's order denying suppression of evidence from Marquardt's vehicle on warrantless search grounds.

BACKGROUND

¶ 3 On March 13, 2000, Alfred Marquardt found his wife, Mary, dead in their garage. Mary had been shot and stabbed. Officers investigating the death immediately obtained a warrant to search the home.

***772** ¶ 4 On March 15, officers obtained a warrant to search the home of Mary and Alfred's son, Bill Marquardt. Officers conducting the search found

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dead animals at Bill Marquardt's home and subsequently obtained an arrest warrant for Marquardt on a charge of cruelty to animals.

¶ 5 On March 18, Marquardt was arrested at his home. At the time of his arrest, Marquardt's locked vehicle was parked in his driveway. In the hours after Marquardt was arrested, the Eau Claire County Sheriff's Department arranged for the vehicle to be hauled to the department, where it was then searched. Two days later, the vehicle was transported to the State Crime Laboratory in Madison where it was again searched. No warrant was ever obtained for the search and seizure of the vehicle.

¶ 6 On May 4, Marquardt was charged with one count of first-degree intentional homicide and one count of possession of a firearm by a felon. Following a preliminary hearing and bindover, Marquardt filed several motions to suppress evidence. Two motions are relevant to this appeal: a motion to suppress evidence that was seized from Marquardt's home pursuant to the March 15 search warrant and a motion to suppress evidence that was seized from Marquardt's car without a search warrant. [FN2]

FN2. Marquardt sought to exclude not only evidence seized on March 15, 2000, but also all physical evidence seized from Marquardt's premises, person or vehicles that was discovered as a result of the issuance and execution of the March 15 search warrant. Thus, Marquardt challenged the admission of evidence seized from the vehicle found at his home based on two independent grounds: (1) as "fruit of the poisonous tree" (the tree being the March 15 search warrant); and (2) as the product of an unconstitutional, warrantless search and seizure of his vehicle.

¶ 7 The circuit court conducted motion hearings on July 31 and December 8. At **192 the first hearing, the *773 court held that the search warrant for Marquardt's home was issued upon sufficient probable cause and denied Marquardt's request for a *Franks* hearing on the issue of whether the application for a search warrant contained material misstatements and omissions. Following the second day of hearings, the court issued a memorandum decision denying the motion to suppress evidence seized from the vehicle, concluding that the search was valid under the automobile exception to the Fourth Amendment's warrant requirement.

¶ 8 Marquardt seeks reversal of the circuit court's order finding probable cause in the search warrant application, denying his request for a *Franks* hearing, and denying the suppression of evidence derived from the warrantless vehicle search. By order of January 24, 2001, we granted Marquardt's request for leave to appeal the court's order.

STANDARD OF REVIEW

[1][2][3] ¶ 9 The Fourth and Fourteenth Amendments to the United States Constitution and art. I, § 11, of the Wisconsin Constitution guarantee Wisconsin citizens freedom from "unreasonable searches and seizures." *State v. Griffith,* 2000 WI 72, ¶ 25, 236 Wis.2d 48, 613 N.W.2d 72. The question whether police conduct violated the constitutional guarantee against unreasonable searches and seizures is a question of constitutional fact. *Id.* at ¶ 23. On review, this court gives deference to the trial court's findings of evidentiary or historical fact, but determines the question of constitutional fact independently. *Id.*

*774 DISCUSSION

I. Issuance of the initial search warrant for Marquardt's house

[4] ¶ 10 Marquardt argues that the March 15 search warrant for his house was issued based on insufficient probable cause. A search warrant may issue only when a neutral and detached magistrate (or judge, as in this case) finds probable cause to believe that evidence of a crime may be found in a particular place. *See State v. Ward,* 2000 WI 3, ¶ 21, 231 Wis.2d 723, 604 N.W.2d 517.

[5] ¶ 11 Whether there is probable cause is determined by examining the "totality of the circumstances." *Id.* at ¶ 26. A finding of probable cause is a commonsense test:

The task of the issuing magistrate is simply to make a practical, commonsense decision whether, given all the circumstances set forth in the affidavit before him, including the "veracity" and "basis of knowledge" of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in

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a particular place.
Id. at ¶ 23 (citing *Illinois v. Gates,* 462 U.S. 213, 238, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983)).

[6][7] ¶ 12 A probable cause determination must be based upon what a reasonable judge can infer from the information presented by the police. *Ward,* 231 Wis.2d 723, 604 N.W.2d 517, 2000 WI 3 at ¶ 26. The issuing judge ordinarily considers only the facts set forth in supporting affidavits accompanying the warrant application. *See id.*

[8][9][10][11] ***775** ¶ 13 It is the duty of the reviewing court to ensure that the judge had a substantial basis to conclude that probable cause existed. *Id.* at ¶ 21. We must consider whether, objectively viewed, the record before the judge provided sufficient facts to excite an honest belief in a ****193** reasonable mind that the objects sought are linked with the commission of a crime, and that they will be found in the place to be searched. *Id.* at ¶ 27. We accord great deference to the determination made by the warrant-issuing judge. *Id.* at ¶ 21. Thus, the judge's determination will stand unless the defendant establishes that the facts are clearly insufficient to support a probable cause finding. *Id.*

[12] ¶ 14 With these standards in mind, we examine the facts that were presented to the judge. The judge did not take any testimony in support of the search warrant application. Instead, only written documents were provided. The application for Marquardt's home, dated March 15, was completed by a detective from the Eau Claire County Sheriff's Department, and was based upon the following statement of facts:

> Affiant reports that on March 15, 2000, he received a copy of an affidavit for search warrant sworn and executed in Chippewa County on March 13, 2000, with respect to the suspected homicide of Mary J. Marquardt. A copy of said affidavit and search warrant is attached and hereby incorporated by reference. [[FN3]]

FN3. Marquardt in his reply brief suggests that the March 13 application and warrant may not have been provided to the judge with the March 15 application. We have reviewed the transcript of the motion hearing and have found no indication that defense counsel, the State or the circuit court expressed any doubt that the March 13 application was attached. Indeed, the circuit court referred to the fact that the March 13 warrant was attached to the March 15 application and asked the State, "Is there anything in there that ties the defendant to the homicide? I went through it, and I didn't see anything that did so, but I want to know if I missed anything." Because Marquardt raises this factual issue for the first time in his reply brief, we decline to address it. *See State v. Mata,* 230 Wis.2d 567, 576 n. 4, 602 N.W.2d 158 (Ct.App.1999) (court will not address issues raised for the first time in a reply brief). Instead, we will assume that the March 13 application and warrant were attached to the March 15 application.

***776** Investigator Price reports that after finding the body of Mary J. Marquardt, he spoke with her husband, Alfred E. Marquardt. Mr. Marquardt informed him that he and Mary have a son, Bill Marquardt, who, since the location of Ms. Marquardt's body had not been seen or heard from. Alfred Marquardt further informed Investigator Price that Bill Marquardt owned with Alfred Marquardt a cabin in which Bill resided at E27505 County Highway M, Town of Fairchild, County of Eau Claire, Wisconsin.
Investigator Price further reports that in examining the body of Mary J. Marquardt and the scene where she was found, it appeared as though among the wounds incurred by her was a knife wound. Also at the scene, officers were able to locate a number of footprints that may be suitable for comparison with the shoes that made them.
Investigator Barnier reports that in checking Eau Claire County tax rolls, he learned that a cabin, storage building, pumphouse and out-house located at E27505 County Highway M .... are owned by Alfred and Bill Marquardt.

***777** ¶ 15 The search warrant application sought permission to search for ammunition; firearms; clothing containing Mary's hair, blood or fibers; knives; shoes; and documents that may indicate Marquardt's whereabouts on or after March 13.

¶ 16 The March 13 search warrant for Mary's home that was referred to in the March 15 application contained the following statement of facts:
****194** Inv[estigator] Price reports that on March 13, 2000, Chippewa County Sheriff's Dispatch received a 911 call from 11766 State Hwy 178, Chippewa Falls, Township of Eagle Point. The caller identified himself as Alfred E. Marquardt.

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.... Marquardt reported that his wife was apparently dead at the residence.
Price continued that he responded to the Marquardt home and met with Marquardt. Marquardt relayed that he had left home at about 7 AM that morning and tried to call home about 11:50. The phone was busy and remained so the remainder of the day. Marquardt stated that he left work early and returned home because of the busy phone and upon arrival, found his wife, Mary J. Marquardt covered with a blanket in the garage. She was cold and unresponsive and appeared to have a head wound. Price reports that a shell casing, tentatively identified as 9 mm, was observed on the premises.

¶ 17 Marquardt argues that these statements are "devoid of any information from which it could be reasonably concluded that evidence of a crime could be located at [Marquardt's] residence, which was located in a different county than his parents' residence, where his mother's body was found." He notes that the fact no one had seen or heard from him raises no reasonable inference that he was involved in the crime. "Even if ***778** absence could be considered a reason for suspicion, the police officers in this case had nothing more than a guess that contraband or evidence of a crime would be found in [Marquardt's] home." He argues, citing *United States v. Schultz,* 14 F.3d 1093, 1097-98 (6th Cir.1994), that to find probable cause based on these facts "would be to invite general warrants authorizing searches of any property owned, rented, or otherwise used by a criminal suspect--just the type of broad warrant the Fourth Amendment was designed to foreclose."

¶ 18 In response, the State admits that the facts recited in the affidavits are "scant," but argues that they are not so thin as to be insufficient for probable cause. The State points to several facts in the affidavits: (1) Mary's telephone was off the hook the day she was killed, suggesting "that the perpetrator had been inside the residence"; (2) Mary was shot and stabbed, and no valuables were taken, suggesting the crime was an intentional homicide, as opposed to a break-in, and that the perpetrator was probably a male; [FN4] (3) there were footprints at the crime scene that could be compared with footware if any are located; (4) Mary was covered with a blanket, which suggests the perpetrator knew, or was familiar with the victim; and (5) Marquardt's father stated that his son had not been heard from since Mary's body was discovered.

FN4. The State cites several authorities for the general proposition that "males kill in overwhelming numbers compared to females, and they kill with firearms."

¶ 19 Although these facts may lead a reasonable police officer to pursue further investigation of Marquardt, we conclude that there is nothing in the facts to tie Marquardt to the crime, much less to tie his home to the crime. Although the warrant-issuing judge may ***779** have been provided sufficient facts to excite an honest belief in a reasonable mind that the particular types of objects sought--including shoes, knives, and guns--could be linked with the commission of the crime, there was no fact that suggested those items would be found in Marquardt's cabin. We conclude that Marquardt has established that the facts are clearly insufficient to support a probable cause finding and, ****195** therefore, we reject the judge's probable cause determination. *See Ward,* 231 Wis.2d 723, 604 N.W.2d 517, 2000 WI 3 at ¶ 2.

[13] ¶ 20 Until recently, this conclusion would end our analysis, and we would simply reverse the circuit court's order denying Marquardt's motion to suppress. However, as a result of our supreme court's decision in *Eason,* we instead reverse and remand for a determination of whether the good faith exception to the exclusionary rule applies in this case.

¶ 21 In *Eason,* the court adopted the good faith exception to the exclusionary rule recognized in *United States v.. Leon,* 468 U.S. 897, 918- 20, 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984), adding some additional protections required by art. I, § 11, of the Wisconsin Constitution. *See Eason,* 245 Wis.2d 206, 629 N.W.2d 625, 2001 WI 98 at ¶ 74. *Eason* stated:
We hold that where police officers act in objectively reasonable reliance upon the warrant, which had been issued by a detached and neutral magistrate, a good faith exception to the exclusionary rule applies. We further hold that in order for a good faith exception to apply, the burden is upon the State to show that the process used in obtaining the search warrant included a significant investigation and a review by either a

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police officer trained and knowledgeable in the requirements of probable cause and reasonable suspicion, or a knowledgeable government attorney. We also hold that this process is required by Article I, Section 11 of the Wisconsin Constitution, in addition to those protections ***780** afforded by the good faith exception as recognized by the United States Supreme Court in *United States v. Leon,* 468 U.S. 897, 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984).
Id.

¶ 22 *Eason* was decided after briefing was completed in this case, although the State in the circuit court and on appeal argued for application of a good faith exception to the exclusionary rule. We conclude that the State has preserved this issue for appeal. Accordingly, we reverse that portion of the circuit court's order denying Marquardt's motion to suppress and remand for a good faith hearing consistent with *Eason.*

¶ 23 If the circuit court ultimately concludes that the good faith exception to the exclusionary rule is inapplicable, the court must issue a suppression order with respect to the March 15 search. In that case, the court must also determine the facts surrounding the subsequent searches to determine if they were tainted by the initial unlawful search of Marquardt's residence and, if so, issue a suppression order consistent with its findings. *See State v. Durbin,* 170 Wis.2d 475, 486, 489 N.W.2d 655 (Ct.App.1992).

II. Marquardt's request for a *Franks* hearing

¶ 24 The circuit court denied Marquardt's request for a *Franks* hearing. A *Franks* hearing allows a defendant to contest the finding of probable cause to issue a search warrant in a hearing if he or she "makes a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in ***781** the warrant affidavit, and if the allegedly false statement is necessary to the finding of probable cause." *State v. Marshall,* 92 Wis.2d 101, 112, 284 N.W.2d 592 (1979) (citing *Franks v. Delaware,* 438 U.S. 154, 155-56, 98 S.Ct. 2674, 57 L.Ed.2d 667 (1978)). Marquardt in his briefs stated that this court need not consider his *Franks* hearing request if we conclude that the warrant lacks probable cause. ****196** Because we have concluded that there was insufficient probable cause to support the March 15 search warrant application, we will not address the *Franks* issue.

III. Warrantless search of Marquardt's vehicle

¶ 25 Marquardt seeks suppression of the evidence found in the vehicle seized from his home at the time of his arrest on two grounds: that it is "fruit of the poisonous tree" and that the vehicle was unlawfully seized and searched without a warrant. The circuit court will address the first ground if it determines that the good faith exception to the exclusionary rule does not apply to the March 15 search warrant. Resolution of the second ground requires us to consider the "automobile exception" to the warrant requirement of the Fourth Amendment of the United States Constitution and art. I, § 11, of the Wisconsin Constitution.

[14][15] ¶ 26 Warrantless searches of homes are "presumptively unreasonable," but searches of vehicles are not. *State v. Pallone,* 2000 WI 77, ¶ 59, 236 Wis.2d 162, 613 N.W.2d 568. During the last seventy-five years, the United States Supreme Court has recognized that the unique nature of automobiles sets them apart from other areas protected from warrantless searches under the Fourth Amendment. *Id.* This exception to the general rule requiring a warrant for searches and seizures is known as the automobile exception.

***782** A. Federal case law on the automobile exception

¶ 27 The elements required to satisfy the automobile exception have changed over time. In *Carroll v. United States,* 267 U.S. 132, 45 S.Ct. 280, 69 L.Ed. 543 (1925), the court held that three elements were required to satisfy the automobile exception to the warrant requirement: (1) a mobile vehicle; (2) probable cause to believe the vehicle contained evidence of a crime; and (3) impractibility of obtaining a search warrant. *See id.* at 153-60, 45 S.Ct. 280.

¶ 28 In *California v. Carney,* 471 U.S. 386, 388, 105 S.Ct. 2066, 85 L.Ed.2d 406 (1985), the court effectively eliminated the *Carroll* requirement of "impractibility to obtain a search warrant," explaining that the exigency inherent in the "ready mobility" of a vehicle, coupled with the "lesser

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expectation of privacy" in a readily mobile vehicle, excuses the need to secure a search warrant. *See Carney,* 471 U.S. at 390-91, 105 S.Ct. 2066.

¶ 29 If there was any doubt about the elimination of the impracticability requirement, it was resolved by *Pennsylvania v. Labron,* 518 U.S. 938, 116 S.Ct. 2485, 135 L.Ed.2d 1031 (1996) (per curiam). In *Labron,* the Court overturned the Pennsylvania Supreme Court's conclusion that warrantless searches of automobiles are limited to cases where unforeseen circumstances involving the search of an automobile are coupled with the presence of probable cause. *See id.* at 940, 116 S.Ct. 2485. The Court stated:

> Our first cases establishing the automobile exception to the Fourth Amendment's warrant requirement were based on the automobile's "ready mobility," an exigency sufficient to excuse failure to obtain a search warrant once probable cause to conduct the search is clear. .... More recent cases provide a further justification: the individual's reduced expectation of privacy in an automobile, ***783** owing to its pervasive regulation. .... If a car is readily mobile and probable cause exists to believe it contains contraband, the Fourth Amendment ****197** thus permits police to search the vehicle without more.
>
> *Id.*

¶ 30 The Supreme Court reiterated its conclusion three years later in *Maryland v. Dyson,* 527 U.S. 465, 119 S.Ct. 2013, 144 L.Ed.2d 442 (1999) (per curiam). The Court rejected the state court's conclusion that the automobile exception requires a separate finding of exigency in addition to a finding of probable cause. *Id.* at 467, 119 S.Ct. 2013. The Court explained:

> The Fourth Amendment generally requires police to secure a warrant before conducting a search. ... As we recognized nearly 75 years ago ... there is an exception to this requirement for searches of vehicles. And under our established precedent, the "automobile exception" has no separate exigency requirement. We made this clear in *United States v. Ross,* 456 U.S. 798, 809, 102 S.Ct. 2157, 72 L.Ed.2d 572 ... (1982), when we said that in cases where there was probable cause to search a vehicle "a search is not unreasonable if based on facts that would justify the issuance of a warrant, *even though a warrant has not been actually obtained.*" (Emphasis added.).... [In *Labron*], we repeated that the automobile exception does not have a separate exigency requirement: "If a car is readily mobile and probable cause exists to believe it contains contraband, the Fourth Amendment .... permits police to search the vehicle without more."
>
> *Id.*

[16] ¶ 31 Thus, under current federal law, the warrantless search of a vehicle does not offend the Fourth Amendment if (1) there is probable cause to search the vehicle; and (2) the vehicle is readily mobile. *See id.* ***784** Issues concerning whether the police could have obtained a warrant prior to searching are not relevant to the analysis. *See id.;* 3 WAYNE R. LAFAVE, SEARCH AND SEIZURE § 7.2(b) (3d ed.1996) (courts uphold warrantless searches with virtually no inquiry into the facts of the particular case, reasoning that whether any kind of exigent circumstances claim could plausibly be put forward is totally irrelevant).

B. Wisconsin case law on the automobile exception

[17] ¶ 32 Wisconsin's Constitution also protects Wisconsin's citizens from unreasonable searches and seizures. *See* WIS. CONST. art. I, § 11. Although the United States Supreme Court sets the minimal constitutional standards applicable to the states through the Fourteenth Amendment, Wisconsin's Supreme Court is free to interpret our constitution in a manner that affords greater protections. *State v. Tompkins,* 144 Wis.2d 116, 132, 423 N.W.2d 823 (1988). However, *Tompkins* added,

> where the language of the state constitutional provision at issue is virtually identical with that of its federal counterpart, as here, we have traditionally interpreted our constitution consistent with the protections of the federal constitution as interpreted by the United States Supreme Court. This is particularly true of this court's interpretation of the Wisconsin search and seizure provision.
>
> *Id.* at 133, 423 N.W.2d 823.

C. Application of the automobile exception

¶ 33 Applying these principles to the instant case, we must consider (1) whether there was probable ***785** cause to search Marquardt's vehicle; and (2) whether the vehicle was readily mobile. *See Dyson,* 527 U.S. at 467, 119 S.Ct. 2013. We

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conclude: (1) that there was probable cause to search the vehicle because Marquardt has **198 not contested that issue; and (2) that the vehicle was readily mobile. Therefore, the automobile exception applies. We also reject Marquardt's two additional challenges to the automobile exception: that the exception applies only to vehicles in public places and that the court should consider the ease with which the officers could have obtained a search warrant in applying the automobile exception.

1. Probable cause

[18] ¶ 34 Marquardt filed numerous motions to suppress evidence. After the first of two hearings on his motions, the State requested additional time to investigate and present evidence, explaining that the State had not realized that Marquardt was challenging the search of the vehicle on warrantless search grounds as well as "fruit of the poisonous tree" grounds. Marquardt's counsel agreed to continue the hearing.

¶ 35 Prior to the continued motion hearing, the State filed a brief urging the circuit court to deny Marquardt's motion to suppress, arguing that the warrantless search of the vehicle was constitutional under the automobile exception. With respect to probable cause, the State noted: "The defendant's entire argument for the suppression of the evidence seized from the [vehicle] centered on the failure of the police to obtain a search warrant. Implicit in this argument is a concession that the officers had probable cause sufficient to obtain a search warrant."

***786** ¶ 36 Marquardt did not file a written response, choosing instead to present his arguments orally after the remaining testimony was taken. We have reviewed the transcript and agree with the State that Marquardt did not challenge the State's assumption that there was probable cause to search the vehicle. Instead, Marquardt contested whether the car's location on a private driveway, as opposed to on public property, satisfied the automobile exception.

¶ 37 Marquardt's apparent concession of the probable cause issue was reflected in the circuit court's written decision, in which the court simply stated that there was probable cause to search the vehicle and concentrated on the single issue raised at the motion hearing: whether there is a "public place" requirement in the automobile exception.

¶ 38 On appeal, Marquardt in his opening brief did not challenge whether there was probable cause to search his vehicle. The State identified this omission in its brief, and also explained why such an argument would lack merit. In his reply brief, Marquardt does not directly respond to the State's assertion that he failed to challenge probable cause, although he notes in a single paragraph:

> The officers did not state that they had probable cause to search the vehicle. In fact, Investigator Price stated that he did not know "that there was anything visible from the exterior of the vehicle that would be classified as contraband" and that there was "suspect information" visible from the exterior of the vehicle. However, he testified that "we were able to see a material on the door, but we had no idea what it was." There was no testimony that any officer even saw the stain until Bill Marquardt's car was transported to the Eau County Sheriff's Department and it was not until the car was ***787** sent to the State Crime Lab in Madison that the stain was determined to be blood. The vehicle[']s prospective value remained uncertain until after the interior[ ][was] thoroughly searched and examined.

¶ 39 Based on the record and the briefs, we conclude that to the extent Marquardt attempts to contest probable cause for the **199 first time in his reply brief, he is too late. *See Swartwout v. Bilsie,* 100 Wis.2d 342, 346 n. 2, 302 N.W.2d 508 (Ct.App.1981) (Ordinarily, we do not consider arguments raised for the first time in a reply brief.). Not only was the issue not raised in Marquardt's opening brief, it was not raised at the circuit court. Accordingly, we decline to address it. *See Apex Elecs. Corp. v. Gee,* 217 Wis.2d 378, 384, 577 N.W.2d 23 (1998) (The oft-repeated rule of Wisconsin appellate practice is that issues not raised in the circuit court generally will not be considered for the first time on appeal.). We therefore conclude that the probable cause prong of the automobile exception has been satisfied.

2. "Readily mobile" vehicle

[19] ¶ 40 It is undisputed that Marquardt's vehicle was in working order on the day he was arrested. Indeed, an officer testified that law enforcement on

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March 18 proceeded to Marquardt's home to execute the arrest warrant shortly after a neighbor notified them that he saw Marquardt's car pull into the driveway. However, Marquardt argues that once he was arrested, the vehicle was no longer readily mobile.

[20] ¶ 41 We decline to address this argument in detail because Marquardt did not raise this issue at the trial court and has provided us with no authority for his argument. *See id.* at 384, 577 N.W.2d 23; *State v. Shaffer,* 96 Wis.2d ***788** 531, 545-46, 292 N.W.2d 370 (Ct.App.1980) (we need not consider arguments unsupported by citations to authority). However, we note that our brief survey of the applicable case law assures us that the argument lacks merit.

¶ 42 In *United States v. Gallman,* 907 F.2d 639, 641 (7th Cir.1990), the court addressed the same argument from a defendant who contended that his car was not readily mobile because he had been arrested and the officers had his car key. The court rejected Gallman's reasoning, concluding: "These circumstances do indeed make the car less accessible to Gallman, but they do not make it less mobile." *Id.* This reasoning is equally persuasive here; Marquardt's arrest would not prevent other unknown individuals from moving the vehicle.

[21] ¶ 43 Additionally, we are not concerned by the fact that the car was seized and impounded before it was searched. The Supreme Court has held that the justification to conduct a warrantless search does not vanish once the car has been immobilized. *See United States v. Johns,* 469 U.S. 478, 484, 105 S.Ct. 881, 83 L.Ed.2d 890 (1985). In short, we are confident that the readily mobile component of the automobile exception has been satisfied.

3. Rejection of additional arguments

¶ 44 Marquardt challenges the application of the automobile exception on two additional grounds: that the exception applies only to vehicles in public places and that the court should consider the ease with which the officers could have obtained a search warrant. We reject these arguments.

[22] ***789** ¶ 45 We first consider Marquardt's contention that the automobile exception is inapplicable because his vehicle was parked in his private driveway at the time it was seized. He argues that the Wisconsin Constitution limits the application of the automobile exception to vehicles found in public places. His argument is based on several Wisconsin Supreme Court cases, beginning with *Tompkins,* 144 Wis.2d at 128-29, 423 N.W.2d 823.

¶ 46 The *Tompkins* court discussed the applicability of the automobile exception. ****200** *Tompkins* included the following quotation from *Carney:*

> When a vehicle is being used on the highways, or if it is readily capable of such use and is found stationary in a place not regularly used for residential purpose--temporary or otherwise--the two justifications for the vehicle exception come into play. First, the vehicle is obviously readily mobile by the turn of an ignition key, if not actually moving. Second, there is a reduced expectation of privacy stemming from its use as a licensed motor vehicle subject to a range of police regulation inapplicable to a fixed dwelling.

Tompkins, 144 Wis.2d at 128-29, 423 N.W.2d 823 (quoting *Carney,* 471 U.S. at 392-93, 105 S.Ct. 2066). Marquardt seizes on the phrase "found stationary in a place not regularly used for residential purposes" in support of his argument that the automobile exception is inapplicable to him.

¶ 47 In subsequent cases, the court cited *Tompkins* for the proposition that "A warrantless search of an automobile is justified when the police have probable cause to believe that an automobile, found in a public place, contains evidence of a crime; no showing of exigent circumstances is required." *See State v. Weber,* 163 Wis.2d 116, 137, 471 N.W.2d 187 (1991). This same phrase was repeated in *State v. Caban,* 210 Wis.2d 597, ***790** 607, 563 N.W.2d 501 (1997), and *State v. Secrist,* 224 Wis.2d 201, 210, 589 N.W.2d 387 (1999).

¶ 48 Despite the "public place" language that appears in these cases, we conclude that the automobile exception is nonetheless applicable to Marquardt. The genesis of the language was *Carney,* which involved the search of a fully mobile motor home located in a public place. *See Carney,* 471 U.S. at 387, 105 S.Ct. 2066. United States Supreme Court cases subsequent to *Carney* have not recognized a public place requirement for the automobile exception. *See, e.g., Dyson,* 527 U.S. at 467, 119 S.Ct. 2013. Thus, to the extent that

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Carney ever intended to impose a public place requirement, it is no longer applicable.

[23] ¶ 49 Marquardt does not argue that federal law imposes a public place requirement. Instead, he essentially contends that Wisconsin, interpreting its own constitution, has chosen to provide greater protection under its own constitution. We disagree. No Wisconsin Supreme Court case has expressly indicated that Wisconsin provides greater protection under the automobile exception. In fact, the court recently restated its commitment to interpreting art. I, § 11, of the Wisconsin Constitution consistently with the Fourth Amendment. *See Eason,* 2000 WI 98 at ¶ 37, 42. [FN5] Any interpretation ***791** requiring that the vehicle be in a public place would be inconsistent with this commitment. Absent an explicit indication that our supreme court is interpreting art. I, § 11, of the Wisconsin Constitution differently than the Fourth Amendment, we will assume ****201** that Wisconsin will continue to follow federal precedent concerning the automobile exception.

FN5. We recognize that in *State v. Eason,* 245 Wis.2d 206, 629 N.W.2d 625, 2001 WI 98, ¶ 74, the court restated this commitment in support of its decision to adopt the good faith exception established in *United States v. Leon,* 468 U.S. 897, 918-20, 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984), but then actually concluded that art. I, § 11, of the Wisconsin Constitution provides "more protection than the Fourth Amendment provides under the good faith exception as adopted in *Leon.*" *See Eason,* 245 Wis.2d 206, 629 N.W.2d 625, 2001 WI 98 at ¶ 60. This only reinforces our conclusion that our supreme court will generally interpret art. I, § 11 consistent with the Fourth Amendment, but may elect to recognize greater protection under the Wisconsin Constitution. When the court has done so, as in *Eason,* such a conclusion has been explicit. *See id.*

¶ 50 Finally, we address Marquardt's argument that the police should have obtained a warrant because "[t]here was no danger of the car or any evidence of any crime that may have existed in the car being driven away and destroyed." Marquardt cites *Coolidge v. New Hampshire,* 403 U.S. 443, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971), where the court rejected application of the automobile exception under similar facts. In *Coolidge,* the defendant was arrested at his home and his two cars were towed to the police station and searched without a warrant, turning up incriminating evidence. *Id.* at 447- 48, 91 S.Ct. 2022.

¶ 51 The Court noted that because the defendant's cars were parked in a private driveway rather than stopped on a public highway, the opportunity to search was not so "fleeting" as to make a warrant application impracticable. *Id.* at 460, 91 S.Ct. 2022. Summarizing its discussion rejecting application of the automobile exception, the Court stated, "Here there was probable cause, but no exigent circumstances justified the police in proceeding without a warrant." *Id.* at 464, 91 S.Ct. 2022.

[24] ¶ 52 We conclude that while *Coolidge's* discussion of impractibility may have been relevant in 1971, it ceased to be relevant after *Carney* effectively eliminated ***792** the *Carroll* requirement of "impractibility to obtain a search warrant" in 1985. *See Carney,* 471 U.S. at 390-91, 105 S.Ct. 2066. The fact that the officers in this case could have secured a warrant, either before towing the vehicle or before searching it at the police station, does not render the automobile exception inapplicable. *See Johns,* 469 U.S. at 484, 105 S.Ct. 881 (the justification to conduct a warrantless search does not vanish once the car has been immobilized.). Accordingly, we reject Marquardt's attempt to reintroduce an impractibility requirement to the automobile exception.

CONCLUSION

¶ 53 We conclude there was insufficient probable cause to justify the search warrant for Marquardt's home. Therefore, we reverse that portion of the court's order and remand for a determination, consistent with *Eason,* 245 Wis.2d 206, 629 N.W.2d 625, 2001 WI 98, of whether the good faith exception to the exclusionary rule applies in this case. In light of our first conclusion, we do not address Marquardt's request for a *Franks* hearing. Finally, we conclude that the automobile exception applies to the warrantless search of Marquardt's vehicle and, therefore, affirm that portion of the court's order denying suppression of evidence from Marquardt's vehicle on warrantless search grounds.

Order affirmed in part; reversed in part, and cause remanded for further proceedings.

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247 Wis.2d 765, 635 N.W.2d 188, 2001 WI App 219

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. 2001 WL 34352525 (Appellate Brief) Brief and Appendix of Defendant-Appellant (Mar. 19, 2001)Original Image of this Document (PDF)

. 2001 WL 34352527 (Appellate Brief) Reply Brief of Defendant-Appellant (2001)Original Image of this Document (PDF)

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STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2004AP0958-CR

STATE OF WISCONSIN,

Plaintiff-Appellant,

v.

BILL PAUL MARQUARDT,

Defendant-Respondent.

ON CERTIFICATION BY THE COURT OF APPEALS
TO REVIEW SUPPRESSION ORDERS
ENTERED IN THE CIRCUIT COURT
FOR CHIPPEWA COUNTY,
THE HONORABLE RODERICK A. CAMERON,
PRESIDING

REPLY BRIEF OF PLAINTIFF-APPELLANT

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STATE OF WISCONSIN

IN SUPREME COURT

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STATE OF WISCONSIN,

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THE HONORABLE RODERICK A. CAMERON,
PRESIDING

REPLY BRIEF OF PLAINTIFF-APPELLANT

INTRODUCTION

For its opening brief, the State chose to stand on the brief-in-chief that it filed in the court of appeals. Defendant Bill Paul Marquardt has filed a new respondent's brief that largely tracks his court of appeals' brief. The State now submits a new, modified reply brief.

The State asks this court to hold that evidence derived from the search warrant of March 15, 2000 ("the March 15 warrant"), at the cabin and outbuildings of Marquardt is admissible at trial.

The court of appeals concluded that the March 15 warrant lacked probable cause, and it remanded "for a determination of whether the good faith exception to the exclusionary rule applies." *State v. Marquardt*, 2001 WI App 219, ¶ 2, ¶ 20, 247 Wis. 2d 765, 635 N.W.2d 188.

Because the March 15 warrant was pertinent to an Eau Claire County case, as well as to this Chippewa County case, the "good faith" remand affected both cases, which are now before this court. In the Eau Claire County case, an *evidentiary* hearing was held on "good faith," and the trial court found "good faith" to sustain the March 15 warrant (327:75-79). However, on remand in Chippewa County, *no evidentiary hearing* was held, and the prosecutor proffered a transcript of the Eau Claire County hearing in support of the application of "good faith" (327).

In light of the Eau Claire County evidentiary hearing, the State believes the existing record is sufficient to conclude that evidence derived from the March 15 warrant is admissible under either the "good faith" exception to the exclusionary rule or the "inevitable discovery" doctrine. The Chippewa County court took into account the Eau Claire County hearing, at least with respect to "inevitable discovery" (335:5). If this court disagrees, it should then remand for an *evidentiary* hearing on "good faith" in Chippewa County.

ARGUMENT

I. OFFICERS ACTED IN OBJECTIVELY REASONABLE RELIANCE ON THE MARCH 15 WARRANT, SO THAT THE "GOOD FAITH" EXCEPTION TO THE EXCLUSIONARY RULE APPLIES.

A. The *Leon* analysis.

1. Introduction.

There is no dispute that *both United States v. Leon*, 468 U.S. 897 (1984), *and State v. Eason*, 2001 WI 98, 245 Wis. 2d 206, 629 N.W.2d 625, are relevant to the analysis of "good faith."

With respect to *Leon*, Marquardt argues that the warrant application is "'so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable.'" *Leon*, 468 U.S. at 923 (citation omitted) (Marquardt's brief at 16-24). Marquardt also argues that in resolving this particular *Leon* issue, a reviewing court is limited to information contained in the warrant application (Marquardt's brief at 21-24).

The State maintains that in the analysis of "good faith," a reviewing court should be able to consider indicia supportive of probable cause for the warrant that were known to the applying officers but omitted from the warrant application – at least so long as the warrant application itself is more than "bare bones." The State also maintains that regardless of whether the reviewing court is limited to the warrant application in determining this particular *Leon* factor, "good faith" was satisfied in the present case.

2. The propriety of considering external indicia of probable cause.

Apparently a majority of courts hold that in determining "good faith," the reviewing court may consider external indicia supportive of probable cause known to the applying officers but omitted from the warrant application. A partial list of such courts is set forth at page 20 of the State's brief-in-chief. To this list, the State adds the following cases: *United States v. Dodd*, 349 F.Supp.2d 1039, 1050-51 (W.D.Tex. 2004); *Moore v. Commonwealth*, 2005 WL 635048 at *2 (Ky. March 17, 2005; modified April 21, 2005).

Marquardt's arguments for restricting "good faith" analysis of probable cause solely to the warrant application are unpersuasive.

- First, contrary to Marquardt's suggestion at pages 6-8 of his brief, in *State v. Brady*, 130 Wis. 2d 443, 388 N.W.2d 151 (1986), this court was *not* faced with deciding whether external indicia supportive of probable cause may be considered in the analysis of "good faith." It simply declined to entertain a good faith analysis, because the warrant affidavit "lacked [any] indicia of probable cause regarding the impracticability of securing [the defendant's] presence through a subpoena." *Id.* at 454 (brackets added).

- Second, Marquardt erroneously commingles the standard of "objective reasonableness" in a "good faith" analysis with the officer's "subjective" beliefs about the sufficiency of the warrant application or reasons for seeking the warrant (Marquardt's brief at 21-24). As the Court said in *Leon*, 468 U.S. at 922 n.23, in determining objective reasonableness, "*all of the circumstances* – including whether the warrant application had previously been rejected by a different magistrate – may be considered" (emphasis added). The example cited in *Leon* is just one *external* circumstance relevant to good faith.

As the court of appeals suggests at page 6 of its certification in the present case, "it is possible to have *objective*, verifiable information [supportive of probable cause] excluded from a warrant application" (emphasis added). Information known to the applying officer but omitted from the warrant application is no less "objective" than information contained in the application. An inquiry into *why* the applicant omitted the information or believed the application was sufficient, would be "subjective," and such considerations are properly excluded from the "objective" analysis of good faith.

Contrary to Marquardt's suggestion at page 22 of his brief, in *Anderson v. Creighton*, 483 U.S. 635 (1987), the Supreme Court did *not* "use[] a subjective good faith analysis" in determining whether an officer violated an arrestee's civil rights by relying on an insufficient warrant. Rather, *Anderson* supports the proposition that *external* indicia supportive of probable cause *are* relevant to the determination of "objective reasonableness" in the analysis of good faith:

> [T]he determination whether it was *objectively* legally reasonable to conclude that a given search was supported by probable cause . . . will often require examination of the information possessed by the searching officials. . . . [T]his does *not* reintroduce into qualified immunity analysis the [forbidden] inquiry into officials' subjective intent.

Anderson, 483 U.S. at 641 (emphasis added). *Anderson* relied on *Malley v. Briggs*, 475 U.S. 335, 342 (1986), which, in turn, relied on *Leon*.

- Finally, *United States v. Koerth*, 312 F.3d 862 (7th Cir. 2002), *cert. denied*, 123 S.Ct. 1947 (2003), on which Marquardt relies, is unconvincing. The State does not dispute the statement in *Koerth*, 312 F.3d at 871, that "'[a]n obviously deficient affidavit cannot be cured by an officer's later testimony on subjective intentions or knowledge'" (citation omitted). But, for the reasons discussed, no such "subjective" inquiry occurs when the

officer later identifies *objective* information that the officer omitted from the warrant application.

There is no incentive for an officer seeking to comply with the "probable cause" requirement of the Fourth Amendment by applying for a warrant to omit information *supportive of* probable cause from the warrant application. Moreover, in such situations, if a magistrate correctly denies the warrant application, the applying officer – who already possesses the favorable, omitted information – could correct the deficiency in short order in a subsequent application.

In effect, in a "good faith" analysis, precluding consideration of external indicia supportive of probable cause for the warrant would *not* "further the purpose[] of the exclusionary rule" to deter police misconduct in conducting searches and seizures. *Leon*, 468 U.S. at 918.

3. "Good faith" was met in the present case.

The warrant application. First, based solely on the March 15 warrant application, officers could reasonably rely in good faith on the warrant's issuance.

Marquardt's assertion at page 19 of his brief that "there [i]s no single fact in the affidavit to support probable cause that Marquardt was involved in the homicide" is simply untrue. Rather, as outlined at pages 25-28 of the State's brief-in-chief, multiple facts in the application, and reasonable inferences therefrom, provided sufficient minimal indicia of probable cause linking Marquardt to the homicide for "good faith" reliance on the warrant. To summarize:

- The fact that the residence phone inexplicably "was busy" all afternoon of the day of the killing suggested that the phone was off the hook, and coupled

with the absence of any indication of a break-in, suggested that Mrs. Marquardt knew her assailant (1:2).

- The fact that Mrs. Marquardt was shot in head and stabbed, coupled with the absence of information suggesting a robbery or sexual assault, suggests that homicide was the motive (1:2; 33:10).

- The use of a gun and a knife suggests that the killer was male (1:2; 33:10).

- The fact that Mrs. Marquardt's body was covered in the garage with a blanket suggests that the killer felt compassion for the victim or remorse for the killing, precisely because he intimately knew the victim, and vice versa (1:2).

- Finally, the fact that Bill Marquardt, who lived in the area, "had not been seen or heard from" in the two days after the homicide despite the publicity (33:9) suggests that he, among the victim's family and friends, best fit the other identified information about the killer.

A "bare bones" affidavit is one that "contains 'wholly conclusory statements'" without any recitation of facts. *United States v. DeQuasie*, 373 F.3d 509, 521 (4th Cir. 2004) (citation omitted); *United States v. Satterwhite*, 980 F.2d 317, 321 (5th Cir. 1992); *People v. Altman*, 960 P.2d 1164, 1170 (Colo. 1998); *see generally Illinois v. Gates*, 462 U.S. 213, 239 (1983). A "bare bones" affidavit is one in which the affiant avers simply that he or she "'has cause to suspect and does believe,'" or has "'received reliable information from a credible person and do[es] believe,'" that contraband is at a specific location. *Gates*, 462 U.S. at 239 (citations omitted).

In the present case, the March 15 warrant application was not wholly conclusory, but rather satisfied the *Leon* requirement of minimum indicia of probable cause to permit an officer to rely in good faith on the warrant's issuance.

Eau Claire County Judge Benjamin Proctor issued the March 15 warrant (33:11-12), Chippewa County Judge Roderick Cameron initially upheld the warrant (345:21-22, 27-30; 87), and Eau Claire County Judge Eric Wahl found "good faith" reliance on the warrant (327:75-79). Then-Eau Claire County District Attorney Raymond Pelrine drafted the warrant application (327:10-20). These facts further support the objective reasonableness of officer reliance on the March 15 warrant.

External indicia of probable cause. While the warrant application alone is sufficient to satisfy "good faith," there should be no doubt when consideration is properly given to *external* indicia *supportive of* probable cause known to the applying officers but omitted from the warrant application. These include the following:

- On the day of the homicide, a message for Bill Marquardt that had been attached to the refrigerator in his parents' residence had been moved to the bedroom, beneath a jewelry box (84:33-34), suggesting Bill Marquardt had been in the residence that day (327:36-37).

- On March 14, 2000, the day after the homicide and the day before the March 15 warrant was sought, an investigator learned that Bill Marquardt's neighbor's dog recently had been shot with a 9mm bullet, the same caliber as the bullet that killed Mrs. Marquardt (327:53-54). A reasonable officer could find this evidence more than coincidental when coupled with the aforementioned information implicating Bill Marquardt in his mother's homicide.

- Finally, officers knew of Bill Marquardt's prior history of "drug dealings" and that Mrs. Marquardt recently had caught Bill digging up $12,000 in cash on his parents' property (327:56). This information reasonably suggested a possible motive for the killing – that Mrs. Marquardt may have challenged Bill's conduct or threatened to go to authorities.

Contrary to Marquardt's assertions at pages 33-38 of his brief, officers obtained the foregoing information *in advance of the March 15 warrant application* and supplied it to District Attorney Pelrine and Eau Claire County Sergeant John Vogler for purposes of seeking the warrant (33:24-31; 327:53-58).

With or without the added external indicia of probable cause, application for the March 15 warrant was based on sufficient information to enable a reasonable officer to rely in good faith on issuance of the warrant.

B. The *Eason* analysis.

To satisfy "good faith" under the Wisconsin Constitution, the State also must show "that the process used in obtaining the search warrant included [1] a significant investigation and [2] a review by" a knowledgable and experienced police officer or government attorney. *Eason*, 24 Wis. 2d 206, ¶ 74.

Marquardt challenges only the State's proof of a "significant investigation." He argues that the investigation must have been qualitatively and quantitatively significant and must have "provide[d] significant *results* that point to the suspect" (Marquardt's brief at 26; emphasis added).

First, the sheer number of officers or manhours devoted to an investigation should not be the sole determinant of whether it is "significant." The *nature* of the investigative activities also must be considered. In the present case, the record reflects a significant investigation in advance of the March 15 warrant application, both quantitatively and qualitatively, as enumerated at page 34 of the State's brief-in-chief. The pre-warrant investigation involved twenty officers from two counties and the Wisconsin Division of Criminal Investigation (327:46) and included the following activities:

- A four- to five-hour interview with Alfred Marquardt, the victim's husband, reduced to an eight-page report (33:24-31; 327:31-32);

- Crime-scene evidence gathering (1:1-7);

- Interviews of Bill Marquardt's brother and sister to identify (and rule out) possible suspects (327:37-38);

- A next-day autopsy of the victim, ruling out sexual assault (327:34);

- A next-day interview with a neighbor of Bill Marquardt, leading to the discovery that the neighbor's dog had been shot with a 9mm bullet, the same caliber used to shoot Mrs. Marquardt (327:53); and

- Repeated attempts to locate Bill Marquardt at his cabin, by cell phone and by interview with his former employer (327:51-53).

In light of these activities and the resulting information, seeking a search warrant within forty-eight hours of the homicide made eminent sense.

Second, contrary to Marquardt's suggestion, it is illogical to interpret "significant investigation" as requiring significant *results*. If a warrant application contains probable cause – that is, significant "results" implicating the suspect – a good faith inquiry will be unnecessary. Moreover, if significant "results" were part of the good faith analysis, it would make even greater sense to permit consideration of *external* indicia of probable cause known to the applying officers but omitted from the warrant application.

In the present case, both the *Leon* and *Eason* requirements have been satisfied with respect to the March 15 warrant to permit application of the good faith exception to the exclusionary rule.

II. ALTERNATIVELY, EVIDENCE SEIZED WITH THE MARCH 15 WARRANT IS ADMISSIBLE UNDER THE "INEVITABLE DISCOVERY" DOCTRINE.

Also unpersuasive is Marquardt's challenge to the State's alternative ground for admitting evidence derived from the March 15 warrant – "inevitable discovery." The State's proffer, based in part on the Eau Claire hearing transcript, meets all three requirements for application of this doctrine.

Reasonable probability of discovery. First, the record reflects "a reasonable probability that the evidence in question would have been discovered by lawful means but for the police misconduct." *State v. Lopez*, 207 Wis. 2d 413, 427-28, 559 N.W.2d 264 (Ct. App. 1996). In the present context, "police misconduct" simply means failure to provide sufficient probable cause in the search warrant application.

Marquardt either misperceives or misconstrues the State's argument on this first criterion. The State is *not* arguing that the evidence derived from the March 15 warrant would still have been available for discovery five to ten days after execution of the warrant on March 18. Rather, if the March 15 warrant had been denied for lack of probable cause, the additional external indicia of probable cause *already known* to the applying officers (but omitted from the application) reasonably would have led to another, valid warrant *before Marc 18* when the evidence was found.

This is a *stronger* situation for application of "inevitable discovery" than where police simultaneously undertake an illegal warrantless search while applying for a warrant that would have been issued and executed successfully had police waited for it. Yet, in the latter situation, "inevitable discovery" has been "readily applied." 3 Wayne R. LaFave, Jerold H. Israel & Nancy

J. King, *Criminal Procedure* § 9.3(c) at 356 (2d ed. 1999) (collecting cases).

Preexisting leads. The fact that officers already possessed the additional indicia of probable cause omitted from the March 15 warrant application also necessarily satisfies the requirement that other "leads" existed at the time of the March 15 application. *Lopez*, 207 Wis. 2d at 427-28.

Alternate lines of investigation. Likewise, the pre-existence of additional indicia of probable cause omitted from the warrant application also necessarily satisfies the requirement that the State "was actively pursuing some alternate line of investigation." *Id.*

Moreover, the fact that incriminating ballistics and fingerprint analyses were completed within five to ten days after March 18 (327:2, 81-84) reasonably suggests that if the March 15 warrant had been denied, investigators would have more quickly pursued those analyses. After all, after March 18, when the March 15 warrant was executed, speedier Crime Lab analyses were unnecessary.

The purpose of the "inevitable discovery" doctrine is to "put[] police in the same, not a worse, position tha[n] they would have been if no police error or misconduct had occurred." *Nix v. Williams*, 467 U.S. 431, 443 (1984).

CONCLUSION

For the reasons set forth in the State's two briefs, this court should reverse the suppression orders in question. Alternatively, it should remand for an evidentiary hearing.

Dated at Madison, Wisconsin: May 10, 2005.

Respectfully submitted,

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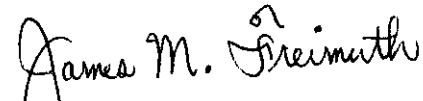

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CERTIFICATION

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is: proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line. The length of the brief is 2,923 words.

JAMES M. FREIMUTH

STATE OF WISCONSIN

IN THE SUPREME COURT

Case No.2004AP1609-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

BILL P. MARQUARDT,

Defendant-Appellant.

ON CERTIFICATION FROM THE COURT OF APPEALS
FROM A JUDGMENT OF CONVICTION,
SENTENCE AND ORDER DENYING
POSTCONVICTION RELIEF ENTERED IN
THE CIRCUIT COURT FOR EAU CLAIRE COUNTY,
THE HONORABLE ERIC J. WAHL, PRESIDING

REPLY BRIEF

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REPLY BRIEF

I. The good faith exception to the exclusionary rule does not apply.

A. It was improper for the trial court to consider information outside the warrant application to determine whether the officers acted in good faith.

Nor would an officer manifest objective good faith in relying on a warrant based on an affidavit so lacking in indicia of probable cause as to render official belief in

its existence entirely unreasonable.

United States v. Leon, 468 U.S. 897, 923(1984)(internal cites omitted).

Leon could not have made it clearer. The warrant application, itself, must reflect adequate indicia of probable cause for an officer to rely in good faith on the warrant. The ***Leon*** court found good faith based upon information contained in the warrant application. 468 U.S. at 926.

The same is true in ***State v. Eason***, 2001 WI 98, 245 Wis.2d 206, 629 N.W.2d 625. ***Eason***

held there was objective good faith because the affidavit documented a significant investigation implicating the defendants. 2001 WI 98 ¶ 70. No evidence external to the warrant application was submitted to the court.

Nevertheless, the state cites cases from other jurisdictions holding a reviewing court may consider information external to the warrant application. (State's brief at 12).

Among other cases, the state cites ***United States v.***

Martin, 297 F.3d 1309(11th Cir)Cert denied 537 U.S. 1076(2002) and ***United States v. Danhauer***, 229 F.3d 1002(10th Cir.2000) .(State's brief at 15). Mr. Marquardt's brief-in-chief has already pointed out that ***Martin*** does not support the state's position.(Marquardts's Brief-in-Chief, 21-23).

Nor does ***Danhauer*** support the state. ***Danhauer*** specifically says,

> When reviewing the reasonableness of an officer's reliance upon a search warrant, this court must examine the underlying documents to determine whether they are "devoid of factual support."

299 F.3d at 1006

Danhauer refers to no information outside of the warrant affidavit to support its conclusion of good faith.

In Wisconsin, if the warrant application has no indicia of probable cause, there is no basis upon which to even raise "good faith". See ***State v. Brady***, 130 Wis.2d 443, 453-545, 388 N.W.2d 151 (1986).

The State cites ***Anderson v. Creighton***, 468 U.S. 635(1987), to support its claim that it was proper to examine of information possessed by searching officers at the time of

the search. However, ***Creighton,*** where officers entered a home without a warrant claiming probable cause and exigent circumstances,[1] is not on point. Since there was no warrant application for the court to review, the only basis upon which the court could decide whether the officers acted reasonably was to take evidence about why the officers entered the home. ***Creighton*** offers no guidance to a court trying to determine good faith based upon a warrant application lacking indicia of probable cause.

B. The warrant application lacked indicia of probable cause so reliance upon the warrant was unreasonable.

The state argues that inferences drawn from facts in the warrant applications for the March 13 and March 15 warrants would have allowed the officers to reasonably rely on the warrants.(State's Brief 20-24). Mr Marqaurdt has already responded to these claims in his brief-in-chief. (Marquardt's Brief-in-Chief 28-31).

C. Even if it were permissible for the trial court to look

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1 ***Anderson v Creighton,*** 468 U.S. at 637

outside of the warrant application, there still was no basis for good faith reliance shown

Mr. Marquardt has already commented on the additional evidence State argues supports good faith. (See Marquardt's Brief-in-Chief 31-34.)

D. The *Eason* criteria were not met.

The investigation failed to turn up any fact linking Marquardt with the homicide.

The state cites Investigator Prices report to support the fact that the police found shell casings and latent fingerprints[2] on the door of the garage where the victim was found.(State's Brief 28 citing Record 23:Ex 1). A review of Investigator Price's report provides no such information.

The state also claims that Price "interviewed Marquardt's brother and sister to discover possible suspects.(States Brief at 29). The testimony the state refers to

---

2 Marquardt had been in the Alfred Marquardt residence within the previous few weeks and there is no showing that the prints would have been destroyed in the interim.

is as follows:

> Q. Did you have contact on the evening of the 13th with the brother and sister of Bill Marquardt?
>
> A. Yes, I did.
>
> Q. Did you discuss with them their mother and the fact that she had been killed.?
>
> A. I gave them a death notice. I provided them with as much of the information as I had available at the time as to what had happened Mary Jane.
>
> Q. Did either of those two individuals or Alfred Marqaurdt give you any indication that any non-relative may have a motive to do harm to Ms. Marquardt.
>
> A. No.
>
> Q. Did any of them give you any indication that one of the other three -- in other words, you talked with Alfred, you talked with Sheila Marquardt and what was the second son's name?
>
> A. I don't recall....
>
> Q. Okay, did any of those three individuals give you any indication that either of the other two would have some reason to harm Mary Marquardt?
>
> A. No.

(84:34-35(Price's testimony).

There is no suggestion in this testimony, that Marquardt's brother or sister suggested that Bill might be a suspect.

The state claims that on March 14th, and effort was begun to obtain Marquardt's cell phone records.(State's Brief 29 citing record 84:48-50). The record cite does not support that claim. Investigator Price testified that the cell phone records were obtained on March 16th - the day after the search.(84:41). There is nothing in the record cited by the state to suggest the police were looking for Marquardt's cellphone records before the search.

II. The inevitable discovery doctrine does not apply.

While the state first raised the issue of inevitable discovery in the trial court at the postconviction motion hearing, it only preserved the issue, offering no evidence or argument(96:62), the state now asks this court to consider inevitable discovery.(State's Brief 31-36).

A. There was no reasonable probability of discovery.

The state argues that had the original warrant been rejected the police would have used the additional information available to secure a warrant.(State's Brief 33-34). With few exceptions the state restates the same facts it argues to justify

good faith.[3] For reasons stated in Marquardt's brief-in-chief, the additional facts neither support good faith nor probable cause for a warrant.(Marquardt's brief-in-chief 31-34).

B. The police did not connect the Anderson shooting to the Ms. Marquardt's death until after the search.

The state has repeatedly suggested that the fact that the Anderson's dog had been shot with a nine millimeter bullet led officers to connect that crime with Ms. Marquardt's murder.(State's Brief 25,29,33, 35). The evidence in the record shows that the police made no such connection until after the search of Marquardt's cabin.

Special Agent Rehrauer did not ask Anderson to watch for Marquardt's vehicle until after the carcasses had been found.(91:119)

> Q. Well, do you recall what prompted you to begin looking for the defendant's car?
>
> A. Just that he had been looking for – the officer asked me to watch for his cars.

3

One additional piece of information the state includes is the fact that Marquardt's cell phone records reflected several calls to local pets and the humane society.(State's brief at 33). However, those calls did not become relevant to any investigation until after the search when the officers found six animal carcasses and pet store receipts.

Q. All right. And you believe that was shortly after they found the three carcasses?

A.. Yes, sir

(Anderson testimony(91:119-120)).

Rehraur did not obtained the Anderson bullet casings from the Eau Claire sheriff department to compare them with the bullet casings left at the Marquardt murder scene until later.

Q. All right. Did you do any type of comparison between the shall casings that were recovered from Mr. Anderson's residence and the shell casings that was located at the residence in Chippewa Falls before requesting the search warrant in Eau Claire?

A. Not at that time. And in fact, I think if my memory serves me correctly, the crime lab had already taken that shell casing with them to the Wausau lab. That's my recollection.

Q. Had you gone to the Eau Claire County Sheriff's Department and asked to be able to retrieve the shell casing that had been obtained at the Anderson residence so that they could be compared with the Shell casing in Chippewa before you applied for the warrant?

A. No.

(Rehauer testimony (84:58)).

Rehauer had not even mentioned the Anderson shooting to Richard Price, the lead detective in the Marquardt

murder investigation(84:36). Price testified that as late as March 18th when Marquardt was arrested, Price was unaware of the Anderson shooting.

> A. I don't believe at the time of the interview when Agent Rehrauer and myself spoke with Bill Paul following his Miranda warnings that I was aware of the Anderson dog thing.

(Price's testimony (92:143)).

C. It is likely the a search even a few days later would not have yielded any evidence.

Until the search of Marquardt's cabin, no one was aware of the three dead rabbits and three dead dogs. The rabbit carcasses were found on south side about 25 yards from the cab in the brush (91:80) The dog remains were found in the hole of outhouse.(91: 78-79)

Even if the state had been able to secure a warrant at a later time, it is not clear that the animal carcasses would have been there. The rabbits were out where any scavenger would be likely to carry them off. The record reflects that there were packs of dogs running free in the neighborhood. (91:135). Further, although the dog remains were in the outhouse, there

is no showing that it would have been impossible for scavengers to have gotten at them as well.

Further, even if the animals were not dragged off, if they decomposed or were attacked by other animals, their value as evidence of mistreatment would have been reduced.

Assuming that the state had eventually connected the Anderson shooting with the Marquardt murder[4], a proper warrant would not have been issued until days later since it would have taken time to perform the ballistics tests. The longer the time period, the less likely the animal carcasses would have been found. One can only speculate whether the guns would have found.

