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STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2007AP1894-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

DAVID A. DEARBORN,

Defendant-Appellant-Petitioner.

On Appeal from a Judgment of Conviction Entered
in the Grant County Circuit Court, the
Honorable George S. Curry, Presiding

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT-PETITIONER

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TABLE OF CONTENTS

CASES CITED

CONSTITUTIONAL PROVISIONS AND STATUTES CITED

United States Constitution

Wisconsin Constitution

Wisconsin Statutes

OTHER AUTHORITIES CITED

ISSUES PRESENTED

1. Did a Search of Mr. Dearborn's Locked Truck after He Was Arrested, Handcuffed, and Secured in a Squad Car, Violate his State and Federal Constitutional Right to Be from Unreasonable Searches and Seizures and Wis. Stat. § 968.11?

The circuit court denied Mr. Dearborn's suppression motions, and declined to rule on the specific issue raised here. The court of appeals affirmed.

2. Was Mr. Dearborn Denied His Right to a Unanimous Verdict by a Jury Instruction That an Element of the Offense Was Proved By Any of Three Types of Behavior: Assaulting or Resisting or Obstructing a Conservation Warden?

The circuit court denied the defendant's request for an alternative instruction, and denied the defendant's request to focus the jury instruction on resistance alone. The court of appeals affirmed.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Because a decision in this case will address important constitutional issues and issues of statutory construction that have statewide impact, oral argument and publication are both warranted. That is especially true in this case, because the recent decision in ***Arizona v. Gant***, 556 U.S. __, 129 S. Ct. 1710 (2009), will require this court to overrule its previous decision in ***State v. Fry***, 131 Wis. 2d 153, 388 N.W. 2d 656

(1986), and to withdraw language from decisions that relied in part upon ***Fry***.

STATEMENT OF THE CASE

A complaint filed on April 11, 2006, charged Mr. Dearborn with assaulting, obstructing or resisting a conservation warden on April 9, 2006, contrary to Wis. Stat. § 29.951. Based on evidence found during a search of his truck after his arrest, he was also charged with possession of tetrahydrocannabinols (THC) and possession of drug paraphernalia, contrary to Wis. Stat. §§ 961.41(3g)(e) and 961.573(1).

Mr. Dearborn filed two suppression motions challenging the authority of the conservation warden to stop and arrest Mr. Dearborn for a traffic violation, but both were denied. (2; 3; 19:18-20; 20:14-16). After a trial to a jury on January 9, 2007, Mr. Dearborn was convicted of assaulting, obstructing or resisting a conservation warden and possession of THC. He was acquitted of possession of drug paraphernalia. (9, 10, 11).

The court sentenced Mr. Dearborn to four months in jail for assaulting, obstructing or resisting a conservation warden, and one month in jail for possession of THC. The court stayed both sentences, and put Mr. Dearborn on probation for one year. (13; App. 123).

Mr. Dearborn appealed. However, at a postconviction hearing regarding a stay of Mr. Dearborn's jail condition time, appellate counsel notified the circuit judge that she was considering a motion for remand to challenge the constitutionality of the search incident to arrest. The court replied: "Well, if you'd like to take it to the Court of Appeals

right away, that's okay with me." (27:2; App. 145). Therefore, the issue was raised directly on appeal.

In a decision entered on July 24, 2008, the court of appeals affirmed Mr. Dearborn's convictions. ***State v. Dearborn,*** 2008 WI App 131, 313 N.W. 2d 767, 758 N.W. 2d 463. (App. 101-122). Mr. Dearborn filed a petition for review, which was held in abeyance pending the Wisconsin Supreme Court decision in ***State v. Denk***, 2008 WI 130, 315 Wis. 2d 5, 758 N.W. 2d 775. After ***Denk*** was decided, the court held the petition in abeyance pending the United States Supreme Court decision in ***Arizona v. Gant***, 556 U.S. ___, 120 S. Ct. 1710 (2009).

This court accepted the petition for review on November 12, 2009.

STATEMENT OF FACTS

DNR Warden Martin Stone testified that on April 9, 2006, a man driving a truck at a boat landing made a rude gesture toward him. Warden Stone checked his in-car computer, and learned that the truck was registered to David Dearborn, whose driver's license was revoked. (21:45-46; App. 125-126).

Warden Stone followed Mr. Dearborn to the Village of Blue River, then pulled him over. (21:47; App. 127). Mr. Dearborn, the driver and only occupant, got out of the truck and began to walk toward the warden's car. The warden ordered him to get back in his truck. Mr. Dearborn went back to his truck door, shut it, locked it, and returned to the back of his truck. He took out his DNR license. (21:48-49; App. 128-129).

The warden asked Mr. Dearborn for his driver's license. The warden double-checked with dispatch, which informed him that Mr. Dearborn's license was revoked. The warden told Mr. Dearborn he was under arrest; Mr. Dearborn "blew up," and said he wasn't revoked, "you can just take me home." (21:50; App. 130).

When the warden reached for Mr. Dearborn's wrist, he "tensed up and he pulled his hand out." When the warden ordered him to turn over his car keys, he refused. (21:51; App. 131).

The warden "went to grab his wrist again," and Mr. Dearborn pulled away and moved backwards; the warden grabbed his shirt and his chest, and Mr. Dearborn started to run, but their feet tangled, and both fell to the ground. (21:51-52; App. 131-132).

On the ground, the warden tried to get Mr. Dearborn's hands behind his back, but Mr. Dearborn tried to kick and push the warden away. (21:52-53; App. 132-133). After they got up, the warden sprayed Mr. Dearborn with pepper spray, but Mr. Dearborn pulled off his jacket and swung it toward the warden, deflecting the spray.

Mr. Dearborn ran toward a nearby house. According to the warden's testimony, Mr. Dearborn grabbed some decorative rocks, and positioned himself as if to throw them at the warden. (21:53, 64; App. 133). The warden pulled his gun, and ordered Mr. Dearborn to drop the rocks. Mr. Dearborn obeyed.

Mr. Dearborn then ran to the front door of the house, where he shook the door. He was yelling and shouting that it was a friend's house. (21:54, 62; App. 134). The warden tried again to grab Mr. Dearborn, to pull him off the door and

get his hands behind his back, and Mr. Dearborn tried to kick and elbow him away. The warden sprayed Mr. Dearborn in the face with pepper spray, then called for assistance. Mr. Dearborn sat down, holding on to the door. (21:55-56; App. 135-136).

When a state trooper arrived, they pulled Mr. Dearborn off the porch and handcuffed him. They put him in a squad car. At first he "wouldn't put his feet in," but when the trooper threatened to "make him," he did. (21:56-57; App. 136-137).

After Mr. Dearborn was secured in the squad car, Warden Martin unlocked and searched the passenger compartment of his truck. He found a small amount of marijuana and objects the warden identified as drug paraphernalia. (21:58; App. 138).

Mr. Dearborn filed suppression motions arguing that the arrest and search were unconstitutional, on the grounds that the conservation warden did not have authority to stop and arrest Mr. Dearborn for a traffic offense. (2, 3). The court denied both motions. (19:18-20; 20:14-16).

At a jury instruction conference, defense counsel objected to the state's proposed jury instruction on resisting a conservation warden, arguing that it included different types of behaviors – resisting and obstructing – in one instruction, and therefore violated Mr. Dearborn's constitutional due process right to a unanimous jury verdict. The defense proposed an instruction focused solely on resisting. The court rejected the defense argument and adopted the state's instruction. (21:95-99; App. 139-143).

The court instructed the jurors as follows:

> Resisting a conservation warden as defined in s. 29.951 of the Criminal Code of Wisconsin is committed by one who knowingly, assaults, resists, or obstructs a warden while the warden is doing an act in an official capacity and with lawful authority. Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following four elements were present: One; the defendant assaulted, resisted or obstructed a conservation warden. To resist a conservation warden means to oppose the warden by force or threat of force. The resistance must be directed to the warden personally. To obstruct a conservation warden means that the conduct of the defendant prevented or made more difficult the performance of the warden's duties.

21:132-33; 26:27; App. 145.

The jury was not instructed that it had to unanimously agree on whether Mr. Dearborn obstructed, or whether he resisted, Warden Stone.

ARGUMENT

I. The Search of Mr. Dearborn's Locked Truck after He Was Arrested, Handcuffed, and Secured in a Squad Car, Violated His Right to Be Free From Unreasonable Searches and Seizures Under the Federal Constitution, the Wisconsin Constitution, and Wis. Stat. § 968.11.

A. Introduction and standard of review.

The right to be free from unreasonable searches is guaranteed by the Fourth Amendment to the United States Constitution, Article I, § 11 of the Wisconsin Constitution, and Wis. Stat. § 968.11. "[S]earches conducted outside the judicial process, without prior approval by judge or

magistrate, are *per se* unreasonable under the Fourth Amendment – subject only to a few specifically established and well-delineated exceptions." ***Katz v. United States***, 389 U.S. 347, 357 (1967); ***State v. Sanders***, 2008 WI 85, ¶ 27, 311 Wis. 2d 257, 752 N.W. 2d 713. The exceptions are "jealously and carefully drawn." ***Jones v. United States***, 357 U.S. 493, 499 (1958).

Because police did not have a warrant to search Mr. Dearborn's truck after he was arrested, handcuffed, and secured in a squad car, therefore, the search is presumed constitutionally unreasonable, unless it falls within an accepted exception. The state has the burden of proving reasonableness. ***Katz,*** 389 U.S. at 357; ***State v. Sanders***, 2008 WI 85, ¶ 27, 311 Wis. 2d 257, 752 N.W.2d 713.

One established exception to the warrant requirement is a search incident to a lawful arrest. ***Weeks v. United States***, 232 U.S. 383, 392 (1914). In this case, the search incident to arrest exception was the sole reason asserted by the state as a basis for the search of Mr. Dearborn's truck.

The relevant historical facts are undisputed. Mr. Dearborn had been arrested, handcuffed, and secured in a police squad car when Warden Martin unlocked and searched the passenger compartment of Mr. Dearborn's truck. (21:56-58).

Therefore, the issue on appeal is whether the state proved, based on the historical facts, that the search was a reasonable search incident to Mr. Dearborn's arrest. This presents a question of constitutional law, reviewed *de novo* by the appellate court. ***State v. Johnson***, 2007 WI 32, ¶ 13, 299 Wis. 2d 675, 729 N.W. 2d 182.

B. The search of Mr. Dearborn's truck violated his federal constitutional right to be free from unreasonable searches.

The search of Mr. Dearborn's truck incident to his arrest was not constitutionally reasonable, under ***Arizona v. Gant***, 556 U.S. ___, 120 S. Ct. 1710 (2009). A brief history provides context for the ***Gant*** decision and its application to this case.

In ***Chimel v. California***, 395 U.S. 725 (1969), the court defined the limits of a reasonable search incident to arrest, and the reasons for this exception to the warrant requirement:

> When an arrest is made, it is reasonable for the arresting officer to search the person arrested in order to remove any weapons that the latter might seek to use in order to resist arrest or effect his escape. Otherwise, the officer's safety might well be endangered, and the arrest itself frustrated. In addition, it is entirely reasonable for the arresting officer to search for and seize any evidence on the arrestee's person in order to prevent its concealment or destruction. And the area into which an arrestee might reach in order to grab a weapon or evidentiary items must, of course, be governed by a like rule.

Id., 762-63.

Therefore, the permissible scope of a search incident to arrest is limited to the arrestee's person and an area "within his immediate control," or "wingspan." ***Id.,*** 763; ***State v. Sykes***, 2005 WI 48, ¶ 20, 279 Wis. 2d 742, 754, 695 N.W. 2d 277.

In ***New York v. Belton***, 453 U.S. 454 (1982), the court considered the applicability of the ***Chimel*** principles to cases in which a recent occupant of a vehicle is arrested and

remains unsecured in close proximity to the vehicle. The court concluded that a "workable rule" would be useful, and determined that "when a policeman has made a lawful custodial arrest of the occupant of an automobile, he may, as a contemporaneous incident of that arrest, search the passenger compartment of that automobile." ***Id.***, 469. The court pointed out, however, at footnote 3:

> Our holding today does no more than determine the meaning of *Chimel's* principles in this particular and problematic content. It in no way alters the fundamental principles established in the *Chimel* case regarding the basic scope of searches incident to lawful custodial arrests.

For the last twenty years, the question of the applicability of the "***Belton*** rule" to cases in which the vehicle was not within the arrestee's reach, has resulted in different answers from various courts. ***Gant***, 129 S. Ct. at 1718, fn. 2 (collecting decisions of the federal courts of appeals). However, a broad reading, resting on the "fiction . . . that the interior car is always within the immediate control of an arrestee who has recently been in the car," prevailed. ***Id.***, quoting ***Belton***, (dissent), 453 U.S. at 466.

That specific issue of the applicability of the ***Belton*** rule to cases in which the arrestee was handcuffed and secured in a police vehicle, was first addressed by the United States Supreme Court in Justice Scalia's concurring opinion in ***Thornton v. United States***, 541 U.S. 615 (2004), in which Thornton had been arrested and placed in a patrol car when his own vehicle was searched. Justice Scalia wrote: "The Court's effort to apply our current doctrine to this search stretches it beyond its breaking point." When a suspect is handcuffed and secured in the back of the officer's squad car,

he pointed out, the constitutional underpinnings of this exception to the warrant requirement – the need to protect officer safety or prevent concealment or destruction of evidence, are absent. ***Id.***, 625-29.

The majority did not disagree, noting "whatever the merits of Justice Scalia's opinion . . . this is the wrong case in which to address them," because the defendant had not argued that basis for challenging the search. ***Id.,*** 624, n. 4.

The issue was squarely addressed and resolved by the court in ***Gant***, 129 S. Ct. 1710. The ***Gant*** decision acknowledges that "[d]espite the textual and evidentiary support" for a contrary reading of ***Belton***, it had been "widely understood to allow a vehicle search incident to the arrest of a recent occupant even if there is no possibility the arrestee could gain access to the vehicle at the time of the search." ***Gant,*** 129 S. Ct. 1718.

However, it rejected that reading, concluding:

> To read ***Belton*** as authorizing a vehicle search incident to every recent occupant's arrest would thus untether the rule from the justifications underlying the ***Chimel*** exception – a result clearly incompatible with our statement in ***Belton*** that it "in no way alters searches incident to lawful custodial arrests." [citation omitted]. Accordingly we reject this reading of ***Belton*** and hold that the ***Chimel*** rationale authorizes police to search a vehicle incident to a recent occupant's arrest only when the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search.
>
> Although it does not follow from ***Chimel***, we also conclude that circumstances unique to the vehicle context justify a search incident to a lawful arrest when it is "reasonable to believe evidence relevant to the crime

> of arrest might be found in the vehicle." [citation omitted].

Id.

Gant was arrested for driving with a suspended license. Police had conducted a records check, showing an outstanding warrant for that offense, when they saw him drive into a driveway of a house they were watching. He parked, "got out of his car, and shut the door." He was immediately arrested, handcuffed, and locked into a back seat of a patrol car. ***Id.,*** 1715.

Under those facts, the court concluded:

> Neither the possibility of access nor the likelihood of discovering offense-related evidence authorized the search in this case. Unlike in *Belton* . . . the five officers in this case outnumbered the three arrestees, all of whom had been handcuffed and secured in separate patrol cars before the officers searched Gant's car. Under those circumstances, Gant clearly was not within reaching distance of his car at the time of the search. An evidentiary basis for the search was also lacking in this case. Whereas Belton and Thornton were arrested for drug offenses, Gant was arrested for driving with a suspended license – an offense for which police could not expect to find evidence in the passenger compartment of Gant's car.

Id., 1720-21.

The relevant facts of this case are indistinguishable from those of ***Gant.*** Mr. Dearborn was stopped for driving after revocation of his license. (21:45-50). He also "obstructed or resisted," the arresting officer, but by the time he was arrested, he was outnumbered by law enforcement officers. He was handcuffed and secured in the back of a

squad car. (21:56-57). Like ***Gant***, he was not within reaching distance of his truck. Also like ***Gant***, law enforcement could not expect to find evidence of driving after revocation in the passenger compartment of his truck. The obstructing offense occurred after Mr. Dearborn had exited and locked his truck – no evidence of obstructing could be found in the truck either.

Because Mr. Dearborn's case falls squarely within the holding of ***Gant***, the search of his truck violated his constitutional right, under the Fourth Amendment to the United States Constitution, to be free from unreasonable searches. As in ***Gant***, Mr. Dearborn's conviction for possession of tetrahydrocannabinols should be reversed, and the evidence suppressed.

C. The search of Mr. Dearborn's truck violated his state constitutional right to be free from unreasonable searches and Wis. Stat. § 968.11.

The Wisconsin Supreme Court adopted the ***Belton*** rule in ***State v. Fry***, 131 Wis. 2d 153, 388 N.W. 2d 565 (1986), finding that neither Wis. Stat. § 968.11, nor the Wisconsin constitutional protection from unreasonable searches, required a different rule. To the extent that ***Fry*** and its progeny have been construed to apply to searches incident to arrest when a recent automobile occupant has been handcuffed and secured in a police car, they must be overruled.

The ***Fry*** analysis began with construction of Wis. Stat. § 968.11, concluding that the language of that statute is "consistent with the constitutional test for a search incident to arrest under ***Chimel***." ***Fry,*** 131 Wis. 2d 153, 165. The court then rejected the defendant's contention that the ***Belton*** rule "relaxes" the constitutional safeguards of ***Chimel***,

concluding: "The ***Belton*** decision, therefore, merely represents an application of the ***Chimel*** test to a specific factual situation. ***Chimel*** is not inconsistent with ***Belton***." ***Fry,*** 131 Wis. 2d 153, 168.

The ***Fry*** decision then turned to whether the Wisconsin constitution, Art. I, Sec. 11, imposes greater restrictions on police activity than the federal constitution. The court concluded, however, that the ***Belton*** rule was consistent with the Wisconsin constitution, citing the similarity in language in the two constitutions, and the importance of preventing "the confusion caused by differing standards." ***Id.***, 172-73. By a majority of 4-3, the court adopted the ***Belton*** rule, which it defined as, "a police officer may assume . . . that the interior of an automobile is within the reach of a defendant when the defendant is still at the scene of an arrest, but the defendant is not physically in the vehicle." ***Id.,*** 174.

In ***Fry,*** the majority's analysis turned only on whether the arrestee had been transported away from the scene. ***Id.,*** 158-159. It did not specify where, at the scene, Fry was. However, the dissent pointed out that Fry and his co-defendant had been arrested and secured in separate squad cars at the time of the search. It questioned whether the ***Belton*** rule applied to these facts, and it pointed out that commentators had predicted that the rule would soon be abandoned. ***Id.,*** 186-187.

Although the majority in ***Fry*** did not expressly consider and decide whether the ***Belton*** rule applied when the defendant was handcuffed and secured in a squad car at the time of the arrest, subsequent court decisions have cited the facts stated in the dissent to construe the ***Fry*** decision broadly. ***State v. Murdock***, 155 Wis. 2d 217, 233, 455 N.W. 2d 618, (1990); ***State v. Pallone,*** 2000 WI 77, ¶ 35, 236 Wis.

2d 162, 181, 613 N.W. 2d 568; ***State v. Littlejohn***, 2008 WI App 45, 307 Wis. 2d 477, 747 N.W. 2d 712 (pet. review granted).

In 2008, this court refused to extend the holdings in ***Murdock*** and ***Pallone***, eschewing rules in favor of a "fact-intensive inquiry." In ***State v. Denk,*** 2008 WI 130, ¶ 52, 315 Wis. 2d 5, 758 N.W. 2d 775, the court noted ***Pallone,*** but undertook a fact-intensive inquiry to determine whether a search of a passenger's eyeglass case was justified as a search incident to arrest. ***Id.,*** ¶ 58-59. In ***Sanders,*** 311 Wis. 2d 257, the court refused to apply the decision in ***Murdock*** to justify a search of a bedroom in which the defendant had been arrested, after he was handcuffed and removed from his home. "By removing the defendant from the home, the officers eliminated the need to detect and remove any weapons that the arrestee might try to use to resist arrest or escape or to prevent the destruction or concealment of evidence." ***Id.,*** ¶ 56.

The United States Supreme Court's decision in ***Gant*** clarifies the ***Belton*** rule's application to situations like Mr. Dearborn's, in which he was handcuffed and secured in a squad car when his truck was searched, and holds that the Wisconsin Supreme Court's application of that rule in ***Fry*** was erroneous. The decision is the supreme law of the land, and it is binding on all state courts. U.S. Constitution, Art. VI., ***State v. Jennings***, 2002 WI 44, ¶ 18, 252 Wis. 2d 228, 237-38, 647 N.W. 2d 142. A court may not authorize police conduct that trenches upon federal constitutional rights. ***Sibron v. New York***, 392 U.S. 40, 61 1968).

Therefore, to the extent that ***Fry*** applied to searches incident to arrest when the arrestee was locked and handcuffed in a squad car at the scene, it and its progeny must

be overruled. Mr. Dearborn's conviction must be overturned, and the evidence must be suppressed.*

D. Mr. Dearborn did not waive this issue because it would have been futile to raise it in the trial court. If he did waive the issue, the court should nevertheless address it because it is of sufficient public interest to merit a decision.

The general rule is that an appellate court will not consider on appeal matters which were not presented to the trial court. ***State v. Polashek,*** 2002 WI 74, ¶ 25, 253 Wis. 2d 527, 646 N.W. 2d 330. The rule is not absolute, as it articulates a "general policy of judicial administration, not the extent of our [the appellate court's] power to hear issues." ***State v. Moran***, 2005 WI 115, ¶ 31, 284 N.W. 2d 24, 700 N.W. 2d 884.