III. The trial court violated Mr. Marquardt's right to represent himself.

A. Marquardt waived his right to counsel.

The state argues that Marquardt did not waive his right to counsel citing several statements made by Marquardt at the

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4 Marquardt does not concede that even if the state connected the two shootings it would necessarily have probable cause to search his cabin. Marquardt had told his parents that someone was after him.(23:Ex 1). That person could have attacked Ms Marquardt and by mistake attacked Marquardt's neighbor's house.

competency hearing held three months before the waiver hearing.(See State's Brief at 39-40). At that time, Marquardt had not yet decided to represent himself.

At the hearing held November 11, 2002, there was no question raise either by the court or by counsel that Marquardt was waiving his right to counsel. However, Marquardt also said that he wanted to prepare his case with Attorney Raush's assistance.(88:7).

> I want to spend a lot of time with Rusch, if Rusch would want to do that with me, like to go over very single question for every witness I got, and I want to go over every single sentence I got of my statements with Rusch if he would let me.
>
> And at the trial, I would like Rusch to be sitting and listening to everything that's and like — tap me on the should if the D.A. asks me - tries to present any illegal evidence or ask illegal question or something, and I want Rusch to like give me statutes or something to say that he can't use it, and I want Rusch to ask me, if I testify on the stand, I want Rusch to ask me my questions I got for me.

(88:7-8)

In other words, Marquardt was asking to represent himself with standby counsel. See Wisconsin JI- Criminal SM-30 "Waiver and Forfeiture of Counsel; Self-Representation; Standby Counsel; `Hybrid Representation'; Court Appointment of Counsel."

B. Marquardt was competent to represent himself.

The state suggests that because Marquardt discharged counsel in this case and in his Chippewa case, he was unable to represent himself.(State's Brief at 40). In each case, Marquardt fired counsel because he objected to them raising the competence issue and the NGI plea.(86: 36, 81-82). Marquardt's reluctance to raise either issue was not irrational.

Because competence was raised in the Chippewa case, he suffered a two year delay of his trial in this case; he remained in custody the entire time.(80:2,4; 81).

The state also argues that because Marquardt had doubts about maintaining the NGI plea after his trial, he was incompetent to represent himself.(State's Brief 42). Marquardt understood that if he dropped the NGI plea, he would be sentenced to prison.(94:5). However, he did not see much difference between prison and a mental institution.(94:5). In fact, he feared that if went to a mental institution, he might spend the rest of his life there. (94:10).

That was not a groundless fear. Having been found not guilty by reason of mental disease or defect, Marquardt now

faces the possibility of 75 years in a mental institution.(54) It is unlikely he would have received such a long initial confinement if he had been sentenced to prison.

The state also argues that Marquardt was not competent to represent himself based on the opinions of two doctors who opined that Marquardt was not competent to stand trial.(State's Brief at 40-41). One of those doctors had never talked with Marquardt.(86:39). In any case, the trial court rejected both of those opinions when it found Marquardt competent to stand trial.(86:81-92; 90:30).[5]

Further, Stephen Peterson, an Eau Claire County Jail nurse with experience as a psychiatric nurse testified about Marquardt's competence.(86:6). Peterson worked in the jail January until August, 2002, while Marquardt was an inmate.(86:7). Peterson never observed any evidence of mental illness in Marquardt.(Id)

At Marqaurdt first competency hearing the court said,

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5 As the prosecutor pointed out, "... in essence if you listen to what Dr. Jens and Dr. Underwager are saying, you almost have to conclude that the world has turned on its head because the more he (Marquardt) acts rationally, the more that's indicative that he is paranoid and delusional.(86:70).

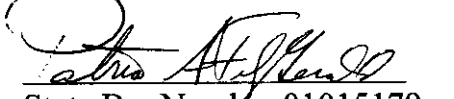
based on Marquardt's "appearance not only today but other days, I do find him competent."(81:7). Following the trial, both the prosecutor and judge commented that Marquardt was clearly competent.(94:10-11).

CONCLUSION

For the reasons set forth above and in his brief in chief, Mr. Marquardt asks this court to reverse his convictions and to remand to the trial court for a new trial.

May 2, 2005

PATRICIA A. FITZGERALD



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CERTIFICATION

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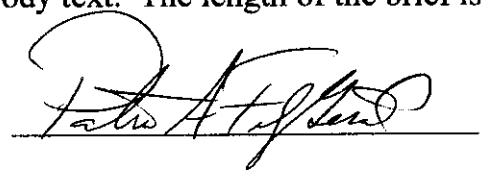

cc Wisconsin Department of Justice
Bill P. Marquardt

STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT III

Case No. 04-0958-CR

STATE OF WISCONSIN,
Plaintiff-Appellant,

v.

BILL PAUL MARQUARDT,
Defendant-Respondent.

ON APPEAL FROM SUPPRESSION ORDERS
ENTERED IN THE CIRCUIT COURT
FOR CHIPPEWA COUNTY,
THE HONORABLE RODERICK A. CAMERON,
PRESIDING

BRIEF-IN-CHIEF AND APPENDIX OF PLAINTIFF-APPELLANT

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STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT III

Case No. 04-0958-CR

STATE OF WISCONSIN,

Plaintiff-Appellant,

v.

BILL PAUL MARQUARDT,

Defendant-Respondent.

ON APPEAL FROM SUPPRESSION ORDERS
ENTERED IN THE CIRCUIT COURT
FOR CHIPPEWA COUNTY,
THE HONORABLE RODERICK A. CAMERON,
PRESIDING

BRIEF-IN-CHIEF AND APPENDIX
OF PLAINTIFF-APPELLANT

INTRODUCTION

This case is in a pretrial posture. Defendant Bill Paul Marquardt is charged with first-degree intentional homicide and possession of a firearm by a felon (3; 17). Pursuant to Wis. Stat. § 974.05(1)(d)2., the State is appealing from two orders suppressing evidence seized pursuant to a March 15, 2000, search warrant for Marquardt's cabin and outbuildings (336) (hereafter "the March 15 warrant"). The trial court rejected application

of both the "good faith" exception to the exclusionary rule and the "inevitable discovery" doctrine (326; 335; 352:14-29). The court's rulings, which are the subjects of this appeal, are appended as A-Ap. 101-126.

ISSUES PRESENTED

I. **GOOD FAITH**: DID OFFICERS ACT IN OBJECTIVELY REASONABLE RELIANCE ON THE MARCH 15 WARRANT, SO THAT THE "GOOD FAITH" EXCEPTION TO THE EXCLUSIONARY RULE APPLIES?

(a) Was the search warrant application of March 15, 2000, so lacking in indicia of probable cause as to render the applying officers' belief in its existence entirely unreasonable and, thus, preclude application of the "good faith" exception?

(b) In determining "good faith" with respect to probable cause in a warrant application, is the reviewing court limited to the information contained with the four corners of the warrant application? Or may the court also consider indicia of probable cause known to the applying officers but not included in the application?

Trial court. The trial court concluded that in determining "good faith," it was limited to reviewing the information set forth in the warrant application (326:1-2; 335:3-4; 352:22-24; A-Ap. 101-102, 106-107, 119-121). It also concluded that such information was so lacking in indicia of probable cause as to render the applying officers' belief in its existence entirely unreasonable, precluding application of the "good faith" exception to the exclusionary rule (326:1-2; 335:1-5; 352:19-22; A-Ap. 101-102, 104-108, 116-119).

II. **INEVITABLE DISCOVERY**: IF THE "GOOD FAITH" EXCEPTION DOES NOT APPLY, IS EVIDENCE SEIZED PURSUANT TO THE MARCH 15 WARRANT NEVERTHELESS ADMISSIBLE UNDER THE "INEVITABLE DISCOVERY" DOCTRINE?

The State alternatively argued that evidence seized pursuant to the March 15 warrant would inevitably have been discovered through a later warrant supported by evidence that was actively being developed when the March 15 warrant was sought (327:1-3, 81-89).

Trial court. The trial court rejected application of the "inevitable discovery" doctrine. The court doubted that evidence derived from the March 15 warrant would have been available for discovery eight days later when the Crime Lab matched the bullet casing found at the homicide scene to bullet casings found in the residence of Marquardt's neighbor, whose dog was shot (335:5-7; A-Ap. 108-110). The court did not address a Crime Lab report of March 27, 2000, that identified Marquardt's fingerprint and palm prints on a door to the garage where his mother's body was found (*id.*).

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Oral argument is not requested. Publication may be warranted, however, if this court reaches the question of whether a reviewing court may look outside the warrant application to determine "good faith" relating to probable cause. There is a dispute among both the federal circuits and state courts on this question.

STATEMENT OF THE CASE

This Chippewa County case has been in a pretrial posture for four years due to resolution of suppression motions, determinations of Marquardt's competency and an Eau Claire County prosecution of Marquardt. Following is a synopsis of these events, leading up to this appeal.

Underlying charges.

By complaint filed May 4, 2000, in Chippewa County, Marquardt, age twenty-four, was charged with first-degree intentional homicide in the death of his mother, Mary Jane Marquardt (3). On March 13, 2000, Mrs. Marquardt was found on the floor of the attached garage of the Chippewa Falls residence that she shared with her husband, Alfred Marquardt (3). She had bled to death from a gunshot wound to the head and stab wounds to her neck (3; 342:15-18).

Marquardt was bound over for trial after a preliminary hearing (342:49), and an information was filed repeating the homicide charge and adding a charge of possession of a firearm by a felon, both with repeater allegations (17). Marquardt pled not guilty and not guilty by reason of mental disease or defect (343:2).

Initial suppression rulings and appeal.
(Appeal No. 01-0065-CR)

Marquardt filed several suppression motions, resulting in evidentiary hearings on July 31, 2000, and December 8, 2000 (*see* 345; 349). Chippewa County Judge Roderick A. Cameron originally found probable cause to uphold the search warrant that Eau Claire County Judge Benjamin Proctor had issued March 15, 2000, for Marquardt's cabin and outbuildings in Eau Claire County (345:21-22, 27-30; 87). By decision of December 15, 2000, he also upheld the warrantless seizure and search of Marquardt's 1995 Thunderbird automobile (84; 87).

In a published decision filed August 21, 2001, on Marquardt's interlocutory appeal, this court concluded that the March 15 warrant was not supported by probable cause, and it remanded "for a determination of whether the good faith exception to the exclusionary rule applies." *State v. Marquardt*, 2001 WI App 219, ¶2, ¶20, 247 Wis. 2d 765, 635 N.W.2d 188. A copy of this decision is appended as A-Ap. 127-138 (*see also* 203). This court added the following caveat:

> If the circuit court ultimately concludes that the good faith exception to the exclusionary rule is inapplicable [to the March 15 warrant], . . . the court must also determine the facts surrounding the subsequent searches to determine if they were tainted by the initial unlawful search of Marquardt's residence.

Marquardt, 247 Wis. 2d 765, ¶23 (referring to later searches outlined below). This court upheld, however, the warrantless search of Marquardt's car under the "automobile exception" to the warrant requirement. *Id.* at ¶¶25-53. The Wisconsin Supreme Court denied review on November 27, 2001 (*see* 201).

Marquardt's competency.

On January 22, 2001, Judge Cameron found Marquardt incompetent to stand trial (98; 102), and he reached the same conclusion after additional reviews in 2002 (*see* 350:25; 351:64). On July 23, 2003, however, Judge Cameron found Marquardt competent to stand trial, although not competent to represent himself (268:2).

Eau Claire County case.

On March 18, 2000, Marquardt was arrested at his Eau Claire County cabin on a warrant charging him with animal cruelty in Eau Claire County (33:32-33; 349:9). Because the March 15 search warrant was pertinent to both the Eau Claire County and Chippewa County cases, this court's remand for a "good faith" determination affected both cases (*cf.* 304:1-3).

Consequently, on April 26, 2002, Eau Claire County Judge Eric J. Wahl conducted an evidentiary "good faith" hearing on the March 15 warrant (327:4-79). Judge Wahl concluded that evidence seized under the March 15 warrant was admissible under the "good faith" exception to the exclusionary rule (327:75-79).

Post-remand suppression rulings in this case.

In Chippewa County, Judge Cameron addressed the "good faith" issue at a hearing on February 6, 2004, concluding that "issue preclusion" did not require him to accept the Eau Claire County court's "good faith" ruling (352:17-18; A-Ap. 114-115). Without taking evidence, Judge Cameron declined to apply the "good faith" exception, holding that the March 15 warrant application was so lacking in indicia of probable cause as to render the applying officers' belief in its existence entirely unreasonable (326:1-2; 335:1-5; 352:19-25; A-Ap. 101-102, 104-108, 116-122).

On the State's motion to reconsider (327), Judge Cameron reaffirmed his "good faith" ruling and rejected the State's alternative argument that evidence seized pursuant to the March 15 warrant is admissible under the "inevitable discovery" doctrine (335:5-7; A-Ap. 108-110). He reserved ruling on whether the "fruits" of later searches must be suppressed, but will allow Marquardt to revisit the issue of probable cause for the car search (326:2; 352:25-27; A-Ap. 102, 122-126).

The court's rulings are set forth in decisions and orders filed February 19 and March 31, 2004 (*see* 326; 335; A-Ap. 101-110). By notice of appeal filed April 1, 2004, the State now appeals from those orders (336).

STATEMENT OF FACTS

Search warrant of March 13, 2000.

Application. On March 13, 2000, after the discovery of Mary Jane Marquardt's body, Chippewa County Sheriff's Investigator Richard Price obtained a search warrant for the residence of Alfred and Mary Jane Marquardt, including the garage, two outbuildings and three vehicles (1). The address is 11766 State Highway 178, Chippewa Falls (1:1). The affidavit in support of the warrant states in relevant part:

> Inv. Price reports that on March 13, 2000, Chippewa County Sheriff's Dispatch received a 911 call from 11766 State Hwy 178, Chippewa Falls, Township of Eagle Point. The caller identified himself as Alfred E. Marquardt, DOB 07/30/1946. Marquardt reported that his wife was apparently dead at the residence.
>
> Price continued that he responded to the Marquardt home and met with Marquardt. Marquardt relayed that he had left home at about 7 AM that morning and tried to call home about 11[:]50. The phone was busy and remained so the remainder of the day. Marquardt stated that he left work early and returned home because of the busy phone and upon arrival, found his wife, Mary J. Marquardt covered with a blanket in the garage. She was cold and unresponsive and appeared to have a head wound.
>
> Price reports that a shell casing, tentatively identified as 9 mm, was observed on the premises.

(1:2.)

Return. This search warrant was executed the same night (1:5-7; 33:30-31). In addition to the bullet casing, recovered items included a "comforter/bedspread" and latent fingerprints (1:5).

Search warrant of March 15, 2000.

Application. On March 15, 2000, Eau Claire County Sheriff's Detective John Vogler obtained a search warrant for Bill Marquardt's cabin and outbuildings -- a storage building, a pumphouse and an outhouse (33:7-19). The supporting affidavit states in relevant part:

> This affidavit is based upon information provided by Fellow Officers Barnier of the Eau Claire County Sheriff's Department and Price of the Chippewa County Sheriff's Department.
>
> Affiant reports that on March 15, 2000, he received a copy of an affidavit for search warrant sworn and executed in Chippewa County on March 13, 2000, with respect to the suspected homicide of Mary J. Marquardt. A copy of said affidavit and search warrant is attached and hereby incorporated by reference.
>
> Investigator Price reports that after finding the body of Mary J. Marquardt, he spoke with her husband, Alfred E. Marquardt. Mr. Marquardt informed him that he and Mary have a son, Bill Marquardt, who, since the location of Ms. Marquardt's body had not been seen or heard from. Alfred Marquardt further informed Investigator Price that Bill Marquardt owned with Alfred Marquardt a cabin in which Bill resided at E27505 County Highway M, Town of Fairchild, County of Eau Claire, Wisconsin.
>
> Investigator Price further reports that in examining the body of Mary J. Marquardt and the scene where she was found, it appeared as though among the wounds incurred by her was a knife wound. Also at the scene, officers were able to locate a number of footprints that may be suitable for comparison with the shoes that made them.
>
> Investigator Barnier reports that in checking Eau Claire County tax rolls, he learned that a cabin, storage building, pumphouse, and out-house located at E27505 County Highway M, Town of Fairchild,

> Eau Claire County, are owned by Alfred and Bill Marquardt.

(33:9-10.)

Return. This search warrant was executed the same afternoon, in Marquardt's absence (33:13). According to the warrant's return, items seized included three dog carcasses in the outdoor toilet and three rabbit carcasses in woods "near [the] residence" (33:15). Among other items seized were sections of bloodstained carpet, a bloodstained plastic tarpaulin, two rifles and a number of knives (33:14-15).

Later that day, the Eau Claire County district attorney charged Marquardt with animal cruelty, and an arrest warrant was issued (33:32-33; 349:9).

Marquardt's arrest on March 18, 2000.

Three days later, on March 18, officers from Eau Claire County, Chippewa County and the State Department of Justice proceeded to Marquardt's cabin in response to a call from a neighbor who reported seeing Marquardt's green 1995 Ford Thunderbird at the residence (345:40; 349:4-5).

Marquardt was arrested outside the cabin with the aid of tear gas (342:21; 345:81, 94-98; 349:12). A search of Marquardt incident to arrest produced a folding knife, among other items (342:22, 31-32, 39-40). Officers noticed blood spatters on Marquardt's tennis shoes and a jean jacket that Marquardt was wearing (342:43-44; 349:12). Marquardt's clothes were secured at the Eau Claire County jail (342:36; 345:103; 349:11), and blood and hair samples were obtained from Marquardt pursuant to another warrant (33:98-99; 349:11).

Subsequent Crime Lab testing showed the presence of Mrs. Marquardt's blood on Marquardt's folding knife and left tennis shoe (342:47-48).

Later on the day of Marquardt's arrest, a new search warrant was obtained and executed at his cabin and outbuildings (33:86-97).

Warrantless searches of Marquardt's Thunderbird.

After Marquardt's arrest outside his cabin on March 18, 2000, officers secured the 1995 Thunderbird parked in the cabin's driveway (345:36; 349:12-13). According to Eau Claire County sheriff's officers, the car was visible from the highway and parked on a curving driveway approximately 100 yards long (349:5, 15, 33).

Chippewa County Investigator Price said that from outside the car, a "reddish" stain was visible on the interior driver's door panel (345:41, 44-45, 48-49). He did not know, however, if officers noticed the prospective bloodstain before the car was towed (345:48). Eau Claire County Detective Sergeant Vogler said he did not search the car but was aware that suspected bloodstains "were visible within the car" (345:66-67). The stain or stains are depicted in Crime Lab photos (349:19) and were determined to be dried blood (349:14).

Officers then had the Thunderbird towed to the Eau Claire County sheriff's department, where it was searched contemporaneously, without a warrant (345:36, 39-40, 43, 47, 66-74; 349:13-15). The car apparently was locked and opened with a key found on Marquardt (349:17-19, 32). Two days later, on March 20, 2000, the car was taken to the State Crime Lab in Madison and searched again without a warrant (345:36; 349:20-21).

Subsequent Crime Lab testing showed the presence of Mrs. Marquardt's blood on a gray dress shirt found in the trunk of Marquardt's 1995 Thunderbird (342:48; *see also* 14:Ex. 11).

Subsequent warrants.

Investigating officers subsequently sought and obtained additional warrants.

On March 20, 2000, a warrant was issued to search a 1989 Chevrolet Geo Metro that Marquardt allegedly had just bought and which was located in a parking lot in Whitehall in Trempealeau County (33:111-12).

Another warrant was obtained on March 28, 2000, to search Marquardt's cabin (33:113-20).

On March 31, 2000, a warrant also was obtained to search a 1992 Mercury Tracer that Marquardt allegedly had bought recently and which was found in Valdosta, Georgia (33:121-27). An amended warrant to search this vehicle was obtained on April 3, 2000 (33:128-32).

Finally, on April 25, 2000, a warrant was obtained to search a 1984 Thunderbird registered to Marquardt and located in a parking lot in Aurora, Illinois (33:133-35).

Additional facts.

Additional facts relevant to resolution of the suppression issues outlined above are discussed in conjunction with arguments that follow. This includes evidence elicited at the Eau Claire County circuit court hearing on "good faith" on April 26, 2002, as well as the State's proffered evidence in support of its argument on inevitable discovery.

INTRODUCTION TO ARGUMENT

The evidence in question.

This appeal presents the question of whether evidence derived from the execution of a search warrant on March 15, 2000, at Marquardt's cabin and outbuildings is admissible should Marquardt go to trial on the charges of homicide and possession of a firearm by a felon.

Physical evidence seized at the warrant's execution on March 15, 2000, included sections of bloodstained carpet, a bloodstained plastic tarpaulin, two rifles and a number of knives (33:14-15).

Although the trial court left open the question of what "derivative" evidence must be suppressed, evidence obtained from Marquardt incidental to his arrest on March 18, 2000, likely would be encompassed by the suppression ruling. Marquardt's arrest stemmed from a formal charge of animal cruelty, which in turn, had resulted from the discovery of animal carcasses on Marquardt's property during execution of the March 15 warrant.

Among evidence obtained from Marquardt incidental to his arrest included a folding knife and a tennis shoe on which his mother's blood was found (342:22, 31-32, 39-40, 43-44, 47-48). Her blood also was found on a dress shirt in the trunk of Marquardt's Thunderbird at the time of his arrest (342:48).

Summary of State's position.

For alternative reasons summarized here and developed in the Argument sections of this brief, evidence derived from execution of the search warrant of March 15, 2000, at Marquardt's cabin and outbuildings should be admissible at trial.

"Good faith" exception.

- First, the application for the March 15 warrant was *not* so lacking in indicia of probable cause as to render the applying officers' belief in its existence entirely unreasonable. Consequently, the "good faith" exception to the exclusionary rule applies and permits the State to introduce at trial the evidence derived from the March 15 warrant.

- Alternatively, if the warrant application itself was insufficient, the "good faith" exception still applies, because the applying officers possessed *additional* evidence of probable cause to justify their reliance on the March 15 warrant. In determining "good faith" with respect to probable cause for a warrant, the reviewing court should be able to consider indicia *supportive* of probable cause and known to the applying officers, but omitted from the warrant application.

"Inevitable discovery" doctrine.

- As a third alternative, evidence derived from the March 15 warrant is admissible at trial under the "inevitable discovery" doctrine. If the March 15 warrant had been denied for lack of probable cause, the State's *additional* evidence (omitted from the application) reasonably would have led to another warrant in such short order that the evidence in question still would have been available for discovery. This is true, moreover, regardless of whether the results of ballistics or fingerprint analyses had been completed before March 18, when Marquardt first returned to his cabin and was arrested.

"Derivative" evidence.

Because the trial court did not determine what, if any, evidence seized apart from execution of the March 15 warrant is suppressible, the State has not addressed the question. In particular, however, the State maintains that the fruits of the car search on March 18 are unaffected.

ARGUMENT

I. OFFICERS ACTED IN OBJECTIVELY REASONABLE RELIANCE ON THE MARCH 15 WARRANT, SO THAT THE "GOOD FAITH" EXCEPTION TO THE EXCLUSIONARY RULE APPLIES.

A. The "good faith" exception to the exclusionary rule.

1. General principles.

On Marquardt's interlocutory appeal, this court concluded that the application for the warrant of March 15, 2000, to search Marquardt's cabin and outbuildings was "clearly insufficient to support a probable cause finding." *Marquardt*, 247 Wis. 2d 765, ¶19. This conclusion is the "law of the case" for purposes of the present appeal. *See State v. Stuart*, 2003 WI 73, ¶23, 262 Wis. 2d 620, 664 N.W.2d 82.

This court then "remand[ed] for a determination of whether the good faith exception to the exclusionary applies in this case." *Id.* at ¶20. The following general principles govern resolution of this question.

Generally, evidence seized pursuant to a search warrant that is invalid for lack of probable cause must be excluded from use by the prosecution as evidence against the defendant. *See, e.g., United States v. Leon*, 468 U.S. 897, 906 (1984); *State v. Eason*, 2001 WI 98, ¶65, 245 Wis. 2d 206, 629 N.W.2d 62. The exclusionary rule "operates as 'a judicially created remedy designed to safeguard Fourth Amendment rights generally through its *deterrent effect*, rather than [as] a personal constitutional right of the party aggrieved.'" *Leon*, 468 U.S. at 906 (citation omitted; emphasis added).

"Suppression of evidence obtained pursuant to a warrant should be ordered only on a case-by-case basis and only in those *unusual* cases in which exclusion will further the purposes of the exclusionary rule." *Id.* at 918 (emphasis added). After all:

> It is the magistrate's responsibility to determine whether the officer's allegations establish probable cause and, if so, to issue a warrant comporting in form with the requirements of the Fourth Amendment. In the ordinary case, an officer cannot be expected to question the magistrate's probable-cause determination or his judgment that the form of the warrant is technically sufficient. "[O]nce the warrant issues, there is literally nothing more the policeman can do in seeking to comply with the law."

Id. at 921 (citation omitted).

Consequently, both the United States and Wisconsin Supreme Courts have recognized a "good faith" exception to the exclusionary rule. Evidence obtained by a police officer through a search warrant is admissible in evidence -- despite inadequate probable cause or technical insufficiency -- so long as the officer acted in "objectively reasonable" reliance upon the warrant. *Leon*, 468 U.S. at 919; *Eason*, 245 Wis. 2d 206, ¶74.

The good-faith inquiry "is confined to the objectively ascertainable question whether a reasonably well trained officer would have known that the search was illegal despite the magistrate's authorization," and it is determined by examining "all of the circumstances." *Leon*, 468 U.S. at 922 n.23.

To assist courts in applying the "good faith" exception, the Supreme Court in *Leon* identified four situations in which "good faith" should *not* be recognized:

> [1] if the magistrate or judge in issuing a warrant was misled by information in an affidavit that the affiant knew was false or would have known was

> false except for his [or her] reckless disregard of the truth[;] . . . [2] where the issuing magistrate wholly abandoned his [or her] judicial role [*i.e.*, "rubber stamping" instead of reviewing a warrant application]; [3] [where the] affidavit [is] "so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable[;]" [and] [4] [where] a warrant may be so facially deficient -- i.e., in failing to particularize the place to be searched or the things to be seized -- that the executing officers cannot reasonably presume it to be valid.

Leon, 468 U.S. at 923 (bracketed material added; citations omitted).

In recognizing a "good faith" exception to the exclusionary rule under the state constitution, the Wisconsin Supreme Court adopted the foregoing "negative" standards of *Leon* and added two "affirmative" standards:

> We . . . hold that in order for a good faith exception to apply, the burden is upon the State to show that the process used in obtaining the search warrant included [1] a significant investigation and [2] a review by either a police officer trained and knowledgeable in the requirements of probable cause and reasonable suspicion, or a knowledgeable government attorney. We also hold that this process is required by Article I, Section 11 of the Wisconsin Constitution, in addition to those protections afforded by the good faith exception as recognized by the United States Supreme Court in . . . *Leon*.

Eason, 245 Wis. 2d 206, ¶74.

The State bears the burden of establishing "good faith" reliance on a search warrant. *See Leon*, 468 U.S. at 924. Whether that burden has been met in a particular case typically is treated as a question of law, or constitutional fact, subject to *de novo* review. *See, e.g.*, *United States v. Koerth*, 312 F.3d 862, 865 (7th Cir. 2002), *cert. denied*, 123 S.Ct. 1947 (2003); *United States v. Simpkins*, 914 F.2d 1054, 1057-58 (8th Cir. 1990), *cert.*

denied, 498 U.S. 1101 (1991); *United States v. Danhauer*, 229 F.3d 1002, 1005 (10th Cir. 2000).

2. Probable cause.

In the present case, the primary focus of the "good faith" analysis is on the third *Leon* "exception" to good faith: whether the warrant application is "'so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable.'" *Leon*, 468 U.S. at 923 (citation omitted). Although the following propositions govern the *original* determination of probable cause in a warrant application, they also necessarily frame the "good faith" discussion on this subject.

A search warrant may issue only when a neutral and detached magistrate finds probable cause -- "a fair probability" -- that evidence of a crime may be found in a particular place. *State v. Ward*, 2000 WI 3, ¶21, ¶23, 231 Wis. 2d 723, 604 N.W.2d 517; *Illinois v. Gates*, 462 U.S. 213, 238 (1983).

Probable cause "'is not a technical, legalistic concept but a flexible, common-sense measure of the plausibility of particular conclusions about human behavior.'" *State v. Higginbotham*, 162 Wis. 2d 978, 989, 471 N.W.2d 24 (1991) (citation omitted). The quantum of evidence necessary to establish probable cause for a search warrant "is less than that required to support bindover for trial at the preliminary examination." *Higginbotham*, 162 Wis. 2d at 989.

Stated another way, the warrant-issuing magistrate must be provided """sufficient facts to excite an honest belief in a reasonable mind that the objects sought are linked with the commission of a crime, and that they will be found in the place to be searched."""" *Ward*, 231 Wis. 2d 723, ¶27 (citations omitted). The issuing magistrate "may draw reasonable inferences" from the facts asserted in the warrant application. *State v. Jones*,

2002 WI App 196, ¶10, 257 Wis. 2d 319, 651 N.W.2d 305.

A court reviewing the *original* determination of probable cause for a search warrant is confined to the record that was before the issuing magistrate but also examines the totality of the circumstances in that record. *Id.* at ¶26. With respect to the *original* decision to issue a search warrant, a reviewing court must "accord great deference to the determination made by the warrant-issuing magistrate." *Id.* at ¶21. Such deference "supports the well-established preference under the Fourth Amendment that searches be conducted pursuant to a warrant." *Id.*

It is "the established policy" of the Wisconsin Supreme Court "that the resolution of doubtful or marginal cases regarding a warrant-issuing [magistrate's] determination of probable cause should be largely determined by the strong preference that law-enforcement officers conduct their searches pursuant to a warrant." *Higginbotham*, 162 Wis. 2d at 990; *see also Ward*, 231 Wis. 2d 723, ¶24. Such deference also is appropriate, "because '[r]easonable minds frequently may differ on the question of whether a particular affidavit establishes probable cause.'" *Higginbotham*, 162 Wis. 2d at 991 (citation omitted).

Consequently, "[a]n officer's decision to obtain a warrant is *prima facie* evidence that he or she was acting in good faith." *Koerth*, 312 F.3d at 868; *see also Leon*, 468 U.S. at 921 n.21; *Gates*, 462 U.S. at 263 (White, J., concurring).

3. In determining "good faith" with respect to probable cause for a warrant, the reviewing court should be able to consider indicia of probable cause known to the applying officers but omitted from the warrant application.

In determining whether indicia of probable cause for a warrant are so lacking as to preclude application of the "good faith" exception to the exclusionary rule, is a reviewing court bound by the warrant application? Or may it also consider external indicia of probable cause known to the applying officers but omitted from the warrant application? Courts appear to be evenly split on this threshold issue. *See United States v. Bynum*, 293 F.3d 192, 199 (4th Cir. 2002) (noting split of authority but bypassing "this difficult question").

Some courts suggest that in determining "good faith" with respect to probable cause, the reviewing court should be limited to the information actually presented in the warrant application, just like the warrant-issuing magistrate. *See United States v. Hove*, 848 F.2d 137, 140 (9th Cir. 1988); *People v. Miller*, 75 P.3d 1108, 1116-17 (Colo. 2003); *State v. Klosterman*, 683 N.E.2d 100, 103-04 (Ohio Ct. App. 1996); *Janis v. Commonwealth*, 472 S.E.2d 649, 653-54 (Va. Ct. App. 1996).

In its most recent discussion of this issue, the Seventh Circuit also appears to align with cases that limit "good faith" analysis of probable cause to the information actually presented in the warrant application. *See Koerth*, 312 F.3d at 869. In an earlier decision, however, the Seventh Circuit looked outside the warrant application to apply "good faith" in a probable cause analysis. *See United States v. Dickerson*, 975 F.2d 1245, 1250 (7th Cir. 1992), *cert. denied*, 507 U.S. 932 (1993).

Many courts hold, however, that the reviewing court may "consider[] facts outside the affidavit when determining whether the *Leon* good faith exception applies," including external indicia *supportive of* probable cause and known to the applying officers but omitted from the affidavit. *United States v. Martin*, 297 F.3d 1308, 1318-19 (11th Cir.), *cert. denied*, 537 U.S. 1076 (2002); *see also United States v. Marion*, 238 F.3d 965, 969-70 (8th Cir. 2001); *Danhauer*, 229 F.3d at 1007; *Moya v. State*, 981 S.W.2d 521, 525-26 (Ark. 1998); *People v. Lim*, 85 Cal. App. 4th 1289, 1297-98 (2001); *State v. Davidson*, 618 N.W.2d 418, 427 (Neb. 2000).

For several reasons that follow, this court should adopt the view that in determining "good faith," a reviewing court *may* consider external indicia supportive of probable cause and known to the applying officers but omitted from the warrant application.

- First, both the United States Supreme Court in *Leon* and the Wisconsin Supreme Court in *Eason* envisioned that an after-the-fact analysis of "good faith" reliance on a search warrant would entail consideration of evidence outside of the warrant application.

For example, the first two *Leon* "exceptions" to good faith -- whether the applying officer lied in the warrant application and whether the issuing magistrate abandoned his or her judicial role -- inherently require consideration of evidence outside of the warrant application itself. *Leon*, 468 U.S. at 923. The same is true of the two affirmative *Eason* factors -- whether the warrant process included "a significant investigation" and whether a trained officer or government attorney reviewed the warrant application. *Eason*, 245 Wis. 2d 206, ¶74. In *Eason*, *id.* at ¶71 n.34, the supreme court expressly counseled: "[W]e expect that there will be testimony offered at the suppression hearing [or "good faith" hearing] on questions concerning significant investigation and review by a knowledgeable police officer or government attorney."

With respect to all four *Leon* "exceptions" to good faith, the Supreme Court observed:

> [O]ur good-faith inquiry is confined to the objectively ascertainable question whether a reasonably well trained officer would have known that the search was illegal despite the magistrate's authorization. In making this determination, *all of the circumstances -- including whether the warrant application had previously been rejected by a different magistrate -- may be considered.*

Leon, 468 U.S. at 922 n.23 (emphasis added). Indeed, if good faith with respect to probable cause depended solely on the warrant application, there would have been no need for this court to remand for a "good faith" determination. "[B]oth by operation of precedent and common sense, a warrant that has failed appellate scrutiny can nonetheless form the basis for good faith execution by a reasonable police officer." *People v. Altman*, 960 P.2d 1164, 1170 (Colo. 1998).

Leon's "indicia of probable cause" standard also applies in civil rights cases in "defin[ing] the qualified immunity accorded to an officer whose request for a warrant allegedly caused an unconstitutional arrest." *Malley v. Briggs*, 475 U.S. 335, 342 (1986). In that context, the Supreme Court has observed:

> [T]he determination whether it was objectively legally reasonable to conclude that a given search was supported by probable cause . . . will often require examination of the information possessed by the searching officers.

Anderson v. Creighton, 483 U.S. 635, 641 (1987).

- Second, a reviewing court's consideration of external indicia *supportive of* probable cause and known to the applying officers but omitted from the warrant application fully comports with the purpose of the exclusionary rule to deter police violations of the Fourth Amendment. *See United States v. Taxacher*, 902 F.2d

867, 872 (11th Cir. 1990), *cert. denied*, 499 U.S. 919 (1991).

There is no incentive for an officer seeking to comply with the "probable cause" requirement of the Fourth Amendment by applying for a warrant to omit information supportive of probable cause from the warrant application. Omission of a fact supportive of probable cause may be just as inadvertent (and important) as omission of a fact particularizing a place to be searched, a circumstance in which courts uniformly take into account external information known to executing officers to uphold the search. *See, e.g.*, *United States v. Procopio*, 88 F.3d 21, 28 (1st Cir.), *cert. denied*, 519 U.S. 1046 (1996), and 519 U.S. 1138 (1997); *United States v. Owens*, 848 F.2d 462, 464-66 (4th Cir. 1988); *United States v. Gahagan*, 865 F.2d 1490, 1496-99 (6th Cir.), *cert. denied*, 492 U.S. 918 (1989).

- Third, as one court has commented, it "would make no sense" in a "good faith" analysis to preclude reviewing courts from considering omissions "*favorable* to a probable cause finding" and known to the warrant applicants. *Lim*, 85 Cal. App. 4th at 1297-98 (emphasis in original). In such cases, if the issuing magistrate had correctly *denied* the warrant application for lack of probable cause, the applying officers -- who already possessed the favorable, omitted information -- could have corrected the insufficiency in short order in a subsequent application, without risking loss of the sought-after evidence.

"[I]n an ideal system[,] an unreasonable request for a warrant would be harmless, because no judge would approve it." *Malley*, 475 U.S. at 345. But, "[p]enalizing the officer for the magistrate's error, rather than his own, cannot logically contribute to the deterrence of Fourth Amendment violations." *Leon*, 468 U.S. at 921.

Conversely, "good faith" would not save a warrant based on insufficient probable cause where the only

external information supportive of probable cause resulted from execution of the invalid warrant itself or otherwise was discovered *after* the warrant was sought. *See Whiteley v. Warden*, 401 U.S. 560, 567 n.11 (1971). In a "good faith" analysis, what matters is what the officers knew *before* they sought the warrant, and the State bears the burden of so proving. *Leon*, 468 U.S. at 924.

- Fourth, some courts that have excluded external information *supportive of* probable cause from "good faith" analyses have questionably commingled the standard of "objective reasonableness" with the officer's "subjective" beliefs in seeking the warrant. *See, e.g.*, *Hove*, 848 F.2d at 140; *Klosterman*, 683 N.E.2d at 104.

Although an officer's subjective beliefs are irrelevant in the analysis of good faith, the relevant standard of "objective reasonableness," which the State must prove, typically depends on information external to the warrant application:

> [T]he good-faith exception, turning as it does on objective reasonableness, should not be difficult to apply in practice. When officers have acted pursuant to a warrant, the prosecution should ordinarily be able to establish good faith without a substantial expenditure of judicial time.

Leon, 468 U.S. at 924; *cf. Anderson*, 483 U.S. at 641 ("examination of the information possessed by searching officials . . . does not reintroduce into qualified immunity analysis the [forbidden] inquiry into officials' subjective intent").

In sum, for the foregoing reasons, this court should conclude that in determining "good faith," a reviewing court *may* consider external indicia supportive of probable cause and known to the applying officers but omitted from the warrant application.

B. Application of "good faith" analysis to the present case.

1. Introduction.

In the present case, as noted, the trial court concluded that the warrant application was so lacking in probable cause as to render the applying officers' belief in its existence entirely unreasonable, precluding application of the "good faith" exception to the exclusionary rule. For this reason, and because the court concluded that it was limited to considering only the information contained in the warrant application, the court did *not* conduct an *evidentiary* hearing on the "good faith" determination, and it did *not* address the other three *Leon* factors or the two *Eason* factors. The State respectfully disputes the court's conclusions, alternatively arguing that:

(1) Based solely on the application for the March 15 warrant, the applying officers could reasonably rely, in "good faith," on the issuing judge's finding of probable cause; and

(2) Even if the warrant application itself was insufficient, the "good faith" exception still applies, because the applying officers possessed *additional* evidence of probable cause sufficient to justify their reliance on the March 15 warrant.

In support of the second proposition, the State relies on the transcript of the Eau Claire County "good faith" hearing. The prosecutor presented this transcript in support of the State's "good faith" argument (327:4-79). This transcript also supports the two affirmative *Eason* factors for finding "good faith" -- a significant investigation and prosecutorial oversight in the warrant process.

Finally, none of the other three negative *Leon* factors -- which the trial court did *not* consider -- bars the application of "good faith."

2. Based solely on the March 15 warrant application, officers could reasonably rely in good faith on the issuing judge's finding of probable cause.

An Eau Claire County sheriff's investigator submitted the supporting affidavit for the warrant of March 15, 2000, to search Bill Marquardt's cabin and outbuildings at noon the same day (33:9-10). This was forty-three to forty-four hours after discovery of the homicide, which was reported to officers between 4:00 and 4:30 p.m. on March 13 (33:20). The warrant application incorporates the affidavit and warrant issued March 13 in Chippewa County to search the residence of Marquardt's parents, including two outbuildings and three vehicles there (33:9-10, 16-19). Eau Claire County Judge Proctor issued the March 15 warrant to search Marquardt's cabin and outbuildings (33:11-12).

Read together, the affidavits for the March 13 and March 15 warrants are *not* so lacking in indicia of probable cause as to preclude objectively reasonable reliance on them in connecting Marquardt to the homicide. In turn, the links to Marquardt made his cabin and outbuildings likely repositories for the warrant's enumerated items. Specifically, the following information, taken together, identifies Marquardt as the probable perpetrator:

- First, the affidavit of March 13 indicates that at 11:50 a.m. that day, the phone "was busy and remained so the remainder of the day" at the residence of Marquardt's parents, prompting Marquardt's father to come home early from work (1:2). This information reasonably suggests that the phone was off the hook, likely in relation to the homicide of Marquardt's mother. In turn, this information reasonably suggests that the perpetrator had been inside the residence. In the absence of any indication of a break-in or missing valuables, it also suggests that

Mrs. Marquardt allowed the perpetrator inside or that the perpetrator had a key for the residence -- in effect, that the perpetrator was a relative or friend.

- Second, the affidavit of March 13 reports that Marquardt's mother had "a head wound" and that a 9mm shell casing was found "on the premises," reasonably suggesting that she had been shot (1:2). The affidavit of March 15 reports that "among the wounds incurred by [the victim] was a knife wound" (33:10).

The foregoing information reasonably suggests that the killing was intentional and that homicide was "*the*" motive of the perpetrator. A reasonable inference is that burglary or sexual assault was *not* a motive, because the affidavit contains no information suggesting a break-in or missing valuables or sexual trauma to the victim. This information further suggests that Mrs. Marquardt knew her killer.[1]

- Third, the fact of homicide by use of a gun and a knife also reasonably suggests that the perpetrator was male. Although support for this common perception should be unnecessary, a sampling of commentaries drives home the point. *See, e.g.:*

✓ Marina Angel, *Abusive Boys Kill Girls Just Like Abusive Men Kill Women: Explaining the Obvious*, 8 Temp. Pol. & Civ. Rts. L. Rev. 283, 290 (1999) ("The statistics show that males kill in overwhelming numbers compared to females, and they kill with firearms;" noting the FBI's Uniform Crime Reports for 1996 reported 12,000 male perpetrators of intentional homicide compared to 1,331 female perpetrators of homicide, with 10,744 cases involving firearms);

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[1]At the Eau Claire County "good faith" hearing, Investigator Price testified that there was no indication of "forced entry" to the residence (327:36). He also said he knew from the autopsy of March 14, 2000, that there was no evidence of sexual assault (327:35). At the first suppression hearing, defense counsel implied that no burglary was involved (113:8-9).

- ✓ Inge Anna Larish, *Why Annie Can't Get Her Gun: A Feminist Perspective on the Second Amendment*, 1996 U. Ill. L. Rev. 467, 508 ("Men generally kill with guns far more often than women do"); and

- ✓ Laura E. Reece, *Women's Defenses to Criminal Homicide and the Right to Effective Assistance of Counsel: The Need for Relocation of Difference*, 1 UCLA Women's L. J. 53, 55 ("[M]en have historically dominated the homicide ranks, committing roughly eight-five to ninety percent of the homicides" (statistics footnoted)).

• Fourth, the affidavit of March 15 reports that officers at the homicide scene "were able to locate a number of footprints that may be suitable for comparison with the shoes that made them" (33:10). Coupled with the foregoing information and reasonable inferences, this statement reasonably suggests that *male* footwear made the prints and that comparisons might definitively include or exclude suspects. Since the return to the warrant of March 13 reports receipt of a "pair of leather boots" from Marquardt's father, Alfred (1:6), a reasonable inference is that Alfred's boots did *not* match the described footprints.

• Fifth, and significantly, the affidavit of March 13 states that the victim was found "covered with a blanket in the garage" (1:2). The return indicates that the "blanket" was a "comforter/bedspread" (1:5). In a residential homicide, such conduct strongly suggests that the perpetrator felt compassion for the victim or remorse for the killing, *because he intimately knew the victim, and vice versa*. The case law supports this conclusion. *See, e.g., Thiel v. Schuetzle*, 200 F.3d 1120, 1122 (8th Cir. 1999) (victim's body "was found covered with a blanket, which was circumstantial evidence that the murderer was a family member or friend"); *Commonwealth v. Lodge*, 727 N.E.2d 1194, 1200 (Mass. 2000) ("the jury could have inferred that it was the defendant, not an intruder, who had taken the time to cover the victim's body," where the victim was the defendant's girlfriend).

• Sixth, and lastly, the affidavit of March 15 states that Marquardt's father reported having a son, Bill, "who, since the location of [the] body had not been seen or heard from" (33:9). A reasonable inference is that Marquardt's father thought it unusual not to have had contact with Bill during this period, especially in light of publicity of the homicide. This information also reasonably suggests that Marquardt's father did not believe Bill had left the area for some reason that would explain not hearing from Bill in the aftermath of the homicide. It further suggests that police had accounted for, and ruled out, Bill's brother and sister as suspects.[2]

"The threshold showing necessary to a determination [that] . . . an officer relied in good faith upon a search warrant *pales considerably next to that required for a finding of probable cause*." *Guerra v. State*, 897 P.2d 447, 458 (Wyo. 1995) (emphasis added). To preclude application of "good faith," the warrant application must be entirely "'*devoid*' of factual support." *Id.* (citation omitted; emphasis in original). It must amount to a "'bare bones'" application, *Leon*, 468 U.S. at 926, consisting of "wholly conclusory statements" from which a magistrate could not independently determine probable cause. *United States v. Wilhelm*, 80 F.3d 116, 121 (4th Cir. 1996).

In the present case, the warrant application itself was far meatier than "bare bones." As outlined above, it set forth multiple facts, giving rise to multiple inferences that filled in gaps in the indicia of probable cause identifying Bill Marquardt as the probable killer. "The purpose behind the constitutional requirement of obtaining a search warrant is not to deny law enforcement officers the support of the usual inferences that reasonable

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[2]At the Eau Claire County "good faith" hearing, Investigator Price said that on March 13, 2000, he spoke to Bill Marquardt's brother and sister, as well as to Bill's father, and that none of these individuals cast suspicion on the other two or on any non-relative (327:34-35).

individuals may draw from the evidence." *Ward*, 231 Wis. 2d 723, ¶28.

Finally, the fact that Eau Claire County Judge Proctor originally found probable cause and that Chippewa County Judge Cameron initially upheld that determination further supports the application of "good faith" in the present case:

> Although a police officer may not rely entirely on the magistrate's finding of probable cause, . . ., in cases where, as here, the courts can not agree on whether the affidavit is sufficient, it would be unfair to characterize the conduct of the executing officers as bad faith.

United States v. Martin, 833 F.2d 752, 755 (8th Cir. 1987), *cert. denied*, 494 U.S. 1070 (1990); *see also United States v. Corral-Corral*, 899 F.2d 927, 939 (10th Cir. 1990).

3. Even if the warrant application itself was insufficient, good faith still applies, based on *additional* evidence of probable cause known to the applying officers.

For the reasons set forth, the warrant application itself contained sufficient indicia of probable cause to support the application of good faith. This conclusion should be beyond dispute, moreover, if this court also considers *external* indicia of probable cause known to the applying officers but omitted from the application. Testimony elicited at the Eau Claire County "good faith" hearing supplies such added indicia.

- First, Investigator Price testified that in his interview of Alfred Marquardt, Bill's father, on the day of the homicide, Alfred said that Bill's mother had attached a phone message for Bill to the refrigerator in the house

(327:36). Investigator Price said the message was gone when he checked the refrigerator that same night and that it turned up "a day or two days later under a jewelry box in the bedroom" (327:37). This information reasonably suggests that Bill Marquardt had been in the house on the day of the homicide.

- Second, Investigator Price also testified that on the day of the homicide, he spoke with Bill's brother and sister, who could think of no "non-relative" with a motive to harm their mother (327:38). Investigator Price said he discovered no "reason" for Bill's siblings or father to harm Mrs. Marquardt (327:38).

- Third, State DCI Special Agent John Rehrauer, who aided in the investigation, testified that in the forty-four hours between the homicide's discovery and the search warrant application of March 15, 2000, there was television coverage of the homicide, as well as publicity stemming from interviews of neighbors (327:54-55). He said that despite such publicity, he was unsuccessful in contacting Bill Marquardt, either at Marquardt's cabin or on Marquardt's cellular phone (327:51-52).

- Fourth, Agent Rehrauer said that on March 14, 2000, he learned from Bill Marquardt's neighbor that on March 9, during a break-in at the neighbor's residence, the neighbor's dog had been shot (327:53). According to the agent, officers had found "five spent nine millimeter shell casings" in the neighbor's residence (327:54) -- the same caliber as the shell casing found at the scene of Mrs. Marquardt's homicide. This commonality and similar time frame, coupled with Bill Marquardt's close personal and physical ties to the two crime scenes, immensely enhanced his status as a suspect in both shootings.

- Fifth, Agent Rehrauer said he was aware of Marquardt's "prior history of being involved in drug dealings" and learned from Marquardt's father that Marquardt's mother had "discovered [Marquardt] digging

up twelve thousand dollars in cash from the Marquardt premises earlier in the year" (327:56). This information reasonably suggested a possible motive for Marquardt to harm his mother, surmising that she may have challenged his conduct or threatened to tell the authorities.

- Finally, Agent Rehrauer testified that he supplied the foregoing information to Eau Claire County Sergeant John Vogler and then-Eau Claire County District Attorney Raymond Pelrine for purposes of applying for the March 15 search warrant (327:57-58). Attorney Pelrine said he drafted the warrant application as a result of that information (327:10-20), and Sergeant Vogler presented the application to Judge Proctor (327:24-25). In effect, the investigating officers did present all of their evidence *supportive of* probable cause to a prosecutor for inclusion in the warrant application.

Prosecutorial consultation in the drafting of a search warrant is "indicative of objective good faith." *Taxacher*, 902 F.2d at 872. As the Seventh Circuit recently observed, "volumes of case law encourage this sort of cooperation between the prosecutor and law-enforcement officers" and support the application of good faith. *United States v. Merritt*, 361 F.3d 1005, 1012 (7th Cir. 2004) (collecting examples). In fact, the Supreme Court in *Leon* applied the "good faith" exception in part because officers had consulted with three deputy prosecutors before submitting what proved to be deficient warrants. *Leon*, 468 U.S. at 903-04 n.4.

In sum, based solely on the application for the March 15 warrant, the applying officers could reasonably rely, in "good faith," on the issuing judge's finding of probable cause. Moreover, even if the warrant application itself was insufficient, the "good faith" exception still applies, because the applying officers possessed *additional* evidence of probable cause sufficient to justify their reliance on the March 15 warrant.

4. The other three *Leon* factors do not bar the application of "good faith," and the two *Eason* factors support its application.

Because the trial court rejected the application of good faith under *Leon's* "indicia of probable cause" standard, it did not address the other three *Leon* "exceptions" to good faith or the two *Eason* requirements. For the reasons that follow, no other *Leon* exception bars the application of good faith, and the *Eason* factors support its application.

Other Leon factors. The other three *Leon* "exceptions" do not bar the application of good faith.

• First, on remand for the "good faith" determination, Marquardt did *not* renew his pre-remand request for an evidentiary hearing under *Franks v. Delaware*, 438 U.S. 154 (1978), on a claim that the warrant application contained a material false statement necessary to the determination of probable cause. *See Marquardt*, 247 Wis. 2d 765, ¶24.

In a post-remand brief, Marquardt implied that one statement in the March 15 warrant application was misleading -- namely, the statement attributed to Marquardt's father that "since the location [*sic*, discovery] of Ms. Marquardt's body, [Bill Marquardt] had not been seen or heard from" (33:9). Marquardt noted that a police report indicates Marquardt's father had not seen Marquardt since February 17, 2000, a month before the homicide (*cf.* 310:14; *see also* 33:4, 27).

The police report is *not* inconsistent with the statement in the warrant application that Alfred Marquardt had not seen his son, Bill, since the discovery of the homicide. Moreover, it does *not* undermine the reasonable inference that Alfred expected to have heard

from Bill in the wake of the homicide's publicity. Also, Alfred's statement that Bill's mother had left a phone message for Bill on the refrigerator supports the inference that Bill was in the area at the time of the homicide and would drop by from time to time -- whether or not Alfred himself would be home to see Bill. *Leon's* "material false statement" standard does *not* bar application of good faith in the present case.

- Second, on "good faith" remand, Marquardt also did *not* argue that Judge Proctor abandoned his judicial role in signing the March 15 search warrant. At the Eau Claire County "good faith" hearing, Sergeant Vogler, who submitted the warrant application, testified that he watched Judge Proctor read the application and that Judge Proctor did not express any reservation about signing the warrant (327:25-26). *Leon's* "judicial role abandonment" standard does *not* bar application of good faith in the present case.

- Finally, on "good faith" remand, Marquardt did *not* claim that the warrant was invalid for lack of particularity about the locations to be searched on Marquardt's property or the items sought. *Leon's* "particularity" standard also does *not* bar application of good faith in the present case.

Eason factors. As noted, the Wisconsin Supreme Court "expect[s]" that the two *Eason* requirements for "good faith" will be determined by testimony outside the warrant application. *Eason*, 245 Wis. 2d 206, ¶71 n.34. In the present case, testimony at the Eau Claire County "good faith" hearing demonstrated satisfaction of the two *Eason* requirements.

First, the post-remand testimony details "a significant investigation," *id.* at ¶74, in the forty-four hours between the homicide and March 15 warrant application, regardless of how "significant" is defined:

- Within an hour after discovery of the homicide on March 13, 2000, Investigator Price interviewed the victim's husband, Alfred, for four to five hours (327:31-32), reducing the interview to an eight-page report (33:24-31; 327:31).

- That same evening, Investigator Price obtained a search warrant for the residence of Alfred and Mary Jane Marquardt, resulting in the collection of evidence that included a shell casing and latent fingerprints on the door of the garage where the victim was found (1:1-7).

- That same evening, Investigator Price also interviewed Bill Marquardt's brother and sister to discover possible suspects (327:37-38).

- The next day, March 14, an autopsy was performed, ruling out sexual assault and confirming that the victim's death resulted from a gunshot wound to the head and a stab wound to the throat (327:34).

- That same day, State DCI agents traveled to Bill Marquardt's cabin in Eau Claire County and spoke to Marquardt's neighbor, Wesley Anderson, discovering that a few days earlier, someone had shot Anderson's dog with the same caliber bullet used to shoot Mrs. Marquardt (327:53).

- That same day, DCI Agent Rehrauer also attempted to locate Marquardt via Marquardt's cell phone and by interviewing Marquardt's former employer, and an effort was begun to obtain Marquardt's cell phone records (327:51-53).

- On March 15, Investigator Price and Agent Rehrauer met with Eau Claire County Sergeant Vogler and District Attorney Pelrine to convey information in support of applying for the March 15 warrant (327:12, 28-29, 57-58). Investigator Price said that up to that point, twenty law-enforcement officers had been pursuing the investigation (327:46).

The timing of the March 15 warrant application made eminent sense in view of the information that had been quickly obtained, the fact that a homicide had occurred and the fact that the most probable suspect could not readily be located. The foregoing information satisfied the first *Eason* requirement for good faith -- a significant investigation.

Second, the *Eason* "good faith" requirement that an experienced officer or prosecutor review the warrant application likewise was met. As noted, officers from Chippewa County, Eau Claire County and the State Division of Criminal Investigation met with District Attorney Pelrine, who actually drafted the March 15 warrant application (327:10-15). Attorney Pelrine had been a prosecutor for more than a decade (*cf.* 327:22) and had drafted many warrants that withstood challenge (327:11).

5. Summary.

For the reasons set forth, none of the four negative *Leon* exceptions bars application of good faith to the March 15 search warrant, and both of the *Eason* requirements for good faith were met. In particular, contrary to the trial court's post-remand conclusion, sufficient indicia of probable cause supported the warrant application to satisfy the "good faith" exception to the exclusionary rule.

Although the existing record should suffice for drawing the foregoing conclusions, if this court disagrees, it should then remand for a further evidentiary hearing to enable the State to present its proffered evidence relating both to "good faith" and "inevitable discovery."

II. ALTERNATIVELY, EVIDENCE SEIZED WITH THE MARCH 15 WARRANT IS ADMISSIBLE UNDER THE "INEVITABLE DISCOVERY" DOCTRINE.

A. Introduction and governing principles.

"[T]he fruits of an illegal search nonetheless may be admitted if [they] inevitably would have been discovered by lawful means." *State v. Schwegler*, 170 Wis. 2d 487, 499, 490 N.W.2d 292 (Ct. App. 1992); *Nix v. Williams*, 467 U.S. 431, 447 (1984). To gain admission of evidence under this doctrine of "inevitable discovery," the State must satisfy three criteria by a preponderance of the evidence, *Nix*, 467 U.S. at 444, namely:

> (1) a reasonable probability that the evidence in question would have been discovered by lawful means but for the police misconduct, (2) that the leads making the discovery inevitable were possessed by the government at the time of the misconduct, and (3) that prior to the unlawful search the government also was actively pursuing some alternate line of investigation.

State v. Lopez, 207 Wis. 2d 413, 427-28, 559 N.W.2d 264 (Ct. App. 1996); *see also State v. Knapp*, 2003 WI 121, ¶133, 265 Wis. 2d 278, 666 N.W.2d 881.

As the Supreme Court explains, if evidence inevitably would have been discovered lawfully, "then the deterrence rationale [of the exclusionary rule] has so little basis that the evidence should be received. Anything less would reject logic, experience and common sense." *Nix*, 467 U.S. at 444.

Application of the "inevitable discovery" doctrine presents a question of law, or constitutional fact, subject to independent review. *See State v. Anderson*, 160 Wis. 2d 307, 315, 466 N.W.2d 201 (Ct. App.), *rev'd on other grounds*, 165 Wis. 2d 441, 477 N.W.2d 277 (1991).