In this case, Mr. Dearborn filed two separate motions seeking suppression of all evidence obtained as a result of his illegal arrest, arguing that the conservation warden did not have authority to arrest him. The trial court heard evidence and argument related to both motions, and denied both motions. (2; 3; 19:18-20; 20:14-16).

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* In this case, Mr. Dearborn's truck was locked and Warden Stone held the keys, presenting a factor that was not present in ***Fry***. Applying the principles of ***Chimel, supra***, the Wisconsin Supreme Court has held, in ***Soehle v. State***, 60 Wis. 2d 72, 80, 208 N.W. 2d 341 (1973), that a warrantless entry to an arrestee's locked car was not constitutionally justified as a search incident to an arrest, or under any other recognized exceptions to the warrant requirement. In ***Littlejohn***, 2008 WI App 45, ¶ 15, the court rejected the same argument, concluding that ***Soehle*** was overruled by ***Fry***. The court of appeals did not address this issue in ***Dearborn***, 2008 WI App 131.

While neither suppression motion presented the legal theory argued here, the trial court made it clear at a postconviction hearing on Mr. Dearborn's motion to stay a condition of probation pending appeal, that it did not want a third suppression motion to be raised in the trial court. When undersigned counsel notified the court that she was considering requesting a remand challenging the application of ***Belton*** to the facts of this case, the court replied: "Well, if you'd like to take it to the Court of Appeals right away, that's okay with me." (27:2; App. 145).

In cases in which "it would have been futile" to raise an issue in the trial court, the Wisconsin Supreme Court considers questions not presented in the trial court. ***Holytz v. Milwaukee***, 17 Wis. 2d 26, 30, 115 N.W. 2d 618 (1962). The trial court's explicit statement that this issue should be raised in the court of appeals, rather than the trial court, makes it inappropriate to refuse to consider this issue on the ground that it was waived.

Additionally, as pointed out above, the waiver rule is one of judicial administration, not jurisdiction. This court may choose to ignore any waiver where the question presented is of sufficient public interest to merit a decision and is likely to recur. ***Moran,*** ¶ 31. The court of appeals addressed the issue, concluding: "Because this issue involves a question of law, has been briefed by the parties, and is of sufficient public interest to merit a decision, we choose to decide." ***Dearborn***, 2008 WI App 131, ¶ 44.

This court has accepted review of the court of appeals decision because it is a question of statewide importance. Therefore, if Mr. Dearborn waived the issue, this court should invoke its discretionary authority to decide it.

II. Mr. Dearborn Was Denied His Right to a Unanimous Verdict by a Jury Instruction That Defined Proof of One Element as Assault Or Resistance Or Obstruction.

A. Introduction and Standard of Review.

The right to a jury trial under Article I, §§ 5 and 7 of the Wisconsin Constitution includes the right to a unanimous jury verdict as to each charged offense. ***State v. Johnson***, 2001 WI 52, ¶ 11, 243 Wis. 2d 365, 627 N.W. 2d 455. In order to ensure a unanimous verdict, each juror must be "convinced beyond a reasonable doubt that the prosecution has proved each essential element of the offense." ***State v. Norman***, 2003 WI 72, ¶ 58, 262 Wis. 2d 506, 664 N.W. 2d 97, citing ***State v. Lomagro***, 113 Wis. 2d 582, 591, 335 N.W. 2d 583 (1993).

The court's decision in ***Norman*** sets forth the "proper analysis for determining whether a defendant's right to a unanimous verdict has been violated by a jury instruction:"

> First, a court must look to the statute defining the crime and ask a threshold question: Does the statute create multiple offenses or a single offense with multiple modes of commission? To resolve this question, a court is to examine four different factors: the language of the statute, the legislative history and context of the statute, the nature of the proscribed conduct and the appropriateness of multiple punishments for the conduct. The point is to determine the legislative intent in drafting the statute.
>
> When a court determines that the legislature intended to enact a statute creating multiple offenses, it is clear that juror unanimity as to each offense is required to convict an accused of each offense. On the other hand, when a court determines that the legislature intended to enact a statute creating one crime with alternate modes of

> commission, the court must make a second inquiry to determine whether an instruction allowing a conviction based upon a finding as to either mode, in the alternative, violates an accused's constitutional right to unanimity.

Id. at ¶ 59-60 (footnotes omitted).

Because the analysis requires statutory construction and analysis of whether the statute meets the constitutional standard, they are questions of law, reviewed *de novo*. ***State v. Derango***, 229 Wis. 2d 1, 11, 599 N.W. 2d 27 (Ct. App. 1999) aff'd, 236 Wis. 2d 721; ***State v. Piddington***, 2001 WI 24, ¶ 13, 241 Wis. 2d 754, 623 N.W. 2d 528.

Mr. Dearborn contends that Wis. Stat. § 29.951 creates multiple offenses. Further, if it creates a single offense with multiple modes of commission, it violates his constitutional right to unanimity.

B. Wisconsin Statute § 29.951 Creates Multiple Offenses.

Wis. Stat. § 29.951 penalizes anyone who "assaults or otherwise resists or obstructs any warden in the performance of duty . . . ."

1. The language of the statute, and legislative history and context.

The legislative history of Wis. Stat. § 29.251 shows that it was originally enacted in 1931 as Wis. Stat. § 29.64, and used similar language: "assault or otherwise willfully resist or obstruct any conservation warden. . . ." ***Dearborn,*** 2008 WI App. 131, ¶ 29.

In interpreting the language of the statute, the court of appeals placed emphasis on the word, "otherwise," to reach its conclusion that "assaulting is one among other ways of resisting a warden in the performance of duty and also one among other ways of obstructing a warden in the performance of duty." ***Dearborn,*** 2008 WI App. 131, ¶ 22.

Mr. Dearborn disagrees because the terms assault, resist, and obstruct, had legally-established meanings in 1931, which precluded assault from being one way of obstructing a warden. In ***State v. Welch,*** 37 Wis. 196, 201-202 (1875), the court held that assault was one way to resist a law enforcement officer, but that resistance was possible without an assault. Resistance was defined as direct, active, and *quasi* forcible. Obstruction, however, was in a completely different category. It was defined as passive, indirect and circuitous behavior. Assault is, by definition, direct, active and forcible. It cannot be one way of obstructing.

Therefore, the correct way to interpret the language of § 29.951, is that it prohibits (a) assaulting or otherwise resisting, and (b) obstructing.

In ***Welch***, the defendant was charged under a statute which made it a crime "to resist an officer engaged in the lawful execution of lawful process." He had attempted to prevent a constable from taking lawful possession of two colts, by picking up a stick and "threatening to split his brains out." He also threw sticks and waved his arms at the colts to make them run away. ***Id.***, 198-99.

After careful consideration of the definition of resistance, the court held that Welch's actions did not prove "resistance." It court concluded that "[t]o resist is to oppose by direct, active and *quasi* forcible means." Resistance is

"always direct, and, applied to persons, always implies more or less force." ***Id,*** p. 201.

Assault was placed squarely in the category of resistance, although the court held that actions other than assault might also be defined as resistance:

> We do not hold that there must be actual force or even a common assault upon the officer. It is not easy to see how, but resistance may be possible, within our construction of the statute, without actual violence or technical assault.

Id., p. 202.

To prove resistance under the law, the state must prove active and direct resistance to the officer; "the gist of the offense is personal resistance." ***Id.***, p. 202.

The court also contrasted "resistance" to "words that would include passive, indirect and circuitous impediments to the service of process," such as "oppose, obstruct, hinder, prevent, interrupt, intimidate, etc." Such impediments, exemplified by actions such as not opening the door, refusing to identify a person or thing, concealing a person or thing, or providing false information, it concluded, are not resistance. ***Id.***, p. 201.

The court assumes that the legislature was aware of ***Welch*** when it chose the language, "assault or otherwise willfully resist or obstruct." ***State v. Grady***, 2006 WI App 188, ¶ 9, 296 Wis. 2d 295, 722 N.W. 2d 760.

If, as assumed, the legislature was aware of ***Welch***, it knew that assault was one way of resisting, although resistance was possible without assault. Therefore, the phrase, "assault or otherwise willfully resist" encompassed

the category of resistance. It also appears that the legislature intended to prohibit passive conduct, so added a second crime, with the words "or obstruct." The language of § 29.951 weighs in favor of the conclusion that the legislature intended two separate offenses.

Mr. Dearborn submits that the legislative history of Wis. Stat. § 29.951, showing a need for greater protection of conservation wardens, is ambiguous in its effect on the central question whether the legislature intended to create one crime with multiple modes of commission.

2. The nature of the proscribed conduct and the appropriateness of multiple punishments.

With regard to the third criterion, the nature of the proscribed conduct, the inquiry focuses on "whether the statutory alternatives are similar or significantly different." ***Manson v. State***, 101 Wis. 2d 413, 426, 394 N.W. 2d 729 (1981). In ***Manson***, the court found that robbery committed by force, and robbery committed by threat of imminent use of force, comprised "one conceptual grouping" and were practically indistinguishable. ***Id.***, 430.

In this case, the court of appeals begins with the faulty legal premise that ***Welch*** did not define "obstruct," and that ***Welch*** did not suggest that conduct labeled resisting could not also be included in the definition of obstructing. ***Dearborn,*** 2008 WI App. 131, ¶ 27.

Mr. Dearborn disagrees with the court of appeals' interpretation of ***Welch.*** The ***Welch*** court did define "obstruct," as well as its synonyms, "oppose. . . hinder, prevent, interrupt, intimidate, etc." It defined them as "passive, indirect and circuitous impediments to the service of

process." ***Id.***, at 201. Resisting is excluded from the conduct labeled obstructing, because it is not passive, indirect or circuitous; it is the opposite, "direct, active and quasi forcible." ***Id.,*** at 201. These terms exclude one another.

Therefore, the nature of the proscribed conduct, "assault or otherwise resisting," and "obstructing," shows that they are mutually exclusive, and distinct. They do not overlap.

The ***Welch*** court's distinction between obstructing and resisting is reflected in Wis. Stat. § 946.41. Until 1957, the statute construed in ***Welch***, resisting a law enforcement officer, was limited to resisting. In 1957, the legislature enacted an amendment to Wis. Stat. § 946.41, penalizing a person whoever "knowingly resists or obstructs an officer while such officer is doing an act in his official capacity . . . ."

According to the comments to WIS JI-Criminal-1766, "obstructing" was added to cover the type of conduct, such as "impeding," "hindering," and "frustrating," that was not covered by the word "resisting." WIS JI-Criminal 1766, p. 3. Wis. Stat. § 946.41, therefore, includes a specific definition of "obstruct," which sets it apart, as a separate type of behavior, from the definition of "resist" set forth so many years ago in ***Welch***.

The jury instruction committee has adopted the "multiple offense" analysis in the jury instructions. In 1990, it divided the jury instructions for Wis. Stat. § 961.41 into three separate instructions. WIS JI-Criminal 1765 instructs on resisting; 1766 instructs on obstructing (which it describes as "limited to offenses involving 'obstructing,' interpreted to involve nonphysical interference"); and 1766A instructs on the specific offense of obstructing by providing false information.

This long-established jury instruction committee decision lends persuasive authority to the argument that the conduct of resisting and obstructing is not similar, but is distinct.

The fourth factor, whether multiple punishments are appropriate, also weighs in favor of a "multiple offenses" conclusion. In ***Manson***, 101 Wis. 2d 413, the court stated that the factor depends on several considerations, including whether the acts "are so significantly different that the conduct satisfying each of these criteria may be characterized as separate crimes," and "whether each act invades a different interest of the victim which the statutes intend to protect." ***Id.,*** at 427-28.

In ***Manson***, the question was whether robbery in which the defendant "used force," or "threatened the imminent use of force, were separate crimes. The court concluded that the behaviors were "practically indistinguishable." ***Id.,*** at 430. Other cases in which the courts have concluded that the statute defines only one crime, are those in which the proposed distinction focused on intent, not behavior. In ***Schad v. Arizona***, 501 U.S. 624 (1991), the behavior was murder and the court determined that intent, whether premeditated, or incident to a felony, did not create two separate crimes. In ***State v. Norman***, 2003 WI 72, 262 Wis. 2d 506, 664 N.W. 2d 97, the crime was falsifying documents, and the court determined that the intent, whether to defraud or injure, did not create two separate crimes. *See also****, State v. Derango***, 2000 WI 89, 236 Wis. 2d 721, 613 N.W. 2d 833 (child enticement, six different possible intents), and ***State v. Hammer***, 216 Wis. 2d 214, 576 N.W. 2d 285 (1997) (burglary, intent to steal or commit a felony).

In this case, the focus is on conduct, whether it was active or passive, direct or indirect, quasi forcible or circuitous. Much of Mr. Dearborn's conduct fell within the category of active resistance. He pulled away when the warden tried to handcuff him, kicked and pushed, swung his fists, threatened to throw rocks, and kicked and elbowed the warden. (21:51-55). Those acts are very distinct from those which might have been categorized as passive obstructing, such as disobeying the officer's order to get in his truck, refusing to relinquish his driver's license, or refusing to put his feet in the squad car. (21:48, 49, 51, 57).

In addition, although all of the actions in the category of "resisting or obstructing" go to the state's interest in protecting wardens from interference with their duties, only the actions involved in "resisting" go to a separate, important interest, of protecting the warden's personal safety.

For these reasons, the court's first analytic question, set forth in ***Norman, supra***, ¶ 59, must be answered: the statute creates multiple offenses. Therefore, "it is clear that juror unanimity as to each offense is required to convict an accused of each offense." ***Id.,*** ¶ 60.

C. Even if the Legislature Intended to Create One Offense with Alternate Modes of Commission, Mr. Dearborn's Constitutional Right to a Unanimous Jury Verdict Was Violated by the Jury Instruction in This Case.

If the court determines that the legislature intended to enact a statute creating one crime with alternate modes of commission, the court must then "make a second inquiry to determine whether an instruction allowing a conviction based upon a finding as to either mode, in the alternative, violates

an accused's constitutional right to unanimity." ***State v. Norman,*** 2003 WI 72, ¶ 60.

That inquiry requires to court to "look both to history and wide practice as guides to fundamental values." ***Schad***, 501 U.S. at 638. The discussion of ***State v. Welch, supra,*** provides the historical context. For decades, only "active, direct and quasi forcible" resistance to law enforcement officers was prohibited by Wisconsin statute. The court concluded that the legislature did not intend to include "passive, indirect, and circuitous" impediments in that category.

As to wide practice, that context is provided by Wis. Stat. § 946.41, prohibiting resistance or obstruction to a wide category of law enforcement officers. It is much more frequently used than the narrow and specific statute directed to conservation wardens, § 29.251. That statute, as explained above, creates two separate offenses, resisting, and obstructing, each with their own jury instruction.

Therefore, the jury instruction in this case, allowing a conviction based upon a finding as to either behavior, resistance or obstruction, in the alternative, violates Mr. Dearborn's constitutional right to unanimity.

It appears that the jury instruction in this case was crafted by the district attorney, consolidating WIS JI-Criminal 1765, defining the first element of the offense as "resisted," with WIS JI-Criminal 1766, defining the first element as "obstructed." The word "assaulted" was also added, but with no definition. All three types of conduct at issue were listed, using the disjunctive, "or."

Therefore, the jury was erroneously instructed that it could find that it must conclude that the first element was

proved if any of three separate types of behavior was proved: assault, or resistance, or obstruction. The jury was not instructed that it had to be unanimous as to which type of behavior Mr. Dearborn had engaged in.

In this case, some jurors may have concluded that Mr. Dearborn's disobedience to the officer's orders to get back into his truck, to put his keys down, to relinquish his driver's license, or to put his feet in the squad car, met the definition of obstructing because it made performance of the warden's duties more difficult. (21:48, 49, 51, 57). On the other hand, some jurors may have been convinced that the conduct was constitutionally protected or did not hinder the warden's performance of his duties.

Some jurors may have determined that Mr. Dearborn's actions, including kicking, elbowing, and swinging at the warden, met the definition of resistance. (21:52-55). Some jurors who were not convinced of obstruction, may have concluded that Mr. Dearborn resisted the warden by his use of force. On the other hand, some jurors may have been convinced that each of Mr. Dearborn's forceful behaviors was taken in self-defense, provoked by an aggressive action of the warden. Those jurors may have concluded that the warden used unreasonable or excessive force, thus was not acting with lawful authority, as instructed by the court. (21:134).

The result is that the erroneous instruction allowed jurors to disagree about "just what [the] defendant did." ***United States v. Gipson***, 553 F. 2d 453, 457-58 (5th Cir. 1977); ***State v. Seymour***, 183 Wis. 2d 683, 697-98, 515 N.W. 2d 874 (1994). Therefore, even if this court were to move to the second step of the ***Norman, supra***, analysis, it must conclude that, under the fundamental fairness test, the

jury instruction in this case violated Mr. Dearborn's fundamental constitutional right to a unanimous jury verdict.

As a result, Mr. Dearborn requests a new trial, at which the jurors are properly instructed that they must reach a unanimous verdict whether Mr. Dearborn "obstructed" Warden Stone, or a unanimous verdict whether Mr. Dearborn "resisted" Warden Stone.

CONCLUSION

For the reasons stated above, Mr. Dearborn respectfully requests that this court vacate his convictions, order that the evidence found in his truck be suppressed, and remand the case to the trial court for a new trial.

Dated this 21st day of December, 2009.

Respectfully submitted,

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CERTIFICATION AS TO FORM/LENGTH

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 of body text. The length of the brief is 6,885 words.

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of § 809.19(12). I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed on or after this date.

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

Dated this 21st day of December, 2009.

Signed:

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A P P E N D I X

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CERTIFICATION AS TO APPENDIX

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

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

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated this 21st day of December, 2009.

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APPENDIX

INDEX
TO
APPENDIX

COURT OF APPEALS
DECISION
DATED AND FILED

July 24, 2008

David R. Schanker
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2007AP1894-CR

Cir. Ct. No. 2006CM116

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT IV

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DAVID A. DEARBORN,

DEFENDANT–APPELLANT.

APPEAL from an order of the circuit court for Grant County: GEORGE S. CURRY, Judge. *Affirmed.*

Before Higginbotham, P.J., Vergeront and Bridge, JJ.

¶1 VERGERONT, J.[1] David Dearborn appeals a judgment of conviction for assaulting or otherwise obstructing, or resisting a conservation warden contrary to WIS. STAT. § 29.951 (2005-06)[2] and for possession of tetrahydrocannabinols (THC) contrary to WIS. STAT. § 961.41(3g)(e). He makes two contentions on appeal. First, he asserts his constitutional right to a unanimous verdict was violated by the jury instruction stating that he may be found guilty of violating § 29.951 if the jury found he assaulted or resisted or obstructed a conservation warden, rather than requiring the jury to unanimously agree on which he did. Second, he asserts the circuit court erred in denying his motion to suppress evidence found from a search of the passenger compartment of his vehicle.

¶2 We conclude that WIS. STAT. § 29.951 defines one crime with multiple modes of commission and comports with the applicable fundamental fairness standard embodied in the due process clause. Therefore, the jury did not need to be unanimous on the mode of commission and the jury instruction did not violate Dearborn's constitutional right to a unanimous jury verdict.

¶3 We also conclude, relying on ***State v. Littlejohn***, 2008 WI App 45, __ Wis. 2d __, 747 N.W.2d 712,[3] that the search of the passenger compartment of

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[1] This appeal was filed as an appeal to be decided by one judge pursuant to WIS. STAT. § 752.31(2)(f), but we ordered that it be converted to a three-judge panel.

[2] All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

[3] A petition for review was filed in ***State v. Littlejohn***, 2008 WI App 45, ___ Wis. 2d ___, 747 N.W.2d 712, but the petition was placed on hold pending the supreme court's resolution of ***State v. Denk***, 2006AP1744-CR (cert. accepted Mar. 18, 2008). Wisconsin Supreme Court and Court of Appeals Case Access, http://wscca.wicourts.gov/index.xsl.

Dearborn's vehicle did not violate his constitutional right to be free from unreasonable search and seizure. Accordingly, we affirm.

BACKGROUND

¶4 The charges arose out of events occurring after a Department of Natural Resources (DNR) warden, Martin Stone, pulled over a truck that Dearborn was driving. The warden and a state trooper, who later arrived in response to the warden's call, were the only witnesses to the incident at the trial. The following summary of facts is based on their testimony.

¶5 The warden was on duty, parked in an area along the lower Wisconsin River and observing people fishing. A man in a truck pulled up next to his vehicle, made a rude gesture, and drove off. The warden ran the truck's license plates and discovered that the owner of the vehicle, David Dearborn, had a revoked driver's license. The warden followed the truck and pulled it over, activating his lights. Dearborn, the driver and only occupant, got out of his truck and walked towards the warden. After the warden instructed Dearborn to get back into his truck, Dearborn shut and locked his truck door and remained outside. The warden obtained Dearborn's driver's license, verified his identity, and double checked his revoked status with dispatch after Dearborn denied he was revoked. The warden then told Dearborn he was under arrest for operating a vehicle after revocation. Dearborn became upset, resisted being handcuffed, and refused to turn over his car keys at the warden's request. Believing Dearborn was going to run, the warden tried to grab his wrist and the two became entangled and fell to the ground.