B. Application of the "inevitable discovery" doctrine to the present case.

In the present case, the State has met all three requirements for application of the "inevitable discovery" doctrine to permit into evidence the fruits of the March 15, 2000, search warrant, including derivative evidence seized on March 18, 2000, when Marquardt was arrested.

Reasonable probability of discovery. With respect to the first "inevitable discovery" criterion, no police "misconduct" rendered the fruits of the March 15 warrant inadmissible. Omitting evidence *supportive* of probable cause from a warrant application is not "misconduct." Indeed, to reiterate, that is why it makes eminent sense to consider such omitted evidence in the analysis of "good faith."

If the March 15 warrant had been denied for lack of probable cause, the State's *additional* evidence (omitted from the application) reasonably would have led to another warrant in such short order that the evidence in question still would have been available for discovery. This is true, moreover, regardless of whether the results of ballistics or fingerprint analyses had been completed before March 18, when Marquardt first returned to his cabin and was arrested (345:46).

As noted, in addition to the indicia of probable cause contained in the March 15 warrant application, the applying officers also knew the following information on March 15 that was omitted from the application:

- The removal from the refrigerator of a phone message for Marquardt, coupled with the absence of a break-in, suggested that Marquardt had been in his parents' house on the day of the homicide (327:36-37).

- Investigator Price had ruled out Marquardt's siblings and father as suspects after talking to them (327:38).

- Bill Marquardt could not be found in the two days after the homicide, despite publicity of the homicide and the likelihood that Marquardt had been at his parents' house on the day of the homicide (327:51-55).

- On March 9, four days before the homicide, Marquardt's neighbor's dog had been shot with the same caliber bullet that had killed Marquardt's mother (327:53-54). Also, Marquardt's cell phone records, obtained March 16, reflected several calls to the local humane society and to a pet store on March 9 and 10 (327:43-44, 89).

- And, a budding motive for Marquardt to kill his mother could be found in facts that his mother recently had caught him digging up $12,000 in cash and that Marquardt had a history of "involve[ment] in drug dealings" (327:56).

If the March 15 warrant had been denied for lack of probable cause, it is reasonable to conclude that officers immediately would have reexamined the sum of their collected data and made sure that the foregoing information was included in another warrant application. This additional information, in turn, would have supplied probable cause for a valid search warrant, and because officers had this additional information on March 15, it is reasonably probable that a second application would have been made before March 18, when Marquardt first returned to his cabin and was arrested. In effect, the evidence found at the cabin and outbuildings and incidental to Marquardt's arrest would still have been present for discovery pursuant to a second warrant containing additional evidence establishing probable cause.

Moreover, if the March 15 warrant had been denied, it also is reasonably probable that investigators would have speeded up their ballistics and fingerprint analyses and included the results in a second warrant application before March 18. Those results further linked Marquardt to the homicide of his mother. According to the State's proffer, on March 23, the State Crime Lab determined that the 9mm shell casing at the homicide was fired from the same gun that killed Marquardt's neighbor's dog (327:2, 81-82). Also, according to the State's proffer, on March 27, the Crime Lab matched Marquardt's prints to a fingerprint and palm prints on the attached garage door at his parents' house (327:2, 83-84).

Preexisting leads. As discussed, officers already possessed the additional indicia of probable cause omitted from the March 15 warrant application that inevitably would have led in short order to a second warrant if the original warrant had been denied for lack of probable cause. In effect, such additional information constitutes preexisting "leads" for purposes of satisfying the second "inevitable discovery" criterion.

Also, although the ballistics and fingerprint analyses had not been completed by the time of the March 15 warrant application, the raw material for such additional "leads" -- the shell casings and latent prints -- also were in the officers' possession at that time.

Alternate lines of investigation. Finally, because the additional indicia of probable cause reasonably would have led in short order to a second warrant application, the "alternate lines of investigation" criterion of the "inevitable discovery" doctrine also has been met.[3]

---

[3]Viewed slightly differently, the existence of additional, but omitted, indicia of probable cause sufficient for a second warrant also could be characterized as "independent sources" for such a successive warrant application. *See Murray v. United States*, 487 U.S. 533, 542 (1988); *State v. Lange*, 158 Wis. 2d 609, 624-26, 463 N.W.2d 390 (Ct. App. 1990).

Moreover, the fact that the ballistics and fingerprint analyses were completed within five to ten days after Marquardt's arrest on March 18 suggests that these lines of investigation were being pursued independently of the other indicia of probable cause on which the original warrant application was brought. The only uncertainty is whether quicker Crime Lab results might have been obtained if the March 15 warrant had been denied. But, as discussed, those results are unnecessary for application of the "inevitable discovery" doctrine in light of the additional indicia of probable cause already in the officers' possession before March 18, 2000.

The "inevitable discovery" doctrine focuses "on what would have happened if the illegal search had not aborted the lawful method of discovery." *United States v. Markling*, 7 F.3d 1309, 1318 n.1 (7th Cir. 1993), *cert. denied*, 514 U.S. 1010 (1995). Applying the "inevitable discovery" doctrine in the present case comports with its rationale:

> [T]he interest of society in deterring unlawful police conduct and the public interest in having juries receive all probative evidence of a crime are properly balanced by putting the police in the same, not a worse, position tha[n] they would have been in if no police error or misconduct had occurred.

Nix, 467 U.S. at 443.

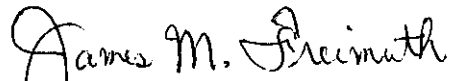
CONCLUSION

For the reasons set forth, this court should reverse the trial court's suppression orders.

Dated at Madison, Wisconsin: June 7, 2004.

Respectfully submitted,

PEGGY A. LAUTENSCHLAGER
Attorney General



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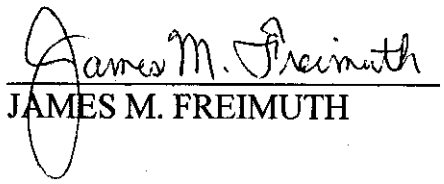
CERTIFICATION

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is: proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line. The length of the brief is 10,474 words.



JAMES M. FREIMUTH

APPENDIX OF APPELLANT

	Record Pages	Appendix Pages
Trial court decision and order suppressing evidence on "good faith" remand, February 19, 2004	326:1-3	101-103
Trial court decision denying State's motion to reconsider, including "inevitable discovery" ruling, March 31, 2004	335:1-7	104-110
Partial transcript reflecting "good faith" ruling, February 6, 2004	352:14-29	111-126
Court of appeals' decision on Marquardt's interlocutory appeal, remanding for "good faith" ruling, published at *State v. Marquardt*, 2001 WI App 219, 247 Wis. 2d 765, 635 N.W.2d 188, issued August 21, 2001	203	127-138

STATE OF WISCONSIN CIRCUIT COURT CHIPPEWA COUNTY

STATE OF WISCONSIN,
Plaintiff,

vs.

BILL PAUL MARQUARDT,
Defendant.

DECISION AND ORDERS ON MOTIONS

Case No. 00-CF-104

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FILED
CLERK OF CIRCUIT COURT
CHIPPEWA COUNTY

I. GOOD FAITH EXCEPTION

Defendant Bill Marquardt moved this Court for a suppression of the evidence seized pursuant to a March 15, 2000, search warrant and affidavit, as well as the suppression of the fruits of that search, alleging that a good faith exception to the exclusionary rule did not exist. The Court of Appeals previously found no probable cause existed in the affidavits for the search warrant and remanded the case to the circuit court for a determination regarding whether or not a good faith exception to the exclusionary rule existed.

Evidence seized in the March 15, 2000, search of the Bill Marquardt residence also resulted in criminal charges against Mr. Marquardt in Eau Claire County. Those charges included cruelty to animals and possession of a firearm by a convicted felon. The Eau Claire circuit court held a good faith hearing on the same search warrant on or about April 26, 2002. At that time, the Eau Claire court found that a good faith exception existed and denied the suppression motion.

The State of Wisconsin in this case moved the court to rely on the doctrine of offensive issue preclusion which would result in the Court accepting the circuit court finding of good faith in Eau Claire County without an additional hearing in Chippewa County. The Eau Claire County collateral case is on appeal at this time and is not final. The issues presented in the good faith matter are of Constitutional proportion and this Court should hear them. The factors in United States v. Leon, 468 US 897, 104 S.Ct. 3405 (1984) apparently were not properly raised during the Eau Claire County good faith hearing.

The Court of Appeals' review of this case found, as a matter of law, that no probable cause existed in the March 15, 2000, application for a search warrant of the defendant's cabin. This application included the March 13, 2000, application and warrant to search the residence of the deceased in Chippewa County. Specifically, the Court of Appeals found that that the affidavits submitted in support of these two search warrants showed no connection whatsoever between Bill Marquardt or his cabin in Eau Claire County, on the one hand, and the murder of his mother, on the other hand.

Six months after the Eau Claire County decision in which that Court found a good faith exception to the defective search warrant, the Seventh Circuit Court of Appeals decided United States v. Koerth, 312 F. 3d 862 (7th Cir. 2002). Koerth held that the State must show objective good faith and may use only the evidence provided when the magistrate signed the search warrant. Under Koerth, the record may not be supplemented with additional information the State may have had but did not disclose to the magistrate at the time of the application for the search warrant. Objective good faith requires that the application for the search warrant, although defective, contained significant indicia of probable cause.

There were no significant indicia of probable cause in the March 15, 2000, search warrant application. Therefore, as a matter of law, no officer could reasonably have believed that the search warrant contained probable cause to search the cabin in Eau Claire County.

THEREFORE, IT IS ORDERED that all evidence seized as a result of the March 15, 2000, search warrant must be suppressed as well as all of the fruits of that search. If the subsequent searches have been tainted by the evidence found in the March 15, 2000, search, those searches must likewise be suppressed.

This Court makes no finding as to the subsequent searches at this time.

II. VENUE

IT IS ORDERED that the venue to this case needs to be an area outside of the Channel 13 viewing area because of extensive pre-trial publicity.

III. PRIOR CONVICTION

The State of Wisconsin filed a motion to introduce the evidence of defendant's prior convictions in Eau Claire County in particular, the conviction for possession of a firearm by a convicted felon. Possession of the particular gun in question is a fact in question in the homicide trial and the defendant has a Constitutional right to make the State prove each fact in this homicide case, including that the defendant possessed that particular gun. Also, the Eau Claire conviction is not final because that case is on appeal. Use of this prior conviction would be unfairly prejudicial to the defendant.

THEREFORE, IT IS ORDERED that the State may not introduce evidence of a prior conviction of the defendant in the Eau Claire collateral case as it would be unfairly prejudicial to the defendant and violate his Constitutional right to have the State prove each fact in the homicide matter.

IV. PROBABLE CAUSE TO SEARCH THE VEHICLE

This Court notes that as a result of its initial decision herein finding no good faith exception to the exclusionary rule, that there may not have been probable cause to search the vehicle.

THEREFORE, IT IS ORDERED that the defendant, Bill Marquardt may litigate the issue of whether probable cause existed to search his vehicle.

V. DENNY EVIDENCE

This Court, having reviewed the affidavit of the defense, finds insufficient evidence to support the induction of Denny evidence, evidence that the defendant moved to introduce to show that Alfred Marquardt may have committed the murder. The proposed evidence is too speculative, too remote and there is no evidence that Alfred Marquardt was or could have been at the scene at the time of the murder.

THEREFORE, IT IS ORDERED that the defendant Bill Marquardt may not introduce Denny evidence as to Alfred Marquardt.

Dated this 19th day of February, 2004.

BY THE COURT,

RODERICK A. CAMERON
CIRCUIT JUDGE

STATE OF WISCONSIN CIRCUIT COURT CHIPPEWA COUNTY

STATE OF WISCONSIN,

Plaintiff.

MEMORANDUM DECISION
DENYING MOTION TO RECONSIDER

vs.

00 CF 104

BILL PAUL MARQUARDT,

Defendant.

The State of Wisconsin moves this court to reconsider its decision holding that a good faith exception to the exclusionary rule did not exist in this case. After consideration of the State's arguments, the court denies the motion. The State, in a new motion, moves the court to find that the evidence seized would inevitably have been discovered and thus should be admitted anyway, regardless of the court's ruling on the good faith exception to the exclusionary rule. The State did not meet its burden of proof on this new motion.

The issues over the search warrant issued March 15, 2000, for the search of the defendant's cabin in Eau Claire County have a lengthy procedural history. This court initially ruled that the affidavit for the search warrant had sufficient probable cause and denied a motion to suppress. The Court of Appeals reversed that decision, ruling that the affidavit for the search warrant showed no connection between the defendant or his cabin, on the one hand, and the murder of the defendant's mother, on the other hand. This court is bound by the ruling of the Court of Appeals. Ordinarily evidence obtained from an invalid search warrant must be suppressed under the exclusionary rule. In this case,

335-1

however, the Court of Appeals also ruled that the State could seek to have the evidence from the search admitted anyway if the State could establish that a good faith exception to the exclusionary rule existed. At a hearing on that issue, this court found that a good faith exception did not exist. The State now moves for reconsideration of that decision.

The State raises four issues in its motion for reconsideration. The State first argues that the Court of Appeals decision implicitly held that the factors in *United States v. Leon*, 468 US 897, 104 S.Ct. 3405 (1984) had been met. This issue is significant because if the *Leon* criteria had been met, then this court could not have made a decision on the good faith exception to the exclusionary rule without doing a further analysis under the holding in *State v. Eason*, 2001 WI 98, 245 Wis. 2d 206, 629 N.W.2d 625 (2001).

Leon held that the good faith analysis was limited to an objective examination of the affidavits presented to the judge when the judge signed the search warrant. The State argues that the Court of Appeals implicitly found the *Leon* criteria satisfied when it remanded the case for a good faith determination. The Court of Appeals remanded the case "for a good faith hearing consistent with *Eason*." *Eason* held that the trial court must apply the *Leon* criteria, and added additional criteria. Nothing in the Court of Appeals decision suggests that the Court of Appeals considered the *Leon* criteria. The issue had not been briefed and the decision did not discuss the *Leon* criteria. The fact that the Court of Appeals could have found that the *Leon* criteria did not exist does not mean it implicitly held that the affidavits for the search warrant met the *Leon* criteria. Had the Court of Appeals applied the *Leon* criteria, it would have said so. It did not. Therefore,

this court concludes that the Court of Appeals did not implicitly find that the *Leon* factors had been satisfied.

The State's second issue alleges that the majority of federal circuit courts interpret *Leon* as permitting the trial court to consider more than just the affidavits for the search warrant when looking for significant indicia of probable cause. The court finds that *State v. Eason* limits the initial review to the affidavits supplied to the judge who issued the search warrant. In this case, this initial review requires a finding that there was no good faith exception to the exclusionary rule.

Federal court decisions do not permit this court to ignore the holding in *Eason*. The State argues that *United States v. Koerth*, 312 F.2d 862 (7th Cir. 2002), cited by the court in its oral decision, represents a minority view. Marquardt argues that *Koerth* represents the majority view. Either way, the Wisconsin Supreme Court in *Eason* did not interpret *Leon* as the State argues it did. *Eason* calls for an objective determination. "We hold that where police officers act in objectively reasonable reliance upon the warrant, which had been issued by a detached and neutral magistrate, a good faith exception to the exclusionary rule applies." *Eason*, 245 Wis. 2d at 266. When the prosecutor and investigator obtained the warrant, they provided information to the judge that the defendant's mother had been murdered, that her son, the defendant, had not been seen since then, a period of two days, and that he owned a cabin. The prosecutor and investigator knew that the affidavit contained this limited information. If this limited information does not contain sufficient indicia of probable cause, then the good faith exception to the exclusionary rule does not exist here. The Court of Appeals found that these facts showed only grounds for further investigation, not probable cause for a search warrant. The State now argues that this

information constitutes indicia of probable cause and establishes a good faith exception to the exclusionary rule. The minimal facts in the affidavit do not show significant indicia of probable cause. Thus, the good faith exception does not exist here.

The State argues that this court should have held a hearing. In fact, the court in *Eason* added two more criteria. "We further hold that ... the burden is upon the State to show that the process used in obtaining the search warrant included a significant investigation and a review by either a police officer trained and knowledgeable in the requirements of probable cause and reasonable suspicion, or a knowledgeable government attorney." *Eason*, 245 Wis. 2d at 266. This language calls for a review beyond the information supplied to the judge at the time of the application for the search warrant if that information contained significant indicia of probable cause. This review might require a hearing. The implication is that a hearing may not be held if the affidavit for the search warrant lacks significant indicia of probable cause. The search warrant in *Eason* had probable cause for the search, but not for its "no knock" provision.

If the State's argument is correct, there is little deterrence to the unlawful searches that the exclusionary rule seeks to prevent. An enterprising officer need only find a magistrate who will sign a search warrant without first examining it carefully. This could happen when the magistrate is in the middle of a busy day or when the magistrate is awakened in the middle of the night. Regardless, finding the existence of a good faith exception to the exclusionary rule here means that the authorities, without probable cause, could search a person's residence by merely alleging that there is a reason to investigate that person. It would take little creativity to make any citizen the target of an investigation in order to obtain a search for the citizen's residence. The good faith

exception to the exclusionary rule is not without limitation. Requiring that the magistrate be presented with significant indicia of probable cause as required by *Leon* and *Eason* is such a limitation.

Continuing with this issue, the State's third argument is that this trial court interpreted the affidavit for the March 15, 2000, search warrant in a hyper technical manner in finding that it contained no indicia of probable cause. This court actually found that the affidavit contained no significant indicia of probable cause. As explained above, one could easily craft an affidavit containing some indicia of probable cause for further investigation, even though that affidavit did not show a connection between the crime and the suspect. A common sense reading of the affidavit, as explained in the preceding paragraph, is insufficient to find significant indicia of probable cause. In other words, the affidavit does not contain enough information to establish a good faith exception to the exclusionary rule.

The State's fourth issue alleges that the items seized on March 15, 2000, would inevitably have been discovered, and thus should not be excluded. Both the State and Marquardt agree that evidence that would inevitably have been discovered is admissible. The State raised this issue for the first time in its motion to reconsider. The court did not hold an evidentiary hearing. The State and Marquardt rely upon the record from the good faith hearing in Eau Claire County and upon documents such as police reports. These items suffice for the court to rule on this issue.

The State has the burden to show by the preponderance of the evidence that the items seized in the search on March 15, 2000, would have inevitably been found. *State v. Schwegler*, 170 Wis. 2d 487, 490 N.W.2d 292 (Ct. App. 1992).

> To do so, the prosecution must demonstrate: (1) a reasonable probability that the evidence in question would have been discovered by lawful means but for the police misconduct; (2) that the leads making the discovery inevitable were possessed by the government at the time of the misconduct; and (3) that prior to the unlawful search the government also was actively pursuing some alternate line of investigation.

Schwegler at 500. The State has not met its burden. First, the State argues that an Eau Claire County investigation into the shooting death of a neighbor's dog not far from Marquardt's cabin had a reasonable probability of leading to a search warrant of his cabin. The State contends that forensic tests of the bullets would have shown that both the murder and the shooting of the dog involved the same firearm. To reach this conclusion, one must assume that the State would have had both bullets analyzed, that the results would have been compared to each other, and that this analysis would be done within a fairly short period of time because the record shows that the defendant began removing items from his cabin on March 18, 2000. To conclude that the items seized on March 15, 2000, would have been at the cabin after the crime lab analyzed both bullets and compared them, if it actually did compare them, has too many uncertainties to make the discovery reasonably probable.

The initial investigation into the shooting of Marquardt's neighbor's dog focused on several suspects. Marquardt was not one of the suspects. Until the March 15, 2000, search found dead animals at Marquardt's cabin, he was not a suspect in the death of the neighbor's dog. (See Exhibit One attached to the Defense Reply Brief of March 26, 2004.) One cannot reasonably conclude that it was more likely than not that the police would have sought to connect this incident with the murder in time to obtain a search warrant while evidence remained at the cabin.

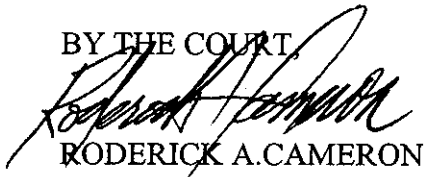
The State contends that the investigation into the shooting of the dog constituted active pursuit of an alternate line of investigation. This was an alternate investigation, but it was not an investigation into the murder in Chippewa County. Without the evidence of the dead dogs at Marquardt's cabin, no one may have sought a connection between the two crimes for many weeks, if the connection was sought at all. The police report and other information show that Marquardt was not a suspect in the dog death until after the first search of his cabin. Assuming the police nevertheless tried to tie the two crimes together, the State has not shown that it would have been done soon enough for the police to find the necessary evidence at Marquardt's cabin or in his vehicle.

CONCLUSION

For the reasons set forth above, the State's motion for reconsideration is denied.

Dated this 31st day of March, 2004.

BY THE COURT,



RODERICK A.CAMERON
CIRCUIT JUDGE

335-7

PARTIAL TRANSCRIPT
FEBRUARY 6, 2004
(352:14-29)

(Remand hearing on "good faith")

17 THE COURT: Dennis Miller.

18 Anyway, I spent a lot of time trying to

19 figure out where this case was going. It's a very

20 difficult decision to make, and as I read over the

21 briefs and reread them and read the cases, I think I've

22 come to what I think is a proper analysis here.

23 I'm going to address first -- I'm going to

24 address a lot of issues. I'm going to address first

25 what I think is the most important issue and conclusive

1 issue and that is the good faith exception to the
2 exclusionary rule and I'll note some facts in the case
3 that I think are undisputed.
4 The Court of Appeals concluded, as a matter
5 of law, there was no probable cause for the search
6 warrant that was issued by an Eau Claire judge and
7 prepared by an Eau Claire prosecutor on March 15, 2000.
8 That search warrant was based upon an affidavit and had
9 attached to it an affidavit and search warrant from
10 March 13 of 2000 and those documents showed, basically,
11 the following things:
12 That Mary Marquardt was killed on March 13,
13 2000. Bill Marquardt had not been seen since the
14 murder. It doesn't say how long it had been before the
15 murder that he had been seen or not seen. It indicated
16 Bill Marquardt owned a cabin in rural Eau Claire
17 County. Footprints were found at the murder scene and
18 a spent shell casing were found at the murder scene.
19 The search warrant did not show, as the Court of
20 Appeals indicated, any relationship between Bill
21 Marquardt and the murder. Also, there was no
22 relationship established between Bill Marquardt's cabin
23 and the murder.
24 The Court of Appeals found no probable cause
25 in the search warrant but remanded the case for a good

1 faith hearing pursuant to the case State of Wisconsin
2 vs. Eason, 245 Wis. 2d, 206. This case was decided in
3 2001 and, basically, changed the law in Wisconsin which
4 up until that time held that the lack of a valid search
5 warrant automatically required exclusion of any
6 evidence seized during the search. Eason extended to
7 Wisconsin the good faith exception to the requirement
8 for a valid search warrant, thus giving prosecutors a
9 second means by which to meet the requirements of the
10 State and Federal Constitutions. Eason was based on
11 both the Wisconsin Constitution and the United States
12 Constitution.
13 In addition, the Court notes that on a
14 collateral case in Eau Claire County which relied on
15 some of the evidence found in the execution of the
16 March 15, 2000 search warrant in Eau Claire County, the
17 trial judge there found, after a hearing held on
18 April 26, 2002 -- I think that's the date, I looked on
19 CCAP late last night -- in the hearing he found there
20 was a good faith exception to the search warrant
21 requirement after having an evidentiary hearing.
22 Approximately seven months later, on December
23 5, 2002, the Seventh Circuit Court of Appeals set forth
24 the criteria for the good faith exception to the
25 exclusionary rule citing United States vs. Leon. This

1 case is captioned United States vs. Koerth,
2 K-O-E-R-T-H, 312 F. 2d, 862. The Leon case first
3 established the good faith exception to the
4 exclusionary rule at the Federal level.
5 The Wisconsin case, State vs. Eason, added
6 two additional requirements to the Leon criteria for
7 the exception to having a search warrant. These two
8 additional criteria were based upon the Constitution
9 for the State of Wisconsin and not upon the United
10 States Constitution.
11 Both sides in this case have argued issue
12 preclusion, in other words, whether or not the
13 Eau Claire Court's decision finding that the good faith
14 exception existed requires this Court to accept that
15 decision as conclusive. I conclude that it does not.
16 There are a number of reasons for this.
17 First of all, I think the Seventh Circuit
18 case, United States vs. Koerth, which was decided after
19 the Eau Claire hearing, clarifies the law of the good
20 faith exception to the exclusionary rule. This is a
21 constitutional issue, but what is involved is findings
22 of constitutional facts.
23 There is a right to appeal here. The State
24 argues here that the criteria is whether the defendant
25 could have obtained review and I think that implies

1 that if the defendant -- one, the defendant had that
2 right and did not exercise it.
3 In this case, the defendant is now in the
4 process of appealing that decision and has not yet
5 obtained review, and, furthermore, that case,
6 obviously, is not final. It may go to the Supreme
7 Court of Wisconsin later, who knows, but because it
8 involves issues of constitutional facts and because
9 there's been no review to date of the Eau Claire County
10 decision, my conclusion is that this Court ought to
11 hear and decide this issue.
12 In this case today, Bill Marquardt is making
13 an argument based upon United States vs. Leon. That,
14 to my knowledge, was not explicitly raised in
15 Eau Claire County with respect to the subjective good
16 faith analysis. Therefore, I believe this Court may
17 address the issue anew, having the benefit of a case
18 not available to the Eau Claire County Court in April
19 of 2002 and having the ability to consider an
20 additional necessary constitutional argument, that
21 under Leon.
22 Leon showed -- Leon held that when the
23 circumstances show objective good faith of the officers
24 involved in the search warrant, suppression of the
25 evidence obtained should not apply subject to three

1 exceptions. The first one is knowing or reckless
2 falsity of the affidavit on which the probable cause
3 determination for the search warrant was based. That
4 issue is, as far as I'm concerned, not presently before
5 the Court.
6 Next is whether the magistrate issuing the
7 search warrant acted as a neutral and detached party as
8 opposed to serving merely as a rubber stamp for the
9 police. That issue is not before the Court.
10 Third: Reviewing courts will not defer to a
11 warrant based upon an affidavit that does not provide a
12 substantial basis for determining the existence of
13 probable cause. Sufficient information must be
14 provided to the magistrate to allow that official to
15 determine probable cause. The action of the magistrate
16 approving the search warrant must not be a mere
17 ratification of the bare conclusions of others. This
18 third exception, in my opinion, creates a significant
19 and insurmountable problem for the prosecution.
20 Leon requires a determination of objective
21 good faith based only upon the information submitted to
22 the judge who signed the search warrant. And while
23 there is a presumption of prima facie good faith when
24 the officer seeks the search warrant, that is
25 rebuttable and there are some requirements.

1 One is that the information presented to the
2 magistrate, which is usually in this part of the
3 country in the form of an affidavit, must have indicia
4 of probable cause before a finding of objective good
5 faith may be made and, in fact, the United States
6 Supreme Court said so in State vs. Brady, which is at
7 130 Wis. 2d, 443, decided in 1986. In that case, the
8 Supreme Court of Wisconsin declined at that time to
9 adopt the good faith exception to the exclusionary
10 rule.
11 In this case, the search warrant in question
12 from March 15, 2000 does not contain sufficient
13 information to show a substantial basis for probable
14 cause let alone any indicia of probable cause. A
15 substantial basis for probable cause would be a
16 situation where the allegations of the supporting
17 affidavit for the search warrant clearly spells out
18 details that establish probable cause but where the
19 informant's reliability is not established.
20 An example of this situation, fact situation
21 was in State -- excuse me, United States vs. Koerth.
22 In that case the Federal District Court and the Federal
23 Court of Appeals found insufficient probable cause in a
24 search warrant because the reliability of a named
25 informant was alleged but not established in the

1 affidavit submitted with the application for the search
2 warrant. Other information provided what would have
3 been probable cause had the informant's -- let me
4 rephrase that here. Other information provided what
5 would have been probable cause had the informant's
6 reliability been established in the affidavit. The
7 Federal District Court and the Seventh Circuit each
8 held that an officer executing the search warrant could
9 reasonably rely upon this warrant to show probable
10 cause even though probable cause had not been
11 established in the affidavit.
12 As I indicated before, the Wisconsin case of
13 State vs. Eason also found that a good faith exception
14 existed. In Eason the search warrant provided adequate
15 probable cause but did not substantiate the no-knock
16 provision authorized by the magistrate who signed the
17 warrant. The entry pursuant to this invalid no-knock
18 provision invalidated the search warrant. On appeal,
19 the Wisconsin Supreme Court adopted the good faith
20 exception to the warrant requirement. The court found
21 that the officers relied with objective reasonableness
22 upon the no-knock search warrant and they found this to
23 be an exception, a good faith exception to the
24 exclusionary rule.
25 In our case, in the search warrant against

1 Bill Paul Marquardt there's nothing that specifically
2 ties him or his cabin to the murder of his mother. No
3 officer could reasonably rely upon that search warrant
4 for probable cause. All the warrant really showed was
5 a murder, a missing son, and that the son owned a
6 cabin. These facts may warrant further investigation
7 by the authorities. However, they do not create even a
8 substantial basis for probable cause for the search.
9 Unlike Eason and Koerth, there was no substantial
10 showing of probable cause in the search warrant for
11 Bill Marquardt's cabin; in other words, there was no
12 indicia of probable cause. There's no showing that
13 Bill Marquardt even knew about the murder. Except for
14 the fact that it was the decedent's son who was
15 missing, what difference is there between Bill
16 Marquardt's absence and someone's else absence?
17 In evaluating the reasonable reliance of the
18 officers who obtained and executed the search warrant
19 of the cabin, the State argues that the Court should
20 also consider, in addition to the information set forth
21 in the affidavits submitted with the application for
22 the search warrant, other knowledge known at the time
23 by the officers. Koerth relies upon Leon and requires
24 that the reviewing court limit its inquiry to whether
25 the officer could reasonably have believed that the

1 materials presented to the magistrate were sufficient
2 to establish probable cause. Koerth emphasizes that
3 test prescribed by Leon is an objective test. It must
4 be based solely on the facts presented to the
5 magistrate. More specifically, the government may not
6 establish objective good faith under Leon by producing
7 evidence of facts known to the officer but not
8 disclosed to the magistrate who authorized the search
9 warrant. Thus, no testimony is permitted on the good
10 faith issue in this case.
11 Therefore, this Court is, by law, limited to
12 the affidavits for the March 13, 2000 search of the
13 Marquardt home and the March 15, 2000 search of Bill
14 Marquardt's cabin in Eau Claire County. As held by the
15 Court of Appeals, these affidavits show only that Bill
16 Marquardt bears further investigation but have no
17 tie-in between him and the crime. Therefore, no
18 trained officer executing the search warrant on
19 March 15, 2000 could reasonably rely upon that search
20 warrant in good faith under the criteria set forth by
21 the United States Supreme Court in Leon and as adopted
22 by the Wisconsin Supreme Court in the Eason case.
23 Eason also set forth two additional criteria
24 to Leon under the Wisconsin Constitution, finding that
25 the State must show that the process used in obtaining

1 the search warrant included a significant investigation
2 and a review by either a police officer trained and
3 knowledgeable in the requirements of probable cause and
4 reasonable suspicion or a knowledgeable government
5 attorney. Before adding these two criteria, the court
6 held "that where police officers act in objectively
7 reasonable reliance upon the warrant, which had been
8 issued by a detached and neutral magistrate, a good
9 faith exception to the exclusionary rule applies."
10 The court did not modify Leon to permit a
11 subjective good faith approach such as an examination
12 of what the officers knew in addition to the
13 information presented in the application for the search
14 warrant. And if one looks at Paragraph 74 of the
15 decision, the court proceeds in exactly that fashion.
16 They refer to the objective good faith determination
17 before the inquiry on the two criteria the court added.
18 Furthermore, the Wisconsin Supreme Court
19 could not modify Leon because a State court may not
20 modify the decision of the United States Supreme Court.
21 Because the Leon criteria were not met, in particular
22 for the objective finding of good faith, this Court
23 will not address the additional criteria in Eason. The
24 Court does not have to. Had the good faith exception
25 in Leon been met, then an evidentiary hearing may have

1 been appropriate, a decision this Court does not need
2 to make because of its finding that the Leon criteria
3 were not met.
4 The conclusion, therefore, is that the
5 evidence seized pursuant to the March 15, 2000 search
6 warrant must be suppressed in this case as well as any
7 evidence obtained from the fruits of the search
8 warrant, which is a requirement of law.
9 There are some other search warrants that
10 were issued later -- I think there were two more -- and
11 I believe they relied, at least in part, on evidence
12 obtained from the March 15 search warrant and I don't
13 know what the effect will be on those. However, if
14 those subsequent search warrants are tainted, then, by
15 law, the evidence obtained from them must also be
16 suppressed. I won't make a decision on that at this
17 time. So that's one issue.
18 I also want to decide a couple of other
19 issues because I expect the case to be appealed and I
20 really want to have as many issues before the Court of
21 Appeals, so if this case comes back, which I don't
22 think it will, if it comes back, I want as many of
23 these issues decided before the case goes to trial.
24 First of all, I have found that venue needed
25 to be changed to an area out of Channel 13's viewing

1 area, either to try the case or pick a jury in that
2 area and sequester them in Chippewa County, and I don't
3 think that conclusion is disputed. The dispute is
4 whether to sequester the jury here or try the case
5 someplace else.
6 Secondly, use of a prior conviction. The
7 prior conviction on the Eau Claire charges by the State
8 in rebuttal to show the defendant possessed a handgun
9 prior to the murder I conclude would be unfairly
10 prejudicial to Bill Paul Marquardt. First of all, it
11 tells a jury about a prior conviction which, I think,
12 in and of itself, is prejudicial and in a homicide case
13 unfairly prejudicial. Furthermore, it removes the
14 facts from the jury. The jury has to decide whether
15 Bill Marquardt possessed a gun and, if so, possessed it
16 at the time of the homicide. Telling the jury they can
17 rely upon that jury's decision here means the jury in
18 the homicide case won't get that existence and
19 possession of this gun as a fact issue and
20 Mr. Marquardt is entitled to have all issues of fact,
21 collateral or otherwise, in this case decided by the
22 jury trying the homicide case.
23 There is an issue here on probable cause for
24 the search of the vehicle. The Court was upheld
25 earlier in its decision allowing the search of the

1 vehicle under an exception to the requirement of the
2 warrant because it was a vehicle and, generally
3 speaking, a warrant is not required for search of a
4 vehicle. However, there was no issue raised at that
5 time whether or not there was actual probable cause for
6 the search of the vehicle. When I started to arrive at
7 my conclusion on this case late last night, I didn't
8 think there was a problem with the issue of probable
9 cause, that it might not be an issue because the State
10 has a problem with the March 15 search warrant and
11 subsequent warrants and those warrants may have been
12 used to help establish probable cause to search the
13 vehicle. This is a constitutional issue and even
14 though it was not brought up at the original motion
15 hearing, I believe the defendant can bring it up at
16 this time.
17 There is an issue on a motion filed by
18 Attorney James Connell still of record. He sought to
19 sever the charges of first degree intentional homicide
20 and possession of a firearm by a felon. I believe that
21 joinder would in a homicide trial be unfairly
22 prejudicial to the defendant because it brings in the
23 prior conviction and the type of conviction and the
24 fact that it was a felony conviction. I think jurors,
25 despite instructions to the contrary, take those

1 convictions very seriously. I believe it affects their
2 ability to be as impartial as we would like them to be,
3 so I'm not going to grant joinder on that. I don't
4 think that creates any prejudice to the State.
5 There is an issue here on Denny evidence
6 which is evidence that shows somebody else may have
7 committed the crime. I think in this case, the
8 proposed Denny evidence is insufficient to admit it at
9 trial. Basically, the evidence sought to be presented
10 by the defendant is too speculative and too remote to
11 tie Alfred Marquardt to the murder. Specifically,
12 allegations that Mary Marquardt was a battered spouse
13 appear to be only unsubstantiated hearsay. Alfred's
14 calm demeanor after the murder doesn't prove anything.
15 Without a tie to a murder, people react in many ways to
16 news of a homicide to their loved ones.
17 The same applies to the $25,000 life
18 insurance on Mary Marquardt. Without more, it doesn't
19 really prove much. It was issued by Mr. Marquardt's
20 employer. There is no evidence he had financial
21 troubles, was trying to get any money.
22 Also, there is an allegation that
23 Mr. Marquardt's red pickup was at the home all day on
24 March 13, 2000. When the source of that statement was
25 interviewed, he simply said he only saw another vehicle

1 turned around in the drive and never saw Alfred's
2 vehicle there during the day.
3 There, finally, is the fingerprint of Alfred
4 Marquardt's in a blood stain at the scene. This is
5 explainable because Mr. Marquardt found the body.
6 Without something more, such as motive or evidence that
7 he was at the scene or covering up at the scene, that
8 fingerprint evidence, without -- with or without
9 evidence of Alfred's calm manner, is not admissible
10 because it proves nothing and is likely to confuse the
11 jury on the issues they have to decide.
12 I think I have decided all the issues that
13 might go up on appeal as best I can except we are not
14 going to get a decision today whether there was cause
15 for the search of the vehicle.
16 I expect the State will want to appeal this
17 and I expect the Clerk should notify Douglas County
18 forthwith not to send out the jury letters on Monday.
19 Anything else the Court needs to decide at
20 this time, Mr. Brinckman or Mr. Gay?
21 MR. BRINCKMAN: No, Your Honor.
22 MR. GAY: No, sir.
23 THE COURT: Who's going to draft an order?
24 Mr. Brinckman, you had more luck today than Mr. Gay.
25 You should draft the order.

Court of Appeals of Wisconsin.

STATE of Wisconsin, Plaintiff-Respondent,
[FN<<dagger>>]

FN<<dagger>> Petition for cross-review denied Nov. 27, 2001.

v.

Bill Paul MARQUARDT,
[FN<<dagger>><<dagger>>] Defendant-Appellant.

FN<<dagger>><<dagger>> Petition for review denied Nov. 27, 2001.

No. 01-0065-CR.

Submitted on Briefs June 11, 2001.
Opinion Released Aug. 21, 2001.
Opinion Filed Aug. 21, 2001.

Defendant charged with first-degree intentional homicide and possession of a firearm by a felon moved to suppress evidence. The Circuit Court, Chippewa County, Roderick A. Cameron, J., denied motion, and defendant appealed. The Court of Appeals, Cane, C.J., held that: (1) facts set forth in warrant affidavit were clearly insufficient to give rise to probable cause justifying issuance of search warrant for defendant's residence; (2) reversal and remand for determination as to applicability of good faith exception to exclusionary rule was required; (3) defendant effectively conceded existence of probable cause for warrantless search of his car; (4) defendant's car remained "readily mobile" following his arrest; (5) application of the automobile exception to the warrant requirement is not limited to vehicles found in public places; and (6) fact that officers could have secured search warrant for defendant's car did not render automobile exception inapplicable.

Affirmed in part, reversed in part, and remanded for further proceedings.

West Headnotes

[1] Searches and Seizures ⚷ 23
349k23

Fourth and Fourteenth Amendments to the United States Constitution and the equivalent provision of the state constitution guarantee citizens freedom from unreasonable searches and seizures. U.S.C.A. Const.Amends. 4, 14; W.S.A. Const. Art. 1, § 11.

[2] Searches and Seizures ⚷ 201
349k201

Question whether police conduct violated the constitutional guarantee against unreasonable searches and seizures is a question of constitutional fact. U.S.C.A. Const.Amends. 4, 14; W.S.A. Const. Art. 1, § 11.

[3] Criminal Law ⚷ 1158(4)
110k1158(4)

On review of a trial court's ruling on a motion to suppress based on allegedly unreasonable search and seizure, the Court of Appeals gives deference to the trial court's findings of evidentiary or historical fact, but determines the question of constitutional fact independently.

[4] Searches and Seizures ⚷ 104
349k104

[4] Searches and Seizures ⚷ 113.1
349k113.1

Search warrant may issue only when a neutral and detached magistrate or judge finds probable cause to believe that evidence of a crime may be found in a particular place. U.S.C.A. Const.Amend. 4; W.S.A. Const. Art. 1, § 11.

[5] Searches and Seizures ⚷ 113.1
349k113.1

Whether there is probable cause justifying the issuance of a search warrant is determined by examining the totality of the circumstances. U.S.C.A. Const.Amend. 4; W.S.A. Const. Art. 1, § 11.

[6] Searches and Seizures ⚷ 113.1
349k113.1

Probable cause determination in connection with the

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issuance of a search warrant must be based upon what a reasonable judge can infer from the information presented by the police. U.S.C.A. Const.Amend. 4; W.S.A. Const. Art. 1, § 11.

[7] Searches and Seizures ⚷ 113.1
349k113.1

In considering an application for a search warrant, an issuing judge ordinarily considers only the facts set forth in supporting affidavits accompanying the warrant application. U.S.C.A. Const.Amend. 4; W.S.A. Const. Art. 1, § 11.

[8] Criminal Law ⚷ 1158(4)
110k1158(4)

It is the duty of the reviewing court, reviewing a trial court's ruling on a motion to suppress, to ensure that the judge issuing the search warrant had a substantial basis to conclude that probable cause existed. U.S.C.A. Const.Amend. 4; W.S.A. Const. Art. 1, § 11.

[9] Criminal Law ⚷ 1158(4)
110k1158(4)

In reviewing a trial court's ruling on a motion to suppress, the reviewing court must consider whether, objectively viewed, the record before the judge issuing the warrant provided sufficient facts to excite an honest belief in a reasonable mind that the objects sought are linked with the commission of a crime, and that they will be found in the place to be searched. U.S.C.A. Const.Amend. 4; W.S.A. Const. Art. 1, § 11.

[10] Criminal Law ⚷ 1158(4)
110k1158(4)

In reviewing a trial court's ruling on a motion to suppress, the reviewing court accords great deference to the determination made by the warrant-issuing judge. U.S.C.A. Const.Amend. 4; W.S.A. Const. Art. 1, § 11.

[11] Searches and Seizures ⚷ 196
349k196

Issuing judge's determination that probable cause existed for the issuance of a search warrant will stand unless the defendant establishes that the facts are clearly insufficient to support a probable cause finding. U.S.C.A. Const.Amend. 4; W.S.A. Const. Art. 1, § 11.

[12] Searches and Seizures ⚷ 114
349k114

Facts set forth in affidavit in support of search warrant application were clearly insufficient to give rise to probable cause justifying issuance of search warrant for defendant's residence; although facts arguably supported an honest belief that particular objects sought, including shoes, knives, and guns, could be linked with commission of the crime, nothing linked those objects to defendant's residence other than statement of victim's husband, defendant's father, that defendant had not been heard from since day of murder. U.S.C.A. Const.Amend. 4; W.S.A. Const. Art. 1, § 11.

[13] Criminal Law ⚷ 1181.5(7)
110k1181.5(7)

Finding that issuing judge had lacked probable cause to issue search warrant for murder defendant's residence required reversal and remand, for determination as to applicability of good faith exception to exclusionary rule and, should the trial court find the exception inapplicable, for examination of facts surrounding subsequent searches to determine whether they were tainted by initial unlawful search. U.S.C.A. Const.Amend. 4; W.S.A. Const. Art. 1, § 11.

[14] Searches and Seizures ⚷ 25.1
349k25.1

[14] Searches and Seizures ⚷ 60.1
349k60.1

Warrantless searches of homes are presumptively unreasonable, but searches of vehicles are not. U.S.C.A. Const.Amend. 4; W.S.A. Const. Art. 1, § 11.

[15] Searches and Seizures ⚷ 60.1
349k60.1

Unique nature of automobiles sets them apart from other areas protected from warrantless searches under the Fourth Amendment. U.S.C.A. Const.Amend. 4.

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[16] Searches and Seizures ⚷ 62
349k62

Under current federal law, the warrantless search of a vehicle does not offend the Fourth Amendment if there is probable cause to search the vehicle; and the vehicle is readily mobile; issues concerning whether the police could have obtained a warrant prior to searching are not relevant to the analysis. U.S.C.A. Const.Amend. 4.

[17] Constitutional Law ⚷ 18
92k18

State Supreme Court is free to interpret the state constitution in a manner that affords greater protections than the federal Constitution.

[18] Criminal Law ⚷ 1130(6)
110k1130(6)

Murder defendant effectively conceded existence of probable cause for warrantless search of his vehicle, on his interlocutory appeal from denial of his motion to suppress evidence seized therefrom, where defendant did not challenge probable cause before the circuit court or in his brief on appeal, and only briefly and obliquely addressed the issue in his reply brief. U.S.C.A. Const.Amend. 4; W.S.A. Const. Art. 1, § 11.

[19] Criminal Law ⚷ 1130(5)
110k1130(5)

Murder defendant waived appellate review of his contention that his car was no longer "readily mobile," within scope of automobile exception to warrant requirement, following his arrest, by failing to raise such issue before circuit court or to cite to authority for such proposition on interlocutory appeal. U.S.C.A. Const.Amend. 4; W.S.A. Const. Art. 1, § 11.

[20] Searches and Seizures ⚷ 60.1
349k60.1

Murder defendant's car remained "readily mobile," within scope of automobile exception to warrant requirement, following defendant's arrest; defendant's arrest would not have prevented other unknown individuals from moving his car. U.S.C.A. Const.Amend. 4; W.S.A. Const. Art. 1, § 11.

[21] Searches and Seizures ⚷ 60.1
349k60.1

Justification to conduct a warrantless search pursuant to the automobile exception to the warrant requirement does not vanish once the car has been immobilized. U.S.C.A. Const.Amend. 4; W.S.A. Const. Art. 1, § 11.

[22] Searches and Seizures ⚷ 60.1
349k60.1

Application of the automobile exception to the warrant requirement is not limited to vehicles found in public places. U.S.C.A. Const.Amend. 4; W.S.A. Const. Art. 1, § 11.

[23] Searches and Seizures ⚷ 60.1
349k60.1

State constitution did not go beyond scope of Fourth Amendment to impose public place requirement for application of automobile exception to warrant requirement, absent an explicit indication that the state Supreme Court interpreted the applicable provision of the state constitution differently than the Fourth Amendment. U.S.C.A. Const.Amend. 4 ; W.S.A. Const. Art. 1, § 11.

[24] Searches and Seizures ⚷ 66
349k66

Fact that officers could have secured search warrant for murder defendant's car, either before towing it or before searching it at police station, did not render automobile exception to warrant requirement inapplicable. U.S.C.A. Const.Amend. 4; W.S.A. Const. Art. 1, § 11.

****190 *770** On behalf of the defendant-appellant, the cause was submitted on the briefs of James B. Connell of Crooks, Low, Connell & Rottier, S.C. of Wausau.

On behalf of the plaintiff-respondent, the cause was submitted on the brief of James E. Doyle, attorney general, and James M. Freimuth, assistant attorney general.

****191 *771** Before CANE, P.J., HOOVER, P.J., and PETERSON, J.

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¶ 1 CANE, C.J.

In this interlocutory appeal, Bill Paul Marquardt appeals from an order (1) denying his motion to suppress evidence seized pursuant to a search warrant for his home; (2) denying his request for a *Franks* [FN1] hearing; and (3) denying his motion to suppress evidence from a warrantless search of his vehicle.

FN1. *Franks v. Delaware,* 438 U.S. 154, 98 S.Ct. 2674, 57 L.Ed.2d 667 (1978).

¶ 2 We conclude first that there was insufficient probable cause to justify the search warrant for Marquardt's home. Because our supreme court recently adopted the good faith exception to the exclusionary rule, *see State v. Eason,* 2001 WI 98, ¶ 74, 245 Wis.2d 206, 629 N.W.2d 625, we reverse that portion of the court's order and remand for a determination of whether the good faith exception to the exclusionary rule applies in this case. Second, we do not address Marquardt's request for a *Franks* hearing because we have concluded that there was insufficient probable cause to support the search warrant. Finally, we conclude that the automobile exception to the Fourth Amendment search warrant requirement applies to the warrantless search of Marquardt's vehicle. Thus, we affirm that portion of the court's order denying suppression of evidence from Marquardt's vehicle on warrantless search grounds.

BACKGROUND

¶ 3 On March 13, 2000, Alfred Marquardt found his wife, Mary, dead in their garage. Mary had been shot and stabbed. Officers investigating the death immediately obtained a warrant to search the home.

***772** ¶ 4 On March 15, officers obtained a warrant to search the home of Mary and Alfred's son, Bill Marquardt. Officers conducting the search found dead animals at Bill Marquardt's home and subsequently obtained an arrest warrant for Marquardt on a charge of cruelty to animals.

¶ 5 On March 18, Marquardt was arrested at his home. At the time of his arrest, Marquardt's locked vehicle was parked in his driveway. In the hours after Marquardt was arrested, the Eau Claire County Sheriff's Department arranged for the vehicle to be hauled to the department, where it was then searched. Two days later, the vehicle was transported to the State Crime Laboratory in Madison where it was again searched. No warrant was ever obtained for the search and seizure of the vehicle.

¶ 6 On May 4, Marquardt was charged with one count of first-degree intentional homicide and one count of possession of a firearm by a felon. Following a preliminary hearing and bindover, Marquardt filed several motions to suppress evidence. Two motions are relevant to this appeal: a motion to suppress evidence that was seized from Marquardt's home pursuant to the March 15 search warrant and a motion to suppress evidence that was seized from Marquardt's car without a search warrant. [FN2]

FN2. Marquardt sought to exclude not only evidence seized on March 15, 2000, but also all physical evidence seized from Marquardt's premises, person or vehicles that was discovered as a result of the issuance and execution of the March 15 search warrant. Thus, Marquardt challenged the admission of evidence seized from the vehicle found at his home based on two independent grounds: (1) as "fruit of the poisonous tree" (the tree being the March 15 search warrant); and (2) as the product of an unconstitutional, warrantless search and seizure of his vehicle.

¶ 7 The circuit court conducted motion hearings on July 31 and December 8. At ****192** the first hearing, the ***773** court held that the search warrant for Marquardt's home was issued upon sufficient probable cause and denied Marquardt's request for a *Franks* hearing on the issue of whether the application for a search warrant contained material misstatements and omissions. Following the second day of hearings, the court issued a memorandum decision denying the motion to suppress evidence seized from the vehicle, concluding that the search was valid under the automobile exception to the Fourth Amendment's warrant requirement.

¶ 8 Marquardt seeks reversal of the circuit court's order finding probable cause in the search warrant application, denying his request for a *Franks* hearing, and denying the suppression of evidence

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derived from the warrantless vehicle search. By order of January 24, 2001, we granted Marquardt's request for leave to appeal the court's order.

STANDARD OF REVIEW

[1][2][3] ¶ 9 The Fourth and Fourteenth Amendments to the United States Constitution and art. I, § 11, of the Wisconsin Constitution guarantee Wisconsin citizens freedom from "unreasonable searches and seizures." *State v. Griffith,* 2000 WI 72, ¶ 25, 236 Wis.2d 48, 613 N.W.2d 72. The question whether police conduct violated the constitutional guarantee against unreasonable searches and seizures is a question of constitutional fact. *Id.* at ¶ 23. On review, this court gives deference to the trial court's findings of evidentiary or historical fact, but determines the question of constitutional fact independently. *Id.*

*774 DISCUSSION

I. Issuance of the initial search warrant for Marquardt's house

[4] ¶ 10 Marquardt argues that the March 15 search warrant for his house was issued based on insufficient probable cause. A search warrant may issue only when a neutral and detached magistrate (or judge, as in this case) finds probable cause to believe that evidence of a crime may be found in a particular place. *See State v. Ward,* 2000 WI 3, ¶ 21, 231 Wis.2d 723, 604 N.W.2d 517.

[5] ¶ 11 Whether there is probable cause is determined by examining the "totality of the circumstances." *Id.* at ¶ 26. A finding of probable cause is a commonsense test:

> The task of the issuing magistrate is simply to make a practical, commonsense decision whether, given all the circumstances set forth in the affidavit before him, including the "veracity" and "basis of knowledge" of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place.

Id. at ¶ 23 (citing *Illinois v. Gates,* 462 U.S. 213, 238, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983)).

[6][7] ¶ 12 A probable cause determination must be based upon what a reasonable judge can infer from the information presented by the police. *Ward,* 231 Wis.2d 723, 604 N.W.2d 517, 2000 WI 3 at ¶ 26. The issuing judge ordinarily considers only the facts set forth in supporting affidavits accompanying the warrant application. *See id.*

[8][9][10][11] *775 ¶ 13 It is the duty of the reviewing court to ensure that the judge had a substantial basis to conclude that probable cause existed. *Id.* at ¶ 21. We must consider whether, objectively viewed, the record before the judge provided sufficient facts to excite an honest belief in a **193 reasonable mind that the objects sought are linked with the commission of a crime, and that they will be found in the place to be searched. *Id.* at ¶ 27. We accord great deference to the determination made by the warrant-issuing judge. *Id.* at ¶ 21. Thus, the judge's determination will stand unless the defendant establishes that the facts are clearly insufficient to support a probable cause finding. *Id.*

[12] ¶ 14 With these standards in mind, we examine the facts that were presented to the judge. The judge did not take any testimony in support of the search warrant application. Instead, only written documents were provided. The application for Marquardt's home, dated March 15, was completed by a detective from the Eau Claire County Sheriff's Department, and was based upon the following statement of facts:

> Affiant reports that on March 15, 2000, he received a copy of an affidavit for search warrant sworn and executed in Chippewa County on March 13, 2000, with respect to the suspected homicide of Mary J. Marquardt. A copy of said affidavit and search warrant is attached and hereby incorporated by reference. [[FN3]]

FN3. Marquardt in his reply brief suggests that the March 13 application and warrant may not have been provided to the judge with the March 15 application. We have reviewed the transcript of the motion hearing and have found no indication that defense counsel, the State or the circuit court expressed any doubt that the March 13 application was attached. Indeed, the circuit court referred to the fact that the March 13 warrant was attached to the March 15 application and asked the State, "Is there anything in there that ties the defendant to the homicide? I went through it, and I didn't see anything that did so, but I want to know if I missed anything." Because Marquardt raises this factual issue for the first time in his reply brief, we decline to address it. *See State v. Mata,* 230 Wis.2d 567, 576 n. 4, 602

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N.W.2d 158 (Ct.App.1999) (court will not address issues raised for the first time in a reply brief). Instead, we will assume that the March 13 application and warrant were attached to the March 15 application.

***776** Investigator Price reports that after finding the body of Mary J. Marquardt, he spoke with her husband, Alfred E. Marquardt. Mr. Marquardt informed him that he and Mary have a son, Bill Marquardt, who, since the location of Ms. Marquardt's body had not been seen or heard from. Alfred Marquardt further informed Investigator Price that Bill Marquardt owned with Alfred Marquardt a cabin in which Bill resided at E27505 County Highway M, Town of Fairchild, County of Eau Claire, Wisconsin.
Investigator Price further reports that in examining the body of Mary J. Marquardt and the scene where she was found, it appeared as though among the wounds incurred by her was a knife wound. Also at the scene, officers were able to locate a number of footprints that may be suitable for comparison with the shoes that made them.
Investigator Barnier reports that in checking Eau Claire County tax rolls, he learned that a cabin, storage building, pumphouse and out-house located at E27505 County Highway M .... are owned by Alfred and Bill Marquardt.

***777** ¶ 15 The search warrant application sought permission to search for ammunition; firearms; clothing containing Mary's hair, blood or fibers; knives; shoes; and documents that may indicate Marquardt's whereabouts on or after March 13.

¶ 16 The March 13 search warrant for Mary's home that was referred to in the March 15 application contained the following statement of facts:
****194** Inv[estigator] Price reports that on March 13, 2000, Chippewa County Sheriff's Dispatch received a 911 call from 11766 State Hwy 178, Chippewa Falls, Township of Eagle Point. The caller identified himself as Alfred E. Marquardt. .... Marquardt reported that his wife was apparently dead at the residence.
Price continued that he responded to the Marquardt home and met with Marquardt. Marquardt relayed that he had left home at about 7 AM that morning and tried to call home about 11:50. The phone was busy and remained so the remainder of the day. Marquardt stated that he left work early and returned home because of the busy phone and upon arrival, found his wife, Mary J. Marquardt covered with a blanket in the garage. She was cold and unresponsive and appeared to have a head wound. Price reports that a shell casing, tentatively identified as 9 mm, was observed on the premises.

¶ 17 Marquardt argues that these statements are "devoid of any information from which it could be reasonably concluded that evidence of a crime could be located at [Marquardt's] residence, which was located in a different county than his parents' residence, where his mother's body was found." He notes that the fact no one had seen or heard from him raises no reasonable inference that he was involved in the crime. "Even if ***778** absence could be considered a reason for suspicion, the police officers in this case had nothing more than a guess that contraband or evidence of a crime would be found in [Marquardt's] home." He argues, citing *United States v. Schultz,* 14 F.3d 1093, 1097-98 (6th Cir.1994), that to find probable cause based on these facts "would be to invite general warrants authorizing searches of any property owned, rented, or otherwise used by a criminal suspect--just the type of broad warrant the Fourth Amendment was designed to foreclose."

¶ 18 In response, the State admits that the facts recited in the affidavits are "scant," but argues that they are not so thin as to be insufficient for probable cause. The State points to several facts in the affidavits: (1) Mary's telephone was off the hook the day she was killed, suggesting "that the perpetrator had been inside the residence"; (2) Mary was shot and stabbed, and no valuables were taken, suggesting the crime was an intentional homicide, as opposed to a break-in, and that the perpetrator was probably a male; [FN4] (3) there were footprints at the crime scene that could be compared with footware if any are located; (4) Mary was covered with a blanket, which suggests the perpetrator knew, or was familiar with the victim; and (5) Marquardt's father stated that his son had not been heard from since Mary's body was discovered.

FN4. The State cites several authorities for the general proposition that "males kill in overwhelming numbers compared to females, and they kill with firearms."

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¶ 19 Although these facts may lead a reasonable police officer to pursue further investigation of Marquardt, we conclude that there is nothing in the facts to tie Marquardt to the crime, much less to tie his home to the crime. Although the warrant-issuing judge may ***779** have been provided sufficient facts to excite an honest belief in a reasonable mind that the particular types of objects sought--including shoes, knives, and guns--could be linked with the commission of the crime, there was no fact that suggested those items would be found in Marquardt's cabin. We conclude that Marquardt has established that the facts are clearly insufficient to support a probable cause finding and, ****195** therefore, we reject the judge's probable cause determination. *See Ward,* 231 Wis.2d 723, 604 N.W.2d 517, 2000 WI 3 at ¶ 2.

[13] ¶ 20 Until recently, this conclusion would end our analysis, and we would simply reverse the circuit court's order denying Marquardt's motion to suppress. However, as a result of our supreme court's decision in *Eason,* we instead reverse and remand for a determination of whether the good faith exception to the exclusionary rule applies in this case.

¶ 21 In *Eason,* the court adopted the good faith exception to the exclusionary rule recognized in *United States v.. Leon,* 468 U.S. 897, 918- 20, 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984), adding some additional protections required by art. I, § 11, of the Wisconsin Constitution. *See Eason,* 245 Wis.2d 206, 629 N.W.2d 625, 2001 WI 98 at ¶ 74. *Eason* stated:

> We hold that where police officers act in objectively reasonable reliance upon the warrant, which had been issued by a detached and neutral magistrate, a good faith exception to the exclusionary rule applies. We further hold that in order for a good faith exception to apply, the burden is upon the State to show that the process used in obtaining the search warrant included a significant investigation and a review by either a police officer trained and knowledgeable in the requirements of probable cause and reasonable suspicion, or a knowledgeable government attorney. We also hold that this process is required by Article I, Section 11 of the Wisconsin Constitution, in addition to those protections ***780** afforded by the good faith exception as recognized by the United States Supreme Court in *United States v. Leon,* 468 U.S. 897, 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984).
> *Id.*

¶ 22 *Eason* was decided after briefing was completed in this case, although the State in the circuit court and on appeal argued for application of a good faith exception to the exclusionary rule. We conclude that the State has preserved this issue for appeal. Accordingly, we reverse that portion of the circuit court's order denying Marquardt's motion to suppress and remand for a good faith hearing consistent with *Eason.*

¶ 23 If the circuit court ultimately concludes that the good faith exception to the exclusionary rule is inapplicable, the court must issue a suppression order with respect to the March 15 search. In that case, the court must also determine the facts surrounding the subsequent searches to determine if they were tainted by the initial unlawful search of Marquardt's residence and, if so, issue a suppression order consistent with its findings. *See State v. Durbin,* 170 Wis.2d 475, 486, 489 N.W.2d 655 (Ct.App.1992).

II. Marquardt's request for a *Franks* hearing

¶ 24 The circuit court denied Marquardt's request for a *Franks* hearing. A *Franks* hearing allows a defendant to contest the finding of probable cause to issue a search warrant in a hearing if he or she "makes a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in ***781** the warrant affidavit, and if the allegedly false statement is necessary to the finding of probable cause." *State v. Marshall,* 92 Wis.2d 101, 112, 284 N.W.2d 592 (1979) (citing *Franks v. Delaware,* 438 U.S. 154, 155-56, 98 S.Ct. 2674, 57 L.Ed.2d 667 (1978)). Marquardt in his briefs stated that this court need not consider his *Franks* hearing request if we conclude that the warrant lacks probable cause. ****196** Because we have concluded that there was insufficient probable cause to support the March 15 search warrant application, we will not address the *Franks* issue.

III. Warrantless search of Marquardt's vehicle

¶ 25 Marquardt seeks suppression of the evidence found in the vehicle seized from his home at the

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time of his arrest on two grounds: that it is "fruit of the poisonous tree" and that the vehicle was unlawfully seized and searched without a warrant. The circuit court will address the first ground if it determines that the good faith exception to the exclusionary rule does not apply to the March 15 search warrant. Resolution of the second ground requires us to consider the "automobile exception" to the warrant requirement of the Fourth Amendment of the United States Constitution and art. I, § 11, of the Wisconsin Constitution.

[14][15] ¶ 26 Warrantless searches of homes are "presumptively unreasonable," but searches of vehicles are not. *State v. Pallone,* 2000 WI 77, ¶ 59, 236 Wis.2d 162, 613 N.W.2d 568. During the last seventy-five years, the United States Supreme Court has recognized that the unique nature of automobiles sets them apart from other areas protected from warrantless searches under the Fourth Amendment. *Id.* This exception to the general rule requiring a warrant for searches and seizures is known as the automobile exception.

***782** A. Federal case law on the automobile exception

¶ 27 The elements required to satisfy the automobile exception have changed over time. In *Carroll v. United States,* 267 U.S. 132, 45 S.Ct. 280, 69 L.Ed. 543 (1925), the court held that three elements were required to satisfy the automobile exception to the warrant requirement: (1) a mobile vehicle; (2) probable cause to believe the vehicle contained evidence of a crime; and (3) impractibility of obtaining a search warrant. *See id.* at 153-60, 45 S.Ct. 280.

¶ 28 In *California v. Carney,* 471 U.S. 386, 388, 105 S.Ct. 2066, 85 L.Ed.2d 406 (1985), the court effectively eliminated the *Carroll* requirement of "impractibility to obtain a search warrant," explaining that the exigency inherent in the "ready mobility" of a vehicle, coupled with the "lesser expectation of privacy" in a readily mobile vehicle, excuses the need to secure a search warrant. *See Carney,* 471 U.S. at 390-91, 105 S.Ct. 2066.

¶ 29 If there was any doubt about the elimination of the impractibility requirement, it was resolved by *Pennsylvania v. Labron,* 518 U.S. 938, 116 S.Ct. 2485, 135 L.Ed.2d 1031 (1996) (per curiam). In *Labron,* the Court overturned the Pennsylvania Supreme Court's conclusion that warrantless searches of automobiles are limited to cases where unforeseen circumstances involving the search of an automobile are coupled with the presence of probable cause. *See id.* at 940, 116 S.Ct. 2485. The Court stated:

> Our first cases establishing the automobile exception to the Fourth Amendment's warrant requirement were based on the automobile's "ready mobility," an exigency sufficient to excuse failure to obtain a search warrant once probable cause to conduct the search is clear. .... More recent cases provide a further justification: the individual's reduced expectation of privacy in an automobile, ***783** owing to its pervasive regulation. .... If a car is readily mobile and probable cause exists to believe it contains contraband, the Fourth Amendment ****197** thus permits police to search the vehicle without more.
> *Id.*

¶ 30 The Supreme Court reiterated its conclusion three years later in *Maryland v. Dyson,* 527 U.S. 465, 119 S.Ct. 2013, 144 L.Ed.2d 442 (1999) (per curiam). The Court rejected the state court's conclusion that the automobile exception requires a separate finding of exigency in addition to a finding of probable cause. *Id.* at 467, 119 S.Ct. 2013. The Court explained:

> The Fourth Amendment generally requires police to secure a warrant before conducting a search. ... As we recognized nearly 75 years ago ... there is an exception to this requirement for searches of vehicles. And under our established precedent, the "automobile exception" has no separate exigency requirement. We made this clear in *United States v. Ross,* 456 U.S. 798, 809, 102 S.Ct. 2157, 72 L.Ed.2d 572 ... (1982), when we said that in cases where there was probable cause to search a vehicle "a search is not unreasonable if based on facts that would justify the issuance of a warrant, *even though a warrant has not been actually obtained.*" (Emphasis added.).... [In *Labron*], we repeated that the automobile exception does not have a separate exigency requirement: "If a car is readily mobile and probable cause exists to believe it contains contraband, the Fourth Amendment .... permits police to search the vehicle without more."
> *Id.*

[16] ¶ 31 Thus, under current federal law, the

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warrantless search of a vehicle does not offend the Fourth Amendment if (1) there is probable cause to search the vehicle; and (2) the vehicle is readily mobile. *See id.* ***784** Issues concerning whether the police could have obtained a warrant prior to searching are not relevant to the analysis. *See id.;* 3 WAYNE R. LAFAVE, SEARCH AND SEIZURE § 7.2(b) (3d ed.1996) (courts uphold warrantless searches with virtually no inquiry into the facts of the particular case, reasoning that whether any kind of exigent circumstances claim could plausibly be put forward is totally irrelevant).

B. Wisconsin case law on the automobile exception

[17] ¶ 32 Wisconsin's Constitution also protects Wisconsin's citizens from unreasonable searches and seizures. *See* WIS. CONST. art. I, § 11. Although the United States Supreme Court sets the minimal constitutional standards applicable to the states through the Fourteenth Amendment, Wisconsin's Supreme Court is free to interpret our constitution in a manner that affords greater protections. *State v. Tompkins,* 144 Wis.2d 116, 132, 423 N.W.2d 823 (1988). However, *Tompkins* added,

> where the language of the state constitutional provision at issue is virtually identical with that of its federal counterpart, as here, we have traditionally interpreted our constitution consistent with the protections of the federal constitution as interpreted by the United States Supreme Court. This is particularly true of this court's interpretation of the Wisconsin search and seizure provision.

Id. at 133, 423 N.W.2d 823.

C. Application of the automobile exception

¶ 33 Applying these principles to the instant case, we must consider (1) whether there was probable ***785** cause to search Marquardt's vehicle; and (2) whether the vehicle was readily mobile. *See Dyson,* 527 U.S. at 467, 119 S.Ct. 2013. We conclude: (1) that there was probable cause to search the vehicle because Marquardt has ****198** not contested that issue; and (2) that the vehicle was readily mobile. Therefore, the automobile exception applies. We also reject Marquardt's two additional challenges to the automobile exception: that the exception applies only to vehicles in public places and that the court should consider the ease with which the officers could have obtained a search warrant in applying the automobile exception.

1. Probable cause

[18] ¶ 34 Marquardt filed numerous motions to suppress evidence. After the first of two hearings on his motions, the State requested additional time to investigate and present evidence, explaining that the State had not realized that Marquardt was challenging the search of the vehicle on warrantless search grounds as well as "fruit of the poisonous tree" grounds. Marquardt's counsel agreed to continue the hearing.

¶ 35 Prior to the continued motion hearing, the State filed a brief urging the circuit court to deny Marquardt's motion to suppress, arguing that the warrantless search of the vehicle was constitutional under the automobile exception. With respect to probable cause, the State noted: "The defendant's entire argument for the suppression of the evidence seized from the [vehicle] centered on the failure of the police to obtain a search warrant. Implicit in this argument is a concession that the officers had probable cause sufficient to obtain a search warrant."

***786** ¶ 36 Marquardt did not file a written response, choosing instead to present his arguments orally after the remaining testimony was taken. We have reviewed the transcript and agree with the State that Marquardt did not challenge the State's assumption that there was probable cause to search the vehicle. Instead, Marquardt contested whether the car's location on a private driveway, as opposed to on public property, satisfied the automobile exception.

¶ 37 Marquardt's apparent concession of the probable cause issue was reflected in the circuit court's written decision, in which the court simply stated that there was probable cause to search the vehicle and concentrated on the single issue raised at the motion hearing: whether there is a "public place" requirement in the automobile exception.

¶ 38 On appeal, Marquardt in his opening brief did not challenge whether there was probable cause to search his vehicle. The State identified this omission in its brief, and also explained why such an argument would lack merit. In his reply brief,

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Marquardt does not directly respond to the State's assertion that he failed to challenge probable cause, although he notes in a single paragraph:

> The officers did not state that they had probable cause to search the vehicle. In fact, Investigator Price stated that he did not know "that there was anything visible from the exterior of the vehicle that would be classified as contraband" and that there was "suspect information" visible from the exterior of the vehicle. However, he testified that "we were able to see a material on the door, but we had no idea what it was." There was no testimony that any officer even saw the stain until Bill Marquardt's car was transported to the Eau County Sheriff's Department and it was not until the car was ***787** sent to the State Crime Lab in Madison that the stain was determined to be blood. The vehicle[']s prospective value remained uncertain until after the interior[ ][was] thoroughly searched and examined.

¶ 39 Based on the record and the briefs, we conclude that to the extent Marquardt attempts to contest probable cause for the ****199** first time in his reply brief, he is too late. *See Swartwout v. Bilsie,* 100 Wis.2d 342, 346 n. 2, 302 N.W.2d 508 (Ct.App.1981) (Ordinarily, we do not consider arguments raised for the first time in a reply brief.). Not only was the issue not raised in Marquardt's opening brief, it was not raised at the circuit court. Accordingly, we decline to address it. *See Apex Elecs. Corp. v. Gee,* 217 Wis.2d 378, 384, 577 N.W.2d 23 (1998) (The oft-repeated rule of Wisconsin appellate practice is that issues not raised in the circuit court generally will not be considered for the first time on appeal.). We therefore conclude that the probable cause prong of the automobile exception has been satisfied.

2. "Readily mobile" vehicle

[19] ¶ 40 It is undisputed that Marquardt's vehicle was in working order on the day he was arrested. Indeed, an officer testified that law enforcement on March 18 proceeded to Marquardt's home to execute the arrest warrant shortly after a neighbor notified them that he saw Marquardt's car pull into the driveway. However, Marquardt argues that once he was arrested, the vehicle was no longer readily mobile.

[20] ¶ 41 We decline to address this argument in detail because Marquardt did not raise this issue at the trial court and has provided us with no authority for his argument. *See id.* at 384, 577 N.W.2d 23; *State v. Shaffer,* 96 Wis.2d ***788** 531, 545-46, 292 N.W.2d 370 (Ct.App.1980) (we need not consider arguments unsupported by citations to authority). However, we note that our brief survey of the applicable case law assures us that the argument lacks merit.

¶ 42 In *United States v. Gallman,* 907 F.2d 639, 641 (7th Cir.1990), the court addressed the same argument from a defendant who contended that his car was not readily mobile because he had been arrested and the officers had his car key. The court rejected Gallman's reasoning, concluding: "These circumstances do indeed make the car less accessible to Gallman, but they do not make it less mobile." *Id.* This reasoning is equally persuasive here; Marquardt's arrest would not prevent other unknown individuals from moving the vehicle.

[21] ¶ 43 Additionally, we are not concerned by the fact that the car was seized and impounded before it was searched. The Supreme Court has held that the justification to conduct a warrantless search does not vanish once the car has been immobilized. *See United States v. Johns,* 469 U.S. 478, 484, 105 S.Ct. 881, 83 L.Ed.2d 890 (1985). In short, we are confident that the readily mobile component of the automobile exception has been satisfied.

3. Rejection of additional arguments

¶ 44 Marquardt challenges the application of the automobile exception on two additional grounds: that the exception applies only to vehicles in public places and that the court should consider the ease with which the officers could have obtained a search warrant. We reject these arguments.

[22] ***789** ¶ 45 We first consider Marquardt's contention that the automobile exception is inapplicable because his vehicle was parked in his private driveway at the time it was seized. He argues that the Wisconsin Constitution limits the application of the automobile exception to vehicles found in public places. His argument is based on several Wisconsin Supreme Court cases, beginning with *Tompkins,* 144 Wis.2d at 128-29, 423 N.W.2d 823.

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¶ 46 The *Tompkins* court discussed the applicability of the automobile exception. **200 *Tompkins* included the following quotation from *Carney:*

> When a vehicle is being used on the highways, or if it is readily capable of such use and is found stationary in a place not regularly used for residential purpose--temporary or otherwise--the two justifications for the vehicle exception come into play. First, the vehicle is obviously readily mobile by the turn of an ignition key, if not actually moving. Second, there is a reduced expectation of privacy stemming from its use as a licensed motor vehicle subject to a range of police regulation inapplicable to a fixed dwelling.

Tompkins, 144 Wis.2d at 128-29, 423 N.W.2d 823 (quoting *Carney,* 471 U.S. at 392-93, 105 S.Ct. 2066). Marquardt seizes on the phrase "found stationary in a place not regularly used for residential purposes" in support of his argument that the automobile exception is inapplicable to him.

¶ 47 In subsequent cases, the court cited *Tompkins* for the proposition that "A warrantless search of an automobile is justified when the police have probable cause to believe that an automobile, found in a public place, contains evidence of a crime; no showing of exigent circumstances is required." *See State v. Weber,* 163 Wis.2d 116, 137, 471 N.W.2d 187 (1991). This same phrase was repeated in *State v. Caban,* 210 Wis.2d 597, *790 607, 563 N.W.2d 501 (1997), and *State v. Secrist,* 224 Wis.2d 201, 210, 589 N.W.2d 387 (1999).

¶ 48 Despite the "public place" language that appears in these cases, we conclude that the automobile exception is nonetheless applicable to Marquardt. The genesis of the language was *Carney,* which involved the search of a fully mobile motor home located in a public place. *See Carney,* 471 U.S. at 387, 105 S.Ct. 2066. United States Supreme Court cases subsequent to *Carney* have not recognized a public place requirement for the automobile exception. *See, e.g., Dyson,* 527 U.S. at 467, 119 S.Ct. 2013. Thus, to the extent that *Carney* ever intended to impose a public place requirement, it is no longer applicable.

[23] ¶ 49 Marquardt does not argue that federal law imposes a public place requirement. Instead, he essentially contends that Wisconsin, interpreting its own constitution, has chosen to provide greater protection under its own constitution. We disagree. No Wisconsin Supreme Court case has expressly indicated that Wisconsin provides greater protection under the automobile exception. In fact, the court recently restated its commitment to interpreting art. I, § 11, of the Wisconsin Constitution consistently with the Fourth Amendment. *See Eason,* 2000 WI 98 at ¶ 37, 42. [FN5] Any interpretation *791 requiring that the vehicle be in a public place would be inconsistent with this commitment. Absent an explicit indication that our supreme court is interpreting art. I, § 11, of the Wisconsin Constitution differently than the Fourth Amendment, we will assume **201 that Wisconsin will continue to follow federal precedent concerning the automobile exception.

FN5. We recognize that in *State v. Eason,* 245 Wis.2d 206, 629 N.W.2d 625, 2001 WI 98, ¶ 74, the court restated this commitment in support of its decision to adopt the good faith exception established in *United States v. Leon,* 468 U.S. 897, 918-20, 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984), but then actually concluded that art. I, § 11, of the Wisconsin Constitution provides "more protection than the Fourth Amendment provides under the good faith exception as adopted in *Leon.*" *See Eason,* 245 Wis.2d 206, 629 N.W.2d 625, 2001 WI 98 at ¶ 60. This only reinforces our conclusion that our supreme court will generally interpret art. I, § 11 consistent with the Fourth Amendment, but may elect to recognize greater protection under the Wisconsin Constitution. When the court has done so, as in *Eason,* such a conclusion has been explicit. *See id.*

¶ 50 Finally, we address Marquardt's argument that the police should have obtained a warrant because "[t]here was no danger of the car or any evidence of any crime that may have existed in the car being driven away and destroyed." Marquardt cites *Coolidge v. New Hampshire,* 403 U.S. 443, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971), where the court rejected application of the automobile exception under similar facts. In *Coolidge,* the defendant was arrested at his home and his two cars were towed to the police station and searched without a warrant, turning up incriminating evidence. *Id.* at 447- 48, 91 S.Ct. 2022.

¶ 51 The Court noted that because the defendant's cars were parked in a private driveway rather than stopped on a public highway, the opportunity to search was not so "fleeting" as to make a warrant

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application impracticable. *Id.* at 460, 91 S.Ct. 2022. Summarizing its discussion rejecting application of the automobile exception, the Court stated, "Here there was probable cause, but no exigent circumstances justified the police in proceeding without a warrant." *Id.* at 464, 91 S.Ct. 2022.

[24] ¶ 52 We conclude that while *Coolidge's* discussion of impractibility may have been relevant in 1971, it ceased to be relevant after *Carney* effectively eliminated ***792** the *Carroll* requirement of "impractibility to obtain a search warrant" in 1985. *See Carney,* 471 U.S. at 390-91, 105 S.Ct. 2066. The fact that the officers in this case could have secured a warrant, either before towing the vehicle or before searching it at the police station, does not render the automobile exception inapplicable. *See Johns,* 469 U.S. at 484, 105 S.Ct. 881 (the justification to conduct a warrantless search does not vanish once the car has been immobilized.). Accordingly, we reject Marquardt's attempt to reintroduce an impractibility requirement to the automobile exception.

CONCLUSION

¶ 53 We conclude there was insufficient probable cause to justify the search warrant for Marquardt's home. Therefore, we reverse that portion of the court's order and remand for a determination, consistent with *Eason,* 245 Wis.2d 206, 629 N.W.2d 625, 2001 WI 98, of whether the good faith exception to the exclusionary rule applies in this case. In light of our first conclusion, we do not address Marquardt's request for a *Franks* hearing. Finally, we conclude that the automobile exception applies to the warrantless search of Marquardt's vehicle and, therefore, affirm that portion of the court's order denying suppression of evidence from Marquardt's vehicle on warrantless search grounds.

Order affirmed in part; reversed in part, and cause remanded for further proceedings.

635 N.W.2d 188, 247 Wis.2d 765, 2001 WI App 219

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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.04-1609-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

BILL P. MARQUARDT,

Defendant-Appellant.

ON APPEAL FROM A JUDGMENT OF CONVICTION,
SENTENCE AND ORDER DENYING POSTCONVICTION RELIEF
ENTERED IN THE CIRCUIT COURT FOR EAU CLAIRE COUNTY,
THE HONORABLE ERIC J. WAHL, PRESIDING

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

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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.04-1609-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

BILL P. MARQUARDT,

Defendant-Appellant.

ON APPEAL FROM A JUDGMENT OF CONVICTION, SENTENCE AND ORDER DENYING POSTCONVICTION RELIEF ENTERED IN THE CIRCUIT COURT FOR EAU CLAIRE COUNTY, THE HONORABLE ERIC J. WAHL, PRESIDING

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

ISSUES PRESENTED

1. DID THE TRIAL COURT ERR IN FAILING TO APPLY THE "OBJECTIVELY REASONABLE RELIANCE" STANDARD OF ***UNITED STATES V. LEON*** IN FINDING A GOOD FAITH EXCEPTION TO ADMIT EVIDENCE SEIZED IN THE MARCH 15TH SEARCH?

The trial court answered: No.

2. DID THE TRIAL COURT MISAPPLY THE ***STATE V. EASON*** NOTION OF "SIGNIFICANT INVESTIGATION" TO FIND THAT THE OFFICERS ACTED IN GOOD FAITH?

The trial court answered: No.

3. DID THE COURT VIOLATE MARQUARDT'S RIGHT TO SELF-REPRESENTATION?

The trial court answered: No.

4. DID INVESTIGATOR PRICE'S TESTIMONY THAT MARQUARDT NEVER MENTIONED LILLie MURPHY OR MISSING ANIMALS VIOLATE MARQUARDT'S RIGHT TO SILENCE?

The trial court answered: No.

5. DID THE TRIAL COURT VIOLATE MARQUARDT'S RIGHT TO PUT ON A DEFENSE WHEN IT DID NOT ALLOW SUSAN WESTERBY TO TESTIFY THAT SHE SAW A CAR SPEED AWAY FROM MARQUARDT'S PARENT'S HOUSE ON MARCH 13, 2000?

The trial court answered: No.

6. WAS EVIDENCE ABOUT MARQUARDT'S BIZARRE BEHAVIOR ADMITTED IN VIOLATION OF S. 904.04(1) STATS., WHERE IT WAS OFFERED TO SUPPORT THE STATE'S CLAIM THAT MARQUARDT COMMITTED IRRATIONAL CRIMES?

The trial court answered: No.

7. WAS MARQUARDT DENIED EFFECTIVE ASSISTANCE OF COUNSEL?

The trial court answered: No.

POSITION ON ORAL ARGUMENT AND PUBLICATION

The defendant-appellant does not request oral argument.

Publication may be indicated because this case deals with several unsettled issues, including the following: the meaning of "objective good faith reliance" under ***United States v. Leon;*** the meaning of "significant investigation" under ***State v. Eason;*** the right of a competent defendant to represent himself at trial; the applicability of s. 904.04(1), Stats.,to exclude evidence of defendant's

bizarre behavior where offered to support state's claim that the defendant committed irrational crimes.

STATEMENT OF CASE

The state filed a complaint on March 17, 2000, charging Bill P. Marquardt with one count of cruelty to animals.(1)

After, Marquardt was bound over for trial, the state filed an information charging Marquardt with six counts of cruelty to animals and one charge of felon in possession of a firearm.(78:24)(2) Marquardt pled not guilty to all counts.(79:2).

Subsequently, the state amended the information to add another count of cruelty to animals, another count of possession of a firearm by a convicted felon, and one count of aggravated burglary. (3).

Marquardt pled not guilty and not guilty by reason of mental disease or defect to all charges.(83:4, 19, 20).

A three day jury trial was held January 28, 29, and 30, 2003. Marquardt was found guilty on all counts.(91,92,93,49) The state conceded the issue of responsibility and the count found Marquardt not guilty by reason of mental disease or defect.(89:10;94:6;95:2).

On April 7, 2004, the trial court ordered Mr. Marquardt to be committed to the Department of Health and Family Services for institutional care for 75 years.(54). On the

same day, Marquardt filed a notice of intent to pursue postconviction relief.(55).

Marquardt filed a postconviction motion(66). Following a hearing the trial court denied postconviction relief on June 11, 2004.(72).

Marquardt filed a timely notice of appeal on June 18, 2004.(74).

FACTS

On March 15, 2000, following the discovery of the body of Bill Marquardt's mother in her Chippewa County home, Sergeant John Volger of the Eau Claire County Sheriff Department requested a warrant to search Marquardt's cabin in Fairchild, Wisconsin.(84:21-22,23). The affidavit in support of the warrant asserted,

> Investigator Price reports that after finding the body of Mary J. Marquardt, he spoke with her husband, Alfred E. Marquardt. Mr. Marquardt informed him that he and Mary have a son, Bill Marquardt, who, since the location of Ms. Marquardt's body had not been seen or heard from. Alfred Marquardt further informed Investigator Price that Bill Marquardt owned with Alfred Marquardt a cabin in which Bill resided at E27505 County Highway M, Town of Fairchild, County of Eau Claire, Wisconsin.

(69: Ex 1; 23 Ex 2).

Eau Claire County Judge, the Honorable Benjamin Proctor, signed the warrant and later the same day, the warrant was executed by Eau Claire County Sheriff's

deputies. Deputies found a black plastic tarp with what appeared to be blood on it and a twenty-two caliber casing in storage shed (91:77); a gun case for a nine millimeter handgun and three deceased dogs stacked in the hole of outhouse(Id: 78-79); three deceased rabbits on south side about 25 yards from the cabin in the brush (Id:80); receipts and bills of sale from Pet Parade, a set of directions to get from Augusta to Eau Claire Humane Society and a dog manual all on counter top in the cabin kitchen.(Id: 91-82). Apparently, a twenty-two gage rifle was also found in the cabin.[1]

Two days later, Eau Claire County issued an arrest warrant and complaint charging Marquardt with one count of cruelty to animals.(1)

On March 18, 2000, Marquardt was arrested at his cabin and taken to the Eau Claire County Jail, where, following ***Miranda*** warnings, he was briefly questioned by Chippewa County Investigator Richard Price and DCI Special Agent John Rehrauer.(90:15).

Meanwhile, deputies performed another search of the cabin. The second search turned up a box of twenty-two

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Although, Evidence Officer Marc Christopher did not testify about the date on which the twenty-two was found, it appears to be undisputed that it was found on March 15th.(91: 58; 70; 92:211; 93:02

caliber ammunition with 11 bullets missing in the bedroom and a nine millimeter round on kitchen floor.(91:82-84).

While Marquardt was still in custody, deputies performed a third search of the cabin on March 29th.(91:95). During that search, the officers found a nine millimeter handgun and two boxes of nine millimeter bullets in the cabin under the refrigerator. (91: 84,96).

Shortly after he was charged in this case, Marquardt was charged with first-degree intentional homicide in Chippewa County(80:2). Competence became an issue in that case.(Id). The parties agreed to take no further action in this case until the competence issue was settled.(80:4).

On March 11, 2002, following an evaluation and a hearing, the Honorable Eric Wahl found Marquardt competent to stand trial in this case.(81:7).

On March 25, 2002, the state filed another amended information adding another charge of cruelty to animals, another felon in possession of a weapon and an aggravated burglary.(3). Those charge arose out of an incident that happened at the Anderson house on March 9, 2000. On that day, the Andersons, neighbors of Marquardt, returned home to find their house broken into and their dog dead from gunshot wounds.(91:103-105,108,112).

On August 21, 2001, this court had issued a decision in ***State v. Bill Paul Marquardt,*** 2001 WI APP 219, 247 Wis 2d 765, 635 N.W. 2d 188, an interlocutory appeal in the Chippewa County case, holding that there had been no probable cause for a search warrant issued on March 15, 2000, to search Marquardt's cabin and remanding to the trial court to determine whether the officers acted in good faith in searching the cabin.

On April 4, 2002, Marquardt moved to suppress evidence seized as a result of the March 15th search on the grounds that in searching his cabin the officers did not act in good faith. (17). Since the search of the cabin turned up the evidence upon which these charges were based, the parties agreed that the court of appeals decision was applicable in this case.(84:4). At the motion hearing, defense counsel agreed that

> ...the issue is controlled by ***State v. Eason*** and the two factual issues are whether the investigators engaged in a significant investigation before applying for, receiving and executing the warrant and whether the search warrant application was reviewed either by a law enforcement officer knowledgeable about the requirement of probable cause or by a government attorney.

(84: 4) .

On April 26, 2002, the trial court held that because a high number of investigators from multiple jurisdictions

tried to solve the homicide over an almost 48 hour period of time there had been a significant investigation.(84:72-73). The court also held that there had been enough information for probable cause although it had not all been included in the affidavit.(85:75) Thus the court denied Marquardt's suppression motion. (84: 75).

On November 11, 2002, Marquardt moved to represent himself at trial.(88:3). The court denied the motion.(88:18-19).

At the trial, the state presented evidence that guns, several dead animals and receipts for purchasing the animals were found during searches of Marquardt's cabin and outbuildings.(91:77-84;). The state also presented testimony about Marquardt's purchase of several of the animals from local pet stores and that after his arrest he asked officers "is this about the dog thing."(91:122-126,134,161-169, 214:92:127, 128-129). Further, the state presented evidence that 9 mm shell casings found at the Anderson house, were fired from the gun found under Marquardt's refrigerator during the March 29th search of his cabin.(92:89-90).

In anticipation of Marquardt's testimony, Investigator Price testified that following his arrest, Marquardt never mentioned anything about a break-in to his cabin or animals being missing from his home.(92:129). Price also claimed he

had never heard anything about Lillie Murphy prior to trial.(Id: 130).

Marquardt testified that he had departed for Florida on March 12th.(93:10). He left the animals with his girlfriend, Lillie Murphy.(93:22). When he returned from Florida in the early morning of March 18th, he found his front door was broken off its hinges and Lillie and the animals were missing.(93:27-28). He also testified that he had seen the twenty-two rifle at his parents house on March 12th , before he left for Florida.(93:19-21).

One theory of Marquardt's defense was that someone took the rifle from his parents house, killed the animals and left the gun at his cabin.(91:70). To support that contention he attempted to present evidence that Susan Westerby saw someone speed out of the driveway of Alfred Marquardt's house on March 13th. Because the state had agreed not to present evidence that Marquardt was charged with the murder of his mother on that day, the court would not allow Westerby to say that she observed the truck on March 13th.(92:48-54).

Another defense theory was that, the 9 mm handgun and bullets found by police during the third search, were planted there while Marquardt was in jail.(91:70-71). To support that theory, Marquardt presented evidence that after

the second search, the cabin was left open.(91:98; 92:61-65).

In his postconviction motion, Marquardt alleged that evidence seized in the second and third search, and as a result of his arrest, where fruits of the poisonous tree of the first search.(66:2-3). However, the trial court ruled that it would not consider those issues unless this court held that the first search was improper.(96:33). Marquardt, therefore does not argue those issues at this time.

Additional facts relevant facts are presented in the argument below.

ARGUMENT

I. THE TRIAL COURT ERRED IN FAILING TO APPLY THE "OBJECTIVELY REASONABLE RELIANCE" STANDARD OF *UNITED STATES V LEON* IN FINDING A GOOD FAITH EXCEPTION TO ADMIT EVIDENCE SEIZED IN THE MARCH 15TH SEARCH.

Based upon the United States Supreme Court decision in ***United States v. Leon***, 468 U.S. 897(1984), ***State v. Eason***, 2001 WI 98,¶ 27,245 Wis.2d 206, 266, 629 N.W.2d 625, holds that "where police officers **act in objectively reasonable reliance** upon the warrant which had been issued by a detached and neutral magistrate", a good faith exception to the exclusionary rule applies.

STANDARD OF REVIEW

The State bears the burden of establishing "good faith" reliance on a search warrant. See ***Leon***, 468 U.S. at 924. Whether that burden has been met in a particular case typically is treated as a question of law, or constitutional fact, subject to *de novo* review. See e.g., ***United States v. Koerth***, 312 F.3d 862, 865 (7th Cir. 2002) cert denied, 123 S. Ct 1947(2003).

OBJECTIVE GOOD FAITH

To understand the "Good Faith" exception, it is necessary to understand the concept of "Objective Good Faith" as defined by the U.S. Supreme Court. To do this, it is necessary to analyze the facts of ***Leon***, as well as, its holding.

Leon involved an extensive drug investigation which focused on three suspects. The investigation initiated as a result of a tip from a confidential informant of unknown reliability. The investigation provided the officers with information that the suspects may have been involved in dealing drugs in the past. Follow-up police surveillance provided observations of several individuals leaving the suspects' residences with small packages. At least one such

person was known to have a drug record. Two of the suspects flew separately from Los Angeles to Miami and were observed flying back from Miami to Los Angeles together. Other suspicious activity was observed at the suspects' residences as well as with their vehicles. ***Leon***, 468 US at 901-02. Based upon the above facts provided within an affidavit, search warrants were issued.

Both the district court and the court of appeals found no probable cause to support the warrants.

The Supreme Court accepted the Court of Appeals' conclusion that there was no probable cause based upon the facts in the affidavit. However, the court held that where the officers show objective good faith in relying on the warrant, suppression should not apply. ***Leon***, 468 U.S. at 919.

The court held that the objective standard requires officers to have a reasonable knowledge of what the law prohibits. Id. at 919 nt 20. Subjective good faith is not enough; officers must act with an objective reasonableness. Id. at 915 nt 13. The officer cannot reasonably rely upon a warrant based upon a deliberately or recklessly false affidavit, or, a bare bones affidavit that she or he reasonably knows could not support probable cause or

reasonable suspicion. Id. at 923. Officers must have reasonable grounds for believing that the warrant was properly issued. Id. at 923.

The ***Leon*** Court pointed out four situations where the good faith exception will not apply,

> (1)"... the magistrate or judge in issuing a warrant was misled by information in an affidavit that the affiant knew was false or would have known was false except for his reckless disregard of the truth....";
>
> (2)"the issuing magistrate wholly abandoned his judicial role... in such circumstances, no reasonably well trained officer should rely on the warrant";
>
> (3) the warrant is "based on an affidavit so lacking in indicia of probable cause as to render the official belief in it existence entirely unreasonable"
>
> (4) the warrant is "so facially deficient - i. e., in failing to particularize the place to be searched or the things to be seized - that the executing officers cannot reasonably presume it to be valid."

Leon, 468 U.S. at 923.

In applying the good faith exception to their case, the ***Leon*** Court found the warrant was supported by much more than a "bare bones" affidavit. Id at 926. The affidavit related the results of an extensive investigation focused on the three defendants. Id at 926 It appeared that the affidavit would have supported probable cause "but for" stale information of the suspects prior criminal activity and the

informant's untested in reliability. Id at 904-905. The Court found that a police officer might reasonably conclude that the warrant was constitutionally sound. Id at 926. As such, the officers relied in objective good faith when they executed the search warrants.

Good Faith Exception in Wisconsin

The Wisconsin Supreme court was urged to apply the ***Leon*** good faith exception in ***State v. Brady***, 130 Wis.2d 443, 388 N.W.2d 151 (1986). ***Brady*** involved a material witness warrant issued in a John Doe proceeding. Because the Court found the affidavit in ***Brady*** to be devoid of any facts to support probable cause for the warrant, the court declined to apply the good faith exception.

> We conclude that this case is not a proper vehicle for deciding whether to adopt a good-faith exception to the exclusionary rule. In ***Leon*** the Supreme Court expressly acknowledged that an officer would not "manifest objective good faith in relying on a warrant based on an affidavit 'so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable.'The fourth amendment requires that the affidavit upon which the warrant was based had to contain sufficient facts to support a finding of probable cause regarding the impracticability of securing Brady's presence through a subpoena. Because the affidavit lacked indicia of probable cause regarding the impracticability of securing Brady's presence through a subpoena, this case does not present a question of "good faith." Therefore, ***Leon*** is not implicated. Accordingly, we do not decide whether to adopt a good-faith

> exception to the exclusionary rule in Wisconsin. We hold that the circuit court acted properly in suppressing the evidence discovered as a result of the illegal arrest of Brady.

Brady, 130 Wis.2d 453-454(Quotes and cites omitted.)

In other words, our Supreme Court made it clear that where no probable cause exists, as opposed to insufficient probable cause - as in ***Leon*** - police officers would not be deemed to have acted in objective good faith.

In ***State v. Eason***, 2001 WI 98, 245 Wis.2d 206, 629 N.W.2d 625, the Wisconsin Supreme Court applied the good faith exception in a case involving a no-knock search warrant. It was undisputed that probable cause existed for the search warrant. Eason attacked only the authorization for a no-knock entry, arguing that the affidavit supporting the warrant failed to allege any specific information that anyone in the apartment possessed weapons, or would destroy evidence, if the officers knocked and announced their presence. Id. 2001 WI at ¶ 10.

The court of appeals affirmed the trial court's suppression order and rejected the State's argument that arrests listed in the affidavit reflected the apartment occupants' willingness to use violence.

> There is no information as to when and where those arrests took place, or whether they involved any violent acts--and, again, whether a conviction followed. The affidavit doesn't assert that either Bentley or Shannon Eason-- or any of the other occupants of the apartment--were armed; it merely offers a general statement that drug-related crimes often involve weapons.

Eason, 2001 WI 98 ¶8.

The Supreme Court affirmed the finding of no reasonable suspicion to believe a no-knock search was necessary. ***Eason***, 2001 WI 98 ¶ 26. However, the Court found objective good faith, because the affidavit documented a significant investigation by law enforcement of the two suspects, and the suspects' lengthy arrest record for violence. ***Eason***, 2001 WI 98 ¶ 70.

By recognizing a good faith exception, ***Eason*** mandated additional factors to those already required by ***Leon***.

> Accordingly, we require that in order for the good faith exception to apply, the State must show that the process used attendant to obtaining the search warrant included a significant investigation and a review by a police officer trained in, or very knowledgeable of, the legal vagaries of probable cause and reasonable suspicion, or a knowledgeable government attorney. While this process was followed in ***Leon***, the United States Supreme Court did not specifically hold that the Fourth Amendment required a significant investigation and review of the warrant application in order for the good faith exception to apply. However, we hold that Article I, Section 11 of the Wisconsin Constitution

> requires this process and thus affords ***additional*** protection than that which is afforded by the Fourth Amendment. Indeed, in some instances, "the Wisconsin Constitution may afford greater protection than the United States Constitution."

Eason, 2001 WI 98 ¶63. (Emphasis added)(Cites omitted)

To be clear, ***Eason*** requires both a ***Leon*** analysis as well as an analysis of the two additional factors mandated by ***Eason***. The ***Eason*** Court first considered the ***Leon*** requirements before it analyzed the two additional ***Eason*** factors.

> Officer Fahrney and his colleagues relied with objective reasonableness upon the no-knock search warrant. There have been no allegations that Officer Fahrney and the officers with him executed the warrant in any manner other than according to the terms of that warrant. There have been no allegations that the warrant was so facially deficient that a reasonable, well-trained officer would not have relied upon it. Indeed, there are no contentions that there are technical or other glaring deficiencies with the warrant. The affidavit is not sketchy or bare-boned. It is deficient only insofar as it fails to provide sufficiently particularized evidence to show that an announced entry would be dangerous or result in the destruction of evidence.
>
> Eason's contention is that the officers could not have reasonably relied upon the no-knock warrant because the affidavit was " so lacking in indicia of probable cause [or reasonable suspicion] as to render official belief in its existence entirely unreasonable." It could hardly be found that there was no indicia of reasonable suspicion to support a no-knock warrant. These are not the circumstances that faced this court in ***Brady***, where there were no facts alleged to

support the material witness arrest warrant. Here, there were facts alleged to support the no-knock warrant; just not sufficiently particularized facts.

Nonetheless, it is the magistrate's responsibility, not the officer's, to determine whether the officer's allegations sufficiently establish reasonable suspicion. "In the ordinary case, an officer cannot be expected to question the magistrate's probable-cause determination or his [or her] judgment that the form of the warrant is technically sufficient. '[O]nce the warrant issues, there is literally nothing more the policeman can do in seeking to comply with the law.'

There also have been no allegations that the magistrate here, the Rock County Court Commissioner, Stephen D. Meyer, abandoned his neutral and independent role. "In the absence of an allegation that the magistrate abandoned his [or her] detached and neutral role, suppression is appropriate only if the officers were dishonest or reckless in preparing their affidavit or could not have harbored an objectively reasonable belief in the existence of probable cause." However, there have been no allegations that Officer Fahrney, who provided the underlying affidavit, knew that the statements therein were false, or that he was reckless in the preparation of the affidavit, or that he did not have an objective belief in the information presented. Accordingly, suppression would be inappropriate here.

Moreover, the additional process we adopt today of ensuring that the warrant was obtained after a significant investigation and review by a knowledgeable police officer or government attorney certainly appears to have been followed.

Eason, 2001 WI 98 ¶66-70. (Emphasis added).(Cites omitted).

The trial court did not consider the *Leon* Factors

In this ***Marquardt*** case, the trial court did not consider the ***Leon*** "good faith" factors; the parties mistakenly agreed that the only two factual issues to determine were the two listed in ***Eason***.

> So then the issue becomes as the Court of Appeals noted in the homicide appeal was there a good faith exception to the warrant requirement? And as Mr. Wright notes in his motion and supporting affidavit the issue is controlled by ***State v. Eason*** and *the two factual issues are whether the investigators engaged in a significant investigation before applying for, receiving and executing the warrant and whether the search warrant application was reviewed either by a law enforcement officer knowledgeable about the requirement of probable cause or by a government attorney.*

(84: 4) (Emphasis Added)

In fact, the transcript makes it clear that court's decision was a result of an analysis of the ***Eason*** factors without considering the ***Leon*** requirements. It is clear that court used a subjective good faith analysis, not the objective good faith requirement of ***Leon***. The decision considered facts not included within the affidavit. (84: 73-76). It appears that testimony about this additional information was received to bolster a subjective good faith. The testimony is completely irrelevant to the ***Leon*** objective probable cause analysis.

Other than the court's finding that no one alleged that Judge Proctor was "anything but a detached magistrate" (84:74), the good faith hearing transcript is devoid of any ***Leon*** analysis. Had court first analyzed the case using the ***Leon*** factors, the court would have considered whether (1)the issuing magistrate has been knowingly misled; (2) the issuing magistrate wholly abandoned his or her judicial role; (3)the application is so lacking in indicia of probable cause as to render reliance upon it unreasonable; and (4)the warrant is so facially deficient that reliance upon it is unreasonable.

However, since defense counsel agreed with the prosecutor that only the two additional ***Eason*** factors were the test in determining good faith, no evidence or argument was received regarding the first ***Leon*** factor - whether the officers misled the issuing magistrate. Nor was the third factor above analyzed- whether the application lacked indicia of probable cause. Had these factors had been considered, the court's ruling would necessarily have been for suppression of the evidence.

The Test for Determining Indicia of Probable Cause.

An objective good faith analysis regarding whether the officers relied on an affidavit so lacking in indicia of

probable cause as to render official belief in its existence entirely unreasonable must be based upon the four walls of the affidavit. The State cannot supplement the record as it did in this case with facts not included in the affidavit and then ask the Court to find whether some "Subjective Good Faith" exists. This is clearly condemned in both ***Leon*** and ***Eason***.

> If subjective good faith alone were the test, the protections of the Fourth Amendment would evaporate, and the people would be 'secure in their persons, houses, papers, and effects,' only in the discretion of the police.
>
> ***Leon***, 468 U.S. at 915 Ft. Nt. 13.
>
> * * *
>
> We emphasize that the standard of reasonableness we adopt is an objective one. Many objections to a good faith exception assume that the exception will turn on the subjective good faith of individual officers. "Grounding the modification in objective reasonableness, however, retains the value of the exclusionary rule as an incentive for the law enforcement profession as a whole to conduct themselves in accord with the Fourth Amendment."
>
> Id. at 919 Ft. Nt. 20.
>
> * * *
>
> (T)he officer's reliance on the magistrates probable-cause determination and on the technical sufficiency of the warrant he issues must be objectively reasonable, and it is clear that in some circumstances the officer will have no reasonable grounds for believing that the warrant was properly issued.
>
> Id.. at 922-23.

U.S. v. Koerth, 312 F.3d 862, (7th Cir. 2002) specifically held that the in determining whether officers acted in good faith in relying upon a warrant that does not support probable cause the court is limited to reviewing the information presented to the magistrate who issued the warrant.

> As a final matter, because the probable-cause determination is based solely on the information presented during the warrant application process, we note that the district judge properly refused to consider documents that were not presented to warrant-issuing Judge Cameron and were cited by the Government for the first time at the suppression hearing in federal court...
>
> The ***Leon*** test for good faith reliance is clearly an objective one and it is based solely on facts presented to the magistrate. An obviously deficient affidavit cannot be cured by an officer's later testimony on his subjective intentions or knowledge.... ***Leon*** creates an exception to the exclusionary rule when officers have acted in reasonable reliance on the ruling of a judge or magistrate. The point is that officers who present a colorable showing of probable cause to a judicial officer ought to be able to rely on that officer's ruling in executing the warrant. When the officers have not presented a colorable showing ... the reasoning of ***Leon*** does not apply.

(Quotations and cites omitted).

A. THE WARRANT APPLICATION LACKED SUFFICIENT INDICIA OF PROBABLE CAUSE SO AS TO RENDER RELIANCE UPON THE WARRANT UNREASONABLE.

The good faith inquiry "is confined to the objectively ascertainable question whether a reasonably well trained

officer would have known that the search was illegal despite the magistrate's authorization." ***Leon,*** 468 U.S. at 922 n.23.

It is reasonable to assume that a reasonably well trained officer would know that a search warrant may be issued only when a neutral and detached magistrate finds probable cause – "a fair probability ...that evidence of a crime may be found in a particular place." ***State v. Ward,*** 2000 WI 3 ¶21, ¶23, 231 Wis.2d 723, 604 N.W.2d 517; ***Illinois v. Gates,*** 462 U.S. 213, 238(1983).

It is also reasonable to assume that a reasonably well trained officer would know that a"probable cause determination must be based upon what a reasonable magistrate can infer from the information presented by the police. The issuing magistrate ordinarily considers only the facts set forth in supporting affidavits accompanying the warrant application." ***State v. Ward,*** 2000 WI 3 ¶26 (cites and quotation marks omitted).

The ***Leon*** analysis requires the court to look at the application for the warrant. The affidavit for the March 15th search provides only the following as to Bill Marquardt:

> Investigator Price reports that after finding the body of Mary J. Marquardt, he spoke with her

> husband, Alfred E. Marquardt. Mr. Marquardt informed him that he and Mary have a son, Bill Marquardt, who, since the location of Ms. Marquardt's body had not been seen or heard from. Alfred Marquardt further informed Investigator Price that Bill Marquardt owned with Alfred Marquardt a cabin in which Bill resided at E27505 County Highway M, Town of Fairchild, County of Eau Claire, Wisconsin.

In ***State v. Marquardt***, 2001 WI App 219, 247 Wis.2d 765, 635 N.W.2d 188, the Court of Appeals reviewed facts from the March 13th affidavit in support of a search of the Alfred Marquardt residence, the facts from the March 15th affidavit in support of the search of Bill Marquardt's cabin and the State's rather extensive inferences from those facts[2]; this court concluded,

> Although these facts may lead a reasonable police officer to pursue further investigation of Marquardt, **we conclude that there is nothing in the facts to tie Marquardt to the crime, much less**

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"In response, the State admits that the facts recited in the affidavits are "scant," but argues that they are not so thin as to be insufficient for probable cause. The State points to several facts in the affidavits: (1) Mary's telephone was off the hook the day she was killed, suggesting "that the perpetrator had been inside the residence"; (2) Mary was shot and stabbed, and no valuables were taken, suggesting the crime was an intentional homicide, as opposed to a break-in, and that the perpetrator was probably a male;4 (3) there were footprints at the crime scene that could be compared with footware if any are located; (4) Mary was covered with a blanket, which suggests the perpetrator knew, or was familiar with the victim; and (5) Marquardt's father stated that his son had not been heard from since Mary's body was discovered." ***Marquardt***, 2001 WI App 219 ¶18

> **to tie his home to the crime.** Although the warrant-issuing judge may have been provided sufficient facts to excite an honest belief in a reasonable mind that the particular types of objects sought - including shoes, knives, and guns - could be linked with the commission of the crime, **there was no fact that suggested those items would be found in Marquardt's cabin.** We conclude that Marquardt has established that the facts are clearly insufficient to support a probable cause finding and therefore, we reject the judge's probable cause determination.

Marquardt, 2001 WI App 219 ¶19(emphasis supplied).

The March 15th, 2000, application for the search warrant contains only one fact about Bill Marquardt - that he had not been seen by his father for two days. This one fact simply does not provide a sufficient indicia of probable cause to support a reasonable reliance on the warrant.

Since there was nothing in the affidavit, nor in the application for the March 13th warrant, to support probable cause that Marquardt was involved in the homicide or that his cabin possessed evidence of the crime, this case is analogous to ***Brady.*** Because there were no facts whatsoever to support probable cause in ***Brady,*** the good faith exception did not apply. The same is true in here. No officers, trained in the law of probable cause, could reasonably have believed that probable cause existed when none was presented

to the magistrate. The third factor of ***Leon*** requires suppression of everything found on March 15th 2000 at the Marquardt cabin.

B. EVEN IF IT WAS PERMISSIBLE FOR THE TRIAL COURT TO LOOK OUTSIDE OF THE WARRANT APPLICATION, THERE STILL WAS NO BASIS FOR GOOD FAITH RELIANCE SHOWN

Mr. Marquardt anticipates that the state will argue that even if the warrant application, itself, was insufficient to support good faith, the following additional evidence known to the applying officers establishes good faith:[3]

> Investigator Price testified that Bill's father told him on March 13th that Bill's mother had attached a message for Bill to the refrigerator.(84:33). Investigator Price said the message was gone when he checked the refrigerator that same night and it turned up in jewelry box in bedroom a day or two later.(Id: 34).

The telephone message was a small piece of paper with only "O.B." and a telephone number on it.(69: Exhibit 3). One can not reasonably infer that evidence of Ms Marquardt's murder would be located at Bill's cabin because of scrap of paper without Bill's name on it was moved from the refrigerator to his mother's jewelry box.

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The state has made this argument in its brief-in-chief in ***State v. Bill Paul Marquardt***, 04-0958-CR, p 23-30.

> Price testified that on the day of the homicide, he spoke with Bill's brother and sister, who could think of no "non-relative" with a motive to harm their mother.(84:35). Further, Price said he discovered no "reason" for Bill's siblings or father to harm Ms. Marquardt.(84:35).

Nor did Price testify that Bill's brother, sister, father or anyone else said that Bill had any motive to harm Ms. Marquardt.[4]

> DCI Special Agent John Rehrauer testified that between the discovery of Ms Marquardt's body on March 13 and the search warrant application on March 15th, there was television coverage of the homicide and publicity stemming from interviews of neighbors.(84: 54-55). He said that despite the publicity, he was unsuccessful in contacting Marquardt.(84:51-52).

Price's report reflects that Alfred Marquardt told him that Bill said on February 17th that he was leaving the country. Alfred said he had not seen Bill since then.(23: Exhibit 1). Rehrauer was aware of the information in the report.(84:46). Rehauer testified that he and Special Agent Miller drove to Bill's cabin. They noted that there were no lights on and that the 1995 green Ford Thunderbird - that Alfred said that Bill was driving - was not there.(84:47-

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The trial court's statement "We have information from the family that seemed to be united that there was only one possible explanation and that was either that Bill Marquardt did or had some information about it," is totally unsupported in the record.(84:74)

48). Rehrauer attempted to call Bill's cell phone but received a message that either the cell phone was not in service now or the party was out of the calling area.(84: 48-49). On March 14th, a neighbor, Westley Anderson told Rehrauer that he had not seen Marquardt for a week.(84:50). Given the fact that Marquardt had said he was going to be out of the county, that he had not been seen for at least a week (well before the Ms. Marquardt's death), that his car was not in the area, it was not at all surprising that Rehrauer could not contact him. Marquardt's absence raised no inference that evidence regarding Ms. Marquardt's death would be found in his cabin.

> Rehrauer testified that on March 14th, Westley Anderson told him that on March 9th there had been a break-in at his residence, his dog had been shot and five spent nine millimeter shell casings had been found.(84:50-51).

Rehrauer also testified that Anderson identified three specific individuals as possible suspects in his dog's shooting.(84:57). There is no suggestion that Marquardt was one of those suspects. Rehrauer made no attempt to question the suspects.(Id.) Further, he made no attempt to get the shell casings from the Anderson scene to have them compared to the shell casings from the Marquardt crime scene.(84:58).Nor is there any suggestion, that nine millimeter shell casings are rare at crime scenes where

shootings have occurred. Richard Price, the Chippewa Sheriff Department investigator in the death of Ms. Marquardt, testified at trial that at the time he and Rehrauer interviewed Marquardt, after his arrest, Price was unaware of the Anderson dog shooting incident.(92:143).

> Rehrauer was aware of Marquardt's "prior history of being involved in drug dealings" and learned that Marquardt's mother had " apparently discovered him digging up twelve thousand dollars in cash from the Marquardt premises in Chippewa County earlier in the year." (84:53).

Alfred Marquardt had told police that "Bill had been arrested on Marijuana charges about four years ago and did go in jail in Chippewa County. Since Bill had gotten out of jail, he had cleaned up his act and was doing better."(23: Exhibit 1). Alfred had also told police that he had learned in a discussion with his wife that on February 18th, "while at the residence, Bill had gone out to the shed and dug up $12,000 cash which he had buried there some time earlier." Alfred had said he did not know where Bill had gotten the money.(23: Exhibit 1). That Bill's mother had seen him dig up money nearly a month before her death, raises no inference that Bill had any motive to kill her. It is apparent from Alfred's statement that he had known the money was there before Bill dug it up. Had Bill been trying to hide the fact that he had the money, it is very unlikely

that Ms. Marquardt would have known the exact amount Bill retrieved.

C. THE MAGISTRATE WAS MISLED

The only fact in the first search warrant application that relates to the defendant is that Alfred. Marquardt informed Investigator Price that he and Mary have a son, Bill Marquardt, who since the location of Ms. Marquard's body had not been seen or heard from. However, what Mr. Marquardt actually told Price was that he had not seen his son since the 17th of February, almost a month before the homicide. (23: Exhibit 1) Alfred Marquardt had also told Investigator Price that Bill had told Alfred that he planned to leave the country. (Id.).

The omission of this information was a knowing or reckless twist of the facts designed to bolsters suspicion. It wrongfully suggests that Bill Marquardt was seen immediately before the homicide. However, had the magistrate known that Marquardt had not been seen for almost a month before the homicide and that he planned to be out of the country - the magistrate would have very likely denied the warrant application as there would have been no information that would have raised a suspicion that Bill Marquardt or his residence had any connection with Mary Jane Marquardt's

death. The State has the burden of justifying this twist in the one an only fact pertaining to the defendant before good faith can be established.

II. THE COURT MISAPPLIED THE NOTION OF "SIGNIFICANT INVESTIGATION" TO FIND THAT THE OFFICERS ACTED IN GOOD FAITH.

Eason requires that the police investigators engaged in a significant investigation before applying for, receiving and executing the warrant. In this case, the trial court ruled that the high number of investigators from multiple jurisdictions trying to solve the homicide over an almost 48 hour period of time constituted a significant investigation.(84: 72-75). This cannot rationally be what the ***Eason*** Court meant by significant investigation.

Any definition of "significant investigation" - that does not require results which point to the particular person or place to be searched, as having been connected with the crime under investigation - is meaningless and thus denies a defendant constitutional due process.

In finding that there had been a "significant investigation" that satisfied the ***Eason*** good faith requirement, the trial court did not look for a link between the results of that investigation and Bill Marquardt

or his cabin. Nevertheless, the court found that the officers relied in good faith on a search warrant affidavit that lacked in probable cause. The court seems to have believed that as long as the investigation was "significant" in any sense of that word, the state had met the first ***Eason*** factor for good faith. However, by that reasoning, because a "significant investigation" took place after the homicide of Mary Jane Marquardt, the police would have been acting in objective good faith by applying for and executing a warrant to search any home in the county. Could that have been what the ***Eason*** court intended by "significant investigation?" Certainly not.