¶6 Once on the ground, Dearborn continued to resist being handcuffed by pushing and kicking. After getting up, the warden tried to subdue Dearborn

with pepper spray, but was unsuccessful because Dearborn swung his jacket at the warden, thereby avoiding the spray. Dearborn ran to a nearby house, picked up rocks of varying sizes, and positioned himself as if he was going to throw them at the warden. He dropped the rocks after the warden drew his gun. Dearborn ran to the front door of the house and grabbed the door, shaking it and yelling and screaming. The warden caught up with him and tried once again to get Dearborn's hands behind his back, but Dearborn started kicking and punching again. This time the warden was able to partially subdue Dearborn with pepper spray and he called for backup. A state trooper arrived and he and the warden together were able to make Dearborn let go of the door handle and to handcuff him. They sat Dearborn in the trooper's squad car, but he refused to put his feet in; he complied when the trooper threatened to "make him" do it.

¶7 Once Dearborn was in the squad car, the warden searched the passenger compartment of Dearborn's vehicle and found a container holding a small amount of marijuana and some objects that the warden identified as drug paraphernalia.

¶8 The State charged Dearborn with assaulting or otherwise resisting or obstructing a warden in violation of WIS. STAT. § 29.951, possession of THC in violation of WIS. STAT. § 961.41(3g)(e), and possession of drug paraphernalia in violation of WIS. STAT. § 961.573(1). Dearborn filed a pretrial motion to suppress the evidence discovered in his vehicle on the ground that the search was unconstitutional. The court denied the motion.

¶9 At the jury instruction conference Dearborn proposed an instruction for the WIS. STAT. § 29.951 charge that referred only to resisting a warden. The State's proposal described the first element of the offense as "assault[ing],

resist[ing] or obstruct[ing]" and also defined "resist[ing]" and "obstruct[ing]." Dearborn defended his proposed instruction and objected to the State's proposal on the ground that, if the jury received instructions on both resisting and obstructing, some jurors could find him guilty of one, some of the other, and that would deny him the right to a unanimous jury verdict. The court disagreed with Dearborn and gave the instruction prepared by the State, which did not require the jury to unanimously agree as to whether Dearborn specifically resisted or obstructed.

¶10 The jury found Dearborn guilty of the WIS. STAT. § 29.951 charge and the THC possession charge and not guilty of possession of drug paraphernalia. The court sentenced Dearborn to four months in jail on the former charge, one month on the latter charge, stayed both sentences, and ordered probation for one year.

DISCUSSION

¶11 Dearborn raises two issues on appeal: (1) did the jury instruction the court gave on the WIS. STAT. § 29.951 charge violate his constitutional right to a unanimous verdict? and (2) was the search of his vehicle unreasonable under the Fourth Amendment to the United States Constitution?

I. Unanimity

¶12 WISCONSIN STAT. § 29.951, provides:

> **Resisting a warden.** Any person who assaults or otherwise resists or obstructs any warden in the

> performance of duty shall be subject to the penalty specified in s. 939.51 (3) (a) [a Class A misdemeanor].[4]

¶13 The jury was instructed that there were four elements to the offense, each of which must be proved beyond a reasonable doubt: (1) the defendant assaulted, resisted, or obstructed a conservation warden; (2) the conservation warden was doing an act in an official capacity; (3) the conservation warden was acting lawfully; and (4) the defendant knew that Martin Stone was a conservation warden acting in his official capacity and with lawful authority and knew the conduct would constitute an assault of the warden or would resist or obstruct the warden.

¶14 With respect to the first element, the jury was instructed:

> 1. The defendant assaulted, resisted, or obstructed a conservation warden.
>
> To resist a conservation warden means to oppose the warden by force or threat of force. The resistance must be directed to the warden personally.
>
> To obstruct a conservation warden means that the conduct of the defendant prevented or made more difficult the performance of the warden's duties.[5]

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[4] The penalty for a Class A misdemeanor is a fine not to exceed $10,000 or imprisonment not to exceed nine months or both. WIS. STAT. § 939.51(3)(a).

[5] These definitions of "resist" and "obstruct" are the same as those in the pattern jury instructions for WIS. STAT. § 946.41. This statute provides:

> **Resisting or obstructing officer.** (1) Whoever knowingly resists or obstructs an officer while such officer is doing any act in an official capacity and with lawful authority, is guilty of a Class A misdemeanor.
>
> (2) In this section:

(continued)

¶15 Dearborn contends that, by referring to "resists" and "obstructs," WIS. STAT. § 29.951 proscribes two separate types of conduct.[6] The instruction, he asserts, allows the jury to find Dearborn guilty if he either resisted or obstructed without instructing the jury that it must be unanimous in deciding which act Dearborn did. Thus, he argues, some jurors may have decided that Dearborn resisted because there was evidence that he opposed the warden by force or threat. Others may not have been persuaded that he resisted, viewing that evidence as self-defense in response to unreasonable or excessive force; these latter jurors may have decided he obstructed based on other evidence that could meet the definition given for "obstruct." This, he asserts, is a violation of his constitutional right to a unanimous verdict.

> (a) "Obstructs" includes without limitation knowingly giving false information to the officer or knowingly placing physical evidence with intent to mislead the officer in the performance of his or her duty including the service of any summons or civil process.

WIS JI—CRIMINAL 1765, Resisting An Officer, provides that "To resist an officer means to oppose the officer by force or threat of force. The resistance must be directed to the officer personally." WIS JI—CRIMINAL 1766, Obstructing An Officer, provides that "To obstruct an officer means that the conduct of the defendant prevents or makes more difficult the performance of the officer's duties."

[6] Dearborn acknowledges that the statute and the jury instruction given also include "assaults." He explains that no issue with respect to assault was raised by defense counsel in the circuit court and thus on appeal his argument is based only on the "resists" and "obstructs" language. However, because the unanimity analysis depends upon legislative intent, our analysis includes all three terms used in the statute.

¶16 The State responds that unanimity is not required on whether Dearborn's conduct constituted assaulting or resisting or obstructing a warden in the performance of duty.[7]

¶17 The right to a jury trial guaranteed by article I, sections 5 and 7 of the Wisconsin Constitution includes the right to a unanimous verdict with respect to the ultimate issue of guilt or innocence. ***State v. Derango***, 2000 WI 89, ¶13, 236 Wis. 2d 721, 613 N.W.2d 833. The primary justification for the unanimity requirement is that it ensures that each juror is convinced that the prosecution has proved each essential element of the offense beyond a reasonable doubt. ***Id.*** "Jury unanimity, however, is required 'only with respect to the ultimate issue of the defendant's guilt or innocence of the crime charged, and ... not ... with respect to the alternative means or ways in which the crime can be committed.'" ***Id.***, ¶14 (citations omitted) (alteration in original).

¶18 The threshold question in a unanimity challenge is therefore whether the statute creates multiple offenses or a single offense with multiple modes of commission. ***Id.*** This presents a question of statutory construction, which is a question of law, and our review is therefore de novo. ***State v. Derango***, 229 Wis. 2d 1, 11, 599 N.W.2d 27 (Ct. App. 1999), *aff'd*, 236 Wis. 2d 721.

¶19 If we conclude the legislature intended multiple offenses, then the jury must be unanimous as to each crime. ***State v. Hammer***, 216 Wis. 2d 214,

[7] We note that, given the definition of "obstruct" that was provided the jury—"to prevent or make more difficult the performance of the officer's duty"—it would appear that any conduct that constituted resisting an officer would also constitute obstructing an officer. However, neither party raises this point; in particular, the State does not assert this has a bearing on the unanimity analysis. Therefore we do not address this issue.

219, 576 N.W.2d 285 (Ct. App. 1997). On the other hand, if we conclude the legislature intended to create one crime with alternate modes of commission, we apply the due process fundamental fairness test utilized in ***Schad v. Arizona***, 501 U.S. 624, 637-45 (1991). *See* ***Derango***, 236 Wis. 2d 721, ¶¶23-25.[8] Whether the statute meets that constitutional standard presents a question of law, which we review de novo. *See* ***State v. Piddington***, 2001 WI 24, ¶13, 241 Wis. 2d 754, 623 N.W.2d 528 (reconciling constitutional consideration of due process with statutory requirements presents question of law).

¶20 Turning to the threshold question of the legislature's intent, we consider: (1) the language of the statute; (2) the legislative history and context of the statute; (3) the nature of the proscribed conduct; and (4) the appropriateness of multiple punishment for the conduct. ***Derango***, 236 Wis. 2d 721, ¶15.[9]

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[8] In its brief, the State relies on the "conceptually distinct test" the supreme court utilized in ***Holland v. State***, 91 Wis. 2d 134, 139, 280 N.W.2d 288 (1979), which relied on ***United States v. Gipson***, 553 F.2d 453 (5th Cir. 1977). However, in ***State v. Derango***, 2000 WI 89, ¶22, 236 Wis. 2d 721, 613 N.W.2d 833, the supreme court explained that the United States Supreme Court in ***Schad v. Arizona***, 501 U.S. 624, 635 (1991), had rejected the "conceptually distinct" test in favor of a due process fundamental fairness test and it applied the ***Schad*** test. The supreme court reaffirmed that the ***Schad*** test was the correct test in ***State v. Norman***, 2003 WI 72, ¶¶61-62, 262 Wis. 2d 506, 664 N.W.2d 97.

[9] In ***State v. Hammer***, 216 Wis. 2d 214, 221, 576 N.W.2d 285 (Ct. App. 1997), we stated that, because it was clear that the statutory language there in dispute plainly set forth a single crime with alternative modes of commission, we did not need to address the remaining three factors to determine legislative intent in unanimity cases. In support of this statement, we cited to ***State v. Vinje***, 201 Wis. 2d 98, 101-02, 548 N.W.2d 118 (Ct. App. 1996), which was not a unanimity case but did involve statutory construction. In ***Vinje***, in setting forth the principles we ordinarily apply when we construe statutes, we stated that "[i]f the language of the statute clearly and unambiguously sets forth the legislative intent, it is the duty of the court to apply that intent to the case at hand and not look beyond the statutory language to ascertain its meaning." ***Id.*** at 102 (citation omitted).

However, in ***State v. Derango***, 236 Wis. 2d 721, ¶¶15-22, decided after ***Hammer***, the supreme court analyzed all four factors even though it concluded the statutory language created
(continued)

¶21 The framework of WIS. STAT. § 29.951 is that all three terms—assault, resist, and obstruct—are contained in one sentence and connected by a disjunctive, with one penalty provided. In ***Manson v. State***, the court initially observed that the framework of that statute, setting forth alternative modes for committing robbery in two separate paragraphs, "lends plausibility to the interpretation that the legislature intended to define two crimes[,]" although the court ultimately concluded other features of the statutory language suggested it described one crime. 101 Wis. 2d 413, 422, 428, 304 N.W.2d 729 (1981). Then, in consulting the legislative history, the ***Manson*** court concluded that the fact that earlier versions of that statute set forth the alternative modes in one paragraph in the disjunctive, with one penalty provided, supported the conclusion that the legislature intended to define one offense with alternative modes of accomplishing the offense. ***Id.*** at 423-25. Applying the reasoning of the ***Manson*** court, we conclude that the framework of § 29.951 indicates the legislature intended to define one crime.

¶22 In addition, the language of WIS. STAT. § 29.951 provides that anyone who "assaults or *otherwise* resists or obstructs any warden in the performance of duty ..." shall be subject to the specified penalty. (Emphasis added.) The word "otherwise" makes clear that the statute is not listing three separate categories of activities. Instead, this language indicates that assaulting is one among other ways of resisting a warden in the performance of duty and also one among other ways of obstructing a warden in the performance of duty.

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only one offense. We therefore do not rely on ***Hammer*** and we analyze all four factors even though we conclude the statutory language indicates an intent to create only one offense.

¶23 Finally, we note that all three types of conduct—assaulting, resisting, and obstructing—are penalized only if they occur in the performance of the warden's duty, and all plainly interfere with the performance of a warden's duty. The language of the statute thus indicates an emphasis on the fact that the conduct is directed at a warden in the performance of his or her duty and interferes with that performance. It does not indicate an intent to precisely distinguish between the types of conduct that accomplish that end so as to punish each separately.

¶24 Dearborn contends that ***State v. Welch***, 37 Wis. 196, 200 (1875), establishes that "resist" and "obstruct" have different meanings and therefore they are different crimes. In ***Welch***, the court interpreted a statute penalizing "resist[ing] an officer engaged in the lawful execution of lawful process."[10] ***Id.*** The issue in ***Welch*** was whether the actions of a defendant who caused horses to run away from a law enforcement officer who was attempting to serve a writ of replevin on the defendant for the horses constituted "resisting." ***Id.*** at 198-99. The court concluded it did not. ***Id.*** at 204. The court held that "resisting" means "to oppose by direct, active and *quasi* forcible means[,]" ***id.*** at 201 (emphasis in original), and did not include "passive, indirect and circuitous impediments." ***Id.*** The court observed that statutes in other jurisdictions used words such as "oppose, obstruct, hinder, prevent, interrupt, intimidate, etc." and "many or all of these words would include passive, indirect and circuitous impediments to the service of process." ***Id.***

[10] The statute construed in ***State v. Welch***, 37 Wis. 196 (1875), R.S ch. 167 § 18 (1854), is a predecessor to WIS. STAT. § 946.41. *See* footnote 5. "Obstruct" was not added until 1957, by 1957 Wis. Laws, ch. 242, § 2, many years after the predecessor to WIS. STAT. § 29.951 was first enacted containing the term "obstruct." *See* footnote 10.

¶25 We agree with Dearborn that ***Welch*** is relevant in determining the legislature's intent in WIS. STAT. § 29.951. The predecessor to § 29.951, with substantially the same wording, was enacted by 1931 Wis. Laws, ch. 278, § 2.[11] We therefore assume the legislature was aware of ***Welch*** when it chose to use the terms "resisting" and "obstructing" in the predecessor to § 29.951. *See* ***State v. Grady***, 2006 WI App 188, ¶9, 296 Wis. 2d 295, 722 N.W.2d 760 (we assume the legislature is aware of the relevant case law when it enacts legislation).

¶26 However, we do not agree that ***Welch*** supports Dearborn's position that the legislature intended "resists" and "obstructs" in WIS. STAT. § 29.951 to constitute separate crimes. ***Welch*** establishes that "resist" and "obstruct" have different meanings. "Resist" means "to oppose by direct, active and *quasi* forcible means" and does not include passive or indirect methods of impeding a warden's or officer's performance of duty. 37 Wis. at 201 (emphasis in original). The ***Welch*** court did not define "obstruct" but did indicate that it includes conduct that resist does not include. *See* ***id.*** Thus, in proscribing obstructing in addition to resisting in § 29.951, the legislature intended to proscribe a broader range of conduct than resisting. However, it does not follow that the legislature intended resisting and obstructing to constitute separate crimes subject to separate punishment, rather than alternative modes of committing one crime.

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[11] When first enacted the statute was codified as WIS. STAT. § 29.64 (1931) and provided:

> **Resisting conservation warden.** Any person who shall assault or otherwise wilfully resist or obstruct any conservation warden in the performance of his duty shall be punished by a fine of not more than five hundred dollars, or by imprisonment in the county jail not more than six months, or by both such fine and imprisonment.

¶27 Indeed, there is nothing in ***Welch*** that indicates "resisting" and "obstructing" include entirely separate types of conduct. Although the ***Welch*** court concluded that "obstructing" (and other terms—"oppose, ... hinder, prevent, interrupt, intimidate") includes conduct that is not included in "resisting," 37 Wis. at 201, the court did not define "obstruct" and did not suggest that some conduct that comes within the meaning of "resisting" could not also be "obstructing." A common dictionary meaning of "obstruct" is "[t]o impede, retard, or interfere with; hinder." AMERICAN HERITAGE COLLEGE DICTIONARY 942 (3d ed. 1993).[12] Certain conduct that is "resisting" as defined by the ***Welsh*** court—"oppose by direct, active and *quasi* forcible means[,]" 37 Wis. at 201—could also be "obstructing": pulling one's arm forcefully away from a warden's hold in an attempt to prevent handcuffing, for example. As for the relationship between "resist" as the *Welch* court defined the term and "assault," the ***Welch*** court recognized the overlap when it stated that "threats, with the present ability and apparent intention to execute them, might well be resistance, as they might well amount to an assault"; however, in order to constitute resistance there need not be "actual force or even a common assault upon the officer." 37 Wis. at 202.

[12] We consult a dictionary definition for the common meaning of "obstruct" to aid in our analysis of the legislature's intent in WIS. STAT. § 29.915 with respect to one crime or multiple crimes. We recognize that the term "obstruct" is also used in WIS. STAT. § 946.41, *see* footnote 5. The jury instruction for that statute, WIS JI—CRIMINAL 1766, used in this case, defines "obstruct" as conduct that "prevents or makes more difficult the performance of the officer's duties" (when the specific instance of "obstruct" in § 946.41(2)(a) is not used). *See* footnote 5. However, because "obstruct" was added to § 946.41 many years after the predecessor to § 29.915 was first enacted, *see* footnote 9, and because the proper construction of § 946.41 is not before us, we do not focus on the meaning of "obstruct" in § 946.41. On the other hand, we do not intend to suggest there is a difference in meaning between the term "obstruct" in the two statutes, and we do not see any significant difference between the dictionary definition we employ here and the definition in WIS JI—CRIMINAL 1766.

¶28 Thus, applying the *Welch* definition of "resist" and a common dictionary definition of "obstruct," we see there can be overlap in the meaning of these terms. This overlap, like the use of "or otherwise" to link "assault" with both "resist" and "obstruct" is another indication that the intent in WIS. STAT. § 29.915 is not to delineate three distinct types of conduct that constitute three distinct offenses but, instead, to identify the variety of conduct that, when directed at a warden in the performance of duty, interferes with that performance.

¶29 Turning to the legislative history of WIS. STAT. § 29.915, we conclude it corroborates our conclusion that the legislature intended to create one crime. The drafting file of the predecessor statute, WIS. STAT. § 29.64 (1931), shows that the legislation was initially proposed because of a concern for the increasing difficulties conservation wardens were having in "handling violators in the field" and the inadequate existing penalties "for resisting officers, pointing guns at them, etc." and some recent "close shaves" experienced by wardens. Drafting file, 1931 Wis. Laws, ch. 278, Legislative Reference Bureau, Madison, Wis. The earlier drafts in the file prohibit "assault, attempt to assault, or point a gun at, whether loaded or unloaded, or interfere with in any manner any conservation warden while acting in the performance of his duty...." *Id.* The bill as amended and finally enacted contained the language "assault or otherwise wilfully resist or obstruct any conservation warden in the performance of his duty...,"[13] and provided as a penalty a fine of not more than five hundred dollars or imprisonment in the county jail for not more than six months, or both a fine and imprisonment. 1931 Wis. Laws, ch. 278, § 2. At the time this legislation was

[13] "Wilfully" was deleted by 1975 Wis. Laws, ch. 365, § 47.

enacted, "assault" was a term used in a number of criminal statutes[14] and was generally defined in the case law as a "willful attempt to do bodily harm to another [involving] a wrongful purpose"; it did not, in the criminal law context, have the common dictionary meaning of "doing of violence by one to another." ***Holmes v. State***, 124 Wis. 133, 140, 102 N.W. 321 (1905).

¶30 The information in the drafting file thus indicates that the initial impetus for the legislation was the protection of conservation wardens in the field from violators who pointed or used their guns to resist arrest. It also shows that the language finally enacted proscribed a broader range of conduct adversely affecting wardens in the performance of their duties. This information does not indicate an intent to make assaulting, resisting, and obstructing three separate crimes.

¶31 As for the nature of the proscribed conduct, this inquiry focuses on "whether the statutory alternatives are similar or significantly different." ***Manson***, 101 Wis. 2d at 426. "If the alternatives are similar, one crime was probably intended." ***Id.*** Alternatives are not dissimilar simply because they include different conduct, such as use of force and threat of imminent use of force, or because the different conduct may have a disparate impact on the victim. ***Id.*** at 427. Rather, we look at the concept embodied in the alternatives. *See* ***id.*** In addition, the court in ***Manson*** considered it significant that the same conduct could fall within the meaning of both alternatives. ***Id.*** at 426-27.

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[14] For example: WIS. STAT. § 340.36 (1931), "Assault with intent to murder or maim"; WIS. STAT. § 340.38 (1931), "Assault regardless of life"; WIS. STAT. § 340.39 (1931), "Assault and theft, being armed"; WIS. STAT. § 340.40 (1931), "Assault with intent to murder or rob." In contrast, our current criminal code does not generally use the term "assault" to describe the penalized behavior outside the context of sexual assaults as in WIS. STAT. § 940.225.

¶32 We conclude the types of conduct embodied in assaulting, resisting, or obstructing a warden in the performance of duty are similar. These terms embody the concept of acts that interfere with the performance of a warden's duty and, because they have overlapping meanings, some acts may be aptly described by more than one term.

¶33 Finally, we consider whether multiple punishments are appropriate. If the proper inquiry here is whether multiple punishments for one act by a defendant of interfering with a warden in the performance of his or her duty are appropriate solely because the act constitutes both resisting and obstructing, for example, or both assaulting and resisting, then the answer is clearly "no."

¶34 However, the case law has described this fourth factor in ways that leave us uncertain how it fits into legislative intent in this case; and neither of the parties addresses this factor. In ***Manson***, the court stated that this factor depends on several considerations, including

> whether [the proscribed actions] are so significantly different that the conduct satisfying each of these criteria may be characterized as separate crimes although each would furnish a factual premise for the violation of the same statute; whether the acts are so close in time that they are to be treated as one; whether each act invades a different interest of the victim which the statutes intend to protect.