Due Process requires that the means chosen to effect a valid objective "bear a rational relationship to the purpose sought to be achieved." ***State v. Joseph E.G.***, 2001 WI App 29, ¶ 13, 240 Wis.2d 481, 623 N.W.2d 137.

Size and duration alone can not satisfy the ***Eason*** "significant investigation" requirement. Such an interpretation violates reasonable notions of substantive due process because if the mere size or duration of an investigation could theoretically justify a search of anyone's home, the doctrine of good faith is meaningless. The term, in order to satisfy Due Process requirements must

incorporate a rational connection between the results of the investigation and the person or place to be searched.

Eason supports the requirement that a "significant investigation" requires such a rational connection. In that case, the police investigation pointed to Clinton Bentley as a drug dealer who sold cocain from his home. It also pointed to the fact that Bentley and Shannon Eason, who apparently lived with Bentley, both had records for assault among other things.

> From the face of Officer Fahrney's affidavit, it is evident that there was a significant investigation. (Fahrney Aff. at 1-5.) Officer Fahrney was assigned to the Special Operation Bureau of the Beloit Police Department to, among other things, "investigate complaints of drug trafficking." (Fahrney Aff. at 3.) He was thus aware of confidential files kept in that unit and the two "pieces of intelligence indicating that Clinton Bentley is a drug dealer." (Fahrney Aff. at 2.) Officer Fahrney worked with a confidential informant to purchase a cocaine-like substance from Clinton Bentley, which he had subsequently tested. (Fahrney Aff. at 2.) The substance tested as cocaine. (Fahrney Aff. at 2-3.) Officer Fahrney reviewed Beloit Police records and learned that Clinton Bentley resided at 802 Bluff Street in Beloit, the location where the confidential informant had purchased the cocaine. (Fahrney Aff. at 3.) Officer Fahrney reviewed utility records, and learned that Shannon Eason was responsible for the utilities at 802 Bluff Street. Id. He also researched Clinton Bentley and Shannon Eason's criminal arrest records, and learned that Bentley had been arrested for aggravated assault and that Shannon Eason had multiple arrests for larceny, assault, and obstructing.

Eason 2001 WI 98 ¶70.

In this case, the investigation had produced nothing that linked Bill Marquardt or his cabin to the death of Mary Jane Marquadt. Immediately after the victim was discovered, Alfred Marquardt told Investigator Price that he hadn't heard or seen Bill Marquardt since the 17th of February, almost a month earlier. Not one additional fact regarding Bill Marquardt was developed over the entire next 48 hours before the search. In other words, the alleged "significant investigation' did not uncover one additional meaningful fact regarding Bill Marquardt or his residence, that would suggest that evidence would be found at his residence.

There had been no "significant investigation" upon which the police could in good faith rely, when they searched Bill Marquardt's cabin.

III. THE COURT VIOLATED MARQUARDT'S RIGHT TO SELF-REPRESENTATION.

A. THE COURT IMPROPERLY APPLIED A HIGHER STANDARD OF COMPETENCE TO DENY MARQUARDT'S RIGHT TO REPRESENT HIMSELF THAN IT APPLIED TO FIND HIM COMPETENT TO STAND TRIAL.

Faretta v. California, 422 U.S. 806, 819 (1975), held that a criminal defendant has a constitutional right to

represent himself.

> We confront here a nearly universal conviction, on the part of our people as well as our courts, that forcing a lawyer upon an unwilling defendant is contrary to his basic right to defend himself if he truly wants to do so.
>
> ***Faretta,*** 422 U.S. at 817.

> Although not stated in the [Sixth] Amendment in so many words, the right to self-representation – to make one's own defense personally – is thus necessarily implied by the structure of the Amendment.
>
> Id. at 819.

> To thrust counsel upon the accused, against his considered wish, thus violates the logic of the Amendment.
>
> Id. at 820

> An unwanted counsel "represents" the defendant only through a tenuous and unacceptable legal fiction. Unless the accused has acquiesced in such representation, the defense presented is not the defense guaranteed him by the Constitution, for, in a very real sense, it is not his defense.
>
> Id.. at 821.

Denial of the right to represent oneself can not be harmless error, ***McKaskle v. Wiggins***, 465 U.S. 168, 178 (1984).

Godinez v. Moran, 509 U.S. 389, 391(1993), held that the standard of competence necessary for waiving the right to counsel is no higher than the standard of competence necessary to stand trial. The court rejected the notion

that a defendant who waives counsel must be more competent that a defendant who does not. Id .at 399.

The court made clear that the competence necessary to waive one's right to counsel is not the competence to represent one-self.

> [T]he competence that is required of a defendant seeking to waive his right to counsel is the competence to waive the right, not the competence to represent himself. In ***Faretta v. California***, 422 U.S. 806 (1975), we held that a defendant choosing self-representation must do so "competently and intelligently," but we made it clear that the defendant's "technical legal knowledge" is "not relevant" to the determination whether he is competent to waive his right to counsel, and we emphasized that, although the defendant "may conduct his own defense ultimately to his own detriment, his choice must be honored," Thus, while "[i]ts undeniable that in most criminal prosecutions defendants could better defend with counsel's guidance than by their own unskilled efforts," **a criminal defendant's ability to represent himself has no bearing upon his competence to choose self-representation..**

Id at 399-400(Emphasis supplied).

While in addition to finding that the defendant is competent to stand trial, where the defendant seeks to waive his or her right to counsel, the court must satisfy itself that the waiver of this constitutional rights is knowing and voluntary. Only in this sense, is there "a 'heighten' standard for waiving of the right to counsel, but it is not a higher standard of competence." Id. at 400-401.

While, ***Godinez*** noted that, "States are free to adopt competency standards that are more elaborate than the ***Dusky*** formulation," it never suggested that a state could require a higher standard of competence on one seeking to represent him or herself than it requires of one who chooses to be represented by counsel. Id at 390. The right to self representation is as much a constitutional right as the right to counsel. See ***Faretta*** 422 U.S. 806. ***Godinez*** implies that the standard of competence to exercise either right is the same.

Thus, where the state requires only the standard of competence set out in ***Dusky v. United States,*** 362 U.S. 402 (1960) i.e. "whether [the defendant] has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding – and whether he has a rational as well as factual understanding of the proceedings against him," to exercise one's right to counsel, it can not require a higher standard of competence from one who seeks to waive his or her right to counsel. Indeed, the state may not impose a greater restriction on the exercise of a federal constitutional right than the federal constitution allows. ***Mills v. Rogers***, 457 U.S. 291(1982).

In this case, Bill Marquardt was found competent to stand trial but denied his right to represent himself. That

was a denial of his sixth amendment right to self representation and is reversible error.

Apparently referring to the holdings of ***Pickens v. State***, 96 Wis.2d 549,292 N.W.2d 601 (1980), and ***State v. Klessig***, 211 Wis.2d 194,564 N.W.2d 716(1997), the state, at the motion hearing, argued that the court could hold Marquardt competent to stand trial but incompetent to represent himself.(88:10, 19). However, ***Pickens*** was decided before ***Godinez***.. Further, in ***Pickens***, as in ***Klessig***, "the validity of a heightened standard of competency for self-representation was not squarely presented ... and was not explicitly raised by the parties." ***Klessig***, 211 Wis 2d 215 at (Abrahamson CJ concurring). Neither, Klessig or Pickens asserted his right to self-representation on appeal; both had already exercised it. Each was seeking a new trial with counsel. Thus, neither ***Klessig*** nor ***Pickens*** is directly on point.

B. EVEN IF A DIFFERENT STANDARD OF COMPETENCE APPLIES MARQUARDT MET THAT STANDARD.

Where a defendant seeks to proceed *pro se,* ***Klessig*** instructs the trial court to engage in a colloquy with the defendant to ensure that the defendant (1) has knowingly, intelligently, and voluntarily waived the right to counsel;

and (2) is competent to proceed *pro se*. Id. at 203. To ascertain whether a defendant has knowingly, intelligently and voluntarily waived the right to counsel, the trial court's colloquy must probe whether the defendant: (1) deliberately chose to proceed without counsel; (2) was aware of the difficulties and disadvantages of self-representation; (3) was aware of the seriousness of the charge or charges; and (4) was aware of the general range of penalties that a sentencing court could impose. Id.

Mr. Marquardt, without prompting, stated the charges against him.(88: 6). He was aware of the general range of penalties involved.(Id. 6-7). The court informed him that he would be held to same standards as it would hold Mr. Rusch.(Id. 7). Marquardt said he understood and hoped to work with Mr. Rusch before trial and have Rusch as stand-by counsel during trial.(Id:7-8)

To determine whether a defendant is competent to represent himself or herself, a trial court considers the defendant's (1) education; (2) literacy; (3) fluency in English; and (4) "any physical or psychological disability which may significantly affect his ability to communicate a possible defense to the jury." ***Klessig***, 211 Wis.2d at 212 In considering these factors, a trial is guided by the principle that a competency determination should not prevent

persons of average ability and intelligence from self-representation unless the court can identify a specific problem or disability that might prevent a meaningful defense from being offered, if one indeed exists. See ***Klessig***, 211 Wis.2d at 212. Technical legal knowledge is irrelevant to an assessment of a knowing exercise of the right to defend oneself. See ***Faretta***, 422 U.S. at 836.

Mr. Marquardt stated that he was 26 years old, he graduated from high school. He had earned A's and B's in all of his high school English classes and had earned straight A's his senior year of high school.(88:3-4). He further stated that he was taking no medication and had not had any difficulty understanding what the judge had been saying in any of the hearings to date.(Id. 4).

Marquardt gave a cogent reason for wanting to defendant himself:

> ...the reason I want to do the talking at my trial is, Your Honor, I have been spending every minute of every day, except when I sleep, working on my defense, and because my life is on the line here and because I'm sitting in jail and I have nothing else to do, and no lawyer can put in as much time working on this case as I have.
> (Id. :5).

He understood that as long as he retained the plea of not guilty by reason of mental disease or defect that the trial would have two phases. (Id 4-5). He argued eloquently about his competence and right to represent himself, even

to the point of citing case law.

> Your Honor, every single doctor I actually talked to about my competency said I was competent, Dr. Marshall, Dr. Beebe, Dr. Minter, and another doctor in Chippewa who I didn't know his name, and a Dr. Black all says I was competent.
>
> Any doctor I talked about by insanity defense plea interview about what might have been going on three years ago has nothing to do with my competency, and plus, I think I made a timely and proper request to ask for me to have a court hearing to do the talking at my trial. My trial is not until January, and on my request to do the talking at my trial, I gave some good reasons way I want to talk at my trial.
>
> The court has to identify a specific problem or disability which may interfere with the presentation of a meaningful defense as stated in ***Pickens versus State***. You, the judge and the D.A. have not seen at this hearing or at any hearing that I have a problem or any disability that would interfere with the presentation of a meaningful defense....
> (Id. 13-14).

Mr. Marquardt went on to explain why he was dissatisfied with his prior counsel.(Id.14)

Nevertheless, in denying Marquardt's request to represent himself, the court focused on Marquardt's lack of legal training.

> ...I assure you that you will have the opportunity to talk, if that 's in the best interest of your defense, in that you have an absolute constitutional right to testify, but that's different that making an opening statement, which may or may not be improper, asking cross - examination questions, which may or may not be proper, putting on your own case by calling witnesses, and handling rules of evidence.
>
> At this juncture, I 'm not persuaded that you are competent enough to do this. I don't know if

> we have – can have another hearing or have some – some different way of doing this, but I'm very concerned that all we would be doing is wasting everybody's time by having you start out then get into trouble.
>
> First of all, Mr. While 's a very excellent attorney, very skilled and very knowledgeable about the law, and you don't have that same vantage point because you haven't studied the law as much as he has...
>
> (Id. 16-17).

The court further said,

> I don't believe you have the education, I don't think you have the training. I believe you – you've looked at this case very microscopically rather than from a broad picture.
>
> I think the fact that you rejected the advise that you've gotten from two very competent criminal trial lawyers, the fact that you're putting Mr. Rusch on the spot with by – makes me very, very concerned that you are not competent enough to do this and also, of course, the absolute seriousness of the charges and complexity of the case.
>
> This other acts evidence is very complex, so at least at this point I'm – that's my ruling. That ruling may change if we – if other information comes into play and we know exactly where we are, but I'm ruling for the moment that you must rely on your attorney to help you, to handle your defense and to do what's necessary to protect your interests.
>
> (Id. 18-19).

Finally, after the prosecutor pointed out that ***Pickens*** and ***Klessig*** require the court identify a specific problem or disability that would prevent Marquardt from representing himself and that there was some disagreement about whether Marquardt was paranoid or psychotic, the court said,

> That would be at least part of the ruling because of the fact that that has been – his mental status has been put into question by a number of

> people, but I was more focusing on the recent, and that is watching him here in court and understanding what I consider to be a very complex case. It isn't just some simple shoplifting, but yes, I would also add that – and incorporate the reports that have been received.
> (Id. : 20).

Clearly, in denying Marquardt's request to represent himself, the court was most concerned about Marquardt's technical ability to represent himself in a complex case. That is exactly what ***Faretta*** and ***Godinez*** forbids.

> Thus, while "[i]ts undeniable that in most criminal prosecutions defendants could better defend with counsel's guidance than by their own unskilled efforts," **a criminal defendant's ability to represent himself has no bearing upon his competence to choose self-representation.**

G***odine***z 509 U.S at 399-400.(citing ***Faretta***).(Emphasis supplied.)

The court made no finding that Marquardt was psychotic or paranoid or that one of those disabilities prevents him from representing himself. It noted only that some reports called Marquardt's mental status into question. Marquardt is of at least average ability and intelligence. He clearly could express himself coherently in court. Where the court can find no specific problem or disability that would prevent him from putting on a defense, he must be allowed to represent himself

IV. INVESTIGATOR PRICE'S TESTIMONY VIOLATED MARQUARDT'S RIGHT TO SILENCE.

At trial, Investigator Richard Price testified Marquardt was advised of his ***Miranda*** rights in the car on the way to the jail and again in the jail about two hours later.(92:126-127). According to Price, following his arrest, Marquardt never mentioned anything about a break-in to his cabin or missing any animals from his home.(92:129). Price also claimed he had never heard anything about Lillie Murphy prior to trial.(Id: 130).

At a suppression hearing, Price testified in more detail about the police questioning. On March 18, 2000, following his arrest, Marquardt was taken to the Eau Claire County Jail, where, following ***Miranda*** warnings, he was questioned by Chippewa County Investigator Richard Price and DCI Special Agent John Rehrauer. When the officers asked if Marquardt was aware that they had been trying to making contact with them, Marquardt responded that he did not know because he had been on vacation.(90: 13-14). Rehrauer told Marquardt his mother had been murder. Marquardt said something that Price could not understand and then said, "Is this about the dog thing?"(90:14) Marquardt asked if he could go home; Rehrauer told that it would be up to the court.(90:15). Then Marquardt asked for an attorney and questioning stopped.(90:15).

Doyle v. Ohio, 426 U.S. 610, 619 (1976), holds that use of a defendant's post-***Miranda*** silence against him at trial, violates the Due Process Clause of the Fourteenth Amendment. Post-arrest silence following such warnings is "insolubly ambiguous." Id. at 617, It is fundamentally unfair to allow an arrestee's silence to be used to impeach an explanation subsequently given at trial after he had been impliedly assured, by the ***Miranda*** warnings, that silence would carry no penalty. Id. 618. See also ***State v. Brecht*** , 143 Wis.2d 297, 316, 421 N.W.2d 96 (1988).

Marquardt had received ***Miranda*** warnings almost immediately after his arrest. Marquardt never agreed to talk to officers about the cruelty to animals charges, indeed, it was never even discussed. He did not tell any story that would have been inconsistent with his testimony at trial.

Nevertheless, over the defense objection, the court allowed this evidence.(Id. 131, 135). Even if it is true that defense counsel opened the door to Marquardt's silence with regard to Lillie Murphy,[5] counsel did not open the door to testimony about Marquardt's silence about the break-

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[5] In his opening statement, defense counsel said that the police had been unable to locate Lillie Murphy.(91:68).

in to his cabin and the missing animals. Admitting that evidence was a violation of Due Process and Marquardt's right to silence.

V. THE COURT VIOLATED MARQUARDT'S RIGHT TO PUT ON A DEFENSE.

Marquardt was charged with felon in possession of a firearm. The police found a .22 gage rifle in his cabin by police on March 15th. Marquardt's testified that he was on a trip to Florida from March 12 thought March 18.(93:10). He claimed that before he left on March 12th, he had seen the rifle at his parent's home.(Id.19-21). The theory of Marquardt's defense was that, Pete Heacox,[6] or someone else, who had grudge against Marquardt, had gone to his parent's house on March 13th and taken the rifle and had brought it back to his cabin.

To support that theory Marquardt wanted to present testimony from Susan Westerby, that on March 13, 2000, she had seen a blue S-10 truck pull out of Marquardt's parent's driveway nearly missing her and speed away. (92:174).

The court would not allow Marquardt to present evidence that Westerby had seen the vehicle speed away on March 13th.(92: 56-58) As a result Westerby testified that she saw the vehicle in the first half of March.(92: 174).

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[6] Who, it was established, had missed work on March 13th.

Given the limitation on Westerby's testimony, there was no way for the defense to connect up the speeding vehicle with the theft of the rifle.

The Constitution guarantees criminal defendants `a meaningful opportunity to present a complete defense. ***California v. Trombetta***, 467 U.S. 479, 485 (1984). That right is rooted both in the Due Process Clause of the Fourteenth Amendment, ***Chambers v. Mississippi***, 410 U.S. 284 (1973), and in the Compulsory Process or Confrontation clauses of the Sixth Amendment, ***Washington v. Texas***, 388 U.S. 14, 23 (1967); ***Davis v. Alaska***, 415 U.S. 308 (1974).

To determine whether the exclusion of evidence violates the right to present a defense the court must consider whether the proffered evidence was "essential to" the defense, and whether without the proffered evidence, the defendant had "no reasonable means of defending his case." ***State v. Johnson***, 118 Wis.2d 472, 480, 348 N.W.2d 196 (Ct.App. 1984).

In order for Marquardt to show that he did not possess the rifle, he had to show that the rifle was taken from his parents home and brought to his cabin by someone else. Marquardt's own testimony placed the rifle at his parent's home on March 12th shortly before he left for Florida. However, the police found the rifle at Marquardt's cabin on

March 15th.[7] Given Marquardt's theory of the case, that someone stole the rifle from his parent's home and took it to his cabin, Marquardt needed the testimony of the one witness who saw the person who might have done this. However, because she could not say she saw the person on March 13th, her testimony was of no help. As far as the jury were concerned, she might have seen the car speed away on March 2nd before the Marquardt saw the rifle at his parent's house. Marquardt was prevented from presenting evidence vital to his defense to the jury.

VI. EVIDENCE ABOUT MARQUARDT'S BIZARRE BEHAVIOR WAS ADMITTED IN VIOLATION OF S. 904.04(1) STATS., WHERE IT WAS OFFERED TO SUPPORT THE STATE'S CLAIM THAT MARQUARDT COMMITTED IRRATIONAL CRIMES.

S. 904.04(1), Stats., provides, in part, as follows:

> (1) Character evidence generally. Evidence of a person's character or a trait of the person's character is not admissible for the purpose of proving that the person acted in conformity therewith on a particular occasion,

At trial, the state presented evidence that Marquardt's behavior was bizarre.

> Pet store clerk, Angela Buck, testified that Marquardt wore his sunglasses the entire time he was in the pet store(91:124)

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[7] Marquardt's father last recalled seeing the rifle in the summer of 1999. (92: 45).

Cab driver, Ronald Lewis, testified that Marquardt asked if he could wear his jacket over his heard because he had a sun burn(Id.:133). According to Lewis, Marquardt wore the jacket over his head during the whole cab ride but when he got out of the cab, he took his jacket off his head and walked into the mall. Lewis said he saw no sunburn.(Id.: 134).

Nina Eisold testified that Marquardt wore sun glasses inside her house.(Id: 166-167).

Cab driver, Robin Ashley, testified that Marquardt was strange; he had a plaid hooded sweatshirt over his head and he wore sunglasses.(Id:214).

Investigator Richard Price testified that upon entering the police vehicle after his arrest, Marquardt, with hands cuffed behind his back, leaned forward in the seat so as to have his face closer to his lap and mentioned a problem with the vehicle mirrors and with his heart. (92: 127). Price further said that Marquardt "was wearing sunglasses and he indicated that if he looked in the mirror it would burn him."(Id: 128).

Alfred Marquardt testified that Marquardt didn't want his parents to visit his cabin, that he wasn't keeping the cabin as clean as he had before and that he quit his job. (92:38). He further testified that there were times when he and his wife visited the cabin and Marquardt would not let them in.(Id. 38-39). He said that one time Marquardt took his mother's shoulders and backed her out of the cabin.(Id. 39). He also said that at 10:30 pm on February 17, 2000, he saw Marquardt who had shaved his head and was wearing sunglasses.(Id. 40).

The defense repeatedly objected to the evidence as irrelevant.

At one point, the Prosecutor made clear his reasons for presenting such testimony.

> The problem I have is that these acts are irrational, shooting dogs, stacking them up, shooting rabbits, breaking into a neighbor's house and shooting a dog in which, under the circumstances in which you have no grudge against the neighbor those are irrational acts, His behavior is consistent with that. (92: 36).[8]

Basically what he prosecutor was saying was Marquardt has been doing crazy things, he is a crazy guy so he must have done this crazy thing. That is no different than saying, Marquardt has done bad things, he is a bad guy so he must have done this bad thing. That is exactly what s.904.04(1), Stats., prohibits. That evidence should have been excluded.

VII MARQUARDT WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL.

Both the United States Constitution and the Wisconsin Constitution guarantee effective assistance of counsel. ***State v. Simpson***, 185 Wis. 2d 772, 519 N.W.2d 662 (Ct.App. 1994). ***Strickland v. Washington***, 466 U.S. 688 (1984), sets out a two part analysis for determining whether a defendant has been denied effective assistance of counsel under the United States Constitution. First, the defendant must show deficient performance by the defense attorney, that is, performance that falls below an objective standard of

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8 Indeed the court noted that all of this testimony fit together to show Marquardt's erratic behavior. Id. 37.

reasonableness. Second, the defendant must show prejudice, that is, a reasonable probability that the result would have been different but for the counsel's deficient performance. A reasonable probability is a probability sufficient to undermine confidence in the outcome. However, the defendant need not show that it is more likely than not that counsel's errors caused the result. See also: ***State v. Pitsch***, 124 Wis. 2d 628, 369 N.W.2d 711 (1985).

Saying in the opening statement that the police had been unable to locate Lilly Murphy.

In his opening statement, defense counsel said that the police had been unable to locate Lillie Murphy.(91:68). At the ***Machner*** hearing, Counsel could not identify any police report that indicated the police had attempted to locate Murphy. The only information he had from police about Murphy was that one of the clerks who sold an animal to Marquardt had said Marquardt told her he was buying the animal for his girlfriend.(96:16). Other than the fact that Counsel had listed Murphy as a witness, Counsel had no information of police efforts to locate her.(Id).

Counsel's justification for making the claim to the jury, was "We were unable to call this witness and the jury would be wondering where this witness was an why wasn't this

witness being produce...the State was aware of her existence by name and address and despite really our joint efforts to find that witness neither one of us were able to."(96:17).

However, Counsel had absolutely no information that the State was in fact looking for Murphy.

In claiming the police could not find Murphy, Counsel opened the door to Investigator Price's testimony which undermined Marquardt's explanation that he bought the dogs and rabbits to keep Lillie Murphy company while he was in Florida.

Failing to argue that the officers reliance on the March 15th warrant was not objectively reasonable reliance under *United States v. Leon*, 468 U.S. 897 (1984).

As pointed out in Section I above, Counsel agreed that only the additional factors set out in **Eason** were to be considered in the good faith hearing.

At the ***Machner*** hearing, Counsel testified that he did not consider raising the ***Leon*** factors.(96:9-10). Counsel said that he did believe that the affidavit did contain an indicia of probable cause.(Id.). However, when Counsel reviewed that affidavit in support of the application, he did not see what he believed had provided the indicia of probable cause.(96:11-12)

The ***Leon*** criteria should have been argued in the motion to suppress. Failure to do so, prevented the court from considering whether the application for the warrant was so lacking in indicia of probable cause as to render reliance upon it unreasonable and whether the issuing magistrate had been misled. Had those factors been considered by the court, the suppression motion most certainly would have been granted.

Failing to present evidence to show that officers could not have missed seeing at least the yellow boxes of bullets under the refrigerator during the second search if they were there.

The theory of Marquardt's defense on the charge of shooting the Anderson's dog, was that the 9 mm handgun and a yellow box of bullets had been placed in the cabin after his arrest on March 18th. The gun and bullets were found in the cabin on March 29th under the refrigerator. The space under the refrigerator was clearly visible.(47: Exhibit 35). Detectives found a 9 mm round on the floor in front of the refrigerator but claimed they did not see the gun or yellow boxes of bullets. Presenting evidence showing how visible the yellow boxes of bullets would have been, had they been there on March 15th or March 18th , would have established that someone other than Marquardt had planted the bullets and the 9 mm handgun, in the cabin while Marquardt was in jail.

At the postconviction hearing, David Cihlar testified that he viewed the refrigerator in the cabin on January 9, 2004(96:41,42). The refrigerator appeared to be the same refrigerator pictured in trial exhibit 35.(96:48). The refrigerator had no kick plate in the front.(96:42). The refrigerator stood about 3 inches off the ground.(96:43). When he stood at the opposite wall, he could see about three to five inches under the refrigerator.(96:43-44).

Cihlar placed a slightly taller box under the refrigerator in the position similar to the boxes shown in trial exhibit 35.(96: 48;69:Exhibits 6 and 7). He could see the box if he stood at the opposite wall or in the middle of the room.(96:48). He could not see the box under the refrigerator, if stood right at the refrigerator and looked straight down but he could see it if he backed away from the refrigerator.(96:48-49).

Detective Marc Christopher testified that on March 18th they found a 9 mm round on the kitchen floor about three feet away from the place the 9 mm handgun was found on March 29th .(91:84,93). He also testified that they didn't look under the refrigerator on March 18th because "It didn't appear that the items we were looking for would fit under the refrigerator.(91:85). However, Christopher's testimony that it did not appear that items would fit under the

refrigerator implies that officers at least glanced at the refrigerator to determine if the items would fit. Cihlar's testimony establishes that if the yellow boxes of bullets were under the refrigerator as pictured on trial exhibit 35, they would have been visible to the officers unless the officers were at the refrigerator looking straight down.

It is clear from Counsel's testimony that he never even considered that the evidence might have been visible while the refrigerator was in place. He seemed to believe that it would have been necessary to move the refrigerator to see the evidence.(96:20-21).

CONCLUSION

For the reasons set forth above, Mr. Marquardt asks this court to reverse his convictions and to remand to the trial court for a new trial.

September 21, 2004

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in sec. 809.19(8)(b) and (c) for a brief and appendix produced with a non-proportional monospaced font. The length of this brief is 56 pages.

Patricia A. FitzGerald

cc Wisconsin Department of Justice
Bill P. Marquardt

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AMENDED

STATE OF WISCONSIN, CIRCUIT COURT, EAU CLAIRE COUNTY

For Official Use

FILED
CIRCUIT COURT
JUN 02 2003
DIANA J. MILLER
CLERK OF CIRCUIT COU

State of Wisconsin, Plaintiff,
-vs-

Bill Marquart, Defendant
Name

12-17-75
Date of Birth

Order of Commitment for Institutional Care (Not Guilty by Reason of Mental Disease or Defect)

Case No. 00CF137

THE COURT FINDS:

1. The defendant was found not guilty by reason of mental disease or defect of the following crime(s):

Crime(s)	Wis. Statute(s) Charged	Date(s) Occurred
6 Counts-Mistreatment of Animals/Cause Harm	951.02	03-13 to 3-15-00
2 Counts Felon Possess Firearm	941.29(2)(a)	03-13 to 3-15-00
1 Count of Aggravated Burglary	943.10(2)(a)	03-13 to3-15-00

2. The total maximum term of incarceration for the crime(s) is:
   ☐ life incarceration ☐ life incarceration plus _____ years. ☒ 204 years, _____ months.
3. A hearing has been conducted and the court determines that conditional release would pose a significant risk of bodily harm to the defendant or to others, or of serious property damage.
4. ☒ The involuntary administration of psychotropic medications is needed, given the legitimate needs of institutional confinement, because:
   a. The defendant poses a current risk of harm to self or others if not medicated.
   b. The administration of medication is in the defendant's medical interest, and
   c. The defendant is not competent to refuse psychotropic medication or treatment due to:
      ☒ mental illness, ☐ developmental disability, ☐ alcoholism, ☐ drug dependence, because
      ☒ the defendant is incapable of expressing an understanding of the advantages and disadvantages of accepting psychotropic medication or treatment and the alternatives; *or,*
      ☐ the defendant is substantially incapable of applying an understanding of the advantages, disadvantages and alternatives to his or her mental illness, developmental disability, alcoholism or drug dependence in order to make an informed choice as to whether to accept or refuse psychotropic medication or treatment.
5. ☐ The crime (or, if more than one, at least one of them) is a felony and the court has informed the defendant of the requirements and penalties under §941.29, Wisconsin Statutes, that possession of a firearm is a Class E felony with a penalty of a fine not to exceed $10,000 or imprisonment not to exceed 5 years, or both.

THE COURT ORDERS:

1. The defendant is committed to the Department of Health and Family Services for institutional care for:
   ☒ 75 years, 0 months, 0 days, which is not more than two-thirds of the maximum term authorized by Wisconsin Statutes, had the defendant been convicted of the offense.
   ☐ life.
   This commitment shall commence on (date) 04-07-2003. The defendant is entitled to 3yr 6mo days credit for time in custody.
2. If the defendant is not competent to refuse psychotropic medication or treatment, whoever administers the medication or treatment to the defendant shall observe appropriate medical standards.
3. The sheriff of the county shall transport the defendant to the Department's designated institution:

_____.

BY THE COURT:

Circuit Court Judge/Clerk of Court

Eric Wahl
Name Printed or Typed

06-02-2003
Date

Distribution:
1. Court (Original)
2. District Attorney
3. Defense Attorney
4. Department of Health and Family Services - fxed.
5. Sheriff (of county of defendant's residence)
6. §51.42 Board (of county of defendant's residence)

STATE OF WISCONSIN | CIRCUIT COURT BRANCH 2 | EAU CLAIRE COUNTY

STATE OF WISCONSIN,
Plaintiff,

vs. Case No. 00 CF 137

BILL P. MARQUARDT,
Defendant.

ORDER DENYING
POSTCONVICTION RELIEF

For the reasons stated on the record at the hearing held on June 7, 2004, the court denies the defendant's postconviction motion on all grounds..

Dated: June 10, 2004

FILED
CIRCUIT COURT
EAU CLAIRE COUNTY

JUN 11 2004

DIANA J. MILLER
CLERK OF CIRCUIT COURT

BY THE COURT

Judge of Circuit Court

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1 to prosecute this case and obviously the homicide
2 in Chippewa County shouldn't be subject to
3 suppression.
4 THE COURT: Anything else, Mr. Wright?
5 MR. WRIGHT: Your Honor, I don't disagree
6 with Mr. White's case that you need to decide
7 whether this is good faith but, again, I would
8 urge the Court to keep in mind what good faith
9 means. It doesn't mean that the officers were
10 necessarily acting in bad faith. It means that
11 there was not a significant enough investigation
12 done with regard to specific information that
13 would tie anything that they suspected existed in
14 Bill Marquardt's cabin with the state of their
15 investigation when they applied for the warrant.
16 That's the issue of good faith. I have not asserted
17 and the standard is not that the officers acted in
18 bad faith.
19 THE COURT: Well, the difficulty these cases
20 pose for everyone involved is the fact that appellate
21 courts oftentimes are able to look at things in a
22 different light with a little more leisurely approach
23 to things, a little more thoughtful approach even to
24 things.
25 We first start off with the fact that

there was a significant investigation. Deputy Price indicated there were approximately twenty employees of multiple jurisdictions. You have the Chippewa County Sheriff, Eau Claire County Sheriff. You had the State investigators and I think Sergeant Vogler even thought maybe the City of Chippewa Police Department were involved. So you in any event had different officers from different jurisdictions all working what I would consider to be nearly around the clock efforts.

Again, Deputy Price indicated that the search, the forensic search ended at like two-thirty a.m. They were back on the job at eight o'clock the following morning so obviously these people involved were working very diligently, very determinedly to find out what was going on here. District Attorney, former District Attorney Pelrine in my judgment from watching him in that capacity was an unusually thorough and detailed person who did not charge out willy-nilly on various cases but used a very thoughtful approach and even he admitted at this point that he perhaps did not include all of the information that he had heard and certainly not all of the information that the officer had believing that some of it

1 was redundant. That's certainly a decision that one
2 in his position would make.
3 There's been no allegation that Judge Proctor
4 was anything other than a detached magistrate
5 and in fact he is as I think everyone knows him
6 would agree that he certainly is a dutiful judge
7 who looks at these kinds of jobs very seriously.
8 Mr. Wright mentioned in the Eason case something
9 about age of information, that they had
10 information that was several months old. Well,
11 that was not the case here. We were, I know
12 it's not the proper legal term, but it's still
13 one that more or less applies, it's almost
14 a hot pursuit type situation that we have a
15 woman slain very, very severely injured prior
16 to her death. We have information from the
17 family that seemed to be united that there was
18 only one possible explanation and that was either
19 that Bill Marquardt did or had some information
20 about it. So there wasn't any other suspects that
21 made any sense at the time using again the experience
22 of the investigators.
23 Mr. Wright pointed out that certainly more
24 things could have been done in comparison. Nine
25 millimeter shell casings, further additional interviews

with neighbors of the cabin and so forth, and there's always more information that can be gathered. Anybody that's ever investigated something of that kind knows that to be true.

I was impressed with the diligence of the officers who testified, particularly Deputy Price and Special Agent Rehrauer. Clearly, they were working diligently. Clearly, they were focused on trying to get some answers to the questions and I think that this certainly meets the Eason test of good faith. I think the officers were in good faith. I think everybody was. The fact that Mr. Pelrine maybe in retrospect should have included some more information and in retrospect maybe Judge Proctor should have asked some questions or something of that kind, but I'm still satisfied when all is said and done that the good faith exception should be applied to this case. I can't believe there's any other, other way to go given the facts as I heard them here today.

And for those reasons I'm going to deny the motion. I do think that there was sufficient information available for probable cause to be bolstered. It's too bad it wasn't but we're all

now looking in hindsight so for those reasons I'm going to deny the motion and not suppress the evidence that was seized.

MR. WHITE: Thank you.

MR. WRIGHT: Thank you, Your Honor.

THE COURT: Are there any exhibits floating around? Do we have them all?

MR. WHITE: I believe we have four originals. Do you have --

THE CLERK: Yes.

(The hearing concluded at 3:47 p.m.)

1 You've got to decide Leon first and then you look
2 at Eason.
3 That's all.
4 THE COURT: Well, it's always easier four
5 years after the fact to look at things and to muse
6 over the law and have conversations and thoughts
7 about it, but if you go back to what was going on
8 at the time, we had a terrible incident as far as
9 Mr. Marquardt is concerned. I also heard Deputy Price
10 say that Mr. Marquardt was having trouble recalling
11 things, even the fire number of his cabin, so that
12 was a rather heat of the moment situation. We do
13 have a great deal of information. An investigation
14 that was going on essentially twenty-four hours a
15 day and information presented to Mr. Pelrine. Now,
16 whether Mr. Pelrine didn't include all of the
17 information or could have included more of the
18 information for the sufficiency of the warrant we'll
19 never know.
20 As Mr. White points out now in hindsight
21 we know that the warrant wasn't valid. But I
22 think it would be highly inappropriate to now
23 say the police knew, they should have known and
24 they shouldn't have carried this through. I believe
25 that they believed at the time and under all of

the circumstances, under the very profound and horrible circumstances of this case, they exercised good faith. They were experienced officers and I find the first search to be valid.

So now what else?

MR. WHITE: I think I would agree that Ms. FitzGerald certainly is not waiving her ultimate ability to be able to advance the argument as to the fruit of the poisonous tree if the Court of Appeals would disagree with you and conclude that the first search was not valid, but I think it's a moot point at this particular juncture.

THE COURT: Well, I would certainly agree with that, that nothing is being precluded. She could have presented all kinds of evidence, but I said at the outset as far as I'm concerned anything after the first search has nothing to do with this case. If, in fact, I'm overturned, then all this would be revisited.

Now, to your point on right of self representation.

MR. WHITE: Can I just mention two points as to that issue of the fruit of the poisonous tree? I haven't argued inevitable discovery along the same lines because it's a moot point since you

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found the first search to be valid, but of course the State would be advancing that and ultimately that issue would have to be determined if we ever got to that point. It's basically the opposite side of the coin of the fruit of the poisonous tree, but the only reason I mention that is to make it clear that that particular issue would be preserved if we ever revisited that point.

THE COURT: Well, preserved for both sides certainly.

Do you wish to argue the right of self representation?

MS. FITZGERALD: I believe I argued that in my brief, Your Honor. I can respond to the State's argument.

THE COURT: Well, I don't know that the State needs to argue. As far as I'm concerned all of us were concerned about Mr. Marquardt particularly at that time. I see he still remains somewhat agitated but I assume this many months later he's on some medication and is maybe showing some signs of improvement. And I sympathize with all of the lawyers. It isn't just one or two that's represented him. Mr. Marquardt had a battery of lawyers both in the Chippewa County case and

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Eau Claire County case and even today Ms. FitzGerald is trying to concentrate on everything that's going on and Mr. Marquardt is rifling through files. He's writing notes. He's practically talking out loud in her ear.

The choice was made at the time that Mr. Rusch continue to stay on the case. He did so at frankly my request because I -- as interested a client as Mr. Marquardt is, I wasn't, I was satisfied that he could not properly represent himself and that if I allowed him to do so, I would have been reversed on that ground. Mr. Marquardt is a very bright person. He has many characteristics, but I just think at this point and even more so at that point he was too emotionally involved to know how to represent himself. So I would deny that motion.

MS. FITZGERALD: Your Honor, I'd just like to clarify something for the record. While Mr. Marquardt is active over here he -- what he's writing down is totally on point. And I mean some of the things I could use, some of the things I can't. But I don't want the record to get misconstrued that he's been obstructing me. He's not.

///

THE COURT: I didn't mean to imply that and as Mr. Rusch pointed out, that sometimes he had some good ideas and sometimes he didn't, but I've never been involved in a case in any point in my career where every day a multiple page letter with multiple points -- Mr. Marquardt has very tiny writing and can get more words per page than anybody I've ever seen, and these were coming in, you know, daily with all kinds of things in it.

Right to silence. Do you want to be heard on that?

MS. FITZGERALD: I believe that I've put down what I needed.

THE COURT: All right. And, again, I don't think there was any way that Mr. Marquardt was not going to testify. Mr. Marquardt was insistent that he had information that the jury needed to hear. And though I frankly don't remember what rights were given he did have several attorneys. He did have several warnings during the course of the investigation and as far as I'm concerned if he was once again informed that he didn't have to take the stand, Mr. Marquardt would have absolutely insisted he was going to take the stand so I would

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deny that motion.

If you have anything to add, Mr. White, --

MR. WHITE: Can I just make two quick points? The first one has to do with just for the record on this issue of the right to self representation. It's clear that there is a difference of opinion among the three of us in essence as to the appropriate standard. Ms. FitzGerald advanced her position that if a person's competent to stand trial, then by definition that person is competent to represent himself. My position is is that Klessig at 211 Wis. 2d 194, which is referred to by Ms. FitzGerald, specifically disagrees with that. The Supreme Court at footnote seven specifically addresses that point and says that states can and Wisconsin has adopted a higher standard of competency as to self representation. I understand her argument she set forth but I just wanted to note that at least on that particular issue that that's the State's position.

As to this issue of the claimed violation of defendant's right to silence we've already addressed through the testimony of Mr. Rusch this issue of the Lilly Murphy reference and opening the door. Even if Mr. Rusch hadn't opened the

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door as he quite plainly had as you concluded, the
2 questions that were asked whether it would have
3 been that question or the questions about when
4 Mr. Marquardt told Detective Price or asked
5 the question is this about the animal thing, I
6 asked the question when he asked that question
7 did he say anything about missing animals or cabin
8 break-in. That wasn't a comment on his constitutional
9 right against self incrimination as protected by the
10 Fifth Amendment. The case of Anderson vs. Charles
11 at 447 U.S. 404, a 1980 U.S. Supreme Court case
12 pointed out that a defendant who voluntarily speaks
13 after Miranda hasn't been induced to remain silent
14 and then went on to point out that as to the
15 subject matter of his statement he has not remained
16 silent at all. So if he chooses to make statements
17 and ask questions clarifying those statements, that's
18 not a comment on his right to silence. That's
19 questions about the nature of his statements. You
20 can't at the same time waive Miranda to help yourself
21 and then insulate yourself from having a prosecutor
22 ask questions to clarify those things. That's
23 obviously in dispute but the State's position is
24 that the case of Anderson vs. Charles and numerous
25 other cases such as U.S. vs. Whalen, W-H-A-L-E-N,

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at 940 F.2d 1027, a 7th Circuit case from 1991 stands for that proposition.

The final point that I would make on the Miranda issue is that even if you would for some reason disagree with my position on that just as with these other issues of other acts evidence and the right to present a defense, the Court could and should invoke the doctrine of harmless error to conclude that the issues were so miniscule in the greater picture that the State could prove that they had no likely outcome on the verdict in this case.

THE COURT: Well, I agree with that and I also agree when we get to these points we're looking at everything under a microscope and we have no idea the jury paid any attention to any particular piece of evidence. Jurors react to the whole trial and base decisions on whatever they observe. So all these things, whether Mr. Marquardt could remember the exact time seems really rather immaterial, but anyway.

Right to put on a defense. I'm not sure what you're talking about there, Ms. FitzGerald.

MS. FITZGERALD: I just want to make one comment about the right to silence. It seems to me

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the jury, and I don't have the questions right in front of me, but it seems to me the jury asked questions about that evidence. I'll have to check.

Okay. In this instance Mr. Rusch wanted to ask Ms. Westaby about evidence, the fact that she on March 13th she had seen a blue truck pull out of the Marquardt property and kind of cut her off and headed down the road, pulled out really fast. Pete Heacox was off work on March 13th. One of the theories of the defense was that the rifle was taken from the Marquardt house, the twenty-two game shotgun was taken from the Marquardt house and brought to Bill's cabin on the 13th while Bill meanwhile was away.

Now, the Court would not allow Mr. Rusch to ask Ms. Westaby about the date. He was put in a position where he had to ask about the first part of March. So he couldn't connect those two things up. And there was -- for the jury I'm sure they didn't have a clue why Ms. Westaby testified because she was talking about the first part of March and then we had a very specific date on the 13th that Pete Heacox was out of work. We also had Mr. Marquardt's testimony, Bill's testimony

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that he had seen the gun at his parent's house on the 12th.

Now, at least, at least regarding the possession of the gun that was vital evidence. There was no way that they could show that Pete, that anybody was at the Marquardt house on the 13th.

THE COURT: Can you refresh my recollection?

MR. WHITE: Sure.

THE COURT: I don't recall --

MR. WHITE: Yes. And, Your Honor, I'm in the same position you are. We did this trial a year and a half ago and I have to confess I spent a considerable amount of time reviewing Ms. FitzGerald's brief and then going back and reviewing all these things and that did bring specifically into mind exactly what happened here.

What happened was Mr. Rusch initially asked the question of Alfred Marquardt about whether there had been a break-in at his residence on March 13th. I immediately objected. We got the jury out of the courtroom and we had a relatively long colloquy about the fact that first of all there was no break-in on March 13th. There was no evidence of a break-in. Secondly, what happened on March 13th was he killed his mother.

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2 I initially sought to introduce evidence of the
3 Chippewa County homicide as other acts evidence
4 here.
5 MS. FITZGERALD: Your Honor, he hasn't been
6 found guilty of --
7 THE COURT: I understand, but now that
8 Mr. White brings that up, my concern was that
9 the jury might infer that he had been convicted
10 and we were trying to keep the homicide separate
11 from this case and so the -- and I remember now
12 that there was no testimony of a break-in. That
13 was Mr. Rusch's characterization and that was
14 the day they found Mrs. Marquardt. And I was
15 concerned at the time that if we started in on
16 that avenue then these two cases were going to
17 start pouring into each other which I thought
18 would very severely damage Mr. Marquardt's right to
19 a fair trial.
20 MR. WHITE: My point at that juncture
21 was that I had conceded I wouldn't use the
22 Chippewa County homicide and there was much in
23 that case that would have benefited me. The only
24 reason I chose not to use it was I didn't want
25 an other acts issue up on appeal, but as you may
recall there is DNA evidence specifically tying

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him in to that crime. The evidence in the Chippewa County case is arguably more compelling than here. And my position in the brief I submitted on other acts evidence initially here was proof of that case necessarily proves this one. I let that issue go because I didn't want the appeal issue, but it was entirely unfair then to have the defense in this case mischaracterize what happened on March 13th as a break-in to leave the impression that hmm, there was a break-in, maybe a gun was stolen, maybe it was planted at his house and then to bar me from introducing the evidence of what really happened on March 13th.

So then by the time we got around to Ms. Westaby after that improper testimony about the break-in, my point was, Judge, you cannot allow them to bring up this issue of a claimed break-in on March 13th, then to have Ms. Westaby testify she saw some car on March 13th without opening the door to me bringing in all the Chippewa County homicide evidence that implicated him. You reached the conclusion that that was not a fair result here and, quite frankly, it would have been more harmful to the defendant than good because there would have been no way in

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fairness to allow in the Westaby testimony as proffered and that claimed break-in testimony as proffered without bringing in all the Chippewa County stuff which would have opened the floodgates so whether you conclude that the evidence was irrelevant because of your earlier ruling, I think the point is pretty clear that we had already crossed that bridge before trial and they couldn't just pick and choose out of the Chippewa County case what they wanted.

MS. FITZGERALD: Your Honor, but we were not at this point for Ms. Westaby -- she wasn't testifying about a break-in. She was simply testifying about somebody pulling out in front of her.

THE COURT: Except that would have followed the -- maybe had Mr. Rusch used a different phrase than break-in we wouldn't have gotten into that mess, but anyway, that was the problem. That was the word that was used and that was the place we were stuck with. And I did as a bit of a compromise offer to let Ms. Westbee be -- Westaby rather, be cross-examined, did best as I could without opening the floodgates so again if that's error, it seemed to me and still seems to me that

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the defense was far better off having it stand the way it did rather than let Mr. White get into all the other matters.

So, again, if that's error, then I would suggest in the run of a weeklong trial that not -- it would be harmless error.

The character, trait evidence. I think that spoke for itself that this man was going to the mall, he was buying animals that he was going to give for pets or whatever. It turned out then they were later killed and I believe this was important as was argued at the time that people remembered him. People remembered these trips because of some of the things that Mr. Marquardt did or said.

So if you wish to be heard further or Mr. White wishes to add something --

MS. FITZGERALD: Well, Your Honor, I would like to point out that in closing argument the prosecution also pointed out to the jury that Mr. -- well, they -- granted, he said just because he's strange you can't convict him, but he certainly pointed out the fact that Mr. Marquardt's bizarre actions in other ways and also that this crime was bizarre. Now, it seems to me that's

just like saying somebody does bad things, therefore, he did this bad thing. I don't see, I don't see a distinction there and the statute talks about character evidence. It doesn't talk about being, you know, -- it's not necessarily just simply other wrongs.

THE COURT: They weren't presented as other wrongs. They were presented as why these people would remember these transactions because I'm sure if you went down to the local cab company and said that, asked them about various trips to Oakwood Mall, you would have by and large most of them saying I don't have any recollection of anything that occurred that day other than what notes I took, other than in this case Mr. Marquardt was saying and doing things to cause attention to himself.

Do you have anything to add to that?

MR. WHITE: I think you're correct, Your Honor. I mean my point during the trial was exactly what you say and also the point of motive here. There was no clear cut motive as to why someone would shoot a number of dogs and rabbits after spending good money on them and then stuffing them down an outhouse hole. The entirety of his

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1 behavior in that context in connection with those
2 animals, with the cabdrivers, with the clerks and
3 with other people was directly relevant proof as
4 you say as to the credibility of their testimony and
5 their ability to recall and also I think on the
6 issue of motive.
7 THE COURT: I may have already indicated
8 the way I feel about effective assistance of
9 counsel. I'll let you be heard if you wish,
10 Ms. FitzGerald, more to that point. This Court is
11 well familiar with Brian Wright. Brian Wright appears
12 here frequently. Brian Wright as far as I'm concerned
13 is always very zealously and fairly and honestly
14 representing clients. I've never heard a critical
15 comment from my colleagues, from the DA or anybody
16 else about Mr. Wright.
17 I did not know Mr. Rusch prior to this
18 and Mr. Rusch and I did clash from time to time
19 and I'm convinced that we did so because he was
20 perhaps and sometimes in my judgment more zealous
21 than I wanted him to be on certain issues.
22 Mr. Marquardt is a very difficult client to
23 represent and Mr. Rusch did the very best I think
24 he could.
25 And, frankly, it bothered me today when

1 you brought in the investigator and I said are
2 you saying that Mr. Rusch would lie and Mr. Marquardt
3 like he's doing now is just nodding his head
4 vigorously. Mr. Rusch did everything I think
5 humanly possible to defend this man. And I don't
6 know what more he could have done. And they may
7 have had some disagreements over what should have
8 been offered and what should have been done.
9 Mr. Rusch is an experienced lawyer. He as far
10 as I know has represented a number of criminal
11 clients over a number of years. I still don't
12 know him other than the single dealings with
13 him in this case but I always have trouble when
14 now after the fact and in the cool light of the
15 day and so forth we can all look back and say
16 somebody should have done that or somebody should
17 have done that. Lawyers make decision and they
18 make them sometimes under great stressful moments
19 and if they are in error, then we drop out this,
20 that he was ineffective. I don't think Mr. Rusch
21 was in any way, shape or form that he was
22 ineffective. That may not be Mr. Marquardt's view,
23 but it certainly was my view with someone who was
24 trying to preside over a trial the most fair way I
25 could possibly do that.

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STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT III

CASE NO. 04-0958-CR

STATE OF WISCONSIN,
Plaintiff- Appellant,

v.

BILL PAUL MARQUARDT
Defendant- Respondent.

ON APPEAL FROM SUPPRESSION ORDERS
ENTERED IN THE CIRCUIT COURT
FOR CHIPPEWA COUNTY,
THE HONORABLE RODERICK A. CAMERON, PRESIDING

BRIEF OF DEFENDANT-RESPONDENT

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STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Oral argument is not requested. Publication is suggested due to the fact that it appears that there may be a number of prosecutors and defense attorneys that believe that "good faith" factors of Eason have replaced the four Leon factors of "objective good faith.

I

THE GOOD FAITH EXCEPTION TO THE EXCLUSIONARY RULE DOES NOT APPLY TO MARQUARDT

In State v. Eason, 245 Wis.2d 206, 2001 WI 98 (2001), the Wisconsin Supreme Court adopted a good faith exception to the exclusionary rule. The rule was based upon the United States Supreme Court decision United States v. Leon, 468 U.S. 897, 104 S. Ct. 3405 (1984) in which the U.S. Supreme Court first recognized a good faith exception.

To properly understand the "Good Faith" exception, it is necessary to understand the concept of "Objective Good Faith" as defined by the U.S. Supreme Court. To do this, it is necessary to properly analyze the Leon decision.

Leon involved an extensive drug investigation which focused on three suspects. The investigation initiated as a result of a tip from a confidential informant of unknown reliability. The investigation provided the officers with information that the suspects may have involved themselves in past drug dealings.

Follow-up police surveillance provided observations of several individuals leaving the suspects' residences with small packages. At least one such person was known to have a drug record.

Two of the suspects flew separately from Los Angeles to Miami and were observed flying back from Miami to Los Angeles together. Other suspicious activity was observed at the suspects' residences, as well at times with their vehicles. Id. at 901-02. Based upon the above facts provided within an affidavit, search warrants were issued.

The defendants filed suppression motions in District Court. In finding no probable cause to support the Search Warrants, the District Court reasoned:

> I just cannot find this warrant sufficient for a showing of probable cause.
>
> * * *
>
> There is no showing of the reliability and credibility of the informant as not being established.
>
> Some details given tended to corroborate, maybe, the reliability of {the informant's} information about the previous transaction, but if it is not a stale transaction, it comes awfully close

> to it; and all the other material I think is as consistent with innocence as it is with guilt.
>
> So I just do not think this affidavit can withstand the test. I find, then, that there is no probable cause in this case for the issuance of the search warrant...
>
> Id. at Ft. Nt. 2.

The Court of Appeals for the Ninth Circuit upheld the District Court's finding of no probable cause in its decision:

> To the extent that the affidavit set forth facts demonstrating the basis of the informant's knowledge of criminal activity, the information included was fatally stale. The affidavit, moreover, failed to establish the informant's credibility.
>
> * * *
>
> The officer's independent investigation neither cured the staleness nor corroborated the details of the informant's declarations.

The U.S. Supreme Court affirmed the Ninth Circuit, holding that after removing the stale facts as well as those facts relating to the unreliable informant, the warrant application lacked probable cause. However, the Supreme Court noted that with the inclusion of the stale information as well as facts from an informant with unknown credibility, the warrant application was supported by more than a bare bones

affidavit. The Court held that officers will be acting in objective good faith if they rely on a search warrant signed by a neutral magistrate and supported by an affidavit comprised of stale information and information from an untested informant, provided the aggregate amounts to probable cause, even if probable cause is missing after removing the stale and unreliable information. Id. at 919.

The objective standard requires officers to have a reasonable knowledge of what the law prohibits. Id. at 919. Subjective good faith by the officers is irrelevant. According to Leon, police officers must at a minimum understand the thresholds of probable cause, although they will not be judged to second guess a magistrate on issues of staleness and reliability of informants. Id. at 915, 919, 923.

The Leon Court pointed out four situations where the good faith exception will not apply.

> Suppression therefore remains an appropriate remedy if the magistrate or judge in issuing a warrant was mislead by information in an affidavit that the affiant knew was false or would have known was false except for his reckless disregard of the truth[;]

> The exception we recognize today will also not apply in cases where the issuing magistrate wholly abandoned his judicial role...[;]
>
> Nor would an officer manifest objective good faith in relying on a warrant based on an affidavit "so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable [;]"
>
> Finally, depending on the circumstances of the particular case, a warrant may be so facially deficient—i.e., in failing to particularize the place to be searched or the things to be seized—that the executing officers cannot reasonably presume it to be valid.
>
> Id. at 923. (bracketed material added; citations omitted).

In applying the principles of the good faith exception, the Leon Court found the warrant application to be supported by much more than a "bare bones" affidavit. The affidavit related the results of an extensive investigation which focused on the three defendants. Probable cause appeared to be present in the affidavit "but for" 1) stale information of prior criminal activity by the suspects along with 2) relevant facts from an unreliable informant. The Court found that a police officer might reasonably conclude that the warrant was constitutionally sound. As such, the officers relied in objective good faith when they executed the search warrants.

After the Leon decision, the first time the Wisconsin Supreme Court was asked to recognize a good faith exception to the exclusionary rule occurred in State v. Brady, 130 Wis.2d 443, 388 N.W.2d 151 (1986). In declining to adopt the Leon good faith exception in that case, the Court pointed out that the affidavit in Brady to be void of any facts suggesting criminal conduct by the defendant or that evidence of a crime would be found.

The Court wrote:

> Relying upon the Supreme Court's decision in *United States v. Leon, supra,* however, the state argues that even if the arrest was illegal, suppression of the evidence is an inappropriate remedy because the officers acted in good-faith reliance upon the material witness arrest warrant in arresting Brady. *Leon* created a good-faith exception to the exclusionary rule. The exception applies in situations in which the exclusion of evidence would not promote the exclusionary rule's purpose, which is to deter police conduct in violation of the fourth amendment. 104 S.Ct. at 3412-22. The state urges us to adopt *Leon* and to overrule our holding in *Hoyer v. State*, 180 Wis. 407, 193 N.W. 89 (1923), in which we adopted an exclusionary rule based upon the Wisconsin Constitution. Brady contends that this case is inappropriate for consideration of a good-faith exception to the exclusionary rule because the record does not support a finding that the police acted in good faith.

. . .

> We conclude that this case is not a proper vehicle for deciding whether to adopt a good-faith exception to the exclusionary rule. In *Leon* the Supreme Court expressly acknowledged that an officer would not "manifest objective good faith in relying on a warrant based on an affidavit 'so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable.' " *Leon*, 104 S.Ct. at 3422 [quoting *Brown v. Illinois*, 422 U.S. 590, 611, 95 S.Ct. 2254, 45 L.Ed.2d 416 (1975) (Powell, J., concurring in part)]. The fourth amendment requires that the affidavit upon which the warrant was based had to contain sufficient facts to support a finding of probable cause regarding the impracticability of securing Brady's presence through a subpoena. Because the affidavit lacked indicia of probable cause regarding the impracticability of securing Brady's presence through a subpoena, this case does not present a question of "good faith." Therefore, *Leon* is not implicated. Accordingly, we do not decide whether to adopt a good-faith exception to the exclusionary rule in Wisconsin. We hold that the circuit court acted properly in suppressing the evidence discovered as a result of the illegal arrest of Brady. The order of the circuit court is affirmed.