Id. at 427-28. The court concluded that "[i]n the case of robbery these factors point to the conclusion that multiple punishment would not be appropriate when use of force and threat of force occur in a single taking." *Id.* at 428. In ***Derango***, 236 Wis. 2d 721, ¶21, the court stated that "[w]e have previously concluded that acts warrant separate punishment when they are separate in time or are significantly different in nature[,]" when citing to ***State v. Sauceda***, 168 Wis. 2d

486, 499-500, 485 N.W.2d 1 (1992), a multiplicity case.[15] The court in ***Derango*** concluded that, because the child enticement statute, WIS. STAT. § 948.07, proscribed only one act committed with six or more possible mental states, it would not be fair to impose more than one punishment. 236 Wis. 2d 721, ¶21.

¶35 Thus, both ***Manson*** and ***Derango*** refer to the similarity of the proscribed conduct as part of the analysis of the fourth factor. This appears to require the same analysis as does the third factor, and we have already concluded the proscribed conduct is similar.

¶36 Both ***Manson*** and ***Derango*** also refer to the closeness in time of the acts, but neither case provides guidance on how that bears on discerning legislative intent when there is a unanimity challenge. We note that in multiplicity cases the supreme court has considered the closeness in time in determining whether the defendant committed separate volitional acts. *See, e.g.,* ***State v. Tappa***, 127 Wis. 2d 155, 170, 378 N.W.2d 883 (1985). *See also* ***State v. Davidson***, 2003 WI 89, ¶110, 263 Wis. 2d 145, 666 N.W.2d 1. Certainly a defendant could commit more than one act that constituted a violation of WIS. STAT. § 29.951 in one extended encounter with a warden, and that might properly give rise to more than one charge under this statute and more than one punishment. However, where, as in this case, there is only one charge, we have difficulty understanding the purpose of analyzing the closeness in time of Dearborn's acts that constitute either assaulting, resisting, or obstructing.

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[15] The double jeopardy clause protects against multiple punishments for the same offense. ***State v. Sauceda***, 168 Wis. 2d 486, 492, 485 N.W.2d 1 (1992). Multiplicity is implicated only to the extent of preventing a court from imposing a greater penalty than the legislature intended. ***State v. Derango***, 236 Wis. 2d 721, ¶28.

¶37 As for the ***Manson*** consideration of whether each proscribed act invades a different interest of the victim which the statute intends to protect, we conclude that each of the proscribed terms of conduct—assaulting, resisting, and obstructing—invade the same interest of a warden to be free from interference in the performance of his or her duties. However, in arriving at this conclusion we do not mean that, in a particular case, a defendant could not properly be charged with more than one violation of WIS. STAT. § 29.951 for acts that occurred during one encounter with a warden.

¶38 In spite of our uncertainty over the scope and purpose of the fourth factor, we conclude the legislature intended to define a single crime in WIS. STAT. § 29.951 with multiple modes of commission. The first three factors—statutory language, legislative history, and similarity of the proscribed conduct—support this conclusion, as do at least some of the considerations in the fourth factor. In addition, even if we were to decide that the fourth factor weighed in favor of legislative intent to define multiple crimes in § 29.951, we are persuaded that the statutory language and the legislative history are far stronger indications of the legislature's intent.

¶39 Having concluded that WIS. STAT. § 29.951 describes one crime that can be performed in multiple ways, we turn to ***Schad***'s due process test of fundamental fairness. *See* ***Derango***, 236 Wis. 2d 721, ¶¶23-24. The Court in ***Schad*** stated:

> We are convinced, however, of the impracticability of trying to derive any single test for the level of definitional and verdict specificity permitted by the Constitution, and we think that instead of such a test our sense of appropriate specificity is a distillate of the concept of due process with its demands of fundamental fairness and for the rationality that is an essential component of that fairness. In translating these demands for fairness and rationality into

> concrete judgments about the adequacy of legislative determinations, we look both to history and wide practice as guides to fundamental values, as well as to narrower analytical methods of testing the moral and practical equivalence of the different mental states that may satisfy the *mens rea* element of a single offense. The enquiry is undertaken with a threshold presumption of legislative competence to determine the appropriate relationship between means and ends in defining the elements of a crime.

501 U.S. at 637-38 (citation omitted).

¶40 The Court in ***Schad*** concluded that due process did not require unanimity for the agreement of two alternative mental states for the crime of murder because of the historical acceptance of this and the moral equivalency of the alternative mental states. ***Id.*** at 640-45.

¶41 Applying ***Schad***'s due process test, we conclude that unanimity is not required. As the court did in ***Derango***, 236 Wis. 2d 721, ¶24, we start with the presumption from ***Schad*** that the legislature made a constitutionally viable choice in creating WIS. STAT. § 29.951 to describe one crime with multiple modes of commission. ***Schad***, 501 U.S. at 637-38. We next observe that § 29.915 does not appear to have the type of lengthy history rooted in common law that the Court in ***Shad*** found existed with respect to murder. ***Id.*** at 640-43. However, ***Schad*** recognized that this could be true for many modern statutes, ***id.*** at 640 n.7, and the ***Derango*** court found this to be true of the child enticement statute addressed there. 236 Wis. 721, ¶24. Finally, we consider that assaulting, resisting, and obstructing a warden in the performance of duty are of similar moral culpability in that they are each ways to interfere with a warden's performance of duty.

¶42 Because WIS. STAT. § 29.951 creates one crime with multiple modes of commission and does not offend the due process standard employed in ***Schad***,

we conclude that jury unanimity as to the manner in which a defendant violates § 29.951 is not required. Therefore, Dearborn was not denied his due process right to a unanimous jury verdict.

II. Vehicle Search

¶43 Dearborn asserts that the search of the passenger compartment of his car violated his right to be free from unreasonable search and seizure under the Fourth Amendment of the Untied States Constitution, as well as article I, section 11 of the Wisconsin Constitution. He asserts that the search did not fall within the exception to the warrant requirement for a search incident to a lawful arrest as articulated in ***Chimel v. California***, 395 U.S. 752, 762-63 (1969), because it was not justified by the purposes underlying that exception—officer safety nor prevention of destruction or concealment of evidence. This is so, according to Dearborn, because the search did not occur until he was in the squad car, handcuffed.

¶44 The State contends that Dearborn waived this issue by failing to raise it in the circuit court. We assume without deciding that Dearborn failed to preserve this issue in the lower court. However, the waiver rule is one of judicial administration, not judicial authority. *See* ***State v. Moran***, 2005 WI 115, ¶31, 284 Wis. 2d 24, 700 N.W.2d 884. Because this issue involves a question of law, has been briefed by the parties, and is of sufficient public interest to merit a decision, we choose to decide it. *See* ***id.***

¶45 When we review a motion to suppress, we affirm the circuit court's findings of fact unless they are clearly erroneous. ***State v. Pallone***, 2000 WI 77, ¶27, 236 Wis. 2d 162, 613 N.W.2d 568. We review de novo the circuit court's application of constitutional principles to the facts. ***Id.***

¶46 We conclude our decision in ***Littlejohn***, 747 N.W.2d 712, is controlling and resolves this issue against Dearborn. As in this case, in ***Littlejohn*** the police searched the passenger compartment of the defendant's vehicle after he was arrested outside the vehicle, handcuffed, and secured in a police vehicle at the scene. ***Id.***, ¶¶2, 12. Littlejohn's car was locked, ***id.***, ¶15, as was Dearborn's. Littlejohn made the same argument that Dearborn makes—that the search-incident-to-arrest exception did not apply because he was locked in the back of a police car and his vehicle therefore was not within his "immediate control." ***Id.***, ¶6. In addition, Littlejohn argued, as does Dearborn, that ***Soehle v. State***, 60 Wis. 2d 72, 208 N.W.2d 341 (1973), holds a search of a vehicle locked at the time of arrest is an invalid search incident to an arrest. ***Id.***, ¶15.

¶47 We rejected both arguments in ***Littlejohn***. We stated that, under ***State v. Fry***, 131 Wis. 2d 153, 388 N.W.2d 565 (1986), and subsequent case law interpreting ***Fry***, "the government is not required to show in each case that the area searched was actually accessible to the arrestee at the time of the search"; ***Littlejohn***, 747 N.W.2d 712, ¶11, rather, the inquiry, as stated in ***Fry*** was "whether a vehicle's passenger compartment was within 'the area into which an arrestee might reach.'" ***Id.***, ¶18 (citations omitted). We concluded that ***Fry*** had decided this standard was met on facts that were not meaningfully distinguishable from Littlejohn's situation. ***Id.***, ¶¶18, 19. We also concluded that ***Fry*** had overruled ***Soehle*** to the extent the latter case could be read to hold that a search of a vehicle locked at the time of arrest was an invalid search incident to an arrest. ***Id.***, ¶15.

¶48 Because ***Littlejohn***, 747 N.W.2d 712, is controlling, we conclude the search of the passenger compartment of Dearborn's car did not violate his right to

be free from unreasonable searches. Therefore he was not entitled to suppression of the evidence seized in that search.

CONCLUSION

¶49 We conclude that WIS. STAT. § 29.951 defines one crime with multiple modes of commission and comports with the applicable fundamental fairness standard embodied in the due process clause. Therefore, the jury did not need to be unanimous on the mode of commission and the jury instruction did not violate Dearborn's constitutional right to a unanimous jury verdict. We further conclude, relying on ***Littlejohn***, 747 N.W. 2d 712, that the search of the passenger compartment of Dearborn's vehicle did not violate his constitutional right to be free from unreasonable search and seizure. Accordingly, we affirm

By the Court.—Order affirmed.

Recommended for publication in the official reports.

STATE OF WISCONSIN CIRCUIT COURT BRANCH 2 GRANT COUNTY *For Official Use Only*

State of Wisconsin vs. David A. Dearborn

Date of Birth: 10-22-1967

Judgment of Conviction

Sentence Imposed & Stayed, Probation Ordered

Case No.: 2006CM000116

CLERK OF CIRCUIT COURT
FILED
FEB 16 2007
DIANE PERKINS, Clerk
GRANT COUNTY, WIS.

The defendant was found guilty of the following crime(s):

Ct.	Description	Violation	Plea	Severity	Date(s) Committed	Trial To	Date(s) Convicted
1	Resist Conservation Warden	29.951	Not Guilty-Mental Disease/Defect	Misd. A	04-09-2006	Jury	01-09-2007
2	Possession of THC	961.41(3g)(e)	Not Guilty-Mental Disease/Defect	Misd. U	04-09-2006	Jury	01-09-2007

IT IS ADJUDGED that the defendant is guilty as convicted and sentenced as follows:

Ct.	Sent. Date	Sentence	Length	Concurrent with/Consecutive to/Comments	Agency
1	02-15-2007	Probation, sent imposed	1 YR		Department of Corrections
2	02-15-2007	Probation, sent imposed	1 YR		Department of Corrections
2	02-15-2007	License suspended	6 MO		

	Sentence(s) Stayed		Concurrent with/Consecutive to/Comments	Sent. Credit
1	Local jail	4 MO	IMPOSED AND STAYED, if imposed jail to run consecutive to Ct. #2	
2	Local jail	1 MO	IMPOSED AND STAYED	

Conditions of Sentence or Probation

Obligations: (Total amounts only)

Fine	Court Costs	Attorney Fees	Restitution	Other	Mandatory Victim/Wit. Surcharge	5% Rest. Surcharge	DNA Anal. Surcharge
	40.00			16.00	120.00		

Conditions:

Ct.	Condition	Agency/Program	Comments
1	Costs		
1	Employment / School		Def to be employed full tim unless defendant can supply a doctor or psychiatrist excuse that he cannot be employed full time.
1	Other		Random Drug Testing
2	Costs		

IT IS ADJUDGED that 0 days sentence credit are due pursuant to § 973.155, Wisconsin Statutes

IT IS ORDERED that the Sheriff execute this sentence.

STATE OF WISCONSIN CIRCUIT COURT BRANCH 2 GRANT COUNTY *For Official Use Only*

State of Wisconsin vs. David A. Dearborn

Date of Birth: 10-22-1967

Judgment of Conviction

Sentence Imposed & Stayed, Probation Ordered

Case No.: 2006CM000116

BY THE COURT: DIANE PERKINS CLERK OF COURT BY:

George S. Curry, Judge
Anthony J. Pozorski Sr., District Attorney
Andrea L. Olmanson, Defense Attorney

Court Official – DEPUTY CLERK

February 16, 2007
Date

the Grant County side, and it's hard for me to see in there. And so I drove over across the bridge, went over into Richland County on this little boat landing just upstream – little fishing area so I could see people underneath the bridge to see if they were littering or if they were keeping short fish. It's just a place I could sit and watch and see what people are doing as they're fishing. That's where I had gone to that day. I think it was about 5:00 when I started.

Q Okay, then what happened?

A Well, I pulled into that. I drove into that parking lot, and I pull in. There's another vehicle there, a pickup truck that turned out to be Mr. Dearborn's, and I pulled in and I faced towards the bridge where I was watching the fishermen from out of my truck and took out my binoculars, and I started watching – I think there was three or four people there fishing underneath the bridge, and I started watching them.

Q What happened then?

A Well, it was just a few moments. It wasn't long at all that I heard that truck start up and it was leaving. I was still watching people, and it seemed kind of odd. It seemed like it just stopped next to me real slow and kind of was waiting there. And I looked over and it was still sitting there, and I went to wave. He looked at me real mean and he just – I mean, it's like Mr. Pozorski said, I've been given the finger before and a lot of people joke about it and laugh. That's the way it goes. I was a deputy sheriff before I did this, and that stuff happens. But there was so much anger on his face

and to the point where his hands was shaking, and it actually kind of concerned me. He went out of his way to do this. Wasn't just passing down the road. You know, it wasn't – it was just odd. That's never happened before, and it kind of concerned me.

Q So what'd you do?

A Well, he – that took several seconds. He stayed there for a little bit. And he drove out, and I didn't want to – he's there now and he fishes there. I don't – didn't recognize him. I didn't know who it was, but I didn't want to come maybe a few months later or come later not knowing who he is and to go check his fishing license and maybe he's had a problem in the past. Maybe he would want to assault me. He sure just told me he wanted to hurt me, so I wanted to know at least who he is, he's got any warrants, if there's any offi – maybe there's an officer safety warning issued that says if you approach this guy, use caution. So I made note of his license plate, and I have – as Mr. Pozorski stated, I have a computer in my truck that allows me to identify vehicles, people, check records. In addition, I can do reports in my truck. I ran his license plate and it came back to Mr. David Dearborn, and it said that he was revoked. He wasn't allowed to drive his truck. And he had since then driven away and gone down the road. So I started up, figured I better at least talk to him and see what's going on.

Q Okay. So then what happened?

A I started my truck up, backed up out of where I was parked and got up on the road, and I had seen he had gone west down 60 there and he was

starting to go across Highway T back into Grant County. And I got behind his truck and verified that was the same truck that I saw, and I used my two-way radio and I called the license plate in then to Grant County dispatch and had them verify the same that I had saw on the computer. And the dispatch said yes, it goes back to a Mr. Dearborn and it looks like his driving privileges are revoked.

Q And was it your understanding at that time that it would have been a criminal charge of OAR or operating after revocation?

A Yes. It's um –

Q Well, I just ask you that.

A Yes. It was – it was – said it was OWI-related and that's a criminal offense in Wisconsin.

Q Okay. So what did you do then?

A I activated my emergency lights and he pulled over.

Q With respect to where he pulled over –

A By the time I was talking on the radio we had finished crossing the bridge and we were getting close to the Village of Blue River there, and I activated my lights. We were just turning into – getting into Blue River and he turned on West Street, which is the first street in Blue River as you come from Richland County and it goes west. He turned there and he pulled over right soon as he turned off of 60 there.

Q So with respect to where the driver stopped, was that in the Village of Blue River?

A At that point it was. It was right in front of – he stopped right in front of somebody's driveway.

Q Okay. And was it in Grant County, Wisconsin?

A Yes, it was.

Q How many people were in that truck?

A Just – I could just see one.

Q And as it – when you say you could just see one, as it turned out –

A There was just one.

Q There was just one.

A Yes.

Q And who was that?

A It was Mr. Dearborn.

Q The defendant in court here today?

A Yes.

Q So then after he stopped, what happened?

A Well, he pulled over and stopped, and he immediately jumped out of his truck, and we don't like to have people – like to keep them in the vehicle so we can keep control. And I just stepped out and I ordered him to – I said get back in your truck. And he was halfway back and he turned around and started to go back, so I shut my door and I was going to finish calling into dispatch, and I was watching him. He walked up to the truck and he locked it, shut it, and started walking back towards me again. I had just told them where I was at, and so I hung up the mic, and he started to

get back and he looked in his billfold and he took out a DNR license. And I got out and started to conduct my traffic stop.

Q Okay. So then what happened when you walked out and made contact with him?

A Well, I walked up to him. The first thing I asked is are you David Dearborn. He said – nodded his head and said yeah. Then I said well, I guess that's a fishing license you got to show me there. And he looks at me and eyed me over, and for some reason he knew me. I couldn't figure out how he knew me.

MS. BAKER: Objection; foundation.

A I don't know how he knew that.

THE COURT: Just a second. Foundation for?

MS. BAKER: Knowledge that Mr. Dearborn knew him.

THE COURT: Well, he's just repeating what Mr. Dearborn said, so I'll overrule the objection.

A And he does that, and he says well, he says I wasn't fishing, so you can't see it. I said okay, can I see a driver's license then? And he says – puts his fishing license away and pulls out his driver's license and hands it to me. So I go to take it and he holds it out to me and I go – and he wouldn't let go. I pull a little harder and he squeezes a little bit harder and I just pull it out of his hand. I said what's wrong, and I said I give you a ticket before or – I don't remember it. Is there something wrong? And he asked what are you doing, and I said well, I'm checking to see if you're valid to drive.

And he says I'm valid to drive. And I said it sounds like that you're not legal to drive. He says well, I have to take some classes to get my license back. And he said otherwise I'm okay. And I said well, I'm going to go back and I'm going to check again and make sure. So I went back to my truck again and I called dispatch on the phone and I said he says he's okay to drive. It doesn't quite sound right because he said he's got to take classes yet, but he's still insisting that he's okay to drive. And the phone dispatch said nope, no, we double-checked. He is revoked, and it's a criminal offense.

Q So then what happened?

A Well, I got back out of the truck and I said, Mr. Dearborn, it sounds like you are revoked. You're not allowed to drive, and right now you're under arrest for operating a motor vehicle while revoked. And he blew up. He said I'm not revoked. You can just take me home. And I stepped back a little bit because it was just – it was just me and said if there's a problem, we'll get this worked – we'll figure this out. And I said but right now you have to come with me. You're under arrest. And I reached down to touch his right wrist to take him back to my truck, and he tensed up and he pulled his hand out and he come back like that and I drew my OC spray, and I said listen, if you're going to fight, I'm going to spray you. And I showed him the OC and I said I'm going to spray you. And he says I know, I know, I've been sprayed before by the police. I said listen, if you're going to do this, you're going to fight with me, I'm going to spray you. And he

started to calm down a little bit, so I put it back away. And then I – he started – he was pacing, and he never really calmed down much to the point where he was when he first got out of the truck.

Q How about his voice?

A He was screaming and shouting. He just wanted to go home. I could let him go, I could let him go home. And I kept saying what's wrong, why do you want to go home? I just want to go home. And there was a lot of statements I just didn't really – I didn't quite understand. It didn't make any sense to me what was wrong. He didn't tell me that he was mad at me, that I'd given him maybe a ticket in the past, why he was so mad at me.

Q When he was shouting or yelling, did you do anything to try to calm the situation?

A I told him – I showed him my hands like this. You know, I didn't – wasn't grabbing my baton or anything like that. I was just, you know, relax, take a breath. If this is something wrong, we'll get it figured out. I said but right now everybody's telling me – dispatch – you know, it's the third time I checked that you are revoked. You're under arrest. And I said you have to come with me.

Q And then what happened?

A Well, he had his keys in his fist, and I said put those keys down on the tailgate. And he said no, he wasn't going to. He just put them in his pocket. And he was pacing and I think he was going to start to run, and I went to grab his wrist again and he started to move – pull away real hard

and move backwards. I went to grab his shirt and his chest to stop him from running, and then he broke. And he kind of consisted with running and our feet got tangled up, and we both fell to the ground.

Q What happened then?

A I tried to get his hands behind his back. We were kind of, not quite rolling on the ground. I was kind of halfway kneeling. He was trying to kick and push me away when he was on his arm and punching back like this, and I couldn't get his hands behind his back. He was struggling too hard.

Q Was anybody there to help you at that time?

A No. I didn't have -- I called out where I was at, but I didn't have time to do anything else other than that, and I figured if I try to go back, he's just going to run.

Q What do you mean if you try to go back?

A He was really agitated.

Q I know, but when you say try to go back, you mean to go back to your squad to call for help?

A I think he would have ran.

Q Okay. What about that -- did you have that walkie-talkie on your shoulder or not?

A Yeah. At that point I was trying to just hold onto him. So, yeah, it was just like this, minus the tie. I had a turtleneck. So we were on the ground. I couldn't get his hands behind his back, and I was trying and we're kicking. I didn't want to actually start rolling around on the ground because I didn't

want to possibly lose my firearm or anything, and I wasn't keeping control of him. He was just as strong as me or maybe a little bit stronger. And he was starting to force his way to his feet, so I just got back, jumped up. Then he – that's when he was roundhousing as hard as he could. I just kept going back, and he tried to get away and he'd come at me again. We just kind of going like that, and at that point he was going to hit me, so I drew my OC spray and I tried to –

Q What's OC spray?

A Oleoresin of capsicum. It's a pepper spray. It's like Mace, but it doesn't have the Mace product. I guess Mace is not a correct term. It's like – it's cayenne pepper in an aerosol.

Q Something that would burn his eyes, like?

A It doesn't burn your eyes. It doesn't leave any actual burn. It just – if you've gotten a flake of salt in your eye or a pepper, it really irritates your eyes and it really makes them water. And its object is is it makes you close your eyes, and it makes you want to maybe stop fighting.

Q Okay. So what'd you do with that pepper spray?

A I tried to spray him in the face area, and he was swinging and I'm trying to get back. He pulled off his coat and he was getting like that and swinging his jacket at me real hard and he's coming at me. I'd back up and I'd try to keep control of him. I'm sure I probably got some, but I was watching for his eyes to shut and they never – he never give up. It never did.

Q Okay, so then what?

A I put the OC back, and then he started to run, and he ran over – actually he pulled over in front of the driveway and there was some river rock and like some shrubs, nice decorations going up to the porch of the house, and it was the big round multicolored river rock. He ran over and grabbed two handfuls of rock, and he stepped back as a pitcher stance just like that. And I was pretty close. I was probably from me to you away from him, and I was looking to get hurt seriously if he would have whipped that at me that hard, so I drew my firearm and told him to stop.

Q How big were the rocks?

A There was golf ball and some were as big as grapefruit size and some were a lot smaller, but he just grabbed two big handfuls and it was really quick. And I ordered him to stop, put the rocks down as I was trying to run back and not trip and get out of the way. That would have killed me if I would have got hit right in the face or something with a rock that big. I don't know what he was going to do if I was unconscious.

Q So then what happened after you pulled your gun and backed up and –

A He did drop the rocks. And I put my gun back in the holster. Then he started to run towards the house, and he grabs the front door and he's shaking the door like this and the whole time he's yelling and screaming. And I don't know whose house this was. It didn't sound like it's his. He didn't mention that. He was trying to get into the house, and the last thing I wanted to break into someone's house and maybe take a hostage or something like that. Again I tried to pull his hands from the door and get

behind his back, and we were right – I was right on – then he started to kick and punch me again. He was kicking back, like a side – like a karate kick or something. Kicking and elbowing, and I couldn't – I couldn't get him off the door to get his hands behind his back. And beings he's trying to hit me again, I pulled my OC spray and I sprayed him, and this time I was close enough where I actually got some on his face.

Q And what happened then?

A He still started to kick and stuff and I stayed back just a few inches to not get hit as hard as he was, and he started to tire a little bit. And that point he wasn't trying to run, he was trying to get that door open, so I was able to call for help.

Q Okay, then what happened?

A I called dispatch and said I used some OC spray and I needed help, and luckily there was two state troopers just across the bridge in Richland County. I didn't know that they were there. And they – they actually just overheard the traffic. They weren't dispatched by Grant County – the closest deputy if I remember was south of Lancaster. And so they came on their own, and they were really close. They were there pretty shortly, but before they came he did tire out pretty quick. And the OC I think started to work. And he still wouldn't let go of the door, but he sat down. And then I – he was still yelling. I tried again. What's wrong I said. You know, did somebody die or something traumatic? What is causing all this? And he didn't really have any answers that I could understand. And he

was still yelling and screaming. He yelled, then he was spitting, and he actually at one point spit his false teeth out, his front upper ones, at me. He was just so violent.

Q And did these state troopers come?

A A few minutes after I called for help the first trooper arrived, and he came up to the porch and Mr. Dearborn – we told him, you know, you got to come with us, and he wouldn't let go of the door. And with two of us then we were able to pull him off that door, and I had his right hand and the trooper had his left hand. And there's a porch with cement steps, and we couldn't lay him down on the steps. We didn't want to – so we moved him over and laid him down where it was flat, and then we put his hands behind his back and we were able to get handcuffs on him. Then we set him up, and the trooper and I were both asking him what was wrong.

Q Let me ask you this: Was he then placed in a squad car or your vehicle?

A First of all, we made sure he wasn't hurt. And we asked him, and he wasn't hurt and all he wanted was his teeth back. And the one trooper told me not to touch them or give them back, but he said he really wanted his teeth back. And I guess I was afraid if he – I didn't want him to bite me, but I wasn't going to take his handcuffs off and let him start fighting again, so I had a glove and I said I'll give these back to you, put them in your – he wanted me to put them in his mouth, and I figured if that's going to calm him down a little bit, it'd be worth it. And I told him to not bite me if I do this, and he said he wouldn't, and so I put them back and he asked me

how he wanted me to do it – put them in his mouth, and so that's what I did. And then we walked him over to the squad car, but then he wouldn't get into the squad car.

Q What do you mean?

A He wouldn't – we sat him down, but he wouldn't put his feet in, and so the trooper told him if he didn't, they were going to make him. And then he finally did put his feet in and we were able to shut the door.

Q Did you then participate in searching Mr. Dearborn's vehicle?

A Yes. It's standard procedure if you're placed under custodial arrest like that. It's called search incident to arrest. If you're removed from a vehicle, we search the passenger compartment of the vehicle. And I did that. It was a standard cab pickup truck. It's a bench seat. And right next – say if you're the driver, if you put your right hand down, there was lots of clothes, lots of debris in containers. But however, sitting right there on top covered with a glove there was – to me which was obvious with my years of training and experience – was drug paraphernalia.

MR. POZORSKI: May I approach, Your Honor?

THE COURT: Yes.

Q Mr. Stone, I'll show you a photograph marked as Exhibit No. 4. Can you identify that for us, please.

A Yes. That's – I guess that's referred to as a dugout, and what they're – the only thing I've ever seen them used for is to hold a little bit of marijuana. And then a small brass or steel pipe that holds enough for one – for lack of

a better term – one smoke or one hit of marijuana. And this is the one that was sitting on top the seat.

Q Oh, in Mr. Dearborn's truck?

A Yes.

Q And is that a true and accurate photograph of that?

A Yes. I took this photograph.

Q Okay. Now the box itself, that's what you referred to as the dugout?

A Correct.

Q And the – is there like a brass-colored item there?

A Yes. That's a little pipe. It's like a small – it's like a half of a straw, and it's used – it contains enough material at the end for one smoke, I guess one hit is what it's called.

Q Did you take those items then, the pipe and the substance and the dugout, to the crime lab?

A Yes.

Q Was there something in – was there a substance inside –

A Yes. There was a little bit of dried green plant material that looked and smelled like marijuana.

Q In your work capacity have you come across marijuana before?

A I guess I've lost track how many times now. It's several times.

Q Okay. I'll show you what's marked as Exhibit No. 5. I think I already asked you, did you take this to the crime lab?

A Yes.

MR. POZORSKI: I think mine is pretty much off the pattern, Judge, with the exception that I have to add the language regarding the conservation warden. Checking out counsel's.

THE COURT: Did you make – is yours the same as his you know, Attorney Baker?

MS. BAKER: No, Your Honor. My 1765 is quite different from the State's.

THE COURT: You have verbal debate does not constitute resistance?

MS. BAKER: Yes.

THE COURT: Okay. Paragraph one adds a lot. It says verbal debate does not constitute resistance, which is a modification. It doesn't include the second – the words, to obstruct an offi – a conservation warden means that the conduct of the defendant prevented or made more difficult the performance of the warden's duties. You don't have those words included.

MS. BAKER: No.

THE COURT: But you have locking of a car door does not constitute resistance?

MS. BAKER: Yes.

THE COURT: Failure to obey a command to reenter a vehicle does not constitute resistance. So the last three sentences of

Attorney Baker's number one paragraph under the elements is substantially different. Mr. Pozorski?

MR. POZORSKI: That's correct, Your Honor, and I think her instruction focuses too much on resistance and leaves out the other way the State will prove the case, which is based upon obstructing. Furthermore, I'm not aware of any case law which says that the locking of a car door would not constitute obstructing or the failure to obey a warden's command would constitute obstructing, or if not constitute, I'm not aware of any case law that counsel's citing for adding that language. Now, I would concede that her statements are correct as they relate to resistance, because the definition of resistance involves a use of force or a threat of force directed at the officer. But again, she focuses – I think this instruction focuses too much on resistance and leaves out the whole idea of obstructing, and I think this could confuse the jury because they might think that well, this is called resisting a warden and here the judge is telling them as a matter of law what constitutes resisting a warden when in fact I think they might then follow that instruction and not consider these other facts as they might apply to obstructing a warden.

MS. BAKER: And, Your Honor, if I could respond to that. I don't think it's proper for this to go to the jury on both resisting and obstruction because it would possibly defend – or deny the defendant the right to a unanimous jury. You know, part of the jury might say okay, he resisted, but he didn't obstruct. You know, maybe some of the jurors might

think okay, he obstructed, but didn't resist, and so he would be found guilty of the crime charged, but based on the jury crediting different facts. So for that reason I would oppose the State going forward with the obstructing. Also, you know the locking of a car door is perfectly lawful. It's not an unlawful act. Standing behind your vehicle is not an unlawful act. Debating with somebody is so protected by the First Amendment that – you know, in this case it's not like he was issuing any threats here. That just can't be a lawful element of a crime. It's protected by the First Amendment. So I would ask that the Court not go forward with the obstructing, because otherwise the jury could be confused. I mean if you debate with someone or you move slowly rather than fast or if you lock your car doors, that might be perfectly lawful conduct, but I suppose it could obstruct, but at some point lawful conduct has to take precedence and any due process would prohibit the criminalization of these ordinary lawful behaviors.

THE COURT: Mr. Pozorski?

MR. POZORSKI: The problem I think that counsel's argument presents is it would almost require the State then under this circumstance to charge one count of resisting for when the defendant punched Warden Stone. We would have to charge one count of resisting for when he threw punches at Warden Stone but missed, because that would be the use of force or threat of force directed at the officer. We'd have to charge one count of obstructing for the defendant running away

from the officer, for picking up the rocks, for all the other conduct which the defendant engaged in which made the officer's job more difficult. And I guess if that's what the Court decides, well then that's fine. I mean because if the Court makes the decision on that, then that's something that we would then have to live with; just that it would result then in a person under these circumstances being charged with three counts of resisting for in effect one incident. And then we hear the opposite argument. Then the argument is, Judge, this is double jeopardy. They're really trying to prosecute a defendant for three crimes when in fact it's all one incident and one crime. And that would be a violation of due process. So either way we get an argument of a violation of due process, we get a violation the other way of double jeopardy. Under this circumstance we could still have unanimous jury. They would not necessarily be unanimous as to whether it was obstructing or resisting or assault, but they could all be unanimous as to whatever conduct the defendant engaged in constitutes resisting. So – and I think that's where we would still have the unanimous verdict.

THE COURT: Well, taking a look at Attorney Baker's itemization of the different facts, I don't believe we should itemize the facts, because we have to look at – the jury has to look at this as the totality of all the facts, not just each individual fact. I agree with her that these individual things do not constitute resistance, but those coupled with everything else the jury can consider. So I think the better instruction is

that which the jury instruction committee has drafted. So I won't give that paragraph itemizing those three items and leaving out the paragraph which starts with the words to obstruct a conservation officer. I'll put that in. So I'm going to give Mr. Pozorski's No. 1. No. 2; is there any change in No. 2?

MS. BAKER: No.

THE COURT: No. 3?

MS. BAKER: Yes.

THE COURT: Where is it changed?

MS. BAKER: Well, what I oppose of course is that any sort of inference that a conservation warden can lawfully engage in a stop when he has simply a reasonable suspicion that the person has committed, is committing, or is about to commit a crime. I just object to any sort of instruction that a conservation warden can make any sort of tarry sort of stop pertaining to traffic crimes. I think that the -- I guess I also would like the language in there that specifically says that a warden who uses excessive force does not act with lawful authority. And then the rest -- he is entitled to resist a warden who uses unreasonable or excessive force.

THE COURT: It says here in the standard instruction, a conservation warden making an arrest may only – may use only the amount of force reasonably necessary to take a person into custody. So that in and of itself excludes excessive forces. It did say a person is

1765 (M) RESISTING A CONSERVATION WARDEN — § 29.951

Statutory Definition of the Crime

Resisting a conservation warden, as defined in § 29.951 of the Criminal Code of Wisconsin, is committed by one who knowingly assaults, resists, or obstructs a warden while the warden is doing any act in an official capacity and with lawful authority.

State's Burden of Proof

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following four elements were present.

Elements of the Crime That the State Must Prove

1. The defendant assaulted, resisted, or obstructed a conservation warden.

   To resist a conservation warden means to oppose the warden by force or threat of force. The resistance must be directed to the warden personally.

   To obstruct a conservation warden means that the conduct of the defendant prevented or made more difficult the performance of the warden's duties.

2. The conservation warden was doing an act in an official capacity.

   Conservation wardens act in an official capacity if they perform duties that they are employed to perform. A conservation

(Partial transcript as ordered by Attorney Eileen Hirsch)

THE COURT: So you based it on the fact that he was handcuffed, in handcuffs in the back of a police car; therefore, the police don't have grounds to search the vehicle, his vehicle, for safety reasons?

MS. HIRSCH: Correct. And that was the holding in *Belton*. And I'm thinking I may need to move for a remand and bring it back to this court because of the procedural history of the case.

THE COURT: Well, if you'd like to take it to the Court of Appeals right away, that's okay with me.

MS. HIRSCH: But I just – I tell you that and I tell you the background to say I'm sorry that I – I didn't mean to sandbag anybody coming into court today. This has just come up and I'm running behind in my work, which is why it's coming up so close to our hearing today. So I do have a challenge to that second issue as well.

CERTIFICATION AS TO APPENDIX

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

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

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated this 21st day of December, 2009.

Signed:

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IN SUPREME COURT

No. 2007AP1894-CR

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Plaintiff-Respondent,

v.

DAVID A. DEARBORN,

Defendant-Appellant-Petitioner.

ON APPEAL FROM A JUDGMENT OF CONVICTION ENTERED IN THE GRANT COUNTY CIRCUIT COURT, THE HON. GEORGE S. CURRY, PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT STATE OF WISCONSIN

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TABLE OF CONTENTS

CASES CITED

Page

Page

STATUTES CITED

OTHER AUTHORITIES

STATE OF WISCONSIN

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STATEMENT OF THE ISSUES PRESENTED

1. The first issue in this case is whether the court of appeals conclusion that the search of Defendant-Appellant-Petitioner Dearborn's vehicle met the standard as a lawful search incident to arrest, can stand after the April 21, 2009, decision of the United States Supreme Court in *Arizona v. Gant.* The circuit court denied Dearborn's motion to suppress, and the court of appeals affirmed. If, as the parties agree, it cannot, the issue then becomes the extent to which prior decisions of this court, upon which the court of appeals relied, need to be modified or overruled.

2. The second issue in this case, not addressed by Petitioner Dearborn, is whether this court should nevertheless uphold the court of appeals decision that evidence seized from the search of the vehicle should not be suppressed on the basis of the good faith exception to the exclusionary rule, or more broadly because the exclusionary rule is not applied when it will not serve to deter police misconduct. There is no dispute that the search was lawful under then applicable federal and state case law, prior to the decision in *Gant.*

3. The third issue is whether Dearborn was denied his right to a unanimous verdict by a jury instruction that required the State to prove that Dearborn had assaulted, resisted or obstructed a conservation warden, without requiring the jury to agree specifically as to which behavior was engaged in by the defendant. The circuit court refused Dearborn's request for an alternative instruction, and the court of appeals affirmed.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

As in most cases accepted by this court for full briefing, both oral argument and publication appear warranted.

SUPPLEMENTAL STATEMENT OF THE CASE

Pursuant to Wis. Stat. § (Rule) 809.19(3)(a), the State elects not to present a full statement of the case. Facts are presented below as necessary to develop the argument.

ARGUMENT

I. THE SEARCH OF DEARBORN'S VEHICLE WAS A LAWFUL SEARCH INCIDENT TO ARREST UNDER LAW IN EFFECT PRIOR TO THE UNITED STATES SUPREME COURT'S APRIL 21, 2009 DECISION IN *ARIZONA v. GANT,* BUT NOT THEREAFTER.

A. The Standard Of Review.

The standard of review is one of "constitutional fact." *State v. Malone*, 2004 WI 108, ¶ 14, 274 Wis. 2d 540, 683 N.W.2d 1; *State v. Johnson,* 2007 WI 32, ¶ 13, 299 Wis. 2d 675, 729 N.W.2d 182. This entails a two-step process in which: 1) the trial court's finding of evidentiary or historical fact are upheld unless clearly erroneous; and 2) the appellate court independently evaluates those facts against the constitutional standard to determine whether the search was lawful. *State v. Matejka*, 2001 WI 5, ¶ 16, 241 Wis. 2d 52, 621 N.W.2d 891.

B. The Court Of Appeals Properly Held That, As Of The Date Of The Decision, The Search Of Dearborn's Vehicle Was A Lawful Search Incident To Arrest.

The July 24, 2008 court of appeals' decision in *State v. Dearborn,* 2008 WI App 131, 313 Wis. 2d 767, 758 N.W.2d 463, affirmed Dearborn's convictions for violation of Wis. Stat. § 29.951, entitled "Resisting a warden," and for possession of THC in violation of Wis. Stat. § 961.41(3g)(e). Specifically, the court held

that: 1) the language of § 29.951 that "any person who assaults or otherwise resists or obstructs any warden in the performance of duty shall be subject to the penalty. . . ." created one crime with multiple modes of commission for which the jury did not have to be unanimous; and 2) the search of his car leading to discovery of the marijuana was lawful. *Dearborn*, 313 Wis. 2d 767, ¶¶ 2-3.

The warden stopped Dearborn's truck after determining his driver's license was revoked. *Dearborn*, 313 Wis. 2d 767, ¶ 5. Dearborn had made a "rude gesture" to the warden at a boat landing and had driven off. *Id.* After stopping the truck Dearborn got out and approached the warden. *Id.* The warden instructed Dearborn to get back into his truck, but Dearborn instead closed and locked his trunk door, and remained outside of it. *Id.* The warden obtained Dearborn's license, verified that he was revoked after Dearborn had denied it, and told him he was under arrest. *Id.* Dearborn became upset, resisted being handcuffed, and refused to the give the warden his keys. *Id.* The warden tried to grab Dearborn's wrist to prevent his running away, and they fell to the ground. *Id.* Dearborn continued to resist being handcuffed by pushing and kicking. *Id*., ¶ 6.

After getting up, Dearborn deflected the warden's pepper spray by swinging his jacket at the warden. *Dearborn*, 313 Wis. 2d 767. Dearborn ran to a nearby house, picked up rocks, and postured as if to throw them at the warden. *Id.* Dearborn dropped the rocks when the warden drew his gun. *Id.*

Dearborn then ran to the front door of the house, and began shaking it while yelling and screaming. *Dearborn*, 313 Wis. 2d 767. The warden caught up with him, but was not able to get Dearborn's hands behind his back because of his kicking and punching. *Id.* The warden partially subdued Dearborn with pepper spray and called for backup. *Id.*

A state trooper arrived, and the two together were able to get Dearborn off the door handle and handcuff him. *Dearborn*, 313 Wis. 2d 767. Dearborn refused to put his feet in the trooper's squad car until the trooper threatened to make him do it. *Id.*

The warden then searched the passenger compartment of Dearborn's truck, finding a small amount of marijuana in a container and drug paraphernalia. *Dearborn*, 313 Wis. 2d 767, ¶ 7.

The circuit court denied Dearborn's motion to suppress evidence found in his truck. *Dearborn*, 313 Wis. 2d 767, ¶ 8. The court of appeals affirmed the circuit court based upon its recent decision in *State v. Littlejohn,* 2008 WI App 45, 307 Wis. 2d 477, 747 N.W.2d 712. *Dearborn*, 313 Wis. 2d 767, ¶¶ 46-48. *Littlejohn* had held that a vehicle search incident to arrest was lawful even if the defendant was handcuffed and secured in a squad car, based upon *State v. Fry,* 131 Wis. 2d 153, 388 N.W.2d 565 (1986).

C. The State Takes Issue With Little Of Dearborn's Rendition Of The Facts Or Of The Law Prior To The United States Supreme Court's Decision In *Arizona v. Gant*.

The State does not take issue with Dearborn's summary of the procedural history of this case or with his summary of the facts (*see* Dearborn's Brief at 2-6). The State does not dispute Dearborn's chronology of case law dealing with search incident to arrest, except perhaps as to emphasis and nuance (*see* Dearborn's Brief at 6-11).

The State acknowledges that under the holding of the United States Supreme Court's decision in *Arizona v. Gant,* 556 U.S. ___, 129 S. Ct. 1710, __ (2009), issued

April 21, 2009, the search can no longer be justified as incident to arrest, because Dearborn was handcuffed and secured, and because it was not reasonable to expect to find evidence of driving after revocation in the locked passenger compartment of his vehicle. (*See* also Dearborn's Brief at 11-12).

The State does not dispute the bulk of Dearborn's analysis of *Fry,* 131 Wis. 2d 153. (Dearborn's Brief at 12-13). But it is not accurate to state that "the majority in *Fry* did not expressly consider and decide whether the *Belton* rule applied when the defendant was handcuffed and secured in a squad car. . . ." (Dearborn's Brief at 13). Early in the opinion, the court noted that "[Fry] was searched, handcuffed, placed in a squad and removed from the scene . . . after discovery . . . of a weapon in the glove compartment of his car." *Id.* at 158. The court then proceeded to hold that the *New York v. Belton* 453 U.S. 454 (1982) rule applied to these circumstances. *Fry*, 131 Wis. 2d at 174.