Our Supreme Court made it clear that Leon dictates that if within the four walls of the affidavit, no indicia of probable cause exist against the person or place to be searched; police officers can not be found to have acted in objective good

faith. It is important to note that the Brady Court did not suggest that the language of Leon;

> Nor would an officer manifest objective good faith in relying on a warrant based on an affidavit "so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable [;]"
>
> Leon at 923,

provided the State with a post-search evidentiary hearing to try and fix its affidavit by supplementing it with subjective knowledge of what the officers might have known before the search, but didn't include within the affidavit. The State is asking for such a vehicle where bad memory would replace the objective certainty required by Leon.[1] Such a procedure would make the determination of "objective good faith" dependant upon the subjective hindsight of the testifying witnesses for the State. Brady correctly avoided such an interpretation of Leon.

[1] In this case, the State attempted to argue that prior to the first search of Marquardt's cabin, the police and DCI agents "substantially narrowed the focus of the investigation to the defendant as the most likely suspect." (332:10) However, no police report substantiates this claim and a statement made by the Sheriff after the first search of Marquardt's cabin refutes the subsequent claim. (330:3-4).

In State v. Eason, 245 Wis.2d 206, 629 N.W.2d 625, 2001 WI 98 (2001), the Wisconsin Supreme Court applied the "good faith exception" for the first time. The case involved a no-knock search warrant. Probable cause clearly existed for the issuance of the search warrant. But Eason attacked that part of the search warrant that authorized a no-knock entry. He argued that the affidavit supporting the warrant did not justify a no-knock search. The affidavit failed to allege any specific information that someone in the apartment might possess weapons, or would destroy evidence, if the officers knocked and announced their presence. Id. at 220.

The trial court had reviewed the search warrant, including Officer Fahrney's affidavit, and concluded that the "affidavit for [the] search warrant fails to allege the requisite reasonable suspicion to justify the issuance of a no knock search warrant." Although the affidavit pointed out arrests of the suspects for aggravated assaults and obstruction, the affidavit did not provide any information regarding convictions. The trial court suppressed all of the evidence obtained during the execution of the search warrant. The State appealed.

The court of appeals agreed with the defendant that the affidavit did not sufficiently indicate that knocking and announcing would have been dangerous to the officers. The court of appeals also rejected the State's argument that arrests listed in the affidavit reflected the apartment occupants' willingness to use violence.

> There is no information as to when and where those arrests took place, or whether they involved any violent acts--and, again, whether a conviction followed. The affidavit doesn't assert that either Bentley or Shannon Eason--or any of the other occupants of the apartment--were armed; it merely offers a general statement that drug-related crimes often involve weapons.

Id. at 222.

Our Supreme Court in Eason affirmed the finding of no reasonable suspicion to believe a no-knock search was necessary. However, due to the significant investigation by law enforcement of the two suspects, coupled with a lengthy arrest record for violence of the two suspects, all documented within the affidavit, the Court found objective good faith.

When our Supreme Court recognized a good faith exception, it went further than just adopting the Leon rule. Before good faith in a Wisconsin Court is found, courts are mandated to

find two additional elements to exist after ruling out the four Leon situations where objective good faith will not be found.

> Accordingly, we require that in order for the good faith exception to apply, the State must show that the process used attendant to obtaining the search warrant included a significant investigation and a review by a police officer trained in, or very knowledgeable of, the legal vagaries of probable cause and reasonable suspicion, or a knowledgeable government attorney. [FN29] While this process was followed in *Leon,* the United States Supreme Court did not specifically hold that the Fourth Amendment required a significant investigation and review of the warrant application in order for the good ***649** faith exception to apply. [FN30] However, we hold that Article I, Section 11 of the Wisconsin Constitution requires this process and thus affords ***additional protection*** than that which is afforded by the Fourth Amendment. Indeed, in some instances, "the Wisconsin Constitution may afford greater protection than the United States Constitution." ***258** *State v. Hansford,* 219 Wis.2d 226, 242, 580 N.W.2d 171 (1998); *see also Hoyer v. State,* 180 Wis. 407, 193 N.W. 89. [FN31]

Id. at 257. (Emphasis added)

A.

LEON ANALYSIS OF MARQUARDT

In the case at hand, a Leon analysis of the third situation where objective good faith will not be found requires that we

look to the four walls of the affidavit in support of the March 15th, 2000 search warrant. As to Bill Marquardt, the affidavit provides only the following:

> Investigator Price reports that after finding the body of Mary J. Marquardt, he spoke with her husband, Alfred E. Marquardt. Mr. Marquardt informed him that he and Mary have a son, Bill Marquardt, who, since the location of Ms. Marquardt's body had not been seen or heard from. Alfred Marquardt further informed Investigator Price that Bill Marquardt owned with Alfred Marquardt a cabin in which Bill resided at E27505 County Highway M, Town of Fairchild, County of Eau Claire, Wisconsin.

This Court of Appeals has previously reviewed this case on the issue of whether probable cause existed as to Bill Marquardt. (203) In finding none, this Court of Appeals remanded for a good faith hearing ruling:

> If the circuit court ultimately concludes that the good faith exception to the exclusionary rule is inapplicable, the court must issue a suppression order with respect to the March 15 search. In that case, the court must also determine the facts surrounding the subsequent searches to determine if they were tainted by the initial unlawful search of Marquardt's residence and if so, issue a suppression order consistent with its findings.
>
> (Appendix to State's Brief: p.133).

This Court of Appeals considered all the facts from all of the affidavits and held:

> Although these facts may lead a reasonable police officer to pursue further investigation of Marquardt, *we conclude that there is nothing in the facts to tie Marquardt to the crime, much less to tie his home to the crime.* Although the warrant-issuing judge may have been provided sufficient facts to excite an honest belief in a reasonable mind that the particular types of objects sought – including shoes, knives, and guns – could be *linked with the commission of the crime,* there was *no fact that suggested those items would be found in Marquardt's cabin.* We conclude that Marquardt has established that the facts are clearly insufficient to support a probable cause finding and therefore, we reject the judge's probable cause determination.
>
> (Appendix to State's Brief: p.133). (Emphasis added)

To analyze objective good faith under Leon, we must examine the affidavits supporting the March 15th, 2000 search warrant. It consists of only one fact regarding the defendant. Marquardt has not been seen by his father since the homicide. We are left with an affidavit that contains nothing regarding Bill Marquardt. The third factor of Leon requires suppression

of everything found on March 15th 2000 search at the Marquardt cabin. [2]

Since there was no single fact in the affidavit to support probable cause that Marquardt was involved in the homicide or that his cabin possessed evidence of the crime, this case is analogous to Brady, (above) the first case considered by the Wisconsin Supreme Court after Leon for establishing a good faith exception for warrants. There were no facts whatsoever to support probable cause in Brady and the good faith exception did not apply. The same is true in Marquardt.

When the analysis starts with the Leon factors, we don't ever reach the additional two factors incorporated by Eason. There is no objective good faith.

[2] If a good faith hearing had been held regarding the Leon factors, specifically the first one where false statements are used by law enforcement in the affidavit, then the only fact in the affidavit regarding Marquardt, that Marquardt's father had not seen his son since the homicide two days earlier, might have itself resulted in a finding that good faith doesn't apply in this situation. Officers knew that Marquardt's father had actually said that Marquardt had not visited him since February 17th, 2000, almost a month before the homicide. (322:2). At no time did Marquardt's father suggest this to be unusual.

It should be pointed out that at no time was there a good faith hearing in the Eau Claire County collateral criminal case against Marquardt in which the Leon and Eason factors were properly analyzed. The State tries to make much of the fact that on April 26, 2002, Eau Claire County Judge Eric J. Wahl conducted a "good faith" evidentiary hearing and concluded that the evidence seized under the March 15th, 2000 warrant was admissible.

At the Eau Claire "good faith" hearing, defense counsel for Marquardt stipulated with the prosecutor that the only two factors for consideration were the two Eason factors. (327:6). After testimony, defense counsel argues that Leon only requires objectively reasonable reliance by police officers and the application and preparation of the search warrant by someone with experience for Leon to be satisfied. (327:63) It appears from defense counsel's stipulation and argument regarding Leon that he may have never even read Leon or Eason prior to the hearing. He certainly was ineffective, an issue not reached below but discussed during State arguments to require the Chippewa County Judge Cameron to invoke the Doctrine of Offensive Issue Preclusion and accept Eau Claire

County's finding of good faith. (326:1) The Chippewa County trial court pointed out that the Leon factors were not properly raised in his rejecting to invoke issue preclusion. (326:1) This counsel objected to any use of the Eau Claire County "good faith" transcript below and continues to object to its use by the State in this appeal. (306).

B

LEON DOES NOT ALLOW FOR SUPPLEMENTARY EVIDENTIARY HEARINGS ON ITS THIRD AND FOURTH FACTORS.

The State cites a Federal 8th Circuit case, U.S. v. Martin, 833 F.2d 752 (8th Cir. 1987) for the proposition that a court may supplement the record while determining the third Leon factor. Martin cited Anderson v. Creighton, 483 U.S. 635, 640, 107 S.Ct. 3034, 97 L.Ed.2d 523 as authority for its conclusion. But Anderson was a qualified immunity 4th Amendment case where officers were being sued civilly for an illegal search. Anderson's Fourth Amendment right was not clearly established at the time of the search. "Clearly

established" for qualified immunity purposes means that the contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. His very action need not previously have been held unlawful, but in the light of pre-existing law its unlawfulness must be apparent. *E.g.*, Anderson v. Creighton, 483 U.S. 635, 640, 107 S.Ct. 3034, 97 L.Ed.2d 523.

In the context of that civil suit, and for purposes of determining qualified immunity, the United States Supreme Court used a subjective good faith analysis which allowed for the looking at the totality of the circumstances outside of the affidavit. Anderson's holding did not extend to criminal cases. To the extent that the 8th Circuit has attempted to replace objective good faith with subjective good faith in a criminal setting, Martin is inconsistent with the U.S. Supreme Court holding in Leon.

This exact issue has just been addressed in our Seventh Circuit Court of Appeals. In U.S. v. Koerth, 312 F.3d 862, (7th Cir. 2002), Circuit Judge Coffey writing the decision for the unanimous Court held:

> The *Leon* test for good faith reliance is clearly an objective one and it is based solely on facts presented to the magistrate. An obviously deficient affidavit cannot be cured by an officer's later testimony on his subjective intentions or knowledge.... *Leon* creates an exception to the exclusionary rule when officers have acted in reasonable reliance on the ruling of a judge or magistrate. The point is that officers who present a colorable showing of probable cause to a judicial officer ought to be able to rely on that officer's ruling in executing the warrant. When the officers have not presented a colorable showing ... the reasoning of *Leon* does not apply.
>
> *Hove*, 848 F.2d at 140 (internal citations omitted). *See also Bynum*, 293 F.3d at 212 (Michael, J., dissenting) ("In sum, the Government cannot establish an officer's objective good faith under *Leon* by producing evidence of facts known to the officer but not disclosed to the magistrate."); *Baker*, 894 F.2d at 1149-50.
>
> As a final matter, because the probable-cause determination is based solely on the information presented during the warrant application process, we note that the district judge properly refused to consider documents that were not presented to warrant-issuing Judge Cameron and were cited by the Government for the first time at the suppression hearing in federal court.

There is no question that the seventh circuit Koerth decision based its holding on Leon whereas the eighth circuit case based its holding on a civil suit regarding qualified immunity. The seventh circuit decision is correct. Leon dictates that this

Court cannot look outside the four walls of the affidavit in support of the warrant to determine objective good faith.

C.

EASON ANALYSIS OF MARQUARDT

The first Eason additional factor requires that the police investigators engaged in a ***significant investigation*** before applying for, receiving and executing the warrant. It is first necessary to determine what the term "significant investigation" means. The Eason Court did not give guidance in this respect.

The Webster Dictionary definition of "significant" (found online at Webster.com) is:

> 1 : having meaning; *especially* : SUGGESTIVE <a *significant* glance>
>
> 2 a : having or likely to have influence or effect : IMPORTANT <a *significant* piece of legislation>; *also* : of a noticeably or measurably large amount <a *significant* number of layoffs> <producing *significant* profits> b : probably caused by something other than mere chance <statistically *significant* correlation between vitamin deficiency and disease>

Some meanings of the word are qualitative whereas others are quantitative. As applied to the case at hand, a qualitative analysis of "significant investigation" suggests a nexus between the results of the investigation and the person to be seized or place to be searched before good faith is present. On the other hand, a quantitative analysis of "significant investigation" allows mere size or duration of an investigation alone to justify good faith.

If a quantitative connotation of "significant investigation" was all that was intended by the Eason Court, then for example, a five year drug investigation involving numerous officers from numerous municipalities could justify finding good faith in requesting a warrant for every residence in the county. We would have a five year investigation coupled with many investigators. That's significant, from a quantitative view.

But the above investigation would deny Due Process if it alone cured a defective search as to a particular defendant. The flaw is that the word "significant" cannot be defined in

terms of size and length of time alone. To satisfy constitutional Due Process, there must be a significant correlation between the investigation and the person or place to be searched. The investigation must provide significant results which point to the suspect. Otherwise, the term is meaningless.

Due Process requires that the means chosen to affect a valid objective bear a rational relationship to the purpose sought to be achieved." *State v. Joseph E.G.*, 2001 WI App 29, ¶ 13, 240 Wis.2d 481, 623 N.W.2d 137. State v. Jorgensen, 650 N.W.2d 322, (Wis.App.2002). This means that if the factor of "significant investigation" is to pass constitutional muster, it must be defined qualitatively.

When considering this factor in the context of Marquardt, the affidavit is void of any reference to any significant investigation whatsoever. In Leon and Eason, the Courts found that the affidavits in support of the search warrants themselves demonstrated significant investigations focusing on the defendants. The affidavits described the investigations which included surveillance, record checks and other

activities, all focusing on the defendant over a significant period of time. This is not the case in Marquardt. The affidavits in Marquardt focus on a couple observations made at the crime scene as well as one conversation with the defendant's father which was severely taken out of context. (See ft. nt. 2 above).

The State argues that on March 14th, 2000, DCI agents learned from a Wesley Anderson that a few days earlier, someone shot their dog with a nine millimeter bullet. Crimes involving guns often involve 9mm's. Anderson lives some distance away from Marquardt on the opposite side of the road. (330:8). The State claims this to be a factor in justifying the March 15th, 2000 search warrant. However, police already had a solid suspect for this crime prior to the first Marquardt search. (334:7). A possible connection between this dog shooting and the Marquardt homicide did not occur until ***after*** the March 15th, 2000 search of Marquardt's cabin when police learned for the first time that Marquardt's dogs had been shot.

The State argues that footprints were found for comparison purposes and that this fact was in the March 15th application. This is not a meaningfully significant fact given most all people wear shoes. (State's brief: 27).

The State finds it significant that the victim was found covered with a blanket. The State argues it might suggest that the perpetrator knew the victim. Since the homicide occurred in March, it might suggest that the perpetrator was covering up the time of death by keeping the body warmer longer. It might simply mean that the victim was wearing the blanket around her at the time she was killed. This is not a significant investigation at to Marquardt.

The State claims it significant that the supporting affidavit for the March 15th, 2000 search of Marquardt's cabin included a statement attributed to Alfred Marquardt that Bill Marquardt hadn't been seen since the discovery of the victim's death. This only statement regarding the defendant in the application was actually never made by the Alfred. (322:2) Law enforcement knew that Alfred told them he last saw his son on February 17th, 2000. The State knew Alfred never

suggested that it was unusual to go a month without seeing his son. Alfred told the police the opposite that "Bill would be gone a lot for periods of time." (330:6) In fact, Alfred told police he had almost no contact with Bill between the first of the year 2000 and the homicide. (330:5).

The State puts much weight on testimony from the Eau Claire good faith hearing. This counsel continues to object to any use of it in this case. Eau Claire defense counsel was unfamiliar with the law, unfamiliar with the homicide facts, did not object to leading questions of State witnesses and never impeached the State witnesses with their own police reports.

However, this counsel must respond to the State's brief. The fact of the matter is that many of the factual assertions being made by the State in this appeal were not argued in this trial court below. They have their basis solely in the Eau Claire County Good Faith hearing transcript. This counsel had no occasion to supplement this record with police reports demonstrating that testimony in the Eau Claire transcript is inconsistent with contemporaneous reports made by the

investigators. Since the Chippewa County Circuit Judge Roderick A. Cameron made his rulings without the benefit of an evidentiary hearing and specifically denied effect to the Eau Claire hearing, it is improper for the State to use that transcript in this hearing. If this Court of Appeals believes that the transcript should be considered, then this counsel wishes to move this Court to remand for the purpose of an Ineffective Assistance of Counsel hearing regarding Eau Claire defense counsel or in the alternative, an evidentiary hearing in Chippewa County to demonstrate the numerous errors in the Eau Claire County Good Faith testimony.

The State finds it significant that Investigator Price testified that the defendant's family could think of no "non-relative" with a motive to harm their mother. (State's brief: p.30) Fact of the matter is Investigator Price never testified that way. (327: 28). In response to a leading question, Investigator Price said "No."

> Q. Did either of those two individuals (brother and sister) or Alfred Marquardt give you any indication that any non-relative may have a motive to do harm to Ms. Marquardt?

R. No.

The fact of the matter is that none of the family members knew of any one including the defendant that might have committed this crime.

Special Agent Rehrauer testified at the Eau Claire hearing that there was television coverage of the homicide between the homicide discovery and the search warrant application. Despite this publicity, he couldn't locate the defendant. However, the investigators knew that as of February 17th, 2000, Alfred Marquardt believed his son might have left the country because someone was after him. (33:4; 313:8).

The State points out that Rehrauer also testified at the Eau Claire hearing about a possible motive for Bill to kill his mother, which he learned while interviewing Alfred. The State cites this as "external indicia of probable cause known to the applying officers but omitted from the application." (State's brief: 29-30) Rehrauer testified that he learned from Alfred that Marquardt's mother had "**discovered** [Marquardt] digging up twelve thousand dollars in cash from the

Marquardt premises earlier in the year." (327:56) (Emphasis added)

According to Rehrauer's own report, that's not what Alfred said. Alfred told Rehrauer that on his wife's birthday, Bill went out to the shed to get some money that he kept stored there. (330:6) After Bill left, his wife call Alfred to tell him Bill took some of the money from the shed. She did not know whether Bill had taken all of the money stored in the shed. There is no inference of a "discovery" in Rehrauer's report that might provide a motive to kill a month later. Rehrauer's report makes it clear that all parties were well aware of Bill's use of the shed to keep his money.

But what is more disturbing is that the State has introduced this testimony to supplement the record as to facts known by officers before the March 15th, 2000 search warrant but not included in the affidavit. Problem is Rehrauer's conversation with Alfred Marquardt took place in November of 2000, about eight months after the initial search of the cabin. (330:6; top of report indicates 11/17/00). Again the State is trying to recreate history at the Eau Claire "Good Faith"

hearing as to what had occurred before the first search of Marquardt's cabin. The Eau Claire defense counsel did not properly impeach Rehrauer. Again, defense counsel objects to the use of that transcript.

There is no "significant investigation" as to Marquardt. The record demonstrates that many officers worked on the case for two days before requesting the warrant. (A total of 44 hours included sleeping hours). But the record does not demonstrate that the officers investigated Bill Marquardt or that any evidence was found whatsoever linking Marquardt to the homicide. The only fact known was that the defendant's father Alfred Marquardt had not seen Bill Marquardt in almost a month. (322:2)

So even if the Court were to reach an Eason analysis, the first Eason factor would still require suppression of all evidence discovered in the March 15th, 2000 search of Marquardt's home.

II

THE INEVITABLE DISCOVERY DOCTRINE DOES NOT APPLY IN MARQUARDT

Otherwise excludable fruits of an illegal search may be admitted into evidence if the tainted fruits would have been inevitably discovered by other lawful means. *See* Nix v. *Williams*, 467 U.S. 431, 444, 104 S.Ct. 2501, 81 L.Ed.2d 377 (1984). In the context of search and seizure law, "inevitable discovery" has a specific meaning. It does not apply whenever it is obvious that the police could have and would have legally obtained evidence if they had not first obtained it illegally. Rather, the State must establish: (1) a reasonable probability that the evidence in question would have been discovered by lawful means but for the police misconduct; (2) that the leads making the discovery inevitable were possessed by the government at the time of the misconduct; and (3) that prior to the unlawful search, the government was also actively pursuing some alternate line of investigation. State v. Lopez, 207 Wis.2d 413, 427-28, 559 N.W.2d 264 (Ct.App.1996).

Under the exclusionary rule, if a law enforcement officer conducts an unconstitutional search, then the fruits of that search will normally be excluded from evidence. *See* Wong Sun v. United States, 371 U.S. 471, 484, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963); *State v. Armstrong*, 223 Wis.2d 331, 361, 588 N.W.2d 606 (1999). However, the inevitable discovery doctrine provides that otherwise excludable fruits of an illegal search may be admitted into evidence if the tainted fruits would have been inevitably discovered by other lawful means. *See* Nix v. Williams, 467 U.S. 431, 444, 104 S.Ct. 2501, 81 L.Ed.2d 377 (1984); State v. Washington, 120 Wis.2d 654, 664, 358 N.W.2d 304 (Ct.App.1984), *aff'd on other grounds,* 134 Wis.2d 108, 396 N.W.2d 156 (1986).

Prior to this appeal, the State previously contended that the evidence illegally discovered in the searches of Marquardt's home as well as the evidence discovered in his vehicle after his arrest would inevitably have been discovered through lawful means within 10 days or so of when the evidence was illegally seized. (327:3) To arrive at this conclusion, the State

puts forth a number of propositions, some unsupported by the facts and some speculative at best. (332:9-13)

However, for purposes of this appeal, the State has abandoned its prior theory of inevitable discovery and now argues a new theory not argued below. It now argues that there was no police misconduct. If this is the State's position, then inevitable discovery is inapplicable. This is because police misconduct is a prerequisite to invoking the doctrine of inevitable discovery. If there was no police misconduct, inevitable discovery doesn't apply.

Secondly, the State now argues that the list of alleged facts from the Eau Claire Good Faith Hearing constitute pre-existing leads. As previously discussed, the Eau Claire County Good Faith transcript should not be used in this appeal. The trial court below refused to honor it. As previously demonstrated, some of its contents was obtained months after the first search of Marquardt's home, but purported to be pre-existing knowledge. This is precisely the reason that the State should not be allowed to supplement the record. The officers either have bad memories as to what was

said and when it was said or they are intentionally bolstering the record with misrepresentations.

However, in response to the State's argument of pre-existing leads, our position is that there were no credible pre-existing leads. It is simply implausible that none of this alleged pre-existing knowledge made its way into the application for the March 15th search. The State's arguments show desperation.

Marquardt is prepared to argue against the argument's the State made below. But it seems senseless to do so when the state has abandoned those arguments. But since Marquardt is not guaranteed a further rebuttal brief, Marquardt will demonstrate why "inevitable discovery" is inapplicable using the State's arguments below. (332:9-13).

Below, the State claimed that prior to its first illegal search of Marquardt's residence, the police and DCI agents were involved in a substantial investigation which had substantially narrowed down to the defendant as the most likely suspect. (332:10) However, the affidavit in support of that first search warrant of Marquardt's residence was void of even one fact

supporting probable cause that Marquardt was connected to the crime, an unlikely scenario if a substantial investigation focused on Marquardt. Secondly, according to the Chippewa Harold Archived Newspaper article dated Thursday, March 16, 2000, (See Counsel's affidavit), Sheriff Doug Ellis held two press conferences on Wednesday March 15, 2000. (330:3-4) The first press release was at 4:20 p.m. asking the public to assist in locating Bill Marquardt. This was about one hour after the illegal search of Marquardt's home was complete. The second press release came at 9:47 p.m. elevating Marquardt to "suspect" based upon information which "came to light late in the afternoon Wednesday." Sheriff Ellis further said in his press release that "other suspects had not been ruled out."

Second, the State claims that Bill Marquardt's finger and palm prints would not be expected to be found at the Alfred and Mary Marquardt residence since he hadn't been at the home for almost a month. The State provided no evidence that fingerprints last less than a month. Depending on surrounding circumstances, prints can remain indefinitely.

Next, the State points out investigators were aware of one of Bill Marquardt's neighbor's a few houses down being entered on March 9, 2000. A dog was shot with a 9mm shell.

From this, the State concludes that the 9mm shell casings from the homicide and the dog killing would inevitably have been compared by the crime lab due to the close proximity of the defendant's residence to the dog killing, the closeness in time of the two offenses and the finding of 9mm casings at each. Apparently, *inevitably* the crime lab would provide an opinion that the same weapon was used for both crimes. With this opinion and the other information above, a valid warrant would have *inevitably* been issued to search Marquardt's residence. For unarticulated reasons, the State concluded "a high probability exists" that all of the same evidence would have *inevitably* been discovered pursuant to a valid search warrant. The State concluded without explanation that this would have occurred within five to ten days of the initial illegal search.

The first concern with the State's theory below was their conclusion it would have been inevitable that the 9mm

casings from the Anderson dog shooting in Eau Claire County would be compared with the 9mm casings from the Chippewa County homicide. 9mm casings are common in crimes involving guns. The two crimes occurred over forty miles apart in different counties. The crimes were very different. One involves the killing of a human, whereas the other involves the killing of an animal. The Anderson dog killing was a forced entry break-in whereas there was no evidence of a break-in in the Marquardt homicide. Ms. Marquardt was stabbed in the neck with a knife in addition to being shot in the head. The Anderson dog was not stabbed. There was no apparent motive or *modus operandi* tying the two crimes together. Not one fact was known to the police to connect Marquardt to either crime. In fact, the State has not shown any evidence that Bill Marquardt even knew the Andersons or ever had any dealings with them. Furthermore, the police had a valid suspect for the Anderson dog shooting. It was not likely that the authorities would have requested the crime lab to compare the 9mm casings without the illegal search first.

On the other hand, it is easy to see how and why the 9mm casings were compared after the police illegally searched

Marquardt's residence on March 15, 2000. The police discovered evidence of dogs and rabbits shot and stabbed to death at Marquardt's cabin. Once the authorities had this information, Marquardt became a possible suspect of both crimes and the 9mm casing comparisons became an obvious next step.

The next problem with the State's theory below was that, assuming the crime lab eventually compared the 9mm casings from the Marquardt homicide with the Anderson dog killing casings showing the same gun was used for both, a valid search warrant would issue to search Marquardt's residence. These facts still fall short of probable cause to believe Bill Marquardt committed either crime or that evidence of a crime would be found at his cabin. Given what Alfred Marquardt told the police on the day of his wife's homicide about Bill Marquardt's contemporaneous concerns that someone was after him and he needed to leave the country coupled with what the police knew about Marquardt's prior drug dealings, evidence that both crimes involved the same gun would likely suggest that Bill Marquardt may have had an enemy in the drug world that is out to send him a message. This theory at

least provides a motive for each crime. However, it does not render it probable that Bill Marquardt committed these two very different crimes, each without any apparent motive.

Assuming *arguendo* that a valid search warrant would have eventually been granted, the State wanted to suggest that "a high probability exists" that all of the evidence would have been legally discovered within five to ten days. It is not reasonable to conclude this.

Even after the benefit of the tainted evidence obtained through the March 15, 2000 illegal search as well as the March 18, 2000 illegal arrest and second illegal search of Marquardt's residence, investigators still did not send the Anderson dog shooting evidence to the crime lab for comparison until March 20, 2000. (See Counsel's Affidavit). It is first preposterous to conclude that the investigators would have followed the same "time line" in sending the Anderson evidence to the crime lab for comparison without the benefit of the fruits of the two illegal searches. Without the benefit of the tainted evidence and given the presence of

an alternate prime suspect for the dog shooting, it could have been months if ever before a comparison was made.

Secondly, the State cannot sustain a burden of showing that any of the evidence found on March 18, 2000 would have been present at some undisclosed point in the future. After Marquardt returned home on March 18, 2000 to a cabin that was unsecured and searched through, photographs taken by police on both the 15th and 18th of March show that Marquardt started moving items out of his cabin into his car. (330:9-10. Photos show Marquardt's Play Station moved from cabin [9] to back seat of his vehicle[10]). Even without the photos showing Marquardt moving items from his cabin, it is impossible to predict what evidence might have remained in even a twenty four hour period, much less an indefinite time period into the future.

The State needs to establish three elements before the "Inevitable Discovery Doctrine" can apply. The first is that a reasonable probability exists the evidence in question would have been discovered by lawful means "but for" the police misconduct. While counsel has not found any case law that

defines "reasonable probability" in terms of "time", it appears that Courts which have found the "Inevitable Discovery Doctrine" to apply have done so under circumstances where the inevitable legal seizure is time-wise contemporaneous to the illegal seizure.

The "Inevitable Discovery Doctrine" was introduced in Nix v. Williams, 467 U.S. 431, 432-33 (1984). In Nix, the report of a missing ten-year-old girl triggered a massive search that began before the defendant's arrest and continued *without interruption* until the defendant led the authorities to the body. The police had violated the defendant's Sixth Amendment rights by improperly persuading him to confess to the murder of a young girl after he had refused to speak without counsel present. The United States Supreme Court concluded that because the independent search party was proceeding towards the place where the body was located, the search teams would have continued the search, and the body inevitably would have been found had the defendant not told the police where the body was. Id. at 449. In Nix, the "massive search" was contemporaneous to the defendant leading authorities to the body.

In United States v. Jones, 72 F.3d 1324, 1330 (7th Cir.1995), the 7th Circuit Federal Court of Appeals held that under the inevitable discovery rule, $299 of genuine currency found during a pat-down search of a defendant before he was arrested should be admitted as evidence. The Court found that since the police had completed their search of the defendant's house without searching the defendant personally, they had probable cause to arrest him based on the presence of counterfeiting equipment, and that the subsequent pat-down search conducted at the time of arrest would have produced the currency. The legal search would have occurred within moments of the illegal search of defendant.

In State v. Lopez, 559 N.W.2d 264 (Wis. App., 1996), during the execution of the search warrant, police located a freezer in the basement that was locked. In order to avoid prying it open, police asked Lopez where the key was located. Although Lopez was in custody, the police had not yet read him his *Miranda* warnings; nevertheless, Lopez told the officer where it was hidden. Police found a large quantity of marijuana in the freezer. The trial court determined that since

there were no *Miranda* warnings given, the statement itself should be suppressed. However, the trial court refused to suppress the evidence because it found that "if nothing had been said the officer would have gone down and either found the key or... taken the nearest pry bar and sprung the door." The Court concluded that the evidence would have inevitably been discovered and as such was admissible. In Lopez, the legal ability to search the freezer was contemporaneous to the illegally obtained information as to where the key was hidden.

In State v. Kennedy, 134 Wis.2d 308, 396 N.W.2d 765, (Wis.App. 1986), the doctrine was applied to a search of an impounded vehicle in which a vodka bottle was discovered. It is clear that an inventory search of vehicle would have been conducted anyway. But the search was conducted pursuant to a defective search warrant because the police possessed the warrant and believed it to be valid. If a warrant had not been obtained, a routine inventory search would have occurred *at the same time and in the same manner* as the illegal search. During the inventory search, the unconcealed vodka bottle would have been discovered and

seized, and it would have been admissible in evidence. These facts established that the vodka bottle would have been inevitably discovered by lawful means.

The defense is unable to locate any case in which the "inevitable" discovery was not contemporaneous to the "illegally tainted" discovery. But this makes perfect sense since the more time separating the illegal discovery from a subsequent legal discovery, the less likely the same evidence will still be present. There is no reasonable probability that the evidence would eventually have been discovered "but for" the illegal first search.

Second, the State must show that the leads making the discovery inevitable were possessed by the government at the time of the misconduct. The defense argues herein that "but for" the knowledge acquired by the investigators during the first two illegal searches, the State possessed insufficient leads to conclude that the discovery of any evidence inculpating Marquardt was inevitable. As demonstrated above, the State's theory heavily relies on speculative reasoning as well as totally ignoring the "staleness" issues

involved with a theoretical "inevitable discovery" at some unascertainable point in the future.

Finally, the State must also demonstrate that prior to the unlawful search; the government was also actively pursuing some alternate line of investigation. What was it? The State has not alleged one. This is a necessary element for the State to show in order to prove "inevitability".

In State v. Parker, 646 N.W.2d 854 (Ct. App. 2002), officers had responded to a call from a proprietor of a motel that indicated she found what appeared to be cocaine inside on of the motel rooms while she was cleaning the room. The officers were aware that they had no search warrant. So instead of the officers obtaining a search warrant, they asked the proprietor to bring the cocaine to them. This constituted an illegal seizure because the proprietor became an agent of the officers when she started obeying their requests.

The State in Parker argued that since the officers had probable cause to immediately obtain a warrant and legally seize the cocaine, the evidence should be admissible through

the "inevitable discovery doctrine". The State argued that the third prong of this test is satisfied because "there is nothing to indicate that a search warrant would not have been applied for and obtained by the police officers [if the officers had not instead obtained the evidence illegally]." In rejecting the State's argument, the Court of Appeals held that this assertion does not show that the police were "actively pursuing some alternate line of investigation" which would have led to the legal seizure of the evidence. Therefore, the inevitable discovery doctrine did not apply.

Regardless of which path the State chooses to argue in its rebuttal brief, inevitable discovery is not applicable.

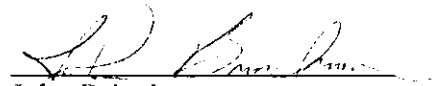
III

CONCLUSION

In conclusion, the Good Faith exception to the exclusionary rule does not apply in Marquardt. Furthermore, there are no facts to support invoking the Doctrine of Inevitable Discovery.

Dated At La Crosse, Wisconsin: July 12, 2004.

Respectfully submitted,



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FORM AND LENGTH CERTIFICATION

I certify that this brief conforms to the rules contained in Wis. Stat. §(Rule) 809.19(8)(b) and (c) in that it is:

Proportional serif font: Minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of a minimum 2 points, maximum of 60 characters per full line of body text. The length of this brief is 8,099 words.

Dated this 12th day of July, 2004.

John M. Brinckman

STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT III

Case No. 04-1609-CR

STATE OF WISCONSIN,
Plaintiff-Respondent,

v.

BILL P. MARQUARDT,
Defendant-Appellant.

ON APPEAL FROM A CRIMINAL COMMITMENT
ORDER AND A POST-COMMITMENT ORDER
ENTERED IN THE CIRCUIT COURT
FOR EAU CLAIRE COUNTY,
THE HONORABLE ERIC J. WAHL, PRESIDING

BRIEF AND APPENDIX
OF PLAINTIFF-RESPONDENT

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STATE OF WISCONSIN

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BRIEF AND APPENDIX OF PLAINTIFF-RESPONDENT

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Oral argument is not requested. Publication may be warranted if this court reaches the question of whether a reviewing court may look outside a search warrant application to determine "good faith" relating to probable cause. The same issue – stemming from the same warrant application – is pending in *State v. Bill Paul Marquardt*, No. 04-0958-CR, a pretrial appeal arising out of a Chippewa County prosecution.

STATEMENT OF THE CASE

On January 30, 2003, after a three-day trial, a jury found Defendant Bill P. Marquardt guilty of ten crimes stemming from the following incidents (49; 93:124-27):

- Between March 6 and March 15, 2000: Six counts of mistreating animals by use of a dangerous weapon (a .22-caliber rifle) for shooting to death three puppies and three rabbits that Marquardt recently had bought, plus one count of possession of a firearm by a felon (3:1-3; 93:72-74); and

- March 9, 2000: One count of armed burglary and one count of mistreating an animal by use of a dangerous weapon (a 9mm handgun) for breaking into the residence of neighbor Wesley Anderson and shooting to death the family dog, plus one count of possession of a firearm by a felon (3:3-4; 93:74).

Marquardt stipulated that in 1996, he was convicted of a felony of possession with intent to deliver marijuana (91:186).

On April 7, 2003, the prosecutor conceded that Marquardt should be found not guilty by reason of mental disease or defect (95:2, 20-21), and Judge Eric J. Wahl committed Marquardt for institutional care not exceeding seventy-five years (54; 95:40-41).

Marquardt unsuccessfully sought a new guilt phase of trial (66; 71; 72; 96:52-78) and now appeals from the commitment and post-commitment orders (74).

STATEMENT OF FACTS:
TRIAL TESTIMONY

Pre-March 2000.

In June 1999, Bill Marquardt, age twenty-four, moved into a small cabin that his father, Alfred, had helped him to buy in a "secluded rural area" (91:76) of the Town of Fairchild (92:29-30). Adjacent to the cabin are an outhouse and storage shed (91:75-77).

Marquardt said he quit his job in the fall of 1999 and that in mid-February 2000, he met "Lillie Murphy," who, he said, told her that she was from St. Paul and was "on the run" from authorities (93:9-11). He said Lillie lived with him until March 12, 2000 (93:10-11, 43).

Marquardt's father, Alfred, said Marquardt did not want his parents to visit him, once pushing his mother out of the cabin (92:38-39). Alfred described the cabin as "a mess," with music tapes scattered near the door (92:39-40). He said the music collection had been Marquardt's "pride and joy" (92:59-60).

March 6, 2000.

Cab driver Ronald Lewis said that on March 6, 2000, he drove Marquardt to a mall (91:131-32), where Marquardt said he was going "to pick up a cat for his mother's birthday" (91:133). According to Lewis, Marquardt "wore his jacket over his head," claiming to have "sunburn on his head," although Marquardt wore the jacket normally after exiting the cab (91:133-35).

Pet store clerk Denise Woodford identified Marquardt as the man who used the name "Dan Schmitt" and a Chippewa Falls address to buy two rabbits (92:14-15). She said Marquardt told her that he was buying the rabbits "for his mother's birthday "(92:14).

Marquardt acknowledged that his mother's birthday is February 19 (93:47), two weeks before his purchase. He said he actually bought the rabbits for Lillie (93:12). He said he does not like to use his real name or address in business dealings or at motels, "[because] I'm a private person" (93:13, 46).

Cab driver Lewis said that just before he dropped off Marquardt at home, three dogs (not Marquardt's) ran across the road, prompting Marquardt to say "he had to get rid of them because they were killing the animals out at his cabin" (91:135-36). Marquardt denied making such comment (93:46). Marquardt said he later bought a third rabbit, one with "better colors" (93:50-51).

March 8, 2000.

Pet store clerk Angela Buck identified Marquette as the man who, on March 8, 2000, used the name "Scott Mueller" and a Chippewa Falls address to buy a sheltie puppy (91:123-25). Marquardt said he bought the sheltie for Lillie (93:13-14), but that Lillie "wanted a bad ass dog . . . like a pit bull or rottweiler" (93:14-15).

March 9, 2000.

Wesley Anderson and his family are neighbors of Marquardt (91:103, 111). Anderson said he only spoke to Marquardt when Marquardt moved into the cabin (91:111). Marquardt said he did not know the Andersons (93:17).

At 4:00 p.m. on March 9, 2000, seventeen-year-old Taylor Anderson came home to find the front door window "shot out" and a blood trail from the kitchen to a bedroom (91:103-05). On the bedroom floor lay Rexi, the family's two-year-old dog, dead from gunshot wounds (91:105, 108, 121; 92:22). Other than bullet holes, the residence had not been damaged or ransacked, and nothing had been taken (91:108-09).

Inside the residence, officers recovered five bullet casings (91:21), which a Crime Lab expert matched to a 9mm handgun found on March 29, 2000, under the refrigerator in Marquardt's cabin (91:84; 92:89-90). Wesley Anderson said Marquardt would know of Rexi, because Anderson's wife regularly walked the dog past Marquardt's cabin (91:112-13, 120).

Wesley Anderson said that a year earlier, his children had "a run-in" on the bus with a Carl Thurmond (91:109-10, 115-16, 122, 149). Thurmond told a deputy that he once "kidding[ly]" threatened to shoot a neighbor's dog (92:229). Thurmond said he disliked Anderson for not allowing Thurmond to hunt on Anderson's property (92:235-36). He said that on March 9, 2000, he worked from 6:00 a.m. to 2:15 p.m. and thereafter was with his aunt and mother (92:236-37).

Cab driver Robin Ashley said that on the afternoon of March 9, 2000, she gave a man a ride to a Fall Creek car dealership (91:212-14). She said the man wore sunglasses, claimed he had "sunburned" his head and wore a hooded sweatshirt (91:214). Marquardt said that on March 9, he bought "a blue car" and that when he returned to his cabin, he noticed squad cars at the Anderson residence and learned of the break-in and shooting of the Anderson dog (93:18-19).

March 10, 2000.

Stacy Adams of the Eau Claire County Humane Association said that on March 10, 2000, a man using the name "Chris Powell" applied to adopt a dog (91:176-79). She said the application was denied the next day, noting that it lacked a phone number and that the applicant's address did not exist (91:177-81, 185). Marquardt admitted making the application (93:49-50).

March 11, 2000.

Nina Eisold testified that on March 11, 2000, she sold two male pit bull puppies to Marquardt (91:166-69). She said Marquardt "did not want to have any [follow-up] contact with me" (91:168-69) and "rushed" through the sale (91:171-73). Marquardt said he bought the pit bull puppies for Lillie (93:15-16).

March 15, 2000.

At 1:00 p.m. on March 15, 2000, deputies executed a search warrant at Marquardt's cabin and outbuildings (91:74-76). The cabin's interior was "a complete mess" (91:89-81). Deputies found pet store receipts, directions to the humane association and a dog care manual (91:81-82). Marquardt was not home.

Inside the outhouse, stacked on top of each other in the "hole," were the remains of Marquardt's two pit bulls and sheltie (91:78-79; 93:51-52). Each puppy had been shot (91:187-88) and "had open wounds on the neck area" (91:79), described as "stab or cutting" wounds (91:199). Beneath the puppies was a gun case for a 9mm handgun (91:78-79, 95). Bullet fragments from the pit bull puppies appeared to be .22-caliber (91:200-01). Inside the storage shed, deputies found a bloodstained tarpaulin and a .22-caliber bullet casing (91:77). Some of the blood appeared viscous (92:199-201).

Twenty-five yards from the cabin were the remains of Marquardt's three pet rabbits (91:80; 93:50). They, too, had been shot and "had open [neck] wounds" (91:80).

March 18, 2000.

Marquardt said he arrived home early on March 18, 2000, from a trip to Florida that began March 12 (93:21-27). He said the cabin's front door was "broken off its hinges" and his CDs, VCRs and a coffee table were "smashed" (93:27, 48). He said Lillie was gone and the

puppies were not in the storage shed, where he noticed stains on the carpet (93:27-28). He said he did not call the police, "[b]ecause I was dead tired and I don't like police much" (93:65).

Marquardt said he awoke at 10:00 a.m. and heard deputies say they had an arrest warrant for him for cruelty to animals (93:29-30). Marquardt said a tear gas can was tossed into the cabin before he could dress (93:30).

When arrested, Marquardt was carrying a "folding knife" (92:203). Inside the cabin, against a wall, was a .22-caliber rifle (91:101-02; 92:32). Marquardt's father, Alfred, said he had bought the rifle for Marquardt when Marquardt was in high school (92:30, 43). An officer said Alfred had reported on March 15 that Marquardt had the .22 rifle at the cabin (92:103-04, 108).

Deputies also found a box of .22-caliber bullets in a backpack in the bedroom (91:82-83). The bullets were the same brand as the .22-caliber casing found in the storage shed (91:83). Eleven bullets were missing from the box (91:82). The backpack had not been in the cabin during the search three days earlier (91:85). Deputies also found a live 9mm bullet on the kitchen floor (91:83-84).

Marquardt's father said he boarded the cabin's front door and windows on the night of March 18 and padlocked the door a few days later (92:64-66).

March 29, 2000.

On March 29, 2000, deputies conducted a third search of Marquardt's cabin (91:84). They moved a refrigerator and found the aforementioned 9mm handgun "lodged" beneath it (91:84), along with two boxes of 9mm bullets (91:96). Marquardt denied knowing of the handgun (93:32).

Marquardt's subsequent statements.

Tony Lovelien testified that in November 2002, while he was a cellmate of Marquardt, Marquardt confessed to shooting "two dogs and . . . a rabbit . . . with a twenty-two caliber gun" (91:153). According to Lovelien, Marquardt said he had had "sexual intercourse" with the animals and shot them "so they wouldn't tell on him" (91:153). Lovelien said Marquardt also mentioned "[s]omething about a dog at a neighbor's place" (91:154). Marquardt denied making such comments (93:37-38).

Investigator Price said Lovelien told him of Marquardt's statements on November 14, 2002, noting that the use of a .22 rifle to kill Marquardt's pets had not been made public (92:124-25, 136). Investigator Price said Lovelien received no "concessions" or "benefit" for the information (92:124; *see also* 91:154-55, 159).

Marquardt's defense testimony.

Marquardt offered alibi testimony for the period of March 12 to March 18, 2000.

Marquardt said that on March 12, he went to his parents' home, accompanied by Lillie, to dig up money he had buried (93:19-20). He said he showed her the .22 rifle there (93:21). Marquardt said he then left alone for Florida and stayed overnight in Madison, sleeping at a stranger's house (93:21-23).

Marquardt said that on March 13, he drove to Aurora, Illinois, with a man named "Mia," and stayed alone at a Budget Inn in Salem, Illinois, under the name "Corey Peters" (93:24, 66). He said he then drove alone to Valdosta, Georgia, arriving on March 14, and took his 1995 green Thunderbird "out of storage," switching from a "red station wagon" (93:24).

Marquardt said that on March 15, he met a friend named Eddie Rams in Florida and stayed at a resort in the

Florida Keys (93:25-26, 57). He said that on March 16, he dropped off Eddie in Orlando and stayed overnight at a hotel in Tifton, Georgia (93:26). He said he drove back to his cabin the next day, arriving on the early morning of March 18 (93:26-27). Officers found receipts suggesting Marquardt was in Florida on March 15-16 and in Georgia on March 17 (91:206-07; 92:191).

Finally, Peter Heacox said that in 1996, he had been to the residence of Marquardt's parents and that he disliked Marquardt because Marquardt may have "snitched" on him (92:165-66). Heacox did not work on March 13, 2000 (92:166-69, 176-77). Susan Westaby said that while driving on a morning in March 2000, a blue S-10 truck backed out "over the lawn" at the Alfred Marquardt residence but she did not see the driver (92:174).

ARGUMENT

I. OFFICERS ACTED IN OBJECTIVELY REASONABLE RELIANCE ON THE MARCH 15 WARRANT, SO THAT THE "GOOD FAITH" EXCEPTION TO THE EXCLUSIONARY RULE APPLIES.

A. Introduction.

By search warrant issued March 15, 2000, for Marquardt's cabin and outbuildings (the "March 15 warrant"), officers sought evidence of Marquardt's involvement in the homicide of his mother on March 13, 2000, in Chippewa County (23:Ex. 2). During execution of the March 15 warrant, officers discovered the remains of Marquardt's three dogs and three rabbits (91:78-79).

In a published decision filed August 21, 2001, on Marquardt's interlocutory appeal in Chippewa County, this court concluded that the March 15 warrant was not

supported by probable cause, and it remanded "for a determination of whether the good faith exception to the exclusionary rule applies." *State v. Marquardt*, 2001 WI App 219, ¶2, ¶20, 247 Wis. 2d 765, 635 N.W.2d 188 (*see* R-Ap. 101-112).

Before the Chippewa County court ruled on the issue of "good faith," Marquardt moved in the present case to suppress evidence derived from the March 15 warrant (17). On April 26, 2002, Judge Wahl conducted an evidentiary hearing and found "good faith" for the March 15 warrant (84:72-76).

On appeal, Marquardt argues:

(1) That Judge Wahl improperly failed to apply the "objectively reasonable reliance" standard of *United States v. Leon*, 468 U.S. 897, 919 (1984), in determining "good faith" (Marquardt's brief at 10-31), and that defense counsel was ineffective for not making such argument (Marquardt's brief at 52-53); and

(2) That the added "good faith" requirement of a "significant investigation" under *State v. Eason*, 2001 WI 98, ¶74, 245 Wis. 2d 206, 629 N.W.2d 62, was not met (Marquardt's brief at 31-34).

For the reasons that follow, this court should reject Marquardt's arguments.

B. The "good faith" exception.

1. General principles.

Evidence obtained through a search warrant is admissible in evidence – despite inadequate probable cause or technical insufficiency – so long as officers acted in "objectively reasonable" reliance on it. *Leon*, 468 U.S. at 919; *Eason*, 245 Wis. 2d 206, ¶74.

The good-faith inquiry "is confined to the objectively ascertainable question whether a reasonably well trained officer would have known that the search was illegal despite the magistrate's authorization," and it is determined by examining "all of the circumstances." *Leon*, 468 U.S. at 922 n.23.

In *Leon*, the Supreme Court identified four situations in which "good faith" should *not* be recognized, and Marquardt focuses on one of those: where the affidavit is "'so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable.'" *Leon*, 468 U.S. at 923 (brackets added; citation omitted).

In recognizing a "good faith" exception to the exclusionary rule under the state constitution, the Wisconsin Supreme Court adopted the "negative" standards of *Leon* and added two "affirmative" standards:

> [T]he State [must also] show that the process used in obtaining the search warrant included [1] a significant investigation and [2] a review by either a police officer trained and knowledgeable in the requirements of probable cause and reasonable suspicion, or a knowledgeable government attorney.

Eason, 245 Wis. 2d 206, ¶74.

Whether the State has shown "good faith" is a question of law subject to *de novo* review. *See, e.g.*, *United States v. Koerth*, 312 F.3d 862, 865 (7th Cir. 2002), *cert. denied*, 123 S.Ct. 1947 (2003).

A court reviewing the *original* determination of probable cause for a search warrant is confined to the record that was before the issuing magistrate but also examines the totality of the circumstances in that record. *State v. Jones*, 2002 WI App 196, ¶26, 257 Wis. 2d 319, 651 N.W.2d 305. The reviewing court must "accord great deference to the determination made by the warrant-issuing magistrate." *Id.* at ¶21.

Consequently, "[a]n officer's decision to obtain a warrant is *prima facie* evidence that he or she was acting in good faith." *Koerth*, 312 F.3d at 868; *see also Leon*, 468 U.S. at 921 n.21.

2. In determining "good faith," the reviewing court should be able to consider indicia of probable cause known to the applying officers but omitted from the warrant application.

Some courts hold that in determining whether indicia of probable cause for a warrant are so lacking as to preclude "good faith," the reviewing court is bound by the warrant application. *See United States v. Hove*, 848 F.2d 137, 140 (9th Cir. 1988); *People v. Miller*, 75 P.3d 1108, 1116-17 (Colo. 2003); *State v. Klosterman*, 683 N.E.2d 100, 103-04 (Ohio Ct. App. 1996); *Janis v. Commonwealth*, 472 S.E.2d 649, 653-54 (Va. Ct. App. 1996).

Other courts hold that the reviewing court may consider external indicia supportive of probable cause known to the applying officers but omitted from the warrant application. *See United States v. Martin*, 297 F.3d 1308, 1318-19 (11th Cir.), *cert. denied*, 537 U.S. 1076 (2002); *see also United States v. Marion*, 238 F.3d 965, 969-70 (8th Cir. 2001); *United States v. Danhauer*, 229 F.3d 1002, 1007 (10th Cir. 2000); *Moya v. State*, 981 S.W.2d 521, 525-26 (Ark. 1998); *People v. Lim*, 85 Cal. App. 4th 1289, 1297-98 (2001); *State v. Davidson*, 618 N.W.2d 418, 427 (Neb. 2000).

Seventh Circuit decisions appear to go both ways. *See Koerth*, 312 F.3d at 869 (limited to warrant application); *United States v. Dickerson*, 975 F.2d 1245, 1250 (7th Cir. 1992) (includes external indicia of probable cause), *cert. denied*, 507 U.S. 932 (1993).

For several reasons, this court should adopt the view that a reviewing court *may* consider external indicia supportive of probable cause and known to the applying officers but omitted from the warrant application.

- First, both the United States Supreme Court in *Leon* and the Wisconsin Supreme Court in *Eason* envisioned that an after-the-fact analysis of "good faith" reliance on a search warrant would entail consideration of evidence outside of the warrant application.

For example, the first two *Leon* "exceptions" to good faith – whether the applying officer lied and whether the issuing magistrate abandoned his or her role – inherently require consideration of evidence external to the warrant application. *Leon*, 468 U.S. at 923. The same is true of the two *Eason* factors: "[W]e expect that there will be testimony offered at the ["good faith" hearing] on questions concerning significant investigation and review by a knowledgeable police officer or government attorney." *Eason*, *id.* at ¶71 n.34

With respect to the *Leon* "exceptions" to good faith, the Supreme Court observed that "all of the circumstances – including whether the warrant application had previously been rejected by a different magistrate – may be considered." *Leon*, 468 U.S. at 922 n.23; *see also Anderson v. Creighton*, 483 U.S. 635, 641 (1987) ("whether it was objectively legally reasonable to conclude that a given search was supported by probable cause . . . will often require examination of the information possessed by the searching officers"). Indeed, if good faith with respect to probable cause depended solely on the warrant application, there would have been no need for this court to remand for a "good faith" determination.

- Second, a reviewing court's consideration of external indicia *supportive of* probable cause and known to the applying officers comports with the purpose of the exclusionary rule to deter police violations of the Fourth Amendment. *See United States v. Taxacher*, 902 F.2d

867, 872 (11th Cir. 1990), *cert. denied*, 499 U.S. 919 (1991).

There is no incentive for an officer seeking to comply with the "probable cause" requirement by applying for a warrant to omit information supportive of probable cause. Omission of a fact supportive of probable cause may be just as inadvertent (and important) as omission of a fact particularizing a place to be searched, a circumstance in which courts uniformly take into account external information known to executing officers to uphold the search. *See, e.g.*, *United States v. Procopio*, 88 F.3d 21, 28 (1st Cir.), *cert. denied*, 519 U.S. 1046 (1996), and 519 U.S. 1138 (1997); *United States v. Owens*, 848 F.2d 462, 464-66 (4th Cir. 1988); *United States v. Gahagan*, 865 F.2d 1490, 1496-99 (6th Cir.), *cert. denied*, 492 U.S. 918 (1989).

- Third, it "would make no sense" in a "good faith" analysis to preclude reviewing courts from considering omissions "*favorable* to a probable cause finding" and known to the warrant applicants. *Lim*, 85 Cal. App. 4th at 1297-98 (emphasis in original). In such cases, if the issuing magistrate had correctly *denied* the warrant application for lack of probable cause, the applying officers – who already possessed the favorable, omitted information – could have corrected the insufficiency in short order in a subsequent application, without risking loss of the sought-after evidence.

"[I]n an ideal system[,] an unreasonable request for a warrant would be harmless, because no judge would approve it." *Malley*, 475 U.S. at 345. But, "[p]enalizing the officer for the magistrate's error, rather than his own, cannot logically contribute to the deterrence of Fourth Amendment violations." *Leon*, 468 U.S. at 921.

- Fourth, some courts that have excluded external information *supportive of* probable cause from "good faith" analyses have commingled the standard of "objecttive reasonableness" with the officer's "subjective" beliefs

in seeking the warrant. *See, e.g.*, *Hove*, 848 F.2d at 140; *Klosterman*, 683 N.E.2d at 104. Although an officer's subjective beliefs are irrelevant, "objective reasonableness," which the State must prove, typically depends on information external to the warrant application. See *Leon*, 468 U.S. at 924 ("the prosecution should ordinarily be able to establish good faith without a substantial expenditure of judicial time"); *Anderson*, 483 U.S. at 641 ("examination of the information possessed by searching officials . . . does not reintroduce into qualified immunity analysis the [forbidden] inquiry into officials' subjective intent").

For the foregoing reasons, this court should conclude that in determining "good faith," a reviewing court *may* consider external indicia supportive of probable cause and known to the applying officers but omitted from the warrant application.

C. Application of "good faith" to the present case.

1. Based solely on the March 15 warrant application, officers could reasonably rely in good faith on the issuing judge's finding of probable cause.

The March 15 warrant was sought within forty-eight hours after discovery of the March 13 homicide of Marquardt's mother (23:Ex. 2 at 2). The warrant application incorporates the affidavit and warrant issued March 13 in Chippewa County to search the buildings and vehicles at the residence of Marquardt's parents (23:Ex. 2 at 1, 8).

Read together, the affidavits for the March 13 and March 15 warrants are *not* so lacking in indicia of

probable cause as to preclude objectively reasonable reliance on them in connecting Marquardt to the homicide. In turn, the links to Marquardt made his cabin and outbuildings likely repositories for the warrant's enumerated items. Specifically, the following information, taken together, identifies Marquardt as the probable perpetrator:

- First, the affidavit of March 13 indicates that at 11:50 a.m. that day, the phone "was busy and remained so the remainder of the day" at the residence of Marquardt's parents, prompting Marquardt's father to come home early from work (23:Ex. 2 at 6). This information reasonably suggests that the phone was off the hook, likely in relation to the homicide of Marquardt's mother. In turn, it reasonably suggests that the perpetrator had been inside the residence. In the absence of any indication of a break-in or missing valuables, it suggests that Mrs. Marquardt allowed the perpetrator inside or that the perpetrator had a key for the residence – in effect, that the perpetrator was a relative or friend.

- Second, the March 13 affidavit reports that Marquardt's mother had "a head wound" and that a 9mm shell casing was found "on the premises," suggesting that she had been shot (23:Ex. 2 at 6). The March 15 affidavit reports that "among the wounds incurred by [the victim] was a knife wound" (23:Ex. 2 at 2). This information reasonably suggests that the killing was intentional and that homicide was "*the*" motive of the perpetrator. The affidavit contains no information suggesting a break-in, missing valuables or sexual trauma to the victim. This information further suggests that Mrs. Marquardt knew her killer.