The State does not dispute Dearborn's conclusion (Dearborn's Brief at 14-15) that *Fry* and certain subsequent cases need to be modified in light of *Gant.* But the thrust of his argument would appear more an attempt to prove that Wisconsin law was a wholly unwarranted extension of *Belton* to circumstances in which it clearly was never intended to apply. This argument is incorrect because in *Gant* the Court: 1) acknowledged that the majority of court's in the land have misinterpreted *Belton;* and 2) the dissent insisted that the Court had in fact overruled *Belton,* and that it was not misinterpreted. *Gant,* 556 U.S. ___, 129 S. Ct. 1710 (2009).

Dearborn's focus is all the more perplexing given that he acknowledges that in *Thornton v. United States,* 541 U.S. 615 (2004), the Supreme Court upheld a vehicular search incident to arrest where the defendant was also arrested, handcuffed and secured in a squad car (Dearborn's Brief at 9-10).

D. The April 21, 2009, Decision Of The United States Supreme Court In *Arizona v. Gant*, Which Applies Retroactively To Appeals Pending At The Time Of The Decision, Means That The Search Of Littlejohn's Car Can No Longer Be Justified As A Search Incident To Arrest.

On April 21, 2009, the United States Supreme Court issued its decision in *Arizona v. Gant,* 556 U.S. __ , 129 S. Ct. 1710. The Supreme Court held that:

> [W]e hold that *Belton* does not authorize a vehicle search incident to a recent occupant's arrest after the arrestee has been secured and cannot access the interior of the vehicle. Consistent with the holding in *Thornton v. United States,* 541 U.S. 615, 124 S.Ct. 2127, 158 L.Ed.2d 905 (2004), and following the suggestion in Justice Scalia's opinion concurring in the judgment in that case, *id.,* at 632, 124 S.Ct. 2127, we also conclude that circumstances unique to the automobile context justify a search incident to arrest when it is reasonable to believe that evidence of the offense of arrest might be found in the vehicle.

Gant, 556 U.S. at 1714.

The Court acknowledged that its opinion in *Belton* has not only been interpreted by the courts to allow vehicle searches incident to arrest of even handcuffed defendants, but that this is largely attributable to Justice Brennan:

> [O]ur opinion has been widely understood to allow a vehicle search incident to the arrest of a recent occupant even if there is no possibility the arrestee could gain access to the vehicle at the time of the search. **This reading may be attributable to**

> **Justice Brennan's dissent in *Belton,*** in which he characterized the court's holding as resting on the "fiction . . . that the interior of a car is always within the immediate control of an arrestee who has recently been in the car." 453 U.S., at 466, 101 S.Ct. 2860.

Gant, 556 U. S. 1718 (emphasis added). Later in the *Gant* opinion the Court made reference to "blind adherence to ***Belton's*** **faulty assumption**." *Id*. at 1723 (emphasis added).

The Court further acknowledged that *Belton* has been so interpreted by a majority of federal courts, especially since the Court's 2004 decision in *Thornton*:

> Since we decided *Belton,* Courts of Appeals have given different answers to the question whether a vehicle must be within an arrestee's reach to justify a vehicle search incident to arrest,[2] but **Justice Brennan's reading** of the Court's opinion has predominated. As **Justice O'Connor observed, "lower court decisions seem now to treat the ability to search a vehicle incident to the arrest of a recent occupant as a police entitlement** rather than as an exception justified by the twin rationales of *Chimel." Thornton,* 541 U.S., at 624, 124 S.Ct. 2127 (opinion concurring in part). **Justice Scalia has similarly noted that, although it is improbable that an arrestee could gain access to weapons stored in his vehicle after he has been handcuffed and secured in the backseat of a patrol car, cases allowing a search in "this precise factual scenario . . . are legion."** *Id.,* at 628, 124 S.Ct. 2127 (opinion concurring in judgment) (collecting cases).[3] Indeed, some courts have upheld searches under *Belton* "even when . . . the handcuffed arrestee has already left the scene." 541 U.S. at 628, 124 S.Ct. 2127 (same).
>
> [3]The practice of searching vehicles incident to arrest after the arrestee has been handcuffed and secured in a patrol car has not abated since we decided *Thornton.*

Gant, 556 U.S. at 1718-19 (emphasis added; citations and footnote omitted).

The Court even acknowledged that the State's:

> **[R]eading of *Belton* has been widely taught in police academies and that law enforcement officers have relied on the rule in conducting vehicle searches during the past 28 years.**

Gant, 556 U.S. at 1722 (emphasis added; footnote omitted).

The Court rejected this reading of *Belton,* concluded that the supposed "bright line" rule has generated a great deal of uncertainty, and held that a vehicle could only be searched incident to a recent occupant's arrest when the arrestee was unsecured and within reaching distance of the passenger compartment at the time of the search. *Gant,* 556 U.S at 1719, 1721. The Court also held that because Gant had been arrested for driving with a suspended license the police could not expect to find evidence for the offense in the passenger compartment of the car. The Court concluded by stating that:

> Because police could not reasonably have believed either that Gant could have accessed his car at the time of the search or that evidence of the offense for which he was arrested might have been found therein, the search in this case was unreasonable.

Gant, 556 U.S. at 1719.

The State acknowledges that the April 13, 2006, search in Dearborn's case does not comport with the rule announced in *Gant* on April 21, 2009, because: 1) Dearborn was handcuffed and secured at the time of the search; and 2) the police did not have a reasonable expectation of finding evidence of the crime for which he was arrested – driving after revocation – in the passenger compartment of his car. The State also acknowledges that

Fry and its progeny need to be modified in order to conform to the rule enunciated in *Gant.*

The four dissenting justices in *Gant*, which included Chief Justice Roberts, were adamant in insisting that the five in the majority had in fact overruled *Belton* and *Thornton,* the majority's protestations to the contrary notwithstanding. *Gant,* 556 U.S. at 1725-32. The dissenters also agreed that the nearly uniform reliance by police agencies nationwide upon the interpretation of *Belton* and *Thornton* by the majority of courts in the land, strongly militated against overruling these cases. *Id.* Even Justice Breyer, who had misgivings about *Belton's* "bright line" rule, thought that the Court had in fact overtly ratified the prevailing interpretation of *Belton* in *Thornton. Id*. at 1726. And, Justice Alito's dissent presaged the next issue to be dealt with in the State's argument – what happens to all those "cases now on appeal . . . [that] were conducted in scrupulous reliance on that precedent." *Id.* at 1728.

E. The State Does Not Claim Waiver Of The Issue.

At pages 15-16 of his brief, Dearborn argues that he has not waived the issue of the search. The court of appeals determined that even if Dearborn had failed to preserve the issue in the circuit court, it would not invoke waiver because the issue involves a question of law, has been briefed, and is of sufficient public interest to merit a decision. *Dearborn*, 313 Wis. 2d 767, ¶ 44. The State did not cross-appeal any part of the court of appeals' decision, and does not now claim that Dearborn waived the issue. Moreover, the issue was contained in Dearborn's petition for review to this court, and this court's order granting the petition did not exclude any of the issues raised.

II. THIS COURT SHOULD NEVERTHELESS AFFIRM THE COURT OF APPEALS' REVERSAL OF THE CIRCUIT COURT'S SUPPRESSION ORDER ON THE ALTERNATIVE GROUNDS OF THE GOOD FAITH EXCEPTION TO THE EXCLUSIONARY RULE, AND BECAUSE THE EXCLUSIONARY RULE DOES NOT APPLY WHEN THE OFFICERS ACTED LAWFULLY UNDER CONTROLLING LAW IN EFFECT AT THE TIME OF DEARBORN'S ARREST.

A. A Lower Court's Decision May Be Affirmed On A Ground Not Advanced Below.

In *Kafka v. Pope*, 186 Wis. 2d 472, 476, 521 N.W.2d 174 (Ct. App. 1994) the court stated that appellate courts can affirm for reasons not stated by the trial court even if the reasons were not argued before the trial court. *See also State v. Milashoski,* 159 Wis. 2d 99, 108-09, 464 N.W.2d 21 (1990).

Dearborn cannot claim that the issue was waived, because the court of appeals determined that the search was lawful at the time it was conducted and the State defended the challenge to the search on the merits. Moreover, waiver is not normally employed against a respondent seeking to uphold a trial court ruling. *State v. Rodriguez,* 2007 WI 252, ¶ 12, 306 Wis. 2d 129, 743 N.W.2d 460. The rule of waiver is one of judicial administration and not of appellate jurisdiction. *State v. Cox,* 2007 WI App 38, ¶ 6, 300 Wis. 2d 236, 730 N.W.2d 452. "When an issue involves a question of law has been briefed by the opposing parties and is of sufficient public

interest to merit a decision, this court has discretion to address the issue." *State v. Moran,* 2005 WI 115, ¶ 31, 284 Wis. 2d 24, 700 N.W.2d 884.

And in *State v. Ward*, 2000 WI 3, ¶ 45, 231 Wis. 2d 723, 604 N.W.2d 517, a case dealing specifically with the good faith exception, this court held that the application of the Wisconsin Constitution to exceptions to the exclusionary rule was a question of law of sufficient public interest to merit a decision.

B. The Finding Of A Good Faith Exception, Or More Broadly The Inapplicability Of The Exclusionary Rule Because There Was No Police Misconduct To Deter, Is Consistent With The Recent United States Supreme Court Opinion In *Herring v. United States,* issued January 14, 2009.

1. The decision in *Herring* leaves no doubt as to the continued vitality, and expansion, of the good faith exception.

In *Herring v. United States,* __ U.S. __ , 129 S. Ct. 695 (2009), the Court held that the exclusionary rule did not apply to evidence seized incident to an invalid arrest. The defendant had been arrested by one jurisdiction upon receiving information from another jurisdiction that there was a warrant for his arrest, which in fact had been withdrawn months before, but not noted because of faulty police record keeping. *Id*. at 698. The Court affirmed the holding of both lower courts that the exclusionary rule did not apply in these circumstances and stated:

> Our cases establish that such suppression is not an automatic consequence of a Fourth Amendment violation. Instead, the question turns on the culpability of the police and the potential of exclusion to deter wrongful police conduct. Here the error was the result of isolated negligence attenuated from the arrest. We hold that in these circumstances the jury should not be barred from considering all the evidence.

Herring, 129 S. Ct. 695.

Two facts of importance to the Court were that: 1) the arresting officers did nothing wrong; and 2) the error of the other jurisdiction was mere negligence, rather than recklessness or deliberate misconduct. *Herring,* 129 S. Ct. at 700. In the course of its analysis the Court stated:

> Indeed, **exclusion "has always been our last resort, not our first impulse**," *Hudson v. Michigan,* 547 U.S. 586, 591, 126 S.Ct. 2159, 165 L.Ed.2d 56 (2006). . . .
>
> **First, the exclusionary rule is not an individual right and applies only where it "'result[s] in appreciable deterrence.'"** *Leon, supra,* at 909, 104 S.Ct. 3405 (quoting *United States v. Janis,* 428 U.S. 433, 454, 96 S.Ct. 3021, 49 L.Ed.2d 1046 (1976)). **We have repeatedly rejected the argument that exclusion is a necessary consequence of a Fourth Amendment violation**. *Leon, supra,* at 905-906, 104 S.Ct. 3405; *Evans, supra,* at 13-14; *Pennsylvania Bd. of Probation and Parole v. Scott,* 524 U.S. 357, 363, 118 S.Ct. 2014, 141 L.Ed.2d 344 (1998).

Herring, 129 S. Ct. at 700 (emphasis added).

> **In addition, the benefits of deterrence must outweigh the costs.** *Leon, supra,* at 910, 104 S.Ct. 3405. **"We have never suggested that the exclusionary rule must apply in every circumstance in which it might provide marginal deterrence."** *Scott, supra,* at 368, 118 S.Ct. 2014.

> "[T]o the extent that application of the exclusionary rule could provide some incremental deterrent, that possible benefit must be weighed against [its] substantial social costs." *Illinois v. Krull,* 480 U.S. 340, 352-353, 107 S.Ct. 1160, 94 L.Ed.2d 364 (1987). . . . **The principal cost of applying the rule is, of course, letting guilty and possibly dangerous defendants go free-something that "offends basic concepts of the criminal justice system."** *Leon, supra,* at 908, 104 S.Ct. 3405. **"[T]he rule's costly toll upon truth-seeking and law enforcement objectives presents a high obstacle for those urging [its] application."** *Scott, supra,* at 364-365, 118 S.Ct. 2014 . . . ; *see also United States v. Havens,* 446 U.S. 620, 626-627, 100 S.Ct. 1912, 64 L.Ed.2d 559 (1980); *United States v. Payner,* 447 U.S. 727, 734, 100 S.Ct. 2439, 65 L.Ed.2d 468 (1980).

Herring, 129 S. Ct. at 700-701 (emphasis added).

The Court clarified that the "good faith" exception would be better referred to as "objectively reasonable reliance." *Herring,* 129 S. Ct. at 701. The Court then traced the extension of the good faith exception from reliance upon an invalid search warrant to reliance upon a statute later declared unconstitutional to reliance upon mistaken information in a court's database. *Id*. at 701.

The Court made clear that exclusionary rule should be invoked **only if** the police conduct was flagrant and the police can be charged with knowledge of the unconstitutionality:

> The extent to which the exclusionary rule is justified by these deterrence principles varies with the culpability of the law enforcement conduct. As we said in *Leon,* "an assessment of the flagrancy of the police misconduct constitutes an important step in the calculus" of applying the exclusionary rule. 468 U.S. at 911, 104 S.Ct. 3405. Similarly, in *Krull* we elaborated that **"evidence should be suppressed 'only if it can be said that the law enforcement officer had knowledge,** or may properly be charged with knowledge, that the search was unconstitutional

> under the Fourth Amendment.'" 480 U.S., at 348-349, 107 S.Ct. 1160.

Herring, 129 S. Ct. at 701 (emphasis added).

The Court concluded by holding that:

> To trigger the exclusionary rule, police conduct **must** be sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the justice system. As laid out in our cases, the exclusionary rule serves to deter deliberate, reckless, or grossly negligent conduct, or in some circumstances recurring or systemic negligence. The error in this case does not rise to that level.

Herring, 129 S. Ct. at 702 (emphasis added).

The Court also raised two other points important to the analysis. The first is that the court acknowledged that suppression **would have** some deterrent effect on sloppy police record keeping, but that it was not worth the "substantial social costs." *Herring,* 129 S. Ct. at 702.

The second point was the Court drawing an analogy to *Franks v. Delaware,* 438 U.S. 154 (1978), wherein the Court held "that mere police negligence in obtaining a warrant did not even rise to the level of a Fourth Amendment violation, let alone meet the more stringent test for triggering the exclusionary rule." *Herring*, 129 S. Ct. at 703. Therefore, it would make no sense to suppress evidence in Herring's case, absent recklessness or deliberate misconduct. *Id.*

And finally, the two dissenting opinions in which four justices joined – vigorous as it was – was premised upon the fact that there **had** been some police misconduct, even if mere negligence by the non-arresting agency. *Herring,* 129 S. Ct. at 704-11.

There can be no serious dispute that under the *Herring* analysis the good faith – or objectively

reasonable reliance – exception should be applied in *Dearborn.* This is because: 1) there was no police misconduct, not even negligence; 2) the police reasonably relied on their training, which incorporated federal and state law going back at least twenty years; 3) the exception is **not** limited to invalid search warrants; 4) the societal costs would be significant, because Dearborn's guilt was beyond any reasonable doubt; and 5) there would be no deterrence of police misconduct – none. This conclusion is fortified by the *Gant* Court acknowledging the Supreme Court's own role in misleading lower courts in their interpretation of *Belton* and *Thornton.*

2. The fact that the Supreme Court did not discuss the exclusionary rule or good faith exception does not undermine the State's argument.

The Supreme Court did not discuss the exclusionary rule in *Gant.* There is only a footnote reference to the doctrine of qualified immunity shielding officers from liability in civil cases. *Gant,* 129 S.Ct. at 1723 n.11.

This issue was squarely addressed in *United States v. Peoples,* ___ F. Supp. 2d ___, No. 3586564, (W.D. Mich. 2009), in an opinion dated October 29, 2009. Even though the court did not apply the good faith exception, it made plain that nothing in the Supreme Court's *Gant* decision can be read as mandating suppression simply because it did not consider the good-faith exception. This is because, first of all, the Court did **not** hold that the evidence should be suppressed. *Peoples,* No. 3586564, slip op. at 3, citing to *Arizona v. Gant,* 128 S. Ct. at 1443. Secondly, clearly established Supreme Court precedent holds that a decision is limited to the issue for which certiorari was granted. *Peoples,* No. 3586564, citing to

Yee v. Escondido, Cal., 503 U.S. 519, 535-36 (1992). Third, certiorari was granted **only** on the issue of whether the search violated the Fourth Amendment. *Peoples,* No. 3586564. And, fourth, the mere fact that the United States Supreme Court affirmed the Arizona Supreme Court – the **only** court to order suppression - did **not** make "the entire holding of the Arizona Supreme Court the holding in *Gant."* *Peoples,* No. 3586564. And finally, the parties made no arguments to the Supreme Court regarding the good-faith exception, and not even the Arizona Supreme Court considered the issue. *Peoples,* No. 3586564.

This conclusion was fortified by the recent Sixth Circuit decision in *United States v. Lopez,* 567 F.3d 755, 757-58 (6th Cir. 2009), finding a pre-*Gant* search to be in violation of the Fourth Amendment, but simply remanding to the district court for determination of a remedy:

> The Sixth Circuit's holding in *Lopez* suggests that this Court should not mechanistically suppress the evidence as a direct result of the holding in *Gant,* but instead should apply *Gant* only to determine whether the search violated the Fourth Amendment.

Peoples, No. 3586564, slip op. at 4.

Moreover, the Supreme Court itself ratified this proposition in *Thornton,* 541 U.S. 615, 624-26, n.4. In response to Justice Scalia's concurrence noting that because Thornton was handcuffed in a squad car and no part of his own car was in his immediate control, the majority stated that the issue had not been raised and would not be considered. *Id.*

Given the citations immediately above, it cannot be said that the *Gant* court's failure to discuss the exclusionary rule or the good faith exception undermines the State's argument in any respect.

C. The Tenth Circuit's Decision In *United States v. McCane,* Finding The Good Faith Exception Applicable To A Pre-*Gant* Search, Is Persuasive And Should Be Adopted By This Court.

On July 28, 2009, the Tenth Circuit issued its opinion in *United States v. McCane,* 573 F.3d 1037 (10th Cir. 2009), petition for certiorari filed October 1, 2009, 78 USLW 3221, #09-402, and held that evidence seized during the search of a vehicle that was valid prior to *Gant* was admissible under the good faith exception to the exclusionary rule. The court's opinion identified the key issues in the analysis. First of all, the court reiterated the Supreme Court's teaching that: 1) the Fourth Amendment does not itself preclude the use at trial of unlawfully obtained evidence; 2) the exclusionary rule is **not** an individual right, but a remedy applied **only** when it results in substantial deterrence of police misconduct; and 3) the societal benefit to that deterrence must exceed the societal costs of letting criminals go free. *McCane,* 573 F.3d at 1042.

Secondly, the court noted that exceptions to application of the exclusionary rule have expanded over time to ensure that the rule is only applied when substantial deterrence of police misconduct will result. *McCane,* 573 F.3d at 1042-43.

The Tenth Circuit further stated:

> Finally, in its recent good-faith decision, *Herring,* the Court extended the good-faith exception to police reliance upon the negligent mistake of a fellow law enforcement employee, as opposed to a neutral third party. 129 S. Ct. at 704. . . . In discussing the principles of the exclusionary rule, the Court stated that "[t]he extent to which the exclusionary rule is justified by . . . deterrence principles varies with the culpability of the law enforcement conduct." *Id.* at 701. Thus, "assessment

> of the flagrancy of the police misconduct constitutes an important step in the calculus of applying the exclusionary rule." *Id.* (quotation omitted).

McCane, 573 F.3d at 1043-44.

> Two inseparable principles have emerged from the Supreme Court cases and each builds upon the underlying purpose of the exclusionary rule: deterrence. First, the exclusionary rule seeks to deter objectively unreasonable police conduct, *i.e.*, conduct which an officer knows or should know violates the Fourth Amendment. . . . Second, the purpose of the exclusionary rule is to deter misconduct by law enforcement officers, not other entities, and even if it was appropriate to consider the deterrent effect of the exclusionary rule on other institutions, there would be no significant deterrent effect in excluding evidence based upon the mistakes of those uninvolved in or attenuated from law enforcement. . . . Based upon these principles, we agree with the government that it would be proper for this court to apply the good-faith exception to a search justified under the settled case law of a United States Court of Appeals, but later rendered unconstitutional by a Supreme Court decision.

McCane, 573 F.3d at 1044 (citations omitted).

The Tenth Circuit also pointed out that applying *Gant* retroactively to cases still pending does **not** mean that those defendants are entitled to the exclusionary rule as a remedy, because the rule is **not** an individual right:

> McCane argues the retroactivity rule announced in *Griffith v. Kentucky,* 479 U.S. 314, 322-23, 107 S.Ct. 708, 93 L.Ed.2d 649 (1987), requires application of the Supreme Court's holding in *Gant* to this case. The issue before us, however, is not whether the Court's ruling in *Gant* applies to this case, it is instead a question of the proper remedy upon application of *Gant* to this case. In *Leon,* the Supreme Court considered the tension between the retroactive application of Fourth Amendment decisions to pending cases and the good-faith exception to the exclusionary rule, stating that

> retroactivity in this context "has been assessed largely in terms of the contribution retroactivity might make to the deterrence of police misconduct." 468 U.S. at 897, 912-13, 104 S.Ct. 3405. The lack of deterrence likely to result from excluding evidence from searches done in good-faith reliance upon settled circuit precedent indicates the good-faith exception should apply in this context. *See Krull,* 480 U.S. at 360, 107 S. Ct. 1160 (declining to apply a court decision declaring a statute unconstitutional to a case pending at the time the decision was rendered and instead applying the good-faith exception to the exclusionary rule because the officer reasonably relied upon the statute in conducting the search).

McCane, 573 F.3d at 1045, n.5.

D. Other Courts Have Reached The Same Conclusion As The Tenth Circuit In *United States v. McCane.*

In *United States v. Grote,* CR-08-6057-LRS, 629 F. Supp. 2d 1201 (E.D. Wash. 2009), in an opinion dated June 16, 2009, the court held that evidence from the defendant's vehicle was admissible after *Gant* on two grounds: 1) the seizure met *Gant's* "reasonable to believe" standard; and 2) the officers conducted the search in good faith reliance on the law as it existed prior to *Gant.* The court stated:

> Although the good faith exception to the exclusionary rule originated from a case involving a search conducted pursuant to an invalid warrant, *United States v. Leon,* 468 U.S. 897, 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984), **this court agrees with other courts which have found the rationale for the exception applies with equal force to invalid warrantless searches.** *United States v. Ortiz,* 714 F. Supp. 1569, 1577-80 (C.D.Cal.1989), *affirmed without opinion sub nom.* in *United States v. Valenzuela,* 899 F.2d 19 (9th Cir.1990); *United States v. Planells-Guerra,* 509 F. Supp. 2d 1000, 1010-16 (D.Utah 2007) (citing cases from the Fifth

> Circuit Court of Appeals, including *United States v. Ramirez-Lujan,* 976 F.2d 930 (5th Cir.1992); *United States v. De Leon-Reyna,* 930 F.2d 396 (5th Cir.1991); and *United States v. Williams,* 622 F.2d 830 (5th Cir.1980)).

Grote, 629 F. Supp. 2d at 1206 (emphasis added).

In a supplemental order denying the defendant's motion for reconsideration, dated July 15, 2009, the court rejected the argument that applying the good faith exception violated the retroactivity doctrine of *Griffith v. Kentucky,* 479 U.S. 314 (1987). This was because *Griffith* did not involve the good faith exception or deal with the interplay between the two doctrines. *Grote,* No. WL 2068023, slip op. at 3. And, *United States v. Johnson,* 457 U.S. 537 (1982), determining that decisions of the Supreme Court interpreting the Fourth Amendment were to be applied retroactively, was decided two years prior to *United States v. Leon,* 468 U.S. 897 (1984), which established the good faith exception. *Grote,* No. WL 2068023, slip op. at 3. The court concluded by stating:

> **This court understands the importance of the retroactivity doctrine in insuring that similarly situated criminal defendants are treated the same. In this court's view, however, the good faith exception to the exclusionary rule is of equal importance. The exclusionary rule is intended to deter future police misconduct, not to cure past violations of a defendant's rights.** Future police misconduct is not deterred when, as here, the officer did not engage in any misconduct and did not make a mistake of fact or law, but acted in objective good faith on the search incident to arrest law as it existed at the time, and had existed for many years. There is no deterrent effect to be gained by applying the exclusionary rule in this case

Grote, 629 F. Supp. 2d at 3 (emphasis added).

The court also noted that the applicability of the good faith exception was not an issue directly addressed in

Gant, and therefore nothing in the decision would preclude this issue from being raised in subsequent cases. *Grote,* No. WL 2068023, slip op. at 3 (citation omitted).

Similarly, in *United States v. Owens,*__F. Supp. 2d ___ No. WL 2584570 (N.D. Fla. Aug. 20, 2009), the court also held that the good faith exception did apply.

In *United States v. Gray,*__F. Supp. 2d__ No. 4739740 (D. Ct. Neb. Dec. 7, 2009), the court held that the *Leon* good-faith exception to the exclusionary rule applied to a vehicle search lawful prior to *Gant,* but still pending on appeal when *Gant* was decided.

The Fifth Circuit has previously held, long before the *Gant* decision, that the good faith exception applied to searches premised upon case law subsequently changed. *See United States v. Jackson,* 825 F.2d 853, 866 (5th Cir. 1987) (*en banc*), *cert. denied sub nom. Ryan v. United States,* 484 U.S. 1011, 108 S. Ct. 711, 98 L.Ed.2d 661, *cert. denied sub nom. Browning v. United States,* 484 U.S. 1019, 108 S. Ct. 730, 98 L.Ed.2d 679 (1988); *United States v. Bengivenga,* 845 F.2d 593, 594 n.2 (5th Cir. 1988).

E. Courts That Have Found No Good Faith Exception Fail To Give Due Consideration To The Constitutional Principles Involved.

In *United States v. Gonzalez,* 578 F.3d 1130, 1132 (9th Cir. 2009), a decision issued August 24, 2009, the court held that the good faith exception did not apply because:

> Neither the Supreme Court nor our court, however, has applied the good faith exception to the scenario we face: a search conducted under a then-prevailing interpretation of a Supreme Court ruling, but rendered unconstitutional by a subsequent Supreme Court ruling announced while the defendant's conviction was on direct review.

> . . .
>
> To hold that *Gant* may not be fully applied here, as the Government urges, would conflict with the Court's retroactivity precedents.

Gonzalez, 578 F.3d at 1132.

In *United States v. Buford,* 623 F. Supp. 2d 923 (M.D.Tenn. 2009), a decision issued June 11, 2009, the court rejected the good faith exception and granted the defendant's motion to suppress evidence. The *Buford* court essentially disregarded the precedent behind the exclusionary rule generally, and the good faith exception specifically, while single-mindedly focusing on the need to apply the retroactivity doctrine so as to avoid "hollow relief" to those defendants standing to benefit from the *Gant* decision. *Id*. at 926.

These courts failed to appreciate that the exclusionary rule is not an "individual right" or a remedy necessarily flowing from the retroactive application of *Gant.* Similarly, a criminal defendant who brings a civil suit for a Fourth Amendment violation cannot complain of "hollow relief" if the action is thwarted by invocation of qualified immunity, or if the jury would award only a nominal $1.00 in damages. Or, a defendant in a criminal case could not claim "hollow relief" if the benefit of retroactive application of *Gant* was thwarted by the seizure being justified on grounds other than incident to arrest.

As discussed above, in *United States v. Peoples,* No. WL 3586564 (W.D. Mich. 2009), the court refused to find a good faith exception. But it nevertheless concluded that the *Gant* Court's failure to discuss the good faith exception did **not** preclude applying it, because the issue had never been raised. *United States v. Peoples,* No. WL 3586564, slip op. at 3. Based upon this the *Peoples* court also concluded that by applying *Gant's* holding and finding the search to be in violation of the Fourth Amendment, the retroactivity doctrine was fully

satisfied, and did not preclude consideration of the good faith exception. *Peoples,* slip op. at 4.

The court held that the good faith exception should not apply because: 1) to apply it to pre-*Gant* searches would require reliance "on the good faith of the officer alone, unchecked by the judgment of either the legislature . . . or the judiciary . . . ."; 2) it would involve an additional "interpretive step" on the part of officers never before countenanced; and 3) reliance upon case law is perilous as evidenced by the misinterpretation of *Belton* that gave rise to *Gant. Peoples,* slip op. at 6, 8.

This conclusion is ill-founded. Reliance on carefully reasoned precedent evolving over time is not the "unchecked good faith" of police officers. The suggestion that court opinions cannot be relied upon in laden with paradox and irony. In *United States v. Mazzone,* 782 F.2d 757, 759 (7th Cir. 1986), court commented that "the effective neutrality and independence of magistrates in *ex parte* proceedings for the issuance of search warrants may be doubted." This suggests that the view that the exception should be limited to subsequently invalidated search warrants may be based upon something of a fiction.

F. The State's Argument Is Consistent With Recent Pronouncements Of The Seventh Circuit Court Of Appeals.

The Seventh Circuit has not yet had occasion to determine if the good-faith exception should be applied to post-*Gant* cases where the vehicle search occurred before the *Gant* decision was issued. But in two decisions issued in 2009, one before *Gant* and one after, the Seventh Circuit questioned the continued vitality of the exclusionary rule in general.

In *United States v. Sims,* 553 F.3d 580 (7th Cir. 2009), decided January 22, 2009, the court held that the inevitable discovery doctrine precluded suppression of evidence seized pursuant to a warrant defective for its failure to describe the items to be seized with particularity. Judge Posner, writing for the court, commented on the dubious future of the exclusionary rule, and noted that the inevitable discovery doctrine was just one more exception created so that the rule did not have to be employed:

> A person whose rights have been violated by a search can be remitted to a suit against the police for committing a constitutional tort. **Now that such suits are common and effective . . . the exclusionary rule is bound some day to give way to them.** For the rule is too strict: illegally seized evidence essential to convicting the defendant of a grave crime might have to be suppressed, and the criminal let go to continue his career of criminality, even if the harm inflicted by the illegal search to the interests intended to be protected by the Fourth Amendment was slight in comparison to the harm to society of letting the defendant off scot free.
>
> Concerned with such anomalies though **unwilling as yet to abrogate the exclusionary rule** (although it has no constitutional basis – it is a doctrine of federal common law), the Supreme Court has in the name of "inevitable discovery" created an exception.

Sims, 553 F.3d at 583-84 (citation omitted; emphasis added).

> As we explained . . . "permitting people to get away with crime is too high a price to pay for errors that . . . do not play any causal role in the seizure. . . ."

Sims, 553 F.3d at 585 (citation omitted).

In *Guzman v. City of Chicago,* 565 F.3d 393 (7th Cir. 2009), in an opinion issued July 14, 2009, the court considered the dismissal of a civil suit upon summary judgment. The case involved failure of police to abandon execution of a search after determining that the

warrant did not accurately describe the premises to be searched. Judge Evans, speaking for the majority, noted that:

> Interestingly, as this is a case for damages under sec. 1983, it may illustrate our recent observation that in some ways it is easier to protect Fourth Amendment rights through civil actions, rather than through the suppression of evidence in criminal cases. In *United States v. Sims,* 553 F.3d 580 (7th Cir. 2009), we wondered whether at some point the Supreme Court will approach civil cases differently from criminal cases because to find a violation in a civil case raises "no concern that the sanction for violating the Fourth Amendment would be disproportionate to the to the harm caused by the violation." Just a few months ago in *Herring v. United States,* ___ U.S. ___, 129 S. Ct. 695, 700, . . . the Court reiterated the distinction between the existence of a Fourth Amendment violation and a subsequent invocation of the exclusionary rule, noting that exclusion "has always been our last resort, not our first impulse . . . ." (quoting *Hudson v. Michigan,* 547 U.S. 586, 591 . . . (2006)). Exclusion is not a necessary consequence of a Fourth Amendment violation, and the benefits of exclusion must outweigh the costs. *Herring,* 129 S.Ct. at 700.

Guzman, 565 F.3d at 398.

The court then went on to state that these societal costs:

> **[A]ccount for the myriad of doctrines employed to avoid the suppression of evidence . . . includ[ing] . . . standing . . . inevitable discovery . good-faith exceptions . . . the exigent circumstances exception . . . and such things like finding a 'consent' to search based on 'apparent authority' . . . ."**

Guzman, 565 F.3d at 398 n.1 (citations omitted; emphasis added).

It is true that in *United States v. 15324 County Highway E.,* 332 F.3d 1070, 1076 (7th Cir. 2003), in a civil forfeiture case, the court stated that it would not extend the good faith exception to police analysis of and reliance upon one Seventh Circuit thermal imaging case later reversed by the Supreme Court. The court nevertheless found the good faith exception applicable because the police relied upon a search warrant wherein the magistrate relied upon the thermal imaging case. *Id.*

It is doubtful whether the Seventh Circuit would reaffirm this holding given the subsequent *Herring, Sims* and *Guzman* decisions. But more importantly, there is a world of difference between police officers interpreting and relying upon a single appellate court case, and officers relying upon nationwide body of case law emanating from the Supreme Court itself and taught in police academies for 28 years.

G. The State's Argument Is Consistent With The Prior Decisions Of Wisconsin Appellate Courts Interpreting Both The United States And Wisconsin Constitutions, And Applying The Good Faith Exception To Them.

In *Leon,* 468 U.S. 897, the United States Supreme Court recognized an objective good faith exception to the exclusionary rule when police officers act in objectively reasonable reliance upon a later invalidated search warrant.

A month after the *Leon* decision, in October 1984, the court of appeals applied the good faith exception in *State v. Collins,* 122 Wis. 2d 320, 363 N.W.2d 229 (Ct. App. 1984). The court held that the rationale of the

exception would apply equally well to a confession resulting from an invalid arrest warrant. *Id.* at 326.

What is important in this case is that the court correctly focused on the overriding purpose of the exclusionary rule to deter future police misconduct, and not on the presence or absence of antecedent judicial involvement in the case. *Collins,* 122 Wis. 2d at 325. The court aptly noted that "allowing guilty defendants to escape punishment . . . generat[es] disrespect for the law" and was not worth "the marginal or nonexistent benefits" of suppression. *Id*. at 325-26. And, the court also acknowledged that there was at least some police misconduct – "a negligent failure to remove an executed warrant from the files" – but that "any deterrent effect produced . . . operat[ing] only on those persons responsible for keeping police department files up to date" was too insignificant to "serve the purpose for which it [the exclusionary rule] was created." *Id*. at 326-27.

In *Ward,* 231 Wis. 2d 723, this court recognized a good faith exception for reliance on the "no-knock" provision of a warrant that was based upon Wisconsin Supreme Court case law controlling at the time, but later invalidated. The court stated:

> On December 4, 1996, the officers' actions were in conformance with the law in Wisconsin, as articulated by this court, allowing for no-knock entries. **The greenest law student, the savviest defense counsel, and a roomful of law professors would have reached the same conclusion.** We find it impossible to say that under such facts and in consideration of binding federal precedent, the exclusionary rule should be applied to this violation of the rule of announcement.

Ward, 231 Wis. 2d, ¶ 49 (emphasis added).

In *State v. Orta,* 2000 WI 4, 231 Wis. 2d 782, 604 N.W.2d 543, decided the same day as *Ward,* the court made the same decision in another no-knock case, based on the same reasoning as in *Ward.*

In *State v. Eason*, 2001 WI 98, ¶ 60, 245 Wis. 2d 206, 629 N.W.2d 625, this court adopted the *Leon* good faith exception, but added conditions to it necessary to comport with protections provided by Wis. Const. art. I, § 11:

> 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.

Eason, 245 Wis. 2d 206, ¶ 63 (footnote omitted).

The court commented that there was no appreciable difference between officers relying upon a warrant or upon controlling law:

> **In both situations, applying the exclusionary rule will have no deterrent effect. In both situations, the officers were acting reasonably, whether relying upon controlling law or a facially valid search warrant.**

Eason, 245 Wis. 2d 206, ¶ 52 (emphasis added).

In *State v. Loranger,* 2002 WI App 5, 250 Wis. 2d 198, 640 N.W.2d 555, the court held that reliance on case law, later overturned, that thermal imaging did not require a search warrant, entitled the police to the good faith exception articulated in *Ward.* The court extended the *Ward* holding beyond the execution of a warrant to the legitimacy of the search itself, and stated:

> "[W]e believe that law enforcement officers and magistrates must be allowed to reasonably rely upon the pronouncements of this court.". . . [W]e see no logical reason to distinguish between published opinions of the court of appeals and the supreme court. . . .

Loranger, 250 Wis. 2d 198, ¶ 15 (citing to *Ward*, 231 Wis. 2d 723, ¶ 62; emphasis added).

In *State v. Marquardt*, 2005 WI 157, ¶ 24, 286 Wis. 2d 204, 705 N.W.2d 878, this court applied the *Leon/Eason* good faith exception to a search warrant because there was sufficient indicia of probable cause despite the warrant's ultimate invalidity.

And finally, in *State v. Robinson,* 2009 WI App 97, __ Wis. 2d __, 770 N.W.2d 721, decided June 30, 2009, and also on review in this court, the court of appeals held that the good faith exception applied where police erroneously believed that there was a warrant for Robinson's arrest. This case is significant because: 1) the court stated it was **"extrapolating"** from *Leon* and *Eason;* 2) the commitment order that existed was not signed by a judge; and 3) the court focused on the absence of any misconduct to deter, and **not** on the presence or absence on the involvement of a neutral and detached magistrate. *Id*., ¶¶ 1, 6, 10-11.

H. Summary Of The State's Argument As To The Applicability Of The Exclusionary Rule, Or Of The Good Faith Exception, To Dearborn's Case.

The State's argument can be summarized as follows. The officers conducting the search in Dearborn's case clearly would be entitled to the good faith exception under federal law. This is because in *Herring* the Supreme Court left no doubt that the touchstone for the exception is future deterrence of reckless or intentional police misconduct that clearly outweighs the societal harm of letting the guilty go free. The police in Dearborn were acting in conformity with the pronouncements of the United States Supreme Court, as understood by virtually

all of the law enforcement community nationwide, and – most importantly – the Wisconsin Supreme Court as it interpreted both federal and state law. Therefore, there was no police misconduct to deter.

The fact that the Supreme Court, in *Gant,* did not discuss the good faith exception, does not undermine this argument. It is beyond dispute that no inference can be drawn if the Court does not address an issue not raised. Moreover, a number of courts have persuasively argued that the retroactivity doctrine does not require that the exclusionary rule be applied or bar application of the good faith exception.

The best reasoned and most persuasive opinion handed down by courts considering the fate of searches lawful when conducted, but now subject to *Gant's* retroactivity, is *McCane* from the Tenth Circuit, which found that the good faith exception should apply. A number of other courts have followed the Tenth Circuit's lead.

And finally, both this court and the court of appeals have recognized the good faith exception, and found it to be consistent with the protections of the Wisconsin Constitution. The Wisconsin courts have applied the exception beyond mere search warrant cases, and have recognized that the exclusionary rule's sole purpose is future deterrence of police misconduct that goes beyond mere negligence. Moreover, the Wisconsin courts have found that the exception can be invoked for reliance upon case law later overturned.

III. THE CIRCUIT COURT PROPERLY INSTRUCTED THE JURY AS TO THE ELEMENTS OF THE OFFENSE.

A. The Standard Of Review.

This issue involves questions of statutory construction, and applying constitutional standards to statutes, which are questions of law subject to de novo review. *State v. Derango,* 229 Wis. 2d 1, 11, 599 N.W.2d 27 (Ct. App. 1999), *aff'd* 236 Wis. 2d 721, 613 N.W.2d 833; *State v. Piddington,* 2001 WI 24, ¶ 13, 241 Wis. 2d 754, 623 N.W.2d 528.

B. The Court Of Appeals Properly Concluded That The Jury Instruction Given By The Circuit Court Was Correct.

The court of appeals' analysis of this issue was thorough and correctly determined the law. The statute charged, Wis. Stat. § 29.951, is entitled "Resisting a warden," but sanctions "Any person who assaults or otherwise resists or obstructs any warden in the performance of duty. . . ." *Dearborn,* 313 Wis. 2d 767, ¶ 12. The one of four elements at issue in the case was the jury instruction as to whether "the defendant assaulted, resisted, or obstructed a conservation warden. . . ." *Id.,* ¶ 13.

"To resist" was further defined by the jury instruction as "to oppose the warden by force or threat of force . . . directed to the warden personally." *Dearborn,* 313 Wis. 2d 767, ¶ 14. "To obstruct" was further defined by the instruction as "the conduct of the defendant prevented or made more difficult the performance of the warden's duties." *Id.* These definitions were taken from the pattern instructions for Wis. Stat. § 946.41, entitled

"Restricting or obstructing officer." *Dearborn,* 31 Wis. 2d 767, ¶ 14 n.5 (citing to Wis. JI-Criminal 1765 and 1766).

Dearborn asserted that resisting and obstructing were two separate types of conduct such that his constitutional right to a unanimous verdict required that the jury be told it had to agree as to which type of conduct Dearborn had committed. *Dearborn,* 313 Wis. 2d 767, ¶¶ 9, 15. The circuit court had denied Dearborn's proposed instruction that only instructed as to resisting a warden. *Id*., ¶ 9. Dearborn admitted that his trial counsel had not raised any issue as to "assault," and thus that the issue was waived on appeal. *Id*., ¶ 15 n.6.

The court of appeals noted that it would appear from the definitions given that any conduct constituting resisting would also constitute obstructing. *Dearborn,* 313 Wis. 2d 767, ¶ 16 n.7. However, because neither party raised the point, the court did not further address the issue. *Id.*

The Wis. Const. art. I, §§ 5 & 7 guarantees the right to a unanimous verdict as to the ultimate issue of guilt or innocence, but not as to alternative ways of committing the crime. *Dearborn,* 313 Wis. 2d 767, ¶ 17, citing to *State v. Durango,* 2000 WI 89, ¶¶ 13-14, 236 Wis. 2d 721, 613 N.W.2d 833. The threshold question then becomes whether the statute creates multiple offenses or a single offense with multiple modes of commission. *Id*., ¶ 18.