- Third, the fact of homicide by use of a gun and a knife also reasonably suggests that the perpetrator was male. *See, e.g.*, Marina Angel, *Abusive Boys Kill Girls Just Like Abusive Men Kill Women: Explaining the Obvious*, 8 Temp. Pol. & Civ. Rts. L. Rev. 283, 290 (1999) ("The statistics show that males kill in

overwhelming numbers compared to females, and they kill with firearms").

- Fourth, the March 15 affidavit states that officers at the homicide scene "were able to locate a number of footprints that may be suitable for comparison with the shoes that made them" (23:Ex. 2 at 2). Coupled with the foregoing information and reasonable inferences, this statement reasonably suggests that *male* footwear made the prints and that comparisons might definitively include or exclude suspects.

- Fifth, and significantly, the affidavit of March 13 states that the victim was found "covered with a blanket in the garage" (23:Ex. 2 at 6). In a residential homicide, such conduct strongly suggests that the perpetrator felt compassion for the victim or remorse for the killing, *because he intimately knew the victim, and vice versa*. The case law supports this conclusion. *See, e.g., Thiel v. Schuetzle*, 200 F.3d 1120, 1122 (8th Cir. 1999) (victim's body "was found covered with a blanket, which was circumstantial evidence that the murderer was a family member or friend"); *Commonwealth v. Lodge*, 727 N.E.2d 1194, 1200 (Mass. 2000) ("the jury could have inferred that it was the defendant, not an intruder, who had taken the time to cover the victim's body," where the victim was the defendant's girlfriend).

- Sixth, the March 15 affidavit states that Alfred Marquardt reported having a son, Bill, "who, since the location of [the] body had not been seen or heard from" (23:Ex. 2 at 1). A reasonable inference is that Alfred thought it unusual not to have had contact with Marquardt in light of publicity of the homicide. Although Marquardt argues that this statement was misleading (Marquardt's brief at 30), he did not request a hearing under *Franks v. Delaware*, 438 U.S. 154, 155-56 (1978), to test it. Moreover, Investigator Price explained at the post-commitment hearing that Alfred suggested he had seen Marquardt after February 17, 2000, but could not recall exactly when (96:27-30).

"The threshold showing necessary to a determination [that] . . . an officer relied in good faith upon a search warrant *pales considerably next to that required for a finding of probable cause*." *Guerra v. State*, 897 P.2d 447, 458 (Wyo. 1995) (emphasis added). To preclude "good faith," the warrant application must be entirely "'*devoid*' of factual support." *Id.* (citation omitted; emphasis in original). It must amount to a "'bare bones'" application, *Leon*, 468 U.S. at 926, consisting of "wholly conclusory statements" from which a magistrate could not independently determine probable cause. *United States v. Wilhelm*, 80 F.3d 116, 121 (4th Cir. 1996).

In the present case, the warrant application was meatier than "bare bones." It set forth multiple facts, giving rise to multiple inferences that filled in gaps in the indicia of probable cause identifying Marquardt as the probable killer. "The purpose behind the constitutional requirement of obtaining a search warrant is not to deny law enforcement officers the support of the usual inferences that reasonable individuals may draw from the evidence." *State v. Ward*, 2000 WI 3, ¶28, 231 Wis. 2d 723, 604 N.W.2d 517.

Finally, the fact that an Eau Claire County judge found probable cause and that a Chippewa County judge initially upheld that determination further supports the application of "good faith" in the present case:

> Although a police officer may not rely entirely on the magistrate's finding of probable cause, . . ., in cases where, as here, the courts can not agree on whether the affidavit is sufficient, it would be unfair to characterize the conduct of the executing officers as bad faith.

United States v. Martin, 833 F.2d 752, 755 (8th Cir. 1987), *cert. denied*, 494 U.S. 1070 (1990); *see also United States v. Corral-Corral*, 899 F.2d 927, 939 (10th Cir. 1990).

2. Even if the warrant application itself was insufficient, good faith still applies, based on *additional* evidence of probable cause known to the applying officers.

For the foregoing reasons, the warrant application contained sufficient indicia of probable cause for "good faith." This conclusion should be beyond dispute when consideration is given to *external* indicia of probable cause known to the applying officers but omitted from the application. Testimony from the "good faith" hearing supplies such indicia.

- First, Investigator Price testified that in his interview of Alfred Marquardt on the day of the homicide, Alfred said that Marquardt's mother had attached a phone message for Marquardt to the refrigerator in the house (84:33). Investigator Price said the message was gone when he checked the refrigerator that same night and that it turned up "a day or two days later under a jewelry box in the bedroom" (84:34). This information reasonably suggests that Marquardt had been in the house on the day of the homicide.

- Second, Investigator Price also testified that on the day of the homicide, he spoke with Marquardt's brother and sister, who could think of no "non-relative" with a motive to harm their mother (84:35). Investigator Price said he discovered no "reason" for Marquardt's siblings or father to harm their mother (84:35).

- Third, Special Agent John Rehrauer testified that in the forty-four hours between the homicide's discovery and the March 15 warrant application there was television coverage of the homicide, as well as publicity stemming from interviews of neighbors (84:51-52). He said that despite such publicity, he was unsuccessful in

contacting Marquardt, either at Marquardt's cabin or on Marquardt's cellular phone (84:48-49).

- Fourth, Agent Rehrauer said that on March 14, he learned from Marquardt's neighbor, Wesley Anderson, that on March 9, during a break-in at the neighbor's residence, the neighbor's dog had been shot (84:50). According to the agent, officers had found "five spent nine millimeter shell casings" in the neighbor's residence (84:51) – the same caliber as the shell casing found at the scene of Mrs. Marquardt's homicide. This commonality and similar time frame, coupled with Marquardt's close personal and physical ties to the two crime scenes, immensely enhanced his status as a suspect in both shootings.

- Fifth, Agent Rehrauer said he was aware of Marquardt's "prior history of being involved in drug dealings" and learned from Marquardt's father that Marquardt's mother had "discovered [Marquardt] digging up twelve thousand dollars in cash from the Marquardt premises earlier in the year" (84:53). This information reasonably suggested a possible motive for Marquardt to harm his mother, surmising that she may have challenged his conduct or threatened to tell the authorities.

- Finally, Agent Rehrauer said he supplied the foregoing information to Eau Claire County Sergeant John Vogler and then-Eau Claire County District Attorney Raymond Pelrine for purposes of seeking the March 15 warrant (84:54-55). Attorney Pelrine drafted the warrant application (84:7-17), and Sergeant Vogler presented it to Judge Proctor (84:21-22). In effect, the investigating officers presented *all* of their evidence *supportive of* probable cause to a prosecutor for inclusion in the warrant application.

Prosecutorial consultation in the drafting of a search warrant is "indicative of objective good faith." *Taxacher*, 902 F.2d at 872. As the Seventh Circuit recently observed, "volumes of case law encourage this

sort of cooperation between the prosecutor and law-enforcement officers" and support the application of good faith. *United States v. Merritt*, 361 F.3d 1005, 1012 (7th Cir. 2004) (collecting examples). In fact, the Supreme Court in *Leon* applied the "good faith" exception in part because officers had consulted with three deputy prosecutors before submitting what proved to be deficient warrants. *Leon*, 468 U.S. at 903-04 n.4.

In sum, regardless of whether "good faith" analysis includes indicia of probable cause known to the applying officers but omitted from the warrant application, the *Leon* requirement of "objectively reasonable" reliance was met in the present case. Marquardt, therefore, also cannot show prejudice from his trial counsel's apparent failure to argue *Leon* (17; 84:4). *See State v. Simpson*, 185 Wis. 2d 772, 784, 519 N.W.2d 662 (Ct. App. 1994) (counsel cannot be ineffective for not pursuing a suppression motion that would fail).

D. The two additional *Eason* requirements for "good faith" also were met.

Testimony at the "good faith" hearing also demonstrates satisfaction of the two additional *Eason* requirements.

First, the post-remand testimony details "a significant investigation," *id.* at ¶74, in the forty-four hours between the homicide and March 15 warrant application, regardless of how "significant" is defined:

- Within an hour after discovery of the homicide on March 13, 2000, Investigator Price interviewed the victim's husband, Alfred, for four to five hours (84:28-29), reducing the interview to an eight-page report (23:Ex. 1; 84:28).

- That same evening, Investigator Price obtained a search warrant for the victim's residence, resulting in the collection of evidence that included a shell casing and latent fingerprints on the door of the garage where the victim was found (23:Ex. 1).

- That same evening, Investigator Price also interviewed Marquardt's brother and sister to discover possible suspects (84:34-35).

- The next day, March 14, an autopsy was performed, ruling out sexual assault and confirming that the victim died from a gunshot wound to the head and a stab wound to the throat (84:50).

- That same day, State Justice agents traveled to Marquardt's cabin and spoke to Marquardt's neighbor, Wesley Anderson, discovering that a few days earlier, someone had shot Anderson's dog with the same caliber bullet used to shoot Mrs. Marquardt (84:50).

- That same day, Agent Rehrauer also attempted to locate Marquardt by cell phone and by interviewing Marquardt's former employer, and an effort was begun to obtain Marquardt's cell phone records (84:48-50).

- On March 15, Investigator Price and Agent Rehrauer met with Eau Claire County Sergeant Vogler and District Attorney Pelrine to convey information in support of applying for the March 15 warrant (84:9, 25-26, 54-55). Investigator Price said that up to that point, twenty law-enforcement officers had been pursuing the investigation (84:43).

The March 15 warrant application made good sense in view of information that had been quickly obtained, the fact that a homicide had occurred and the fact that the most probable suspect could not be found. The foregoing information satisfied the first *Eason* requirement for good faith – a significant investigation.

Second, the *Eason* "good faith" requirement that an experienced officer or prosecutor review the warrant application likewise was met. Officers from Chippewa County, Eau Claire County and the State Department of Justice met with District Attorney Pelrine, who drafted the March 15 warrant application. Attorney Pelrine had been a prosecutor for more than a decade and had drafted many warrants that withstood challenge (84:8, 19).

E. Potential issues unresolved.

On postconviction review, the prosecutor offered "inevitable discovery" as an alternative justification for admitting evidence seized under the March 15 warrant (96:62-63), and Marquardt suggested that the invalid warrant tainted other evidence (96:33, 49). Because the trial court found "good faith," it did not address these potential issues (96:33, 62-63). The State, therefore, respectfully requests remand for further hearing on these issues if "good faith" is not applied to execution of the March 15 warrant.

As a proffer on "inevitable discovery," the existing record reflects "a reasonable probability that the evidence in question would have been discovered by lawful means but for the [invalid warrant]." *State v. Lopez*, 207 Wis. 2d 413, 427-28, 559 N.W.2d 264 (Ct. App. 1996). If the March 15 warrant had been denied for lack of probable cause, the additional external indicia of probable cause *already known* to the applying officers (but omitted from the application) reasonably would have led to another, valid warrant – and the discovery of the same evidence – before Marquardt returned to the cabin on March 18.

II. THE TRIAL COURT PROPERLY DENIED MARQUARDT'S REQUEST TO REPRESENT HIMSELF AT TRIAL.

A. Introduction.

Marquardt also seeks a new trial on the ground that he was wrongly denied his constitutional right to represent himself at trial (Marquardt's brief at 34-43).

On August 8, 2000, after hearing conflicting expert testimony, the trial court found Marquardt competent to stand trial (86:81-82).

On November 11, 2002, two months before trial, Marquardt sought to exercise his right to self-representation (88:2). After undertaking a colloquy with Marquardt, and citing *State v. Klessig*, 211 Wis. 2d 194, 564 N.W.2d 716 (1997), the trial court denied the request (88:3-19), noting "the absolute seriousness of the charges[,] . . . the complexity of the case" and evidence of Marquardt's mental illness (88:18-20). The court opined:

> I'm particularly concerned over Mr. Marquardt's kind of microscopic review of all of these things, whether he's detached enough to make any sense out of the charges and to put the [S]tate to its burden of proof.

(88:12.)

On appeal, Marquardt argues:

(1) That the trial court improperly held him to a standard of competence for self-representation higher than the standard of competence to stand trial (Marquardt's brief at 34-38); and

(2) That in any event, he was competent to represent himself at trial (Marquardt's brief at 38-43).

For the reasons that follow, the trial court properly exercised its discretion in denying Marquardt's request to represent himself.

B. The trial court applied the proper test for determining Marquardt's competence to represent himself.

The state and federal constitutions give a criminal defendant the right to conduct his or her own defense. *See Klessig*, 211 Wis. 2d at 203; *Faretta v. California*, 422 U.S. 806, 819 (1975).

When a defendant seeks to proceed *pro se* at trial, the trial court must insure that the defendant "(1) has knowingly, intelligently and voluntarily waived the right to counsel, and (2) is competent to proceed pro se." *Klessig*, 211 Wis. 2d at 203; *see also* Wis. JI-Criminal SM-30A (1987).

With respect to "competence" for self-representation, the Supreme Court has said "States are free to adopt competency standards that are more elaborate than the . . . formulation" for determining competence to stand trial. *Godinez v. Moran*, 509 U.S. 389, 402 (1993). The Wisconsin Supreme Court has read *Godinez* as permitting Wisconsin to use "a higher standard for determining whether a defendant is competent to represent oneself than for determining whether a defendant is competent to stand trial." *Klessig*, 211 Wis. 2d at 212 (reaffirming *Pickens v. State*, 96 Wis. 2d 549, 557, 292 N.W.2d 601 (1980)).

Although *Klessig* apparently represents a "minority" interpretation of *Godinez*, other states have construed *Godinez* similarly. *See, e.g., People v. Lego*, 660 N.E.2d 971, 973, 978-79 (Ill. 1993); *Commonwealth v. Simpson*, 689 N.E.2d 824, 831 (Mass. App. Ct. 1998). At worst, the *Klessig* interpretation is debatable. *See*

Brooks v. McCaughtry, 380 F.3d 1009, 1012-13 (7th Cir. 2004) (holding that *Klessig* does *not* violate *Godinez*); *see generally* Jennifer W. Corinis, *A Reasoned Standard for Competency to Waive Counsel After Godinez v. Moran*, 80 Boston U. L. Rev. 265, 270 (2000) ("urg[ing] courts to accept *Godinez*'s invitation to adopt higher standards" for competence to proceed *pro se* than the standard for competence to stand trial).

Because *Klessig* does not unequivocally violate Marquardt's federal constitutional right to self-representation, the trial court was bound to follow *Klessig*, and this court is similarly bound by such precedent. *See State ex rel. Cornellier v. Black*, 144 Wis. 2d 745, 751, 425 N.W.2d 21 (Ct. App. 1988).

In Wisconsin, "competence" for self-representation is determined by the following considerations:

> [T]he circuit court should consider factors such as "the defendant's education, literacy, fluency in English, and any physical or psychological disability which may significantly affect his ability to communicate a possible defense to the jury." . . . [T]he competency determination should not prevent persons of average ability and intelligence from representing themselves unless "a specific problem or disability can be identified which may prevent a meaningful defense from being offered, should one exist."

Klessig, 211 Wis. 2d at 212 (citations omitted). Because the determination of a defendant's competence for self-representation "rest[s] to a large extent upon the judgment and experience of the trial judge," *id.*, "the trial court must be given sufficient latitude to exercise its discretion in such a way as to insure that substantial justice will result." *Pickens*, 96 Wis. 2d at 569.

An improper denial of the right to self-representation, however, would be reversible error. *See McKaskle v. Wiggins*, 465 U.S. 168, 177-78 n.8 (1984).

C. Application to Marquardt.

For alternative reasons, the trial court reasonably denied Marquardt's request to represent himself at trial.

No valid waiver of counsel. First, Marquardt did not waive the right to counsel with adequate comprehension of the dangers of self-representation. *See Klessig*, 211 Wis. 2d at 203.

When defense counsel questioned Marquardt's understanding of the incriminating evidence facing him, Marquardt replied: "[T]hat's why we have to have a lawyer to argue my defense and stuff" (86:20). Marquardt repeatedly suggested his need for counsel throughout the hearing:

- "Well, I'm going to have an attorney to argue my innocence" (86:21).
- "I don't think I should have ever been charged with what happened at the neighbor's house and that's what my defense attorney is going to argue" (86:22).
- "And I'll have a defense attorney to argue my innocence" (86:23).
- "I was just suggesting to the lawyer that just have me testify I love animals and stuff . . . [M]y defense attorney's going to argue for me to try to prove my innocence" (86:27).
- "I need a lawyer now, defense lawyer[,] so [trial] can't happen tomorrow" (86:34).

At the time of the hearing on his competency to stand trial, Marquardt had discharged two previous lawyers (86:34). By the close of the hearing, he had discharged a third attorney (86:81-82).

Three months later, Marquardt returned to court with a fourth attorney, Attorney Robert P. Rusch, and asked to be allowed to represent himself (88:3). Marquardt explained that he had drafted "a 180-page argument of my defense" (88:5), and when the court told Marquardt that he would have to follow the same rules of evidence that attorneys must follow, Marquardt replied:

> I want to spend a lot of time with [Attorney] Rusch, . . . like to go over every single question for every witness [of which Marquardt said he had "at least 30" (88:8)], and I want to go over every single sentence I got of my statements with Rusch. . . .
>
> And at the trial, I would like Rusch to be sitting and listening to everything that's said and . . . like tap me on the shoulder if the D.A. . . . tries to present any illegal evidence or ask illegal questions or something.

(88:7.) Marquardt added, "I still want Rusch to be prepared" (88:8), because "I might even change my mind and have Rusch do the talking, but *I'm pretty sure* I want to do the talking right now" (88:15; emphasis added). Marquardt, age twenty-six, said he has a high school education and admitted having no legal training (88:3-4).

On this record, Marquardt did not unequivocally waive his right to counsel with adequate appreciation of the dangers of self-representation. For this reason alone, the trial court properly rejected Marquardt's request to represent himself.

Lack of competence. Second, in any event, the trial court also reasonably concluded that Marquardt was not "competent" to proceed *pro se* due to mental illness that "may prevent a meaningful defense from being offered." *Klessig*, 211 Wis. 2d at 212.

At the same time that Marquardt faced ten charges in the present case, he was facing a homicide charge in Chippewa County (80:2). In both cases, defense counsel raised the issue of Marquardt's competency to stand trial,

and in the Chippewa County case, Marquardt had been found incompetent (80:2-8; 82:9-10; 86:5).

In the present case, two psychiatrists – who, in 2002, had examined Marquardt or reviewed Marquardt's records – opined that Marquardt was not competent to stand trial due to mental illness (86:38-60). Their testimony supports the trial court's conclusion that Marquardt was not competent to represent himself.

Dr. Patricia Jens, with whom Marquardt refused to speak (86:39), opined that Marquardt "suffers from a mental illness that interferes with his ability not only to cooperate with" counsel but also to appreciate the charges against him (86:40-41). She explained:

> I believe that Mr. Marquardt suffers from a delusional [system] which leaves him living in a world where he believes everything that's going on around him is part of a plot to frame him and as such he cannot appreciate that these are serious charges, that these things have occurred, that there is evidence which indicates he has committed these crimes. He simply can't get beyond his belief that the legal system is framing him.

(86:41-42.) Dr. Jens concluded that Marquardt is so delusional that "[h]e cannot plan a defense strategy that is realistic and, therefore, he is not competent" (86:43).

Dr. Ralph Underwager opined that Marquardt suffers from paranoid schizophrenia, founded on a delusional system of "command hallucinations" (86:56-57). He noted that Marquardt professed to be "the [prophet] foretold by Nostradamus[] to provide the gift that will save the world" (86:56-57). He suggested that Marquardt's mental illness causes him to view anyone who challenges his perceptions – including defense attorneys – as "the enemy" (86:60).

Finally, not only did Marquardt equivocate about the need for counsel, but he could not make up his mind on whether to plead not guilty by reason of mental disease

or defect ("NGI"), even after the prosecutor conceded that the State would not contest an NGI plea (83:3-5; 89:10-11, 20-24; 94:2-19; 95:2).

On this record, the trial court reasonably concluded that Marquardt was not competent to proceed *pro se*. For this reason, as well as for an inadequate waiver of counsel, the trial court properly denied Marquardt's request to represent himself.

III. THE ALLEGED VIOLATION OF MARQUARDT'S POST-*MIRANDA* RIGHT TO SILENCE WAS HARMLESS ERROR.

A. Introduction.

Marquardt next seeks a new trial on the ground that the prosecutor improperly elicited testimony on Marquardt's post-*Miranda* right to silence (referring to *Miranda v. Arizona*, 384 U.S. 436 (1966)) (Marquardt's brief at 44-46).

During the State's case-in-chief, Investigator Price testified on direct examination that after Marquardt was arrested, Marquardt received *Miranda* warnings and agreed to talk to officers (92:128-29). According to Investigator Price, Marquardt said he had been out of the area on vacation for one week and then asked the officer, "'Is this about the dog thing?'" (92:128-29). Over defense objection, the prosecutor was permitted to elicit the following testimony from Investigator Price:

> Q. When [Marquardt] made that initial statement about the dog or dog thing did he say anything about missing any animals from his home?
>
> A. He hadn't mentioned anything about animals up to that point.
>
> . . . .

Q. Did he make a statement to you when he stated that about the dog thing about anything regarding a break-in or burglary at his cabin?

A. No, sir, he did not.

Q. Prior to yesterday had you ever heard of the name of Lillie Murphy in connection with this case?

A. No, sir, I have not.

(92:129-30.) Marquardt argues that these questions and answers violated his right to silence.

For the reasons that follow, even though the first two questions and answers probably violated Marquardt's right to silence (while the third question and answer arguably were proper), the violation nevertheless constituted harmless error.

B. Analysis.

Merits. The state and federal constitutions protect against compelled self-incrimination. *See State v. Adams*, 221 Wis. 2d 1, 7, 584 N.W.2d 695 (Ct. App. 1998). Generally, the State may not comment upon a defendant's post-accusatory choice to remain silent. *See Miranda v. Arizona*, 384 U.S. 436, 468 n.37 (1966). Implicit in *Miranda* warnings is the "assurance that silence will carry no penalty." *Doyle v. Ohio*, 426 U.S. 610, 618 (1976). "[I]t would be fundamentally unfair and a deprivation of due process to allow the arrested person's silence to be used to impeach an explanation subsequently offered at trial." *Id.*.

The State may use a defendant's post-*Miranda* silence only "for the limited purpose of impeaching the defendant's testimony" by showing inconsistencies between that testimony and the defendant's "post-arrest behavior." *State v. Nielsen*, 2001 WI App 192, ¶31, 247

Wis. 2d 466, 634 N.W.2d 325; *see also Doyle*, 426 U.S. at 619 n.11; *Anderson v. Charles*, 447 U.S. 404, 408-09 (1980).

In the present case, evidence that Marquardt failed to make a post-*Miranda* comment to police about missing his pets or experiencing a break-in at his cabin is not inconsistent with his post-arrest question about "'the dog thing'" (92:128-29). It does not appear, therefore, to come within the narrow exception for permissible reference to Marquardt's post-*Miranda* silence.

The question about "Lillie Murphy," however, did not directly implicate *Marquardt's* post-*Miranda* silence, as opposed to asking, more broadly, if Investigator Price had heard the particular name at *any time* before trial, from *anyone* (such as Alfred Marquardt, who had testified that his son mentioned having a live-in girlfriend). Moreover, defense counsel arguably "opened the door" to such inquiry when he suggested in opening statement that "the police can't find" any Lillie Murphy (91:68).

Harmless error. In any event, even if "a *Doyle* violation" occurred, it nonetheless constituted harmless error beyond a reasonable doubt. *See State v. Brecht*, 143 Wis. 2d 297, 317, 421 N.W.2d 96 (1988), *aff'd sub nom. Brecht v. Abrahamson*, 507 U.S. 619 (1993); *Chapman v. California*, 386 U.S. 18, 24 (1976) (stating the harmless-error test for federal constitutional error). Such a "trial" error is harmless when there is no reasonable probability that a rational trier of fact would have reached a different verdict despite the error. *See State v. Harvey*, 2002 WI 93, ¶49, 254 Wis. 2d 442, 647 N.W.2d 189.

First, the alleged *Doyle* violation was confined to the aforementioned three questions over a three-day trial, and the prosecutor never argued that jurors should consider Marquardt's post-*Miranda* silence to infer guilt (93:86-95). *Compare, e.g., Reichhoff v. State*, 76 Wis. 2d 375, 381, 251 N.W.2d 470 (1977) (finding reversible error where the prosecutor asked multiple questions of several

witnesses regarding the defendant's post-*Miranda* silence and referenced it at length in closing argument). Moreover, the three questions in the present case did not concern the charges involving the Anderson residence.

Second, much more incriminating than Marquardt's insolubly ambiguous post-*Miranda* silence was admissible evidence that upon returning home on March 18, 2000, and finding his cabin "trashed," his purported girlfriend gone, a possible bloodstain on the carpet in the shed where his puppies were housed, and his six pets all missing, Marquardt chose simply to go to sleep (93:27-28, 65).

Third, the circumstantial evidence of Marquardt's guilt was overwhelming:

- The 9mm handgun used to kill the Anderson dog was hidden beneath Marquardt's refrigerator along with boxes of 9mm bullets (91:84, 96; 92:89-90).

- In Marquardt's backpack – which Marquardt apparently had taken with him on his Florida trip – was a box of .22-caliber bullets of the same brand as the casing found in the shed that had housed Marquardt's puppies (91:82-85). Eleven bullets were missing from the box, and a .22 rifle rested against a cabin wall (91:82; 92:32). Remnants of .22-caliber bullets were found in the bodies of Marquardt's two pit bull puppies (91:200-01).

- According to a fellow cellmate, Marquardt confessed in 2002 to shooting two dogs and a rabbit with a .22-caliber gun (91:153), and police apparently had not publicly disseminated the caliber of the gun used in the shooting of Marquardt's pets (92:125).

- Marquardt's six pets all had been shot within days after Marquardt had bought them while using a false name and address. There is no indication that Marquardt had even given a name to any of the pets.

Finally, Marquardt's combination alibi/third-party defense was incomplete and highly speculative.

Even assuming Marquardt had left for Florida on March 12, 2000, as he claimed, he could have shot his six pets before then, and the Anderson crimes occurred on March 9, 2000, when Marquardt was at his cabin.

Evidence that Peter Heacox may have thought Marquardt had "snitched" on him at some unspecified time in the past and that Heacox was not working on March 13, 2000, does not reasonably suggest that Heacox stole a .22 rifle from Marquardt's parents' house on that day, shot and stabbed Marquardt's pets and then tried to "frame" Marquardt by planting the rifle in Marquardt's cabin (92:165, 177).

Similarly, evidence that Carl Thurmond disliked Wesley Anderson and a year earlier had commented about shooting a dog does not reasonably suggest that Thurmond shot the Anderson dog on March 9, 2000, and then decided to break into Marquardt's cabin and hide the 9mm handgun and boxes of 9mm bullets under Marquardt's refrigerator (92:229, 235-36).

On the foregoing record, the alleged violation of Marquardt's post-*Miranda* right to silence was harmless error beyond any reasonable doubt.

IV. THE TRIAL COURT PROPERLY EXCLUDED EVIDENCE OF THE DATE ON WHICH DEFENSE WITNESS SUSAN WESTABY SAID SHE SAW A TRUCK CARELESSLY LEAVE THE RESIDENCE OF MARQUARDT'S PARENTS.

A. Introduction.

Marquardt next argues that the trial court wrongly barred him from eliciting testimony of the specific date on which defense witness Susan Westaby said she saw a truck carelessly leave the residence of Marquardt's parents (Marquardt's brief at 46-48).

Westaby testified that while driving on a morning in March 2000, a blue S-10 truck backed out "over the lawn" at the Alfred Marquardt residence but she did not see the driver (92:174). In support of a theory that Peter Heacox could have stolen the .22 rifle from the residence of Marquardt's parents, shot Marquardt's pets and then put the rifle in Marquardt's cabin to frame Marquardt, Marquardt sought to adduce testimony from Westaby that the truck incident occurred on March 13, 2000, a day on which Heacox was not working (92:45-54).

Because Alfred Marquardt said no break-in occurred at his residence on March 13, 2000, the trial court barred Westaby from identifying that day as the date of the truck incident (92:47-53). On appeal, Marquardt argues that the court's ruling abridged his constitutional right to present a defense. For alternative reasons, Marquardt's claim of error does not warrant a new trial.

B. Analysis.

Properly excluded evidence. While rulings on the admissibility of evidence generally are left to trial court discretion, they also must comply with a criminal

defendant's constitutional right to present favorable evidence at trial. *See State v. Scheidell*, 227 Wis. 2d 285, 293, 595 N.W.2d 661 (1999); *Taylor v. Illinois*, 484 U.S. 400, 407-09 (1988). Constitutional questions are reviewed *de novo*. *See State v. Dodson*, 219 Wis. 2d 65, 69-70, 580 N.W.2d 181 (1998).

Nevertheless, "[t[he accused does not have an unfettered right to offer testimony that is incompetent, privileged, or otherwise inadmissible under standard rules of evidence." *Taylor*, 484 U.S. at 410. Like the State, an accused "'must comply with established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence.'" *Scheidell*, 227 Wis. 2d at 294 (citation omitted).

When a defendant seeks to present evidence that some "third party" committed the charged crime or crimes, "[t]he proffered evidence must do more than 'simply afford[] a possible ground of suspicion against another person,' . . . it must connect that person to the crime – either directly or inferentially." *Scheidell*, 227 Wis. 2d at 301 (quoting *State v. Denny*, 120 Wis. 2d 614, 623, 357 N.W.2d 12 (Ct. App. 1984))). If it does not do so, the proffered evidence is inadmissible. *Id.* at 296-97.

In the present case, proffered testimony that Susan Westaby saw the truck at Alfred Marquardt's residence on March 13, 2000, did not meet the foregoing test of relevancy for a "third party" defense. In the absence of evidence that a break-in had occurred at the residence on March 13, Marquardt failed to show the "conditional relevancy" of the date of March 13. He failed to show any reasonable possibility that the .22 rifle was stolen from the residence on that particular day – by Peter Heacox or anyone else. *See State v. Johnson*, 181 Wis. 2d 470, 482, 510 N.W.2d 811 (Ct. App.1993). In turn, Marquardt could not link Heacox to the killing of Marquardt's pets other than by pure speculation.

Harmless error. Moreover, if error occurred, it was harmless beyond a reasonable doubt. Even if jurors had heard that the truck incident occurred on March 13, Marquardt's "third party" theory would have fared no better. The State then would have elicited testimony from Alfred Marquardt that no break-in had occurred on March 13. Moreover, no evidence tied Heacox to the blue S-10 truck that Westaby said she saw that day.

To reiterate, it is the sheerest of speculation to suggest that because Heacox may have thought Marquardt had "snitched" on him some time in the past, Heacox would steal a .22 rifle from Marquardt's parents' house, shoot and stab Marquardt's pets and then try to "frame" Marquardt by planting the rifle in Marquardt's cabin. No reasonable jury would believe it, especially in view of the overwhelming evidence of Marquardt's guilt outlined above. The Westaby testimony (and "third party" theory of Heacox's culpability) also said nothing about the three charged crimes at the Anderson residence.

V. THE TRIAL COURT PROPERLY ALLOWED TESTIMONY ABOUT MARQUARDT'S PERSONAL APPEARANCE AND THE APPEARANCE OF HIS CABIN.

A. Introduction.

Marquardt also claims error in the admission of testimony about his personal appearance and the appearance of his cabin before and at the time of the charged crimes (Marquardt's brief at 48-50). Specific testimony is discussed below.

At trial, Marquardt unsuccessfully objected to the evidence as "irrelevant" (91:124, 134, 166, 214; 92:34-35). On appeal, he characterizes the testimony as "other acts" evidence of "bizarre" character traits, inadmissible under Wis. Stat. § 904.04(1).

Again, for alternative reasons, Marquardt's claim of evidentiary error does not warrant a new trial.

B. Analysis.

Admissible evidence. First, most of the challenged testimony was relevant as part of the *res gestae* of the charged crimes and not unfairly prejudicial to the defense.

Evidence of a defendant's conduct at a time and place different from a charged crime nonetheless may be "inextricably intertwined" with the charged crime and admissible as part of the *res gestae*. *See* Jason M. Brauser, *Intrinsic or Extrinsic?: The Confusing Distinction Between Inextricably Intertwined Evidence and Other Crimes Evidence Under Rule 404(B)*, 88 NW. U. L. Rev. 1582 (Summer 1994). This may include evidence of conduct that allegedly was a "'prelude to the crime charged,'" is "'directly probative of the crime charged,'" or "'completes the story of the crime charged.'" *Id.* at 1600-01 (citations omitted). In this sense, such evidence – even if viewed as "other acts" evidence – would be admissible under § 904.04(2). *See, e.g., State v. Hereford*, 195 Wis. 2d 1054, 1069, 537 N.W.2d 62 (Ct. App. 1995).

Evidence that Marquardt wore sunglasses indoors when he bought the puppies in question and that he pulled his jacket over his head during a cab ride to buy two of the rabbits in question was relevant to witness identifications of Marquardt (91:124, 133-34, 166-67). Such identifications, in turn, were necessary to establish that Marquardt had only recently bought the animals and would have no apparent humane reason to put them down. Such evidence, when coupled with Marquardt's use of false names and addresses, also reasonably suggests that Marquardt may have wanted to conceal his identity in making the cash purchases.

Such evidence also was not unfairly prejudicial to Marquardt. It is not unusual to find people wearing sunglasses indoors, especially during relatively brief visits to stores. Also, wearing a hooded sweatshirt during a cab ride in March in northern Wisconsin is hardly irrational behavior (91:214).

Testimony of Alfred Marquardt that *before March 2000*, Marquardt's cabin had been "a mess," with music tapes scattered on the floor (92:38-40), was highly relevant to refute Marquardt's suggestion in opening statement that the cabin's condition was the result of an intruder or intruders who, Marquardt claimed, had "planted" the .22 rifle and 9mm handgun in the cabin (91:67-70).

Marquardt did *not* specifically object to Investigator Price's testimony that when Marquardt was arrested at his cabin, Marquardt expressed "a problem . . . with his heart" and with the squad car mirrors "burn[ing]" his eyes (92:127-28). He, therefore, has waived review. *See State v. Boshcka*, 178 Wis. 2d 628, 638 n.2, 642-43, 496 N.W.2d 627 (Ct. App. 1992). In any case, jurors could reasonably attribute such comments to evidence that Marquardt had just experienced tear gas.

Harmless error. Finally, to the extent that any challenged item of evidence should have been excluded, its admission nevertheless would constitute harmless error. Reasonable jurors would not find Marquardt guilty simply because he wore sunglasses indoors or at night, covered his head with a jacket or hooded sweatshirt or commented about his eyes and heart after experiencing tear gas. Such conduct, even if termed "irrational," is not inherently "bad," much less criminal, behavior. Instead, reasonable jurors would focus on the overwhelming evidence of Marquardt's guilt, as discussed.

VI. MARQUARDT RECEIVED EFFECTIVE ASSISTANCE OF TRIAL COUNSEL IN THE CHALLENGED RESPECTS.

A. Introduction.

Lastly, Marquardt alleges ineffective assistance of trial counsel (Marquardt's brief at 50-55). To obtain a new trial, Marquardt must show that counsel's performance was both deficient – that is, outside the broad range of "prevailing professional norms" – and prejudicial in the sense of "a reasonable probability that, but for counsel's unprofessional errors, the result of [trial] would have been different." *Strickland v. Washington*, 466 U.S. 668, 687-88, 694 (1984). The ultimate Sixth Amendment question is reviewed independently. *See State v. O'Brien*, 223 Wis. 2d 303, 324-25, 588 N.W.2d 8 (1999).

For reasons set forth in Argument I., trial counsel was *not* ineffective in handling the "good faith" issue at the suppression hearing. For the reasons that follow, Marquardt's other two allegations of ineffectiveness also lack merit.

B. Mentioning police efforts to find "Lillie Murphy."

In opening statement, defense counsel told jurors that Marquardt purchased puppies and rabbits for a new girlfriend named "Lillie Murphy" (91:63-65). Marquardt does not dispute that this was reasonable and necessary to explain who was to care for the pets between March 12 and 18, 2000, when Marquardt claimed he was away.

Counsel also told jurors in opening statement that both the defense and the police had unsuccessfully tried to find Lillie Murphy to testify (91:68). At the post-commitment hearing, counsel reasonably explained that he did so, because jurors would naturally expect to hear from her (96:17).

Marquardt now protests that counsel's reference to *police efforts* to find Lillie Murphy unreasonably opened the door for the State to elicit Investigator Price's testimony that he had not heard of "Lillie Murphy" before trial (Marquardt's brief at 51-52). Marquardt's complaint is unpersuasive. At the post-commitment hearing, counsel said a police report showed that police knew Marquardt had spoken of "a girlfriend" (96:16). Also, two months before trial, counsel named "Lillie Murphy" on a list of prospective witnesses (36:7; 96:16). Counsel could reasonably expect, therefore, that police, too, would be looking for such person.

In any event, whether Investigator Price had heard of "Lillie Murphy" before trial could not reasonably have affected the verdicts. Investigator Price's unawareness did not eliminate the prospect that another officer knew the name. Also, Marquardt does not claim any adverse impact on his decision to testify, and jurors were going to hear about "Lillie Murphy" from him.

C. Foregoing evidence about the visibility of the 9mm handgun under the refrigerator.

Officers found the 9mm handgun under Marquardt's refrigerator during the third search of the cabin – on March 29, 2000. Marquardt was arrested at the cabin on March 18, and he suggested that the gun could have been "planted" thereafter (91:70).

At the post-commitment hearing, a defense investigator said that on January 9, 2004, a year after trial, the "kick[]plate" was off the refrigerator and that from across the cabin, he could see three to five inches deep under the refrigerator (96:40-45). Marquardt faults his counsel for not presenting similar evidence to suggest that officers should have seen the gun on March 18 if it had been there (Marquardt's brief at 53-55). This claim, too, lacks merit.

First, counsel *did* elicit trial testimony from Alfred Marquardt to the same effect. Alfred said that before March 29, 2000, he had moved the cabin refrigerator away from the wall to reach a fuse box and did not see any handgun beneath it (92:68-69, 77).

Second, in any event, Marquardt cannot show prejudice under *Strickland*. There is no certainty that the defense investigator's observation one year after trial replicated the circumstances in March 2000, and officers reasonably explained why they did not find the gun on March 18.

Eau Claire Sheriff's Detective Mark Christopher said he did not look under the refrigerator at that time, because he did not expect to find evidence there (91:84-85). He noted that "[t]here was a lot of clutter on the floor in that area," consisting of garbage, clothing and overturned chest drawers (91:95). Justice Agent Rehrauer said he had to kneel to see the gun under the refrigerator and could see it only after the two bullet boxes were removed (92:114-15). Jurors also would reason that if someone wanted to "frame" Marquardt, they logically would not have made the gun so hard to find.

Marquardt received effective assistance of trial counsel in every challenged respect.

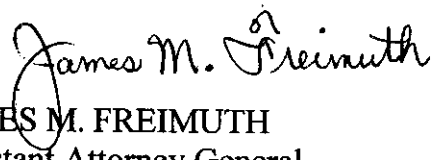
CONCLUSION

For the reasons set forth, this court should affirm the criminal commitment and post-commitment orders.

Dated at Madison, Wisconsin: December 3, 2004.

Respectfully submitted,

PEGGY A. LAUTENSCHLAGER
Attorney General



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CERTIFICATION

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is: proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line. The length of the brief is 10,905 words.

JAMES M. FREIMUTH

APPENDIX OF RESPONDENT

	Pages
State v. Marquardt, 2001 WI App 219, 247 Wis. 2d 765, 635 N.W.2d 188 (Decision on Marquardt's interlocutory appeal in Chippewa County, based on same March 15, 2000, warrant at issue in present case)	101-112

Briefs and Other Related Documents

Court of Appeals of Wisconsin.

STATE of Wisconsin, Plaintiff-Respondent,
[FN<<dagger>>]

FN<<dagger>> Petition for cross-review denied Nov. 27, 2001.

v.
Bill Paul MARQUARDT,
[FN<<dagger>><<dagger>>] Defendant-Appellant.

FN<<dagger>><<dagger>> Petition for review denied Nov. 27, 2001.

No. 01-0065-CR.

Submitted on Briefs June 11, 2001.
Opinion Released Aug. 21, 2001.
Opinion Filed Aug. 21, 2001.

Defendant charged with first-degree intentional homicide and possession of a firearm by a felon moved to suppress evidence. The Circuit Court, Chippewa County, Roderick A. Cameron, J., denied motion, and defendant appealed. The Court of Appeals, Cane, C.J., held that: (1) facts set forth in warrant affidavit were clearly insufficient to give rise to probable cause justifying issuance of search warrant for defendant's residence; (2) reversal and remand for determination as to applicability of good faith exception to exclusionary rule was required; (3) defendant effectively conceded existence of probable cause for warrantless search of his car; (4) defendant's car remained "readily mobile" following his arrest; (5) application of the automobile exception to the warrant requirement is not limited to vehicles found in public places; and (6) fact that officers could have secured search warrant for defendant's car did not render automobile exception inapplicable.

Affirmed in part, reversed in part, and remanded for further proceedings.

West Headnotes

[1] Searches and Seizures ⚷ 23
349k23
Fourth and Fourteenth Amendments to the United States Constitution and the equivalent provision of the state constitution guarantee citizens freedom from unreasonable searches and seizures. U.S.C.A. Const.Amends. 4, 14; W.S.A. Const. Art. 1, § 11.

[2] Searches and Seizures ⚷ 201
349k201
Question whether police conduct violated the constitutional guarantee against unreasonable searches and seizures is a question of constitutional fact. U.S.C.A. Const.Amends. 4, 14; W.S.A. Const. Art. 1, § 11.

[3] Criminal Law ⚷ 1158(4)
110k1158(4)
On review of a trial court's ruling on a motion to suppress based on allegedly unreasonable search and seizure, the Court of Appeals gives deference to the trial court's findings of evidentiary or historical fact, but determines the question of constitutional fact independently.

[4] Searches and Seizures ⚷ 104
349k104
[4] Searches and Seizures ⚷ 113.1
349k113.1
Search warrant may issue only when a neutral and detached magistrate or judge finds probable cause to believe that evidence of a crime may be found in a particular place. U.S.C.A. Const.Amend. 4; W.S.A. Const. Art. 1, § 11.

[5] Searches and Seizures ⚷ 113.1
349k113.1
Whether there is probable cause justifying the issuance of a search warrant is determined by examining the totality of the circumstances. U.S.C.A. Const.Amend. 4; W.S.A. Const. Art. 1, § 11.

[6] Searches and Seizures ⚷ 113.1
349k113.1
Probable cause determination in connection with the issuance of a search warrant must be based upon what a reasonable judge can infer from the information presented by the police. U.S.C.A. Const.Amend. 4; W.S.A. Const. Art. 1, § 11.

[7] Searches and Seizures ⚷ 113.1
349k113.1
In considering an application for a search warrant, an issuing judge ordinarily considers only the facts set forth in supporting affidavits accompanying the warrant application. U.S.C.A. Const.Amend. 4;

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W.S.A. Const. Art. 1, § 11.

[8] Criminal Law ⚷ 1158(4)
110k1158(4)

It is the duty of the reviewing court, reviewing a trial court's ruling on a motion to suppress, to ensure that the judge issuing the search warrant had a substantial basis to conclude that probable cause existed. U.S.C.A. Const.Amend. 4; W.S.A. Const. Art. 1, § 11.

[9] Criminal Law ⚷ 1158(4)
110k1158(4)

In reviewing a trial court's ruling on a motion to suppress, the reviewing court must consider whether, objectively viewed, the record before the judge issuing the warrant provided sufficient facts to excite an honest belief in a reasonable mind that the objects sought are linked with the commission of a crime, and that they will be found in the place to be searched. U.S.C.A. Const.Amend. 4; W.S.A. Const. Art. 1, § 11.

[10] Criminal Law ⚷ 1158(4)
110k1158(4)

In reviewing a trial court's ruling on a motion to suppress, the reviewing court accords great deference to the determination made by the warrant-issuing judge. U.S.C.A. Const.Amend. 4; W.S.A. Const. Art. 1, § 11.

[11] Searches and Seizures ⚷ 196
349k196

Issuing judge's determination that probable cause existed for the issuance of a search warrant will stand unless the defendant establishes that the facts are clearly insufficient to support a probable cause finding. U.S.C.A. Const.Amend. 4; W.S.A. Const. Art. 1, § 11.

[12] Searches and Seizures ⚷ 114
349k114

Facts set forth in affidavit in support of search warrant application were clearly insufficient to give rise to probable cause justifying issuance of search warrant for defendant's residence; although facts arguably supported an honest belief that particular objects sought, including shoes, knives, and guns, could be linked with commission of the crime, nothing linked those objects to defendant's residence other than statement of victim's husband, defendant's father, that defendant had not been heard from since day of murder. U.S.C.A. Const.Amend. 4; W.S.A. Const. Art. 1, § 11.

[13] Criminal Law ⚷ 1181.5(7)
110k1181.5(7)

Finding that issuing judge had lacked probable cause to issue search warrant for murder defendant's residence required reversal and remand, for determination as to applicability of good faith exception to exclusionary rule and, should the trial court find the exception inapplicable, for examination of facts surrounding subsequent searches to determine whether they were tainted by initial unlawful search. U.S.C.A. Const.Amend. 4; W.S.A. Const. Art. 1, § 11.

[14] Searches and Seizures ⚷ 25.1
349k25.1

[14] Searches and Seizures ⚷ 60.1
349k60.1

Warrantless searches of homes are presumptively unreasonable, but searches of vehicles are not. U.S.C.A. Const.Amend. 4; W.S.A. Const. Art. 1, § 11.

[15] Searches and Seizures ⚷ 60.1
349k60.1

Unique nature of automobiles sets them apart from other areas protected from warrantless searches under the Fourth Amendment. U.S.C.A. Const.Amend. 4.

[16] Searches and Seizures ⚷ 62
349k62

Under current federal law, the warrantless search of a vehicle does not offend the Fourth Amendment if there is probable cause to search the vehicle; and the vehicle is readily mobile; issues concerning whether the police could have obtained a warrant prior to searching are not relevant to the analysis. U.S.C.A. Const.Amend. 4.

[17] Constitutional Law ⚷ 18
92k18

State Supreme Court is free to interpret the state constitution in a manner that affords greater protections than the federal Constitution.

[18] Criminal Law ⚷ 1130(6)
110k1130(6)

Murder defendant effectively conceded existence of probable cause for warrantless search of his vehicle, on his interlocutory appeal from denial of his motion to suppress evidence seized therefrom, where defendant did not challenge probable cause before the circuit court or in his brief on appeal, and only briefly and obliquely addressed the issue in his reply brief. U.S.C.A. Const.Amend. 4; W.S.A. Const. Art. 1, § 11.

[19] Criminal Law ⚷ 1130(5)
110k1130(5)

Murder defendant waived appellate review of his contention that his car was no longer "readily

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mobile," within scope of automobile exception to warrant requirement, following his arrest, by failing to raise such issue before circuit court or to cite to authority for such proposition on interlocutory appeal. U.S.C.A. Const.Amend. 4; W.S.A. Const. Art. 1, § 11.

[20] Searches and Seizures ⚷ 60.1
349k60.1

Murder defendant's car remained "readily mobile," within scope of automobile exception to warrant requirement, following defendant's arrest; defendant's arrest would not have prevented other unknown individuals from moving his car. U.S.C.A. Const.Amend. 4; W.S.A. Const. Art. 1, § 11.

[21] Searches and Seizures ⚷ 60.1
349k60.1

Justification to conduct a warrantless search pursuant to the automobile exception to the warrant requirement does not vanish once the car has been immobilized. U.S.C.A. Const.Amend. 4; W.S.A. Const. Art. 1, § 11.

[22] Searches and Seizures ⚷ 60.1
349k60.1

Application of the automobile exception to the warrant requirement is not limited to vehicles found in public places. U.S.C.A. Const.Amend. 4; W.S.A. Const. Art. 1, § 11.

[23] Searches and Seizures ⚷ 60.1
349k60.1

State constitution did not go beyond scope of Fourth Amendment to impose public place requirement for application of automobile exception to warrant requirement, absent an explicit indication that the state Supreme Court interpreted the applicable provision of the state constitution differently than the Fourth Amendment. U.S.C.A. Const.Amend. 4; W.S.A. Const. Art. 1, § 11.

[24] Searches and Seizures ⚷ 66
349k66

Fact that officers could have secured search warrant for murder defendant's car, either before towing it or before searching it at police station, did not render automobile exception to warrant requirement inapplicable. U.S.C.A. Const.Amend. 4; W.S.A. Const. Art. 1, § 11.

****190 *770** On behalf of the defendant-appellant, the cause was submitted on the briefs of James B. Connell of Crooks, Low, Connell & Rottier, S.C. of Wausau.

On behalf of the plaintiff-respondent, the cause was submitted on the brief of James E. Doyle, attorney general, and James M. Freimuth, assistant attorney general.

****191 *771** Before CANE, P.J., HOOVER, P.J., and PETERSON, J.

¶ 1 CANE, C.J.

In this interlocutory appeal, Bill Paul Marquardt appeals from an order (1) denying his motion to suppress evidence seized pursuant to a search warrant for his home; (2) denying his request for a *Franks* [FN1] hearing; and (3) denying his motion to suppress evidence from a warrantless search of his vehicle.

FN1. *Franks v. Delaware,* 438 U.S. 154, 98 S.Ct. 2674, 57 L.Ed.2d 667 (1978).

¶ 2 We conclude first that there was insufficient probable cause to justify the search warrant for Marquardt's home. Because our supreme court recently adopted the good faith exception to the exclusionary rule, *see State v. Eason,* 2001 WI 98, ¶ 74, 245 Wis.2d 206, 629 N.W.2d 625, we reverse that portion of the court's order and remand for a determination of whether the good faith exception to the exclusionary rule applies in this case. Second, we do not address Marquardt's request for a *Franks* hearing because we have concluded that there was insufficient probable cause to support the search warrant. Finally, we conclude that the automobile exception to the Fourth Amendment search warrant requirement applies to the warrantless search of Marquardt's vehicle. Thus, we affirm that portion of the court's order denying suppression of evidence from Marquardt's vehicle on warrantless search grounds.

BACKGROUND

¶ 3 On March 13, 2000, Alfred Marquardt found his wife, Mary, dead in their garage. Mary had been shot and stabbed. Officers investigating the death immediately obtained a warrant to search the home.

***772** ¶ 4 On March 15, officers obtained a warrant to search the home of Mary and Alfred's son, Bill Marquardt. Officers conducting the search found

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dead animals at Bill Marquardt's home and subsequently obtained an arrest warrant for Marquardt on a charge of cruelty to animals.

¶ 5 On March 18, Marquardt was arrested at his home. At the time of his arrest, Marquardt's locked vehicle was parked in his driveway. In the hours after Marquardt was arrested, the Eau Claire County Sheriff's Department arranged for the vehicle to be hauled to the department, where it was then searched. Two days later, the vehicle was transported to the State Crime Laboratory in Madison where it was again searched. No warrant was ever obtained for the search and seizure of the vehicle.

¶ 6 On May 4, Marquardt was charged with one count of first-degree intentional homicide and one count of possession of a firearm by a felon. Following a preliminary hearing and bindover, Marquardt filed several motions to suppress evidence. Two motions are relevant to this appeal: a motion to suppress evidence that was seized from Marquardt's home pursuant to the March 15 search warrant and a motion to suppress evidence that was seized from Marquardt's car without a search warrant. [FN2]

FN2. Marquardt sought to exclude not only evidence seized on March 15, 2000, but also all physical evidence seized from Marquardt's premises, person or vehicles that was discovered as a result of the issuance and execution of the March 15 search warrant. Thus, Marquardt challenged the admission of evidence seized from the vehicle found at his home based on two independent grounds: (1) as "fruit of the poisonous tree" (the tree being the March 15 search warrant); and (2) as the product of an unconstitutional, warrantless search and seizure of his vehicle.

¶ 7 The circuit court conducted motion hearings on July 31 and December 8. At **192 the first hearing, the *773 court held that the search warrant for Marquardt's home was issued upon sufficient probable cause and denied Marquardt's request for a *Franks* hearing on the issue of whether the application for a search warrant contained material misstatements and omissions. Following the second day of hearings, the court issued a memorandum decision denying the motion to suppress evidence seized from the vehicle, concluding that the search was valid under the automobile exception to the Fourth Amendment's warrant requirement.

¶ 8 Marquardt seeks reversal of the circuit court's order finding probable cause in the search warrant application, denying his request for a *Franks* hearing, and denying the suppression of evidence derived from the warrantless vehicle search. By order of January 24, 2001, we granted Marquardt's request for leave to appeal the court's order.

STANDARD OF REVIEW

[1][2][3] ¶ 9 The Fourth and Fourteenth Amendments to the United States Constitution and art. I, § 11, of the Wisconsin Constitution guarantee Wisconsin citizens freedom from "unreasonable searches and seizures." *State v. Griffith,* 2000 WI 72, ¶ 25, 236 Wis.2d 48, 613 N.W.2d 72. The question whether police conduct violated the constitutional guarantee against unreasonable searches and seizures is a question of constitutional fact. *Id.* at ¶ 23. On review, this court gives deference to the trial court's findings of evidentiary or historical fact, but determines the question of constitutional fact independently. *Id.*

*774 DISCUSSION

I. Issuance of the initial search warrant for Marquardt's house

[4] ¶ 10 Marquardt argues that the March 15 search warrant for his house was issued based on insufficient probable cause. A search warrant may issue only when a neutral and detached magistrate (or judge, as in this case) finds probable cause to believe that evidence of a crime may be found in a particular place. *See State v. Ward,* 2000 WI 3, ¶ 21, 231 Wis.2d 723, 604 N.W.2d 517.

[5] ¶ 11 Whether there is probable cause is determined by examining the "totality of the circumstances." *Id.* at ¶ 26. A finding of probable cause is a commonsense test:

The task of the issuing magistrate is simply to make a practical, commonsense decision whether, given all the circumstances set forth in the affidavit before him, including the "veracity" and "basis of knowledge" of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in

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a particular place.
Id. at ¶ 23 (citing *Illinois v. Gates,* 462 U.S. 213, 238, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983)).

[6][7] ¶ 12 A probable cause determination must be based upon what a reasonable judge can infer from the information presented by the police. *Ward,* 231 Wis.2d 723, 604 N.W.2d 517, 2000 WI 3 at ¶ 26. The issuing judge ordinarily considers only the facts set forth in supporting affidavits accompanying the warrant application. *See id.*

[8][9][10][11] ***775** ¶ 13 It is the duty of the reviewing court to ensure that the judge had a substantial basis to conclude that probable cause existed. *Id.* at ¶ 21. We must consider whether, objectively viewed, the record before the judge provided sufficient facts to excite an honest belief in a ****193** reasonable mind that the objects sought are linked with the commission of a crime, and that they will be found in the place to be searched. *Id.* at ¶ 27. We accord great deference to the determination made by the warrant-issuing judge. *Id.* at ¶ 21. Thus, the judge's determination will stand unless the defendant establishes that the facts are clearly insufficient to support a probable cause finding. *Id.*

[12] ¶ 14 With these standards in mind, we examine the facts that were presented to the judge. The judge did not take any testimony in support of the search warrant application. Instead, only written documents were provided. The application for Marquardt's home, dated March 15, was completed by a detective from the Eau Claire County Sheriff's Department, and was based upon the following statement of facts:

Affiant reports that on March 15, 2000, he received a copy of an affidavit for search warrant sworn and executed in Chippewa County on March 13, 2000, with respect to the suspected homicide of Mary J. Marquardt. A copy of said affidavit and search warrant is attached and hereby incorporated by reference. [[FN3]]

FN3. Marquardt in his reply brief suggests that the March 13 application and warrant may not have been provided to the judge with the March 15 application. We have reviewed the transcript of the motion hearing and have found no indication that defense counsel, the State or the circuit court expressed any doubt that the March 13 application was attached. Indeed, the circuit court referred to the fact that the March 13 warrant was attached to the March 15 application and asked the State, "Is there anything in there that ties the defendant to the homicide? I went through it, and I didn't see anything that did so, but I want to know if I missed anything." Because Marquardt raises this factual issue for the first time in his reply brief, we decline to address it. *See State v. Mata,* 230 Wis.2d 567, 576 n. 4, 602 N.W.2d 158 (Ct.App.1999) (court will not address issues raised for the first time in a reply brief). Instead, we will assume that the March 13 application and warrant were attached to the March 15 application.

***776** Investigator Price reports that after finding the body of Mary J. Marquardt, he spoke with her husband, Alfred E. Marquardt. Mr. Marquardt informed him that he and Mary have a son, Bill Marquardt, who, since the location of Ms. Marquardt's body had not been seen or heard from. Alfred Marquardt further informed Investigator Price that Bill Marquardt owned with Alfred Marquardt a cabin in which Bill resided at E27505 County Highway M, Town of Fairchild, County of Eau Claire, Wisconsin.
Investigator Price further reports that in examining the body of Mary J. Marquardt and the scene where she was found, it appeared as though among the wounds incurred by her was a knife wound. Also at the scene, officers were able to locate a number of footprints that may be suitable for comparison with the shoes that made them.
Investigator Barnier reports that in checking Eau Claire County tax rolls, he learned that a cabin, storage building, pumphouse and out-house located at E27505 County Highway M .... are owned by Alfred and Bill Marquardt.

***777** ¶ 15 The search warrant application sought permission to search for ammunition; firearms; clothing containing Mary's hair, blood or fibers; knives; shoes; and documents that may indicate Marquardt's whereabouts on or after March 13.

¶ 16 The March 13 search warrant for Mary's home that was referred to in the March 15 application contained the following statement of facts:
****194** Inv[estigator] Price reports that on March 13, 2000, Chippewa County Sheriff's Dispatch received a 911 call from 11766 State Hwy 178, Chippewa Falls, Township of Eagle Point. The caller identified himself as Alfred E. Marquardt.

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.... Marquardt reported that his wife was apparently dead at the residence.
Price continued that he responded to the Marquardt home and met with Marquardt. Marquardt relayed that he had left home at about 7 AM that morning and tried to call home about 11:50. The phone was busy and remained so the remainder of the day. Marquardt stated that he left work early and returned home because of the busy phone and upon arrival, found his wife, Mary J. Marquardt covered with a blanket in the garage. She was cold and unresponsive and appeared to have a head wound. Price reports that a shell casing, tentatively identified as 9 mm, was observed on the premises.

¶ 17 Marquardt argues that these statements are "devoid of any information from which it could be reasonably concluded that evidence of a crime could be located at [Marquardt's] residence, which was located in a different county than his parents' residence, where his mother's body was found." He notes that the fact no one had seen or heard from him raises no reasonable inference that he was involved in the crime. "Even if ***778** absence could be considered a reason for suspicion, the police officers in this case had nothing more than a guess that contraband or evidence of a crime would be found in [Marquardt's] home." He argues, citing *United States v. Schultz,* 14 F.3d 1093, 1097-98 (6th Cir.1994), that to find probable cause based on these facts "would be to invite general warrants authorizing searches of any property owned, rented, or otherwise used by a criminal suspect--just the type of broad warrant the Fourth Amendment was designed to foreclose."

¶ 18 In response, the State admits that the facts recited in the affidavits are "scant," but argues that they are not so thin as to be insufficient for probable cause. The State points to several facts in the affidavits: (1) Mary's telephone was off the hook the day she was killed, suggesting "that the perpetrator had been inside the residence"; (2) Mary was shot and stabbed, and no valuables were taken, suggesting the crime was an intentional homicide, as opposed to a break-in, and that the perpetrator was probably a male; [FN4] (3) there were footprints at the crime scene that could be compared with footware if any are located; (4) Mary was covered with a blanket, which suggests the perpetrator knew, or was familiar with the victim; and (5) Marquardt's father stated that his son had not been heard from since Mary's body was discovered.

FN4. The State cites several authorities for the general proposition that "males kill in overwhelming numbers compared to females, and they kill with firearms."

¶ 19 Although these facts may lead a reasonable police officer to pursue further investigation of Marquardt, we conclude that there is nothing in the facts to tie Marquardt to the crime, much less to tie his home to the crime. Although the warrant-issuing judge may ***779** have been provided sufficient facts to excite an honest belief in a reasonable mind that the particular types of objects sought--including shoes, knives, and guns--could be linked with the commission of the crime, there was no fact that suggested those items would be found in Marquardt's cabin. We conclude that Marquardt has established that the facts are clearly insufficient to support a probable cause finding and, ****195** therefore, we reject the judge's probable cause determination. *See Ward,* 231 Wis.2d 723, 604 N.W.2d 517, 2000 WI 3 at ¶ 2.

[13] ¶ 20 Until recently, this conclusion would end our analysis, and we would simply reverse the circuit court's order denying Marquardt's motion to suppress. However, as a result of our supreme court's decision in *Eason,* we instead reverse and remand for a determination of whether the good faith exception to the exclusionary rule applies in this case.

¶ 21 In *Eason,* the court adopted the good faith exception to the exclusionary rule recognized in *United States v.. Leon,* 468 U.S. 897, 918- 20, 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984), adding some additional protections required by art. I, § 11, of the Wisconsin Constitution. *See Eason,* 245 Wis.2d 206, 629 N.W.2d 625, 2001 WI 98 at ¶ 74. *Eason* stated:
We hold that where police officers act in objectively reasonable reliance upon the warrant, which had been issued by a detached and neutral magistrate, a good faith exception to the exclusionary rule applies. We further hold that in order for a good faith exception to apply, the burden is upon the State to show that the process used in obtaining the search warrant included a significant investigation and a review by either a

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police officer trained and knowledgeable in the requirements of probable cause and reasonable suspicion, or a knowledgeable government attorney. We also hold that this process is required by Article I, Section 11 of the Wisconsin Constitution, in addition to those protections ***780** afforded by the good faith exception as recognized by the United States Supreme Court in *United States v. Leon,* 468 U.S. 897, 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984).
Id.

¶ 22 *Eason* was decided after briefing was completed in this case, although the State in the circuit court and on appeal argued for application of a good faith exception to the exclusionary rule. We conclude that the State has preserved this issue for appeal. Accordingly, we reverse that portion of the circuit court's order denying Marquardt's motion to suppress and remand for a good faith hearing consistent with *Eason.*

¶ 23 If the circuit court ultimately concludes that the good faith exception to the exclusionary rule is inapplicable, the court must issue a suppression order with respect to the March 15 search. In that case, the court must also determine the facts surrounding the subsequent searches to determine if they were tainted by the initial unlawful search of Marquardt's residence and, if so, issue a suppression order consistent with its findings. *See State v. Durbin,* 170 Wis.2d 475, 486, 489 N.W.2d 655 (Ct.App.1992).

II. Marquardt's request for a *Franks* hearing

¶ 24 The circuit court denied Marquardt's request for a *Franks* hearing. A *Franks* hearing allows a defendant to contest the finding of probable cause to issue a search warrant in a hearing if he or she "makes a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in ***781** the warrant affidavit, and if the allegedly false statement is necessary to the finding of probable cause." *State v. Marshall,* 92 Wis.2d 101, 112, 284 N.W.2d 592 (1979) (citing *Franks v. Delaware,* 438 U.S. 154, 155-56, 98 S.Ct. 2674, 57 L.Ed.2d 667 (1978)). Marquardt in his briefs stated that this court need not consider his *Franks* hearing request if we conclude that the warrant lacks probable cause. ****196** Because we have concluded that there was insufficient probable cause to support the March 15 search warrant application, we will not address the *Franks* issue.

III. Warrantless search of Marquardt's vehicle

¶ 25 Marquardt seeks suppression of the evidence found in the vehicle seized from his home at the time of his arrest on two grounds: that it is "fruit of the poisonous tree" and that the vehicle was unlawfully seized and searched without a warrant. The circuit court will address the first ground if it determines that the good faith exception to the exclusionary rule does not apply to the March 15 search warrant. Resolution of the second ground requires us to consider the "automobile exception" to the warrant requirement of the Fourth Amendment of the United States Constitution and art. I, § 11, of the Wisconsin Constitution.

[14][15] ¶ 26 Warrantless searches of homes are "presumptively unreasonable," but searches of vehicles are not. *State v. Pallone,* 2000 WI 77, ¶ 59, 236 Wis.2d 162, 613 N.W.2d 568. During the last seventy-five years, the United States Supreme Court has recognized that the unique nature of automobiles sets them apart from other areas protected from warrantless searches under the Fourth Amendment. *Id.* This exception to the general rule requiring a warrant for searches and seizures is known as the automobile exception.

***782** A. Federal case law on the automobile exception

¶ 27 The elements required to satisfy the automobile exception have changed over time. In *Carroll v. United States,* 267 U.S. 132, 45 S.Ct. 280, 69 L.Ed. 543 (1925), the court held that three elements were required to satisfy the automobile exception to the warrant requirement: (1) a mobile vehicle; (2) probable cause to believe the vehicle contained evidence of a crime; and (3) impractibility of obtaining a search warrant. *See id.* at 153-60, 45 S.Ct. 280.

¶ 28 In *California v. Carney,* 471 U.S. 386, 388, 105 S.Ct. 2066, 85 L.Ed.2d 406 (1985), the court effectively eliminated the *Carroll* requirement of "impractibility to obtain a search warrant," explaining that the exigency inherent in the "ready mobility" of a vehicle, coupled with the "lesser

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expectation of privacy" in a readily mobile vehicle, excuses the need to secure a search warrant. *See Carney,* 471 U.S. at 390-91, 105 S.Ct. 2066.

¶ 29 If there was any doubt about the elimination of the impractibility requirement, it was resolved by *Pennsylvania v. Labron,* 518 U.S. 938, 116 S.Ct. 2485, 135 L.Ed.2d 1031 (1996) (per curiam). In *Labron,* the Court overturned the Pennsylvania Supreme Court's conclusion that warrantless searches of automobiles are limited to cases where unforeseen circumstances involving the search of an automobile are coupled with the presence of probable cause. *See id.* at 940, 116 S.Ct. 2485. The Court stated:

> Our first cases establishing the automobile exception to the Fourth Amendment's warrant requirement were based on the automobile's "ready mobility," an exigency sufficient to excuse failure to obtain a search warrant once probable cause to conduct the search is clear. .... More recent cases provide a further justification: the individual's reduced expectation of privacy in an automobile, ***783** owing to its pervasive regulation. .... If a car is readily mobile and probable cause exists to believe it contains contraband, the Fourth Amendment ****197** thus permits police to search the vehicle without more.
> *Id.*

¶ 30 The Supreme Court reiterated its conclusion three years later in *Maryland v. Dyson,* 527 U.S. 465, 119 S.Ct. 2013, 144 L.Ed.2d 442 (1999) (per curiam). The Court rejected the state court's conclusion that the automobile exception requires a separate finding of exigency in addition to a finding of probable cause. *Id.* at 467, 119 S.Ct. 2013. The Court explained:

> The Fourth Amendment generally requires police to secure a warrant before conducting a search. ... As we recognized nearly 75 years ago ... there is an exception to this requirement for searches of vehicles. And under our established precedent, the "automobile exception" has no separate exigency requirement. We made this clear in *United States v. Ross,* 456 U.S. 798, 809, 102 S.Ct. 2157, 72 L.Ed.2d 572 ... (1982), when we said that in cases where there was probable cause to search a vehicle "a search is not unreasonable if based on facts that would justify the issuance of a warrant, *even though a warrant has not been actually obtained.*" (Emphasis added.).... [In *Labron*], we repeated that the automobile exception does not have a separate exigency requirement: "If a car is readily mobile and probable cause exists to believe it contains contraband, the Fourth Amendment .... permits police to search the vehicle without more."
> *Id.*

[16] ¶ 31 Thus, under current federal law, the warrantless search of a vehicle does not offend the Fourth Amendment if (1) there is probable cause to search the vehicle; and (2) the vehicle is readily mobile. *See id.* ***784** Issues concerning whether the police could have obtained a warrant prior to searching are not relevant to the analysis. *See id.;* 3 WAYNE R. LAFAVE, SEARCH AND SEIZURE § 7.2(b) (3d ed.1996) (courts uphold warrantless searches with virtually no inquiry into the facts of the particular case, reasoning that whether any kind of exigent circumstances claim could plausibly be put forward is totally irrelevant).

B. Wisconsin case law on the automobile exception

[17] ¶ 32 Wisconsin's Constitution also protects Wisconsin's citizens from unreasonable searches and seizures. *See* WIS. CONST. art. I, § 11. Although the United States Supreme Court sets the minimal constitutional standards applicable to the states through the Fourteenth Amendment, Wisconsin's Supreme Court is free to interpret our constitution in a manner that affords greater protections. *State v. Tompkins,* 144 Wis.2d 116, 132, 423 N.W.2d 823 (1988). However, *Tompkins* added,

> where the language of the state constitutional provision at issue is virtually identical with that of its federal counterpart, as here, we have traditionally interpreted our constitution consistent with the protections of the federal constitution as interpreted by the United States Supreme Court. This is particularly true of this court's interpretation of the Wisconsin search and seizure provision.
> *Id.* at 133, 423 N.W.2d 823.

C. Application of the automobile exception

¶ 33 Applying these principles to the instant case, we must consider (1) whether there was probable ***785** cause to search Marquardt's vehicle; and (2) whether the vehicle was readily mobile. *See Dyson,* 527 U.S. at 467, 119 S.Ct. 2013. We

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conclude: (1) that there was probable cause to search the vehicle because Marquardt has **198 not contested that issue; and (2) that the vehicle was readily mobile. Therefore, the automobile exception applies. We also reject Marquardt's two additional challenges to the automobile exception: that the exception applies only to vehicles in public places and that the court should consider the ease with which the officers could have obtained a search warrant in applying the automobile exception.

1. Probable cause

[18] ¶ 34 Marquardt filed numerous motions to suppress evidence. After the first of two hearings on his motions, the State requested additional time to investigate and present evidence, explaining that the State had not realized that Marquardt was challenging the search of the vehicle on warrantless search grounds as well as "fruit of the poisonous tree" grounds. Marquardt's counsel agreed to continue the hearing.

¶ 35 Prior to the continued motion hearing, the State filed a brief urging the circuit court to deny Marquardt's motion to suppress, arguing that the warrantless search of the vehicle was constitutional under the automobile exception. With respect to probable cause, the State noted: "The defendant's entire argument for the suppression of the evidence seized from the [vehicle] centered on the failure of the police to obtain a search warrant. Implicit in this argument is a concession that the officers had probable cause sufficient to obtain a search warrant."

*786 ¶ 36 Marquardt did not file a written response, choosing instead to present his arguments orally after the remaining testimony was taken. We have reviewed the transcript and agree with the State that Marquardt did not challenge the State's assumption that there was probable cause to search the vehicle. Instead, Marquardt contested whether the car's location on a private driveway, as opposed to on public property, satisfied the automobile exception.

¶ 37 Marquardt's apparent concession of the probable cause issue was reflected in the circuit court's written decision, in which the court simply stated that there was probable cause to search the vehicle and concentrated on the single issue raised at the motion hearing: whether there is a "public place" requirement in the automobile exception.

¶ 38 On appeal, Marquardt in his opening brief did not challenge whether there was probable cause to search his vehicle. The State identified this omission in its brief, and also explained why such an argument would lack merit. In his reply brief, Marquardt does not directly respond to the State's assertion that he failed to challenge probable cause, although he notes in a single paragraph:

> The officers did not state that they had probable cause to search the vehicle. In fact, Investigator Price stated that he did not know "that there was anything visible from the exterior of the vehicle that would be classified as contraband" and that there was "suspect information" visible from the exterior of the vehicle. However, he testified that "we were able to see a material on the door, but we had no idea what it was." There was no testimony that any officer even saw the stain until Bill Marquardt's car was transported to the Eau County Sheriff's Department and it was not until the car was *787 sent to the State Crime Lab in Madison that the stain was determined to be blood. The vehicle[']s prospective value remained uncertain until after the interior[ ][was] thoroughly searched and examined.

¶ 39 Based on the record and the briefs, we conclude that to the extent Marquardt attempts to contest probable cause for the **199 first time in his reply brief, he is too late. *See Swartwout v. Bilsie,* 100 Wis.2d 342, 346 n. 2, 302 N.W.2d 508 (Ct.App.1981) (Ordinarily, we do not consider arguments raised for the first time in a reply brief.). Not only was the issue not raised in Marquardt's opening brief, it was not raised at the circuit court. Accordingly, we decline to address it. *See Apex Elecs. Corp. v. Gee,* 217 Wis.2d 378, 384, 577 N.W.2d 23 (1998) (The oft-repeated rule of Wisconsin appellate practice is that issues not raised in the circuit court generally will not be considered for the first time on appeal.). We therefore conclude that the probable cause prong of the automobile exception has been satisfied.

2. "Readily mobile" vehicle

[19] ¶ 40 It is undisputed that Marquardt's vehicle was in working order on the day he was arrested. Indeed, an officer testified that law enforcement on

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March 18 proceeded to Marquardt's home to execute the arrest warrant shortly after a neighbor notified them that he saw Marquardt's car pull into the driveway. However, Marquardt argues that once he was arrested, the vehicle was no longer readily mobile.

[20] ¶ 41 We decline to address this argument in detail because Marquardt did not raise this issue at the trial court and has provided us with no authority for his argument. *See id.* at 384, 577 N.W.2d 23; *State v. Shaffer,* 96 Wis.2d ***788** 531, 545-46, 292 N.W.2d 370 (Ct.App.1980) (we need not consider arguments unsupported by citations to authority). However, we note that our brief survey of the applicable case law assures us that the argument lacks merit.

¶ 42 In *United States v. Gallman,* 907 F.2d 639, 641 (7th Cir.1990), the court addressed the same argument from a defendant who contended that his car was not readily mobile because he had been arrested and the officers had his car key. The court rejected Gallman's reasoning, concluding: "These circumstances do indeed make the car less accessible to Gallman, but they do not make it less mobile." *Id.* This reasoning is equally persuasive here; Marquardt's arrest would not prevent other unknown individuals from moving the vehicle.

[21] ¶ 43 Additionally, we are not concerned by the fact that the car was seized and impounded before it was searched. The Supreme Court has held that the justification to conduct a warrantless search does not vanish once the car has been immobilized. *See United States v. Johns,* 469 U.S. 478, 484, 105 S.Ct. 881, 83 L.Ed.2d 890 (1985). In short, we are confident that the readily mobile component of the automobile exception has been satisfied.

3. Rejection of additional arguments

¶ 44 Marquardt challenges the application of the automobile exception on two additional grounds: that the exception applies only to vehicles in public places and that the court should consider the ease with which the officers could have obtained a search warrant. We reject these arguments.

[22] ***789** ¶ 45 We first consider Marquardt's contention that the automobile exception is inapplicable because his vehicle was parked in his private driveway at the time it was seized. He argues that the Wisconsin Constitution limits the application of the automobile exception to vehicles found in public places. His argument is based on several Wisconsin Supreme Court cases, beginning with *Tompkins,* 144 Wis.2d at 128-29, 423 N.W.2d 823.

¶ 46 The *Tompkins* court discussed the applicability of the automobile exception. ****200** *Tompkins* included the following quotation from *Carney:*

> When a vehicle is being used on the highways, or if it is readily capable of such use and is found stationary in a place not regularly used for residential purpose--temporary or otherwise--the two justifications for the vehicle exception come into play. First, the vehicle is obviously readily mobile by the turn of an ignition key, if not actually moving. Second, there is a reduced expectation of privacy stemming from its use as a licensed motor vehicle subject to a range of police regulation inapplicable to a fixed dwelling.

Tompkins, 144 Wis.2d at 128-29, 423 N.W.2d 823 (quoting *Carney,* 471 U.S. at 392-93, 105 S.Ct. 2066). Marquardt seizes on the phrase "found stationary in a place not regularly used for residential purposes" in support of his argument that the automobile exception is inapplicable to him.

¶ 47 In subsequent cases, the court cited *Tompkins* for the proposition that "A warrantless search of an automobile is justified when the police have probable cause to believe that an automobile, found in a public place, contains evidence of a crime; no showing of exigent circumstances is required." *See State v. Weber,* 163 Wis.2d 116, 137, 471 N.W.2d 187 (1991). This same phrase was repeated in *State v. Caban,* 210 Wis.2d 597, ***790** 607, 563 N.W.2d 501 (1997), and *State v. Secrist,* 224 Wis.2d 201, 210, 589 N.W.2d 387 (1999).

¶ 48 Despite the "public place" language that appears in these cases, we conclude that the automobile exception is nonetheless applicable to Marquardt. The genesis of the language was *Carney,* which involved the search of a fully mobile motor home located in a public place. *See Carney,* 471 U.S. at 387, 105 S.Ct. 2066. United States Supreme Court cases subsequent to *Carney* have not recognized a public place requirement for the automobile exception. *See, e.g., Dyson,* 527 U.S. at 467, 119 S.Ct. 2013. Thus, to the extent that

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Carney ever intended to impose a public place requirement, it is no longer applicable.

[23] ¶ 49 Marquardt does not argue that federal law imposes a public place requirement. Instead, he essentially contends that Wisconsin, interpreting its own constitution, has chosen to provide greater protection under its own constitution. We disagree. No Wisconsin Supreme Court case has expressly indicated that Wisconsin provides greater protection under the automobile exception. In fact, the court recently restated its commitment to interpreting art. I, § 11, of the Wisconsin Constitution consistently with the Fourth Amendment. *See Eason,* 2000 WI 98 at ¶ 37, 42. [FN5] Any interpretation ***791** requiring that the vehicle be in a public place would be inconsistent with this commitment. Absent an explicit indication that our supreme court is interpreting art. I, § 11, of the Wisconsin Constitution differently than the Fourth Amendment, we will assume ****201** that Wisconsin will continue to follow federal precedent concerning the automobile exception.

FN5. We recognize that in *State v. Eason,* 245 Wis.2d 206, 629 N.W.2d 625, 2001 WI 98, ¶ 74, the court restated this commitment in support of its decision to adopt the good faith exception established in *United States v. Leon,* 468 U.S. 897, 918-20, 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984), but then actually concluded that art. I, § 11, of the Wisconsin Constitution provides "more protection than the Fourth Amendment provides under the good faith exception as adopted in *Leon.*" *See Eason,* 245 Wis.2d 206, 629 N.W.2d 625, 2001 WI 98 at ¶ 60. This only reinforces our conclusion that our supreme court will generally interpret art. I, § 11 consistent with the Fourth Amendment, but may elect to recognize greater protection under the Wisconsin Constitution. When the court has done so, as in *Eason,* such a conclusion has been explicit. *See id.*

¶ 50 Finally, we address Marquardt's argument that the police should have obtained a warrant because "[t]here was no danger of the car or any evidence of any crime that may have existed in the car being driven away and destroyed." Marquardt cites *Coolidge v. New Hampshire,* 403 U.S. 443, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971), where the court rejected application of the automobile exception under similar facts. In *Coolidge,* the defendant was arrested at his home and his two cars were towed to the police station and searched without a warrant, turning up incriminating evidence. *Id.* at 447- 48, 91 S.Ct. 2022.

¶ 51 The Court noted that because the defendant's cars were parked in a private driveway rather than stopped on a public highway, the opportunity to search was not so "fleeting" as to make a warrant application impracticable. *Id.* at 460, 91 S.Ct. 2022. Summarizing its discussion rejecting application of the automobile exception, the Court stated, "Here there was probable cause, but no exigent circumstances justified the police in proceeding without a warrant." *Id.* at 464, 91 S.Ct. 2022.

[24] ¶ 52 We conclude that while *Coolidge's* discussion of impractibility may have been relevant in 1971, it ceased to be relevant after *Carney* effectively eliminated ***792** the *Carroll* requirement of "impractibility to obtain a search warrant" in 1985. *See Carney,* 471 U.S. at 390-91, 105 S.Ct. 2066. The fact that the officers in this case could have secured a warrant, either before towing the vehicle or before searching it at the police station, does not render the automobile exception inapplicable. *See Johns,* 469 U.S. at 484, 105 S.Ct. 881 (the justification to conduct a warrantless search does not vanish once the car has been immobilized.). Accordingly, we reject Marquardt's attempt to reintroduce an impractibility requirement to the automobile exception.

CONCLUSION

¶ 53 We conclude there was insufficient probable cause to justify the search warrant for Marquardt's home. Therefore, we reverse that portion of the court's order and remand for a determination, consistent with *Eason,* 245 Wis.2d 206, 629 N.W.2d 625, 2001 WI 98, of whether the good faith exception to the exclusionary rule applies in this case. In light of our first conclusion, we do not address Marquardt's request for a *Franks* hearing. Finally, we conclude that the automobile exception applies to the warrantless search of Marquardt's vehicle and, therefore, affirm that portion of the court's order denying suppression of evidence from Marquardt's vehicle on warrantless search grounds.

Order affirmed in part; reversed in part, and cause remanded for further proceedings.

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247 Wis.2d 765, 635 N.W.2d 188, 2001 WI App 219

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. 2001 WL 34352525 (Appellate Brief) Brief and Appendix of Defendant-Appellant (Mar. 19, 2001)Original Image of this Document (PDF)

. 2001 WL 34352527 (Appellate Brief) Reply Brief of Defendant-Appellant (2001)Original Image of this Document (PDF)

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STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT III

Case No. 04-0958-CR

STATE OF WISCONSIN,
Plaintiff-Appellant,

v.

BILL PAUL MARQUARDT,
Defendant-Respondent.

ON APPEAL FROM SUPPRESSION ORDERS
ENTERED IN THE CIRCUIT COURT
FOR CHIPPEWA COUNTY,
THE HONORABLE RODERICK A. CAMERON,
PRESIDING

REPLY BRIEF OF PLAINTIFF-APPELLANT

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STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT III

Case No. 04-0958-CR

STATE OF WISCONSIN,

Plaintiff-Appellant,

v.

BILL PAUL MARQUARDT,

Defendant-Respondent.

ON APPEAL FROM SUPPRESSION ORDERS
ENTERED IN THE CIRCUIT COURT
FOR CHIPPEWA COUNTY,
THE HONORABLE RODERICK A. CAMERON,
PRESIDING

REPLY BRIEF OF PLAINTIFF-APPELLANT

INTRODUCTION

The State respectfully asks this court to hold that evidence derived from execution of the search warrant of March 15, 2000 ("the March 15 warrant"), at the cabin and outbuildings of Defendant Bill Paul Marquardt is admissible at trial.

This court previously concluded that the March 15 warrant was not supported by probable cause, and it remanded "for a determination of whether the good faith exception to the exclusionary rule applies." *State v. Marquardt*, 2001 WI App 219, ¶2, ¶20, 247 Wis. 2d 765, 635 N.W.2d 188.

Because the March 15 warrant was pertinent to an Eau Claire County case, as well as to this Chippewa County case, this court's remand affected both cases.

On April 26, 2002, an *evidentiary* hearing was held in Eau Claire County, and the court found "good faith" to sustain the March 15 warrant (327:75-79). However, on remand in Chippewa County, *no evidentiary hearing* was held, and the prosecutor proffered a transcript of the Eau Claire County hearing in support of the application of "good faith" (327).

In light of the Eau Claire County evidentiary hearing, the State believes the existing record is sufficient to conclude that evidence derived from the March 15 warrant is admissible under either the "good faith" exception to the exclusionary rule or the "inevitable discovery" doctrine. The Chippewa County court took into account the Eau Claire County hearing, at least with respect to "inevitable discovery" (335:5).

If this court disagrees, it should then remand for an *evidentiary* hearing, because the Eau Claire County transcript constitutes at least a sufficient proffer for admitting the evidence derived from the March 15 warrant. Moreover, despite suppressing evidence seized at Marquardt's cabin and outbuildings during execution of the March 15 warrant, the Chippewa County court did not determine what other searches, if any, would be affected by its suppression ruling.

ARGUMENT

I. OFFICERS ACTED IN OBJECTIVELY REASONABLE RELIANCE ON THE MARCH 15 WARRANT, SO THAT THE "GOOD FAITH" EXCEPTION TO THE EXCLUSIONARY RULE APPLIES.

A. The *Leon* analysis.

1. Introduction.

There is no dispute that *both United States v. Leon*, 468 U.S. 897 (1984), *and State v. Eason*, 2001 WI 98, 245 Wis. 2d 206, 629 N.W.2d 625, are relevant to the analysis of "good faith."

With respect to *Leon*, Marquardt argues that the warrant application is "'so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable.'" *Leon*, 468 U.S. at 923 (citation omitted) (Marquardt's brief at 11-16). Marquardt also argues that in resolving this particular *Leon* issue, a reviewing court is limited to information contained in the warrant application (Marquardt's brief at 16-19).

The State maintains that in the analysis of "good faith," a reviewing court should be able to consider indicia supportive of probable cause for the warrant that were known to the applying officers but omitted from the warrant application. The State also maintains that regardless of whether the reviewing court is limited to the warrant application in determining this particular *Leon* factor, "good faith" was satisfied.

2. The propriety of considering external indicia of probable cause.

In the analysis of "good faith," courts appear evenly split on whether it is proper to consider external indicia supportive of probable cause known to the applying officers but omitted from the warrant application (State's brief-in-chief at 19-20). *See also* Recent Case, *Eleventh Circuit Holds That Courts May Look Beyond the Text of a Warrant When Determining Whether An Officer Reasonably Relied Upon the Warrant -- United States v. Martin*, 297 F.3d 1308 (11th Cir. 2002), 116 Harv. L. Rev. 1185, 1185 & n.8 (2003) (hereafter "Recent Case," noting that "the holding in *Martin* is now the majority rule").

Marquardt's arguments for restricting "good faith" analysis of probable cause solely to the warrant application are unpersuasive.

- First, contrary to Marquardt's suggestion at pages 6-8 of his brief, in *State v. Brady*, 130 Wis. 2d 443, 388 N.W.2d 151 (1986), the Wisconsin Supreme Court was *not* squarely faced with deciding whether external indicia supportive of probable cause may be considered in the analysis of "good faith." It simply declined to entertain a "good faith" analysis, because the warrant affidavit "lacked [any] indicia of probable cause regarding the impracticability of securing [the defendant's] presence through a subpoena." *Id.* at 454 (brackets added).

- Second, Marquardt erroneously commingles the standard of "objective reasonableness" in a "good faith" analysis with the officer's "subjective" beliefs about the sufficiency of the warrant application or reasons for seeking the warrant (Marquardt's brief at 17-18). As the Court said in *Leon*, 468 U.S. at 922 n.23, in determining objective reasonableness, "*all of the circumstances* -- including whether the warrant application had previously been rejected by a different magistrate -- may be

considered" (emphasis added). The example cited in *Leon* is just one *external* circumstance relevant to good faith.

Information known to the applying officer but omitted from the warrant application is no less "objective" than information contained in the application. An inquiry into *why* the applicant omitted the information or believed the application was sufficient, would be "subjective," and such considerations are properly excluded from the "objective" analysis of good faith.

Contrary to Marquardt's suggestion at page 17 of his brief, in *Anderson v. Creighton*, 483 U.S. 635 (1987), the Supreme Court did *not* "use[] a subjective good faith analysis" in determining whether an officer violated an arrestee's civil rights by relying on an insufficient warrant. Rather, *Anderson* supports the proposition that *external* indicia supportive of probable cause *are* relevant to the determination of "objective reasonableness" in the analysis of good faith:

> [T]he determination whether it was *objectively* legally reasonable to conclude that a given search was supported by probable cause . . . will often require examination of the information possessed by the searching officials. . . . [T]his does *not* reintroduce into qualified immunity analysis the [forbidden] inquiry into officials' subjective intent.

Anderson, 483 U.S. at 641 (emphasis added). *Anderson* relied on *Malley v. Briggs*, 475 U.S. 335, 342 (1986), which, in turn, relied on *Leon*.

• Finally, *United States v. Koerth*, 312 F.3d 862 (7th Cir. 2002), *cert. denied*, 123 S.Ct. 1947 (2003), on which Marquardt relies, is unconvincing. The State does not dispute the statement in *Koerth*, 312 F.3d at 871, that "'[a]n obviously deficient affidavit cannot be cured by an officer's later testimony on subjective intentions or knowledge'" (citation omitted). But, for the reasons discussed, no such "subjective" inquiry occurs when the

officer later identifies *objective* information that the officer omitted from the warrant application.

There is no incentive for an officer seeking to comply with the "probable cause" requirement of the Fourth Amendment by applying for a warrant to omit information *supportive of* probable cause from the warrant application. Moreover, in such situations, if a magistrate correctly denies the warrant application, the applying officer -- who already possesses the favorable, omitted information -- could correct the deficiency in short order in a subsequent application.

In effect, in a "good faith" analysis, precluding consideration of external indicia supportive of probable cause for the warrant would *not* "further the purpose[] of the exclusionary rule" to deter police misconduct in conducting searches and seizures. *Leon*, 468 U.S. at 918. Conversely, precluding consideration of such external indicia of probable cause may actually tend to discourage warrant applications:

> Under a *Martin* rule [allowing, in a "good faith" analysis, consideration of external indicia supportive of probable cause], police officers who enter into the warrant process can expect uncovered evidence to be admissible as long as their actions are reasonable, even if the information they include in the warrant would not by itself convince a reviewing court that the officer reasonably believed probable cause to be present, while evidence retrieved from an otherwise permissible warrantless search would be excluded unless the search was supported by probable cause.

Recent Case, 116 Harv. L. Rev. at 1188-89 (footnotes omitted).

In determining "good faith," the reviewing court should be able to consider indicia of probable cause known to the applying officers but omitted from the warrant application.

3. Regardless of whether good faith is determined solely by the warrant application or supplemented by external indicia of probable cause, good faith was met in the present case.

The warrant application. First, based solely on the March 15 warrant application, officers could reasonably rely in good faith on the warrant's issuance.

Marquardt's assertion at page 14 of his brief that "there [i]s no single fact in the affidavit to support probable cause that Marquardt was involved in the homicide" is simply untrue. Rather, as outlined at pages 25-28 of the State's brief-in-chief, multiple facts in the application, and reasonable inferences therefrom, provided sufficient minimal indicia of probable cause linking Marquardt to the homicide for "good faith" reliance on the warrant. To summarize:

- The fact that the residence phone inexplicably "was busy" all afternoon of the day of the killing suggested that the phone was off the hook, and coupled with the absence of any indication of a break-in, suggested that Mrs. Marquardt knew her assailant (1:2).

- The fact that Mrs. Marquardt was shot in head and stabbed, coupled with the absence of information suggesting a robbery or sexual assault suggests that homicide was the motive (1:2; 33:10).

- The use of a gun and a knife suggests that the killer was male (1:2; 33:10).

- The fact that Mrs. Marquardt's body was covered in the garage with a blanket suggests that the killer felt compassion for the victim or remorse for the

killing, precisely because he intimately knew the victim, and vice versa (1:2).

- Finally, the fact that Bill Marquardt, who lived in the area, "had not been seen or heard from" in the two days after the homicide despite the publicity (33:9) suggests that he, among the victim's family and friends, best fit the other identified information about the killer.

The warrant application was neither devoid of factual support nor wholly conclusory, but rather satisfied the *Leon* requirement of minimum indicia of probable cause to permit an officer to rely in good faith on the warrant's issuance.

Eau Claire County Judge Benjamin Proctor issued the warrant (33:11-12), Chippewa County Judge Roderick Cameron initially upheld the warrant (345:21-22, 27-30; 87), and Eau Claire County Judge Eric Wahl found "good faith" reliance on the warrant (327:75-79). Then-Eau Claire County District Attorney Raymond Pelrine drafted the warrant application (327:10-20). These facts further support the objective reasonableness of officer reliance on the March 15 warrant.

External indicia of probable cause. While the warrant application alone is sufficient to satisfy "good faith," there should be no doubt when consideration is properly given to *external* indicia *supportive of* probable cause known to the applying officers but omitted from the warrant application. Marquardt does not address these external indicia, which include the following:

- On the day of the homicide, a message for Bill Marquardt that had been attached to the refrigerator in his parents' residence had been moved to the bedroom, beneath a jewelry box, suggesting Bill Marquardt had been in the residence that day (327:36-37).

- On March 14, 2000, the day after the homicide and the day before the March 15 warrant was sought, an

investigator learned that Bill Marquardt's neighbor's dog recently had been shot with a 9mm bullet, the same caliber as the bullet that killed Mrs. Marquardt (327:53-54). A reasonable officer could find this evidence more than coincidental when coupled with all of the aforementioned information implicating Bill Marquardt in his mother's homicide.

- Finally, officers knew of Bill Marquardt's prior history of "drug dealings" and that Mrs. Marquardt recently had caught Bill digging up $12,000 in cash on his parents' property (327:56). This information reasonably suggested a possible motive for the killing -- that Mrs. Marquardt may have challenged Bill's conduct or threatened to go to authorities.

Contrary to Marquardt's assertion at pages 22 and 27 of his brief, officers obtained the foregoing information *in advance of the March 15 warrant application* and supplied it to District Attorney Pelrine and Eau Claire County Sergeant John Vogler for purposes of seeking the warrant (33:24-31; 327:53-58). Had such information been included in the warrant application, there would be no doubt about the objective reasonableness of officer reliance on the warrant.

In sum, with or without the added external indicia of probable cause, application for the March 15 warrant was based on sufficient information to enable a reasonable officer to rely in good faith on issuance of the warrant.

B. The *Eason* analysis.

To satisfy "good faith" under the Wisconsin Constitution, the State also must show "that the process used in obtaining the search warrant included [1] a significant investigation and [2] a review by" a knowledgable and experienced police officer or government attorney. *Eason*, 24 Wis. 2d 206, ¶74.

In the present case, Marquardt challenges only the State's proof of a "significant investigation." He argues that the investigation must have been both "qualitatively" and "quantatively" significant (Marquardt's brief at 19-21). He also argues that the investigation "must provide significant *results* which point to the suspect" (Marquardt's brief at 21; emphasis added).

First, the State does not dispute that the sheer number of officers or manhours devoted to an investigation should not be the sole determinant of whether it is "significant." The nature of the investigative activities also must be considered. In the present case, the record reflects a significant investigation in advance of the March 15 warrant application, both quantitatively and qualitatively, as enumerated at page 34 of the State's brief-in-chief. The pre-warrant investigation involved twenty officers from two counties and the Wisconsin Division of Criminal Investigation (327:46) and included the following activities:

- A four- to five-hour interview with Alfred Marquardt, the victim's husband, reduced to an eight-page report (33:24-31; 327:31-32);

- Crime-scene evidence gathering (1:1-7);

- Interviews of Bill Marquardt's brother and sister to identify (and rule out) possible suspects (327:37-38);

- A next-day autopsy of the victim, ruling out sexual assault (327:34);

- A next-day interview with a neighbor of Bill Marquardt, leading to the discovery that the neighbor's dog had been shot with a 9mm bullet, the same caliber used to shoot Mrs. Marquardt (327:53); and

- Repeated attempts to locate Bill Marquardt at his cabin, by cell phone and by interview with his former employer (327:51-53).

In light of these activities and the aforementioned information that they produced, applying for a search warrant within forty-eight hours of the homicide made eminent sense.

Second, contrary to Marquardt's suggestion, it is illogical in the analysis of "good faith" to interpret "significant investigation" as requiring "significant *results* which point to the suspect." If a warrant application contains probable cause -- that is, significant "results" implicating the suspect -- a "good faith" inquiry into an officer's reasonableness in relying on the warrant will be unnecessary. Moreover, if significant "results" were part of the "good faith" analysis, it would make even greater sense to permit consideration of *external* indicia of probable cause known to the applying officers but omitted from the warrant application.

In the present case, both *Leon* and *Eason* requirements have been satisfied with respect to the March 15 warrant to permit application of the "good faith" exception to the exclusionary rule.

II. ALTERNATIVELY, EVIDENCE SEIZED WITH THE MARCH 15 WARRANT IS ADMISSIBLE UNDER THE "INEVITABLE DISCOVERY" DOCTRINE.

Also unpersuasive is Marquardt's challenge to the State's alternative ground for admitting evidence derived from the March 15 warrant -- "inevitable discovery." The State's proffer, based in part on the Eau Claire hearing transcript, meets all three requirements for application of this doctrine.

Reasonable probability of discovery. First, the record reflects "a reasonable probability that the evidence in question would have been discovered by lawful means but for the police misconduct." *State v. Lopez*, 207 Wis. 2d 413, 427-28, 559 N.W.2d 264 (Ct. App. 1996). In the present context, "police misconduct" simply means failure to provide sufficient probable cause in the search warrant application.

Marquardt either misperceives or misconstrues the State's argument on this first criterion. The State is *not* arguing that the evidence derived from the March 15 warrant would still have been available for discovery five to ten days after execution of the warrant on March 18. Rather, if the March 15 warrant had been denied for lack of probable cause, the additional external indicia of probable cause *already known* to the applying officers (but omitted from the application) reasonably would have led to another, valid warrant *before March 18* when the evidence was found.

This is true, moreover, regardless of whether investigators would have speeded up their ballistics and fingerprint analyses and included the results in a second warrant application.

Preexisting leads. The fact that officers already possessed the additional indicia of probable cause omitted from the March 15 warrant application also necessarily satisfies the requirement that other "leads" existed at the time of the March 15 application. *Lopez*, 207 Wis. 2d at 427-28.

Alternate lines of investigation. Likewise, the pre-existence of additional indicia of probable cause omitted from the warrant application also necessarily satisfies the requirement that the State "was actively pursuing some alternate line of investigation." *Id.*

Moreover, the fact that incriminating ballistics and fingerprint analyses were completed within five to ten

days after March 18 (327:2, 81-84) reasonably suggests that if the March 15 warrant had been denied, investigators would have more quickly pursued those analyses. After all, after March 18, when the March 15 warrant was executed, speedier Crime Lab analyses were unnecessary.

The purpose of the "inevitable discovery" doctrine is to "put[] police in the same, not a worse, position tha[n] they would have been if no police error or misconduct had occurred." *Nix v. Williams*, 467 U.S. 431, 443 (1984).

CONCLUSION

For the reasons set forth in the State's two appellate briefs, this court should reverse the suppression orders in question. Alternatively, it should remand for an evidentiary hearing.

Dated at Madison, Wisconsin: July 30, 2004.

Respectfully submitted,

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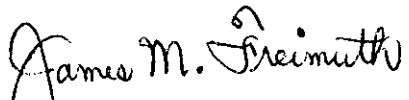

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CERTIFICATION

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is: proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line. The length of the brief is 2,981 words.

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STATE OF WISCONSIN

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

DISTRICT III

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Plaintiff-Respondent,

v.

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ON APPEAL FROM A JUDGMENT OF CONVICTION,
SENTENCE AND ORDER DENYING POSTCONVICTION RELIEF
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REPLY BRIEF

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REPLY BRIEF

I. THE GOOD FAITH EXCEPTION TO THE EXCLUSIONARY RULE DOES NOT APPLY.

A. IT WAS IMPROPER FOR THE TRIAL COURT TO CONSIDER INFORMATION OUTSIDE THE WARRANT APPLICATION TO DETERMINE WHETHER THE OFFICERS ACTED IN GOOD FAITH.

> Nor would an officer manifest objective good faith in relying on a warrant based on an affidavit so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable.

United States v. Leon, 468 U.S. 897, 923(1984)(internal cites omitted).

The warrant application, itself, must reflect adequate indicia of probable cause for an officer to rely in good faith on the warrant. The ***Leon*** court found good faith based upon information contained in the warrant application. 468 U.S. at 926.

The same is true in ***State v. Eason***, 2001 WI 98, 245 Wis.2d 206, 629 N.W.2d 625. ***Eason***, held there was objective good faith because the affidavit documented a significant investigation implicating the defendants. 2001 WI 98 ¶ 70. No evidence external to the warrant application was submitted to the court.

Nevertheless, the state cites cases from other jurisdictions holding a reviewing court may consider information external to the warrant application. (State's brief at 12). This court is not bound by those decisions; it is bound by the opinions of the Wisconsin Supreme Court. ***Schaub v. West Bend Mutual***, 195 Wis.2d 181, 187,536 N.W.2d 123 (Ct.App. 1995).

State v. Brady, 130 Wis.2d 443, 388 N.W.2d 151 (1986), held that where the warrant application lacks any indicia probable cause, good faith can not even be an issue. ***Brady***, 130 Wis.2d 453-454.

In Wisconsin, if the warrant application has no indicia of probable cause, there is no basis upon which to raise

"good faith". Thus, the court may not consider information not included in the warrant application.

The State cites ***Anderson v. Creighton***, 468 U.S. 635(1987), to support its claim that it was proper to examine of information possessed by searching officer at the time of the search. ***Creighton*** involved a damages claim against an officer who entered a residence **without a warrant** claiming probable cause and exigent circumstances. The officer argued that he was immune from liability because his actions were reasonable. The Supreme Court did say,

> It follows from what we have said that the determination whether it was objectively legally reasonable to conclude that a given search was supported by probable cause or exigent circumstances will often require examination of the information possessed by the searching officials.

Anderson v. Creighton, 468 U.S. at 641

However, since there was no warrant application for the court to review, the only basis upon which the court could decide whether the officers acted reasonably was to take evidence about why the officers entered the home. ***Creighton*** offers no guidance to a court trying to determine good faith based upon a warrant application lacking probable cause.

B. THE WARRANT APPLICATION LACKED INDICIA OF PROBABLE CAUSE SO RELIANCE UPON THE WARRANT WAS UNREASONABLE.

The state argues that inferences drawn from facts in

the warrant applications for the March 13 and March 15 warrants would have allowed the officers to reasonably rely on the warrants.(State's Brief 15-18). With three exceptions, the only inference the state draws from facts stated is that Ms. Marquardt might have known her assailant. Assuming this inference is reasonable, since it is likely that Ms Marquardt knew many people, i.e. friends, family and neighbors, one can not reasonably infer that evidence of her murder would be found at Marquardt's cabin.[1]

The state claims that the police could have drawn the far fetched inference that because the homicide was caused by a gun and knife, "that the perpetrator was a male" (State's Brief at 16). From that inference and from the fact that the March 15 affidavit states that officers at the homicide scene "were able to locate a number of footprints that may be suitable for comparison with the shoes that made them," the state claims that the one can infer the footprints were male and "comparisons might definitively include or exclude suspects."(State's Brief at 17).

Assuming that it is reasonable to infer that Ms.

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The state claims that because the body was covered with a blanket, the perpetrator must have been a friend or family member. However, the interview with Alfred Marquardt reflects that Ms Marquardt could have been wearing the blanket. When, Marquardt found the body in the garage under a blanket on March 13th, be believed that Ms Marquardt had fallen and hit her head.(23: Exhibit 1). There is no suggestion in his statement that he thought it was odd that she had a blanket on her.

Marquardt knew her assailant and that the assailant was a male, there is nothing upon which an officer could reasonably believe that this warrant application linked Bill Marquardt's residence with his mother's murder.

Further, with reference to the footprints, no officer could reasonably believe that a warrant could be issued simply to exclude Marquardt as a suspect where there was nothing more to justify a belief that evidence of the homicide would be found at his cabin.

Finally, state points to the fact that Marquardt had not been seen or heard from since the location of the body. Not withstanding that this statement was extremely misleading (See Marquardt's Brief at 29), Ms Marquardt's body was discovered in the late afternoon of March 13th; the warrant affidavit was prepared on the morning of March 15th.(84:7). Marquardt had not been seen or heard from for only a day and a half. Marquardt was a young man in his twenties who lived alone in another county. It is not unusual, that a young man would not report to his father on a daily basis. Based on all of the facts or inferences in the warrant application, there is no indicia of probable cause that evidence of Ms Marquardt's death would be found at Marquardt's cabin.

C. EVEN IF IT WERE PERMISSIBLE FOR THE TRIAL COURT TO LOOK OUTSIDE OF THE

WARRANT APPLICATION, THERE STILL WAS NO BASIS FOR GOOD FAITH RELIANCE SHOWN.

Mr. Marquardt has already commented on the additional evidence State argues supports good faith. (See Marquardt's Brief 26-30.)

D. THE EASON CRITERIA WERE NOT MET.

The investigation failed to turn up any fact linking Marquardt with the homicide.

II. THE TRIAL COURT VIOLATED MR. MARQUARDT'S RIGHT TO REPRESENT HIMSELF.

A. MARQUARDT WAIVED HIS RIGHT TO COUNSEL.

The state argues that Marquardt did not waive his right to counsel citing several statements made by Marquardt at the competency hearing held three months before the waiver hearing.(See State's Brief at 27). At that time, Marquardt had not yet decided to represent himself.

At the hearing held November 11, 2002, Marquardt made clear that he wanted to represent himself. There was no question raise either by the court or by counsel that Marquardt was waiving his right to counsel. However, Marquardt also said that he wanted to prepare his case with Attorney Raush's assistance.(88:7).

> I want to spend a lot of time with Rusch, if Rusch would want to do that with me, like to go over very single question for every witness I got, and I want to go over every single sentence I got

> of my statements with Rusch if he would let me.
> And at the trial, I would like Rusch to be sitting and listening to everything that's and like – tap me on the should if the D.A. asks me - tries to present any illegal evidence or ask illegal question or something, and I want Rusch to like give me statutes or something to say that he can't use it, and I want Rusch to ask me, if I testify on the stand, I want Rusch to ask me my questions I got for me.

(88:7-8)

In other words, Marquardt was asking to represent himself with standby counsel. It is not unusual or inappropriate for a defendant to have standby counsel when a defendant represents him or herself. See Wisconsin JI-Criminal SM-30 "Waiver and Forfeiture of Counsel;Self-Representation; Standby Counsel; `Hybrid Representation'; Court Appointment of Counsel."

Marquardt's comments reflect that he did not believe that he knew everything about representing himself. He wanted the help of standby counsel. But, he also wanted to represent himself, as he had a constitutional right to do.

B. MARQUARDT WAS COMPETENT TO REPRESENT HIMSELF.

The state seems to suggest that because Marquardt discharged counsel in this case and in his Chippewa case, he was unable to represent himself.(State's Brief at 27). In each case, Marquardt fired counsel because he objected to them raising the competence issue and the NGI plea.(86: 36,

81-82). Marquardt's reluctance to raise either issue was not irrational.

Because competence was raised in the Chippewa case, he suffered a two year delay of his trial in this case.(80:2,4; 81). Marquardt remained in custody that entire time; it was not unreasonable for him to want to get his trial over with as soon as possible.

The state also argues that because Marquardt had doubts about maintaining the NGI plea after his trial, he was incompetent to represent himself.(State's Brief 29-30). Marquardt understood that if he dropped the NGI plea, he would be sentenced to prison.(94:5). However, he did not see much difference between going to prison or going to a mental institution.(94:5). In fact, he feared that if went to a mental institution, he might spend the rest of his life there. (94:10). As it turns out, that was not a groundless fear. Having been found not guilty by reason of mental disease or defect, Marquardt now faces the possibility of 75 years in a mental institution.(54). It is highly unlikely that he would have received such an long incarceration had he received a straight prison sentence.

The state also argues that Marquardt was not competent to represent himself based on the opinions of two doctors who opined that Marquardt was not competent to stand

trial.(State's Brief at 29). One of those doctors had never even talked with Marquardt.(86:39). In any case, the trial court rejected both of those opinions when it found Marquardt competent to stand trial.(86:81-92; 90:30).[2]

Further, Stephen Peterson, an Eau Claire County Jail nurse with experience as a psychiatric nurse testified about Marquardt's competence.(86:6). Peterson worked in the jail January until August, 2002, while Marquardt was an inmate.(86:7). Peterson never observed any evidence of mental illness in Marquardt.(Id). He also testified that when Marquardt returned from Mendota Mental Health Institute he was on some anti-psychotic medication.(86:8) In February, Marquardt asked to discontinue the medication.(Id.) With the jail physician's permission, Marquardt quit taking the medication.(Id.) Peterson observed no change the Marquardt's behavior.(Id.).

In Marqaurdt first competency hearing the court said, based on Marquardt's "appearance not only today but other days, I do find him competent."(81:7). Following the trial, both the prosecutor and judge commented that Marquardt was clearly competent.(94:10-11).

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As the prosecutor pointed out, "... in essence if you listen to what Dr. Jens and Dr. Underwager are saying, you almost have to conclude that the world has turned on its head because the more he (Marquardt) acts rationally, the more that's indicative that he is paranoid and delusional.(86:70).

III. ADMITTING MARQUARDT'S POST-MIRANDA SILENCE WAS NOT HARMLESS ERROR.

The evidence against Marquardt was not overwhelming.

The fact that Marquardt did not report the break in to his cabin was not that damaging. When Marquardt returned to his cabin on the morning of March 18, 2000, he found cabin door broken off its hinges and much of his property destroyed.(93:27). He also noticed stains on a carpet in the shed but did not know what they were.(93:28). Lilly Murphy and his pets were missing. Because he was "dead tired" after driving all the way from Tifton, Georgia, he decided to go to bed.(93:29). He planned on going to Joe Olson's house in the morning because he thought that Murphy might have gone back to Olson's house.(93:28).

While, the 9mm handgun used to kill the Anderson's dog was found under the refrigerator in Marquardt's cabin, it was not found until March 29, 2000, after Marquardt had been in jail for 11 days. Several officers had search Marquardt's cabin on March 15th and March 18th . Following the second search the cabin was left open.(91:98; 92:61-65). Anyone could have entered. Trial exhibit 35 shows that yellow boxes of 9mm bullets were clearly visible under the refrigerator on March 29th.(47:Ex 35; 69: Ex 7). Had those boxes been there on March 15 or 18, arguably, the police would have seen them.(96: 47-49).

While a cellmate, Lovelien, testified that Marquardt told him he shot his pets with a .22 caliber gun, Lovelien's credibility was impeached. Lovelien denied ever harassing Marquardt, having any fights or arguments with him, or making barking noises at him.(91: 155). However, another inmate, Andrew Tenny, said that Lovelien would make snide remarks and loud obnoxious comments barking noises and crude jokes about Marquardt. (92:155) Further, although the fact that a .22 caliber gun had been used might not have been publicized, that fact would have been included in police reports that Marquardt had in the jail. There is no showing that Lovelien could not have looked through those materials.

While Marquardt used false names when he bought his pets; Marquardt used false names often.(93:13) For example, when he stayed a motels in Illinois and Florida he used false names.(93:66; 47: Ex. 104). In addition, it is not clear when his pets were shot. Marquardt left Fairchild on March 12th.(93:19). The pets were found dead on March 15th. They were not frozen when they were found.(91:100;92;183,). When Officer Tina Sturz found the dead dogs, she believed that had been killed very recently.(92:183-184).

Finally, Price's testimony about Marquardt's silence was important to the jury. Following that testimony, the jury asked Marquardt why he had not reported the burglary

and about who else knew Lilly Murphy.(93: 65, 66, 67).

IV. WESTERBY EVIDENCE SHOULD HAVE BEEN ADMITTED TO SHOW POSSIBLE LINK BETWEEN PETE HICKS AND THE .22 CALIBER RIFLE.

In order for a defendant to introduce evidence that a third person may have committed a crime, the defendant must offer proof of motive, opportunity and a direct connection between the third party and the crime not remote in time. See See ***State v. Denny***, 120 Wis.2d 614, 622-25, 357 N.W.2d 12, 16-17 (Ct. App. 1984). .

Marquardt wanted to show that Pete Hicox could have stolen the .22 rifle from Alfred Marquardt's home. He offered a motive - Pete Hicox wanted revenge against Marquardt because he believed Marquardt snitched on him.(92:165). He offered opportunity - Hicox worked in the area and he did not show up for work on March 13th.(92:176-77). There was also evidence that the rifle was at Alfred's home on March 12th and that it was found in the cabin on March 15th.(91: 58, 70; 93:19-21). Marquardt wanted to show that someone sped away from Alfred Marquardt's home on March 13th. He was not allowed to show that. Thus, he was prevented from showing a possible connection with the crime.

V. THE TRIAL COURT ERRED IN ADMITTING EVIDENCE OF MARQUARDT'S BIZARRE ACTIONS.

The state argues, on one hand, that testimony about

Marquardt wearing his sweatshirt over his head in the cab and wearing sun glasses inside the pet store was for purposes of identification of Marquardt.(State's Brief at 38). That would suggest that such behavior was unusual. On the other hand, the state argues that it was not prejudicial because in northern Wisconsin is not irrational to wear a sweatshirt over one's head in a cab or unusual to wear sunglasses during a quick shopping trip.(State's Brief at 39).

In any case, Marquardt could not have been trying to conceal his identity when he wore the sweatshirt over his head because one of the cabs picked Marquardt up at the end of his own driveway in Augusta.(91:133). The other picked him up in Augusta near highway M[3] and Marquardt used his own cell phone to call the cab.(91:212).

Further, the state presented receipts for the pets to show the dates of purchase.(91:81;47:ex 2,4,). Thus, the testimony about bizarre behavior was not necessary to show when Marquardt bought the animals.

Alfred Marquardt's testimony about the condition of Marquardt's cabin in January was too remote in time to be relevant to the condition of the cabin on March 15th.

Nevertheless, the state argues that even if there was

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[3]Marquardt's cabin in on highway M.(91:74).

error, it was harmless because such conduct is not bad even if irrational.(State's Brief at 39). That is not the argument the state made at the time the evidence was offered. At that time, the prosecutor argued that these crimes were irrational and this behavior is consistent with that.(92: 36).

Finally, as pointed out above, the state's evidence was not so overwhelming. Thus, evidence of bizarre behavior was likely to have affected the jury in the way the prosecutor intended it to have.

VI. COUNSEL WAS INEFFECTIVE.

Counsel had no basis for believing the police had looked for Lilly Murphy. There is no evidence that the police ever told counsel that they had looked for Murphy and had been unable to find her. Nevertheless, counsel made that claim to the jury. The state concedes that his remark "arguably 'opened the door'" to questions about Marquardt's post-***Miranda*** silence about Murphy.(State's Brief at 32).

On March 29th, police found a 9mm handgun and two yellow boxes of 9mm bullets under the refrigerator in Marquardts cabin.(91: 84,96). On March 18, police found a live 9mm round on the kitchen floor.(91:83-84). Detective Mark Christopher testified that they did not look under the refrigerator during the searches on March 15 or 18 because,

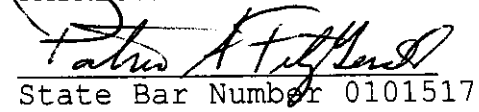
"It didn't appear that the items we were looking for would fit under the refrigerator(91:84-85). One wonders how he could have made that judgment without at least looking at the bottom of the refrigerator. If he had, he would have seen the two yellow boxes of bullets.(See 47:Ex 35; 69: Ex 7). David Cihlar who visited the cabin testified that the boxes would have been visible from nearly anyplace in the room.(96:48; compare 69: Ex 6 and 7). Such evidence should have been presented to the jury.

CONCLUSION

For the reasons set forth above and in his brief in chief, Mr. Marquardt asks this court to reverse his convictions and to remand to the trial court for a new trial.

December 21, 2004

PATRICIA A. FITZGERALD



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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in sec. 809.19(8)(b) and (c) for a brief and appendix produced with a non-proportional monospaced font. The length of this brief is 15 pages.

cc Wisconsin Department of Justice
Bill P. Marquardt