If the Legislature intended multiple offenses, then the jury must be unanimous as to each crime. *Dearborn,* 313 Wis. 2d 767, ¶ 19, citing to *State v. Hammer,* 216 Wis. 2d 214, 219, 576 N.W.2d 285 (Ct. App. 1997). If the Legislature intended to create one crime with alternative modes of commission, the court employs the due process fundamental fairness test of *Schad v. Arizona,* 501 U.S. 624, 637-45. *Dearborn,* 313 Wis. 2d 767, ¶ 19, citing to *Derango,* 236 Wis. 2d 721, ¶¶ 23-25.

The court determines the threshold question of legislative intent by considering: 1) the language of the statute; 2) the legislative history and context of the statute; 3) the nature of the proscribed conduct; and 4) the appropriateness of multiple punishments. *Dearborn,* 313 Wis. 2d 767, ¶ 20, citing to *Derango,* 236 Wis. 2d 721, ¶ 15.

First, the court of appeals first considered the language of the statute. The fact that Wis. Stat. § 29.951 contains assault, resist and obstruct in one sentence in the disjunctive, with only one penalty provided, leads to the conclusion that the Legislature intended one crime with alternative modes of commission, upon which the jury did not have to be unanimous. *Dearborn,* 313 Wis. 2d 767, ¶¶ 21-28.

This conclusion was fortified by the facts that the statute states "assaults or *otherwise* resists or obstructs," and that all three alternatives are punished only if they interfere with the performance of the warden's duty. *Dearborn*, 313 Wis. 2d 767, ¶¶ 22-23. Use of the word "otherwise" implied that assaulting was one example from unspecified lists of behavior constituting resisting or obstructing – all to block the performance of the warden's duty. *Id.*, ¶ 22.

The court of appeals based this conclusion, in part, on *Manson v. State,* 101 Wis. 2d 413, 304 N.W.2d 729 (1981). *Dearborn,* 313 Wis. 2d 767, ¶ 21. In *Manson,* the court held that the armed robbery statute charged only one crime, and that the jury did not have to be unanimous as to whether the defendant used force or merely threatened to use force. *Manson*, 101 Wis. 2d at 415. One important fact in the *Manson* court's holding was that the original statute set forth the alternatives in one sentence in the disjunctive, with only one penalty. *Dearborn*, 313 Wis. 2d 767, ¶ 21, citing to *Manson*, 101 Wis. 2d 422-25, 428.

The court of appeals rejected Littlejohn's argument at an 1875 case dealing with horse theft mandated a different result. *Dearborn*, 313 Wis. 2d 767, ¶ 24. In *State v. Welch,* 37 Wis. 196 (1875), the court stated that "resist" meant direct or active means, and that "obstruct" meant passive or indirect means. *Dearborn*, 313 Wis. 2d 767, ¶ 24 citing to *Welch,* 37 Wis. at 201. The *Welch* court was interpreting the precursor to Wis. Stat. § 946.41, which dealt with resisting an officer, prior to the 1957 addition of obstructing an officer. *Dearborn,* 313 Wis. 2d 767, ¶ 24, n.10. However, the predecessor of Wis. Stat. § 29.951 had substantially the same wording as the current version when it was enacted in 1931, and the Legislature can be presumed to have been aware of *Welch. Dearborn,* 313 Wis. 2d 767, ¶ 25, n.11.

The court of appeals therefore concluded that the legislature intended the statute in question to encompass both more active resistance and more passive obstruction as an alternative means of committing the crime of impeding a warden's performance of his or her duty. *Dearborn,* 313 Wis. 2d 767, ¶ 26. Moreover, the 1875 *Welch* court's definition of resisting had considerable overlap with a modern dictionary's definition of obstructing. *Dearborn,* 313 Wis. 2d 767, ¶¶ 27-28.

The court of appeals further found that legislative history, the second step of the threshold legislative intent question, supported the conclusion of one crime with alternative means of commission. *Dearborn,* 313 Wis. 2d 767, ¶¶ 29-30. The legislative history showed that the initial concern was violators who pointed guns at wardens, but that by the time of passage the statute had been broadened to sweep in any of a multitude of ways that wardens could be impeded. *Id.*

The third step of the threshold legislative intent question, the nature of the proscribed conduct, focuses on whether the alternatives are similar or significantly different. *Dearborn,* 313 Wis. 2d 767, ¶ 31. The differences in conduct and their disparate impact on the

warden was deemed not to be controlling. *Dearborn,* 313 Wis. 2d 767, ¶¶ 31-32. And the overlapping meanings of the words resist or obstruct fostered the conclusion that the Legislature intended one crime. *Id.*

The fourth step of the threshold legislative intent questions, dealing with the appropriateness of multiple punishments, overlaps closely with the third, and was also resolved against Dearborn. *Dearborn,* 313 Wis. 2d 767, ¶¶ 33-38.

The second question in the analysis was application of the *Schad* due process fundamental fairness test. *Dearborn,* 313 Wis. 2d 767, ¶ 41. The court of appeals found that the moral culpability of assaulting, resisting or obstructing a warden were at least as similar as premeditated versus felony murder was in *Schad,* or as the wide variety of intentions for enticing the child were in *Derango. Id.,* ¶ 42.

The court of appeals' analysis is persuasive. In *Derango,* the court held that the jury did not have to be unanimous as to the defendant's intent in attempting to entice a child, be it for sexual contact, prostitution, exposing a sex organ, making recordings, causing harm or giving drugs. *Derango,* 236 Wis. 2d 721, ¶¶ 16, 24-25. The court stated that when applying the due process fundamental fairness and rationality test "we start with *Schad's* **presumption** in favor of the legislative determination to create a single crime with alternative modes of commission, for which unanimity is not required." *Derango,* 236 Wis. 2d 721, ¶ 24, citing to *Schad v. Arizona,* 501 U.S. 624 (1991) (emphasis added).

In *Schad,* the Supreme Court held that the jury did **not** have to be unanimous in a capital murder case as to the alternative mental states of premeditation or felony murder in the course of committing a robbery. *Derango,* 236 Wis. 2d 721, ¶ 23, citing to *Schad*, 501 U.S. at 645. The *Schad* court also stated that one aspect of the due process test was the "moral and practical equivalence" of

the alternative means of committing the crime. *Derango,* 236 Wis. 2d 721, ¶ 22, citing to *Schad,* 501 U.S. at 637-38. The difference between premeditated murder and the unplanned, or even accidental, killing of someone during the commission of any felony is far greater – on either a "moral" or "practical" level - than the difference between resisting and obstructing a warden.

In both *Schad* and *Derango,* the disputed element was the mental state behind the underlying crime. In the former it was homicide, and in the latter, getting a child to come into a secluded place. In Dearborn's case, resisting and obstructing are not mental states, but they are analogous. That is, the underlying crime is trying to prevent a warden from doing his or her duty, and assaulting or resisting or obstructing is simply the means by which this is accomplished.

The *Schad* alternative mental states had death of the victim as the common thread. The *Derango* alternative intentions had luring the child into a secretive place as the common denominator. The *Dearborn* alternatives means are all ways in which a warden's performance of his or her duty is impeded.

Similarly, in *Manson,* the underlying crime was taking property from the person, with the use or threat of force being simply alternative means of overcoming resistance and effecting the crime. Assaulting, resisting and obstructing are no more dissimilar than are using force versus the mere threat of using force--typically verbal.

C. Dearborn's Argument In Opposition Is Not Persuasive.

Dearborn's argument is based upon the 1875 *Welch* decision and the jury instructions for Wis. Stat. § 946.41 (Dearborn's Brief at 19-26). The court of appeals

carefully analyzed *Welch,* and concluded that the argument Dearborn attempted to base upon the case was not correct. Dearborn's argument fails for the very reasons articulated by the court of appeals and discussed above.

The jury instructions for Wis. Stat. § 946.41 do not undermine the court of appeals' conclusion as to Wis. Stat. § 29.951. The instructions, and the comments thereto, do indicate that one instruction was split into three: "resisting" for physical interference; "obstructing" for nonphysical interference; and a third variant for the giving of false information. Wis. JI-Criminal 1765, *Comment*, n.2; Wis. JI-Criminal 1766, *Comment*, n.2 & 3; Wis. JI-Criminal 1766-A. The split was based upon *Welch. Id.*

The instructions and comments do not expressly state that the constitutional right to a unanimous jury is violated if jurors do not agree as to whether a defendant resisted or obstructed an officer. *Id.* Other than for *Welch,* they do not discuss the cases analyzed and relied upon by the court of appeals in *Dearborn. Id*. They do not require that the jurors agree as to what particular acts within each category a defendant committed. *Id.* And, most importantly, they interpret Wis. Stat. § 946.41, not Wis. Stat. § 29.951, or the significantly different language in that statute. In short, even if the pattern jury instructions are generally considered persuasive authority, they are of no avail in Dearborn's case because they are off point and do not in any respect refute the court of appeals' analysis and conclusions regarding Wis. Stat. § 29.951.

CONCLUSION

Based upon the foregoing arguments, the State respectfully asks this court to affirm Littlejohn's conviction for resisting a warden on the merits. The State also asks this court to affirm the denial of his motion to suppress evidence, but on the grounds that the exclusionary rule does not apply when there was no police misconduct, or in the alternative that the good faith exception would apply.

Dated this 11th day of January, 2010.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 10,835 words.

Dated this 11th day of January , 2010.

_____

Michael J. Losse
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CERTIFICATE OF COMPLIANCE
WITH WIS. STAT. § (RULE) 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § (Rule) 809.19(12).

I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

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

Dated this 11th day of January, 2010.

_____
Michael J. Losse
Assistant Attorney General

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STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2007AP1894-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

DAVID A. DEARBORN,

Defendant-Appellant-Petitioner.

On Appeal from a Judgment of Conviction Entered
in the Grant County Circuit Court,
The Honorable George S. Curry, Presiding

REPLY BRIEF OF DEFENDANT-APPELLANT-PETITIONER

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TABLE OF CONTENTS

CASES CITED

CONSTITUTIONAL PROVISIONS AND STATUTES CITED

ARGUMENT

I. The Search of Mr. Dearborn's Locked Truck After He Was Arrested, Handcuffed, and Secured in a Squad Car, Violated His Right to Be Free From Unreasonable Searches and Seizures Under the Federal Constitution, the Wisconsin Constitution, and Wis. Stat. § 968.11.

The state acknowledges that the search of Mr. Dearborn's truck was a violation of his constitutional right to be free from unreasonable searches and seizures under ***Arizona v. Gant***, 556 U.S. ___, 129 S. Ct. 1710 (2009), but nevertheless argues that the search of Mr. Dearborn's truck was "lawful" on the day it was conducted. It was not.

The ***Gant*** decision did not overrule ***New York v. Belton***, 453 U.S. 454 (1982); it held that those courts that had broadly interpreted ***Belton*** were wrong. It more narrowly interpreted ***Belton*** as holding that "*when* the passenger compartment is within an arrestee's reaching distance, ***Belton*** supplies the generalization that the entire compartment and any containers therein may be reached." 129 S. Ct. at 1718, (emphasis in original). Therefore, the search of Mr. Dearborn's truck was ***never*** lawful or constitutional.

However, the state concedes that under ***Gant***, the search of Mr. Dearborn's truck was not justified as a search incident to arrest, and that the holding in ***Gant*** applies retroactively to the search of his truck. Therefore, the issue on appeal is whether the Wisconsin Supreme Court should adopt a radical, new good faith exception to the exclusionary rule, based upon an officer's interpretation of court decisions.

II. This Court Should Not Adopt an Unprecedented New Good Faith Exception to the Exclusionary Rule for Warrantless Searches Based on Court Decisions, Because It Would Violate the Controlling Retroactivity Rule, It Would Be Without Precedential Support, and It Would Be Unjustified by the Rationale for the Good Faith Exception.

The United States Supreme Court has never applied the good faith exception to the exclusionary rule to warrantless searches made in reliance on court decisions. It has, however, held that even where there has been a "clear break" from past precedent, new constitutional decisions must be "applied retroactively to all cases, state or federal, pending on direct review or not yet final." ***Griffith v. Kentucky***, 479 U.S. 314, 322-323 (1987). This rule was adopted by the Wisconsin Supreme Court in ***State v. Koch***, 175 Wis. 2d 684, 694; 499 N.W. 2d 152 (1993).

An unprecedented good faith exception for warrantless searches made in reliance on court decisions would violate the retroactivity rule, and would "take the exception in a new and untenable direction." ***United States v. Peoples,*** 2009 U.S. Dist. LEXIS 100766, *15 (W.D. Mich.).

A. Expansion of the good faith exception to this case would violate the well-established retroactivity rule.

1. The retroactivity rule in Fourth Amendment cases requires exclusion of evidence in cases on direct appeal.

The state argues that the good faith exception does not violate the retroactivity rule announced in ***Griffith v.***

Kentucky, 479 U.S. at 322-323 (1987), because the retroactivity rule goes only to the theoretical constitutionality of the search, whereas the exclusionary rule goes only to the remedy. This argument, based on a footnote in ***United States v. McCane***, 573 F. 3d 1037. 1045, n. 5 (10th Cir. 2009), is wrong.

The retroactivity rule in Fourth Amendment cases is addressed to remedy. It requires exclusion of the evidence in cases on direct appeal. In ***Desist v. United States***, 394 U.S. 244, 89 S. Ct. 1030 (1969) the court directly linked retroactivity to exclusion of evidence, when it considered the possible retroactive effect of ***Katz v. United States***, 389 U.S. 347 (1968). It decided against retroactive application because:

> **Exclusion of electronic eavesdropping evidence seized before *Katz*** would increase the burden on the administration of justice, would overturn convictions based on fair reliance upon pre-*Katz* decisions, and would not serve to deter similar searches and seizures in the future.

Desist, 394 U.S. at 253 (emphasis added).

Similarly, in deciding whether ***Mapp v. Ohio***, 367 U.S. 643 (1961) should be applied retroactively to final convictions, the court concluded that "to make the rule of ***Mapp*** retrospective would tax the administration of justice to the utmost" because hearings would have to be on the excludability of old evidence long since destroyed, misplaced or deteriorated." ***Linkletter v. Walker***, 381 U.S. 618, 637, 85 S. Ct. 1731 (1965).[1]

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[1] ***Mapp*** had already applied the exclusionary rule to the defendant, and to all cases pending on direct review at the time, consistent with common law principles that judicial decisions are not made only for the future. ***Id.***, 622-23.

Therefore, the rule of retroactivity includes the remedy of exclusion. The good faith exception to the exclusionary rule, therefore, would directly contradict the retroactivity rule.

2. The history of the retroactivity rule and the good faith exception to the exclusionary rule, show that the good faith exception cannot be applied to cases governed by the retroactivity rule.

In ***Linkletter,*** the court held that the Constitution did not require retroactive application of constitutional decisions. ***Id.*** at 629. Therefore it adopted a case-by-case balancing test, taking into account the purposes of the new rule, reliance on previous court decisions, and the burden on the administration of justice. Concluding that retroactive application of ***Mapp*** to final convictions would not "deter the lawless action of the police" or "effectively enforce the Fourth Amendment," but that it would imposes a burden on the administration of justice, the court refused retrospective application of ***Mapp*** to final convictions. ***Linkletter,*** 381 U.S. at 637, 640.

In ***Desist,*** 394 U.S. 244, the court balanced the same three factors in determining the retroactivity of the ***Katz*** decision. "[T]he purpose to be served by the new constitutional rule," it concluded, "strongly supports prospectivity for a decision amplifying the evidentiary exclusionary rule," because the exclusionary rule has no bearing on guilt. Second, its own previous decisions "confirmed the interpretation that police and courts alike had placed on the controlling precedents and fully justified reliance on their continuing validity." And finally, retroactive effect would increase the burden on the administration of justice. ***Id.***, 249-251. Accordingly, the court held that ***Katz***

would not be applied retroactively to either final convictions, or those pending on review.

This three-factor balancing approach to retroactivity was relied upon by the court in ***United States v. Leon***, 468 U.S. 897, 104 S. Ct. 3405 (1984), to create a good faith exception to the exclusionary rule for defective warrants. The court noted that "attention to the purposes of the exclusionary rule characterized" Fourth Amendment retroactivity decisions, with the result that "no Fourth Amendment decision marking a 'clear break with the past' has been applied retroactively." It also noted that retroactivity decisions "had been "assessed largely in terms of the contribution retroactivity might make to the deterrence of police conduct," was a key factor. ***Id.,*** 912-13. The court concluded that the "balancing approach that has evolved during the years of experience with the rule provides strong support," for the good faith exception to the exclusionary rule in defective warrant cases. ***Id.,*** 913.

If retroactivity law had not changed after ***Leon***, the rule of retroactivity and the good faith exception to the exclusionary rule, would be entirely compatible. But the law did change. In ***Griffith***, 479 U.S. 314, the court decisively rejected the balancing approach of ***Linkletter*** and ***Desist,*** and concluded that even in cases in which there has been a "clear break" from past precedent, new constitutional decisions must be "applied retroactively to all cases, state or federal, pending on direct review or not yet final." ***Id.,*** at 327.

The ***Griffith*** court based its decision on the "basic norms of constitutional adjudication." ***Id.*** at 322. The nature of judicial review requires that the Court adjudicate specific cases, each of which usually becomes the vehicle for announcement of a new rule. The Court cannot, of course,

hear each case pending on direct review and apply the new rule; thus having decided a new rule in the case selected, "the integrity of judicial review requires that we apply that rule to all similar cases pending on direct review." ***Id.*** at 322-23. That is because selective application of new rules violates the principle of treating similarly situated defendants the same. If the court does not apply new rules to cases pending on direct review, the result is "actual inequity" because only one of many similarly situated defendants becomes the chance beneficiary of the new rule. ***Id.*** at 323,

Although ***Griffith*** was not a Fourth Amendment case, it relied heavily upon the reasoning of ***United States v. Johnson***, 457 U.S. 537, 102 S. Ct. 2579 (1982). In ***Johnson,*** the court had ordered retroactive application of an important Fourth Amendment decision in ***Payton v. New York,*** 445 U.S. 573 (1980), prohibiting warrantless and nonconsensual entry into a suspect's home to make a routine felony arrest. Therefore, the ***Griffith*** retroactivity rule applies to Fourth Amendment cases.

Griffith was not decided in a vacuum. Because the legal foundations of the previous retroactivity rule and the ***Leon*** good faith exception were inextricably linked, the ***Griffith*** court's repudiation of the ***Linkletter*** and ***Desist*** analysis to cases on direct appeal, by definition, prohibited the applicability of ***Leon***'s good faith exception to cases on direct appeal when a new constitutional decision is made.

Therefore, as the court decided in ***United States v. Buford***, 623 F. Supp. 923 (M. D. Tenn. 2009), whatever "the broad language" of good faith exception cases may be, its application to new constitutional court decisions is "inconsistent with the 'basic norms of constitutional

adjudication'" on which ***Griffith*** was based. *See also* ***United States v. Gonzalez,*** 578 F. 3d 1130 (9th Cir. 2009).[2]

In light of the intertwined history and factors determining application of the retroactivity rule and the good faith exception, adoption of the good faith exception in this case would violate the United State's Supreme Court's decision in ***Griffith,*** and the Wisconsin Supreme Court's decision in ***State v. Koch,*** 175 Wis. 2d 694.

3. The ***Gant*** decision reflects the Court's understanding that the retroactivity rule would result in exclusion of evidence in cases on direct appeal.

The ***Gant*** dissent, assuming application of the ***Griffith*** retroactivity rule, pointed out that "the Court's decision will cause the suppression of evidence gathered in many searches carried out in good-faith reliance on well-settled case law." It further recognized that this category of searches "almost certainly includ[es] more than a few that figure in cases now on appeal." 129 S. Ct. at 1726, 1728 (Alito, J. dissenting).

The ***Gant*** majority did not disagree. Instead, it noted that the impact of ***Gant*** would be limited in the civil context

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[2] The state suggests that ***Griffith*** does not apply because it did not expressly address the good faith exception. It cites as authority an order denying reconsideration of the decision in ***United States v. Grote***, 629 F. Supp. 1201 (E.D. Wash. 2009). ***Grote's*** cursory analysis does not even directly address the issue, because, as the court explained: "Emphasizing again that application of the good faith exception in the captioned matter represents only an alternative ruling, the court concludes said ruling did not constitute 'clear error,' nor does it create a 'manifest injustice.'" ***Id.,*** *11. The ***Grote*** analysis was rejected in ***State v. Harris***, 2010 Wash. App. LEXIS *16 (Jan. 2010).

by the doctrine of qualified immunity, based on officers' "reasonable reliance" on their understanding of ***Belton.*** Additionally, it suggested that the cost of suppression was the cost of complying with the Constitution: "The fact that the law enforcement community may view the State's version of the ***Belton*** rule as an entitlement does not establish the sort of reliance interest that could outweigh the countervailing interest that all individuals share in having their constitutional rights fully protected." ***Gant***, 129 S. Ct. at 1723.

This exchange reflects the court's understanding that the good faith exception would not apply to reliance on pre-***Gant*** case law. Notably, the doctrine of qualified immunity in the civil context and ***Leon***'s good faith reliance test in the criminal context use an identical legal standard. *See* ***Groh v. Ramirez***, 540 U.S. 551, 565, n. 8 (2004). If the Court thought that the good faith exception might apply, it would have said so.

Finally, ***Gant*** affirmed the decision of the Arizona Supreme Court, which had suppressed the evidence in Gant's case. The judge's hypertechnical analysis of the affirmance in ***Peoples***, 2009 U.S. Dist. LEXIS 100766, defies common sense. ***Gant*** did not remand the case to the Arizona Supreme Court for determination of a remedy, but instead chose to affirm the Arizona court's decision.

B. An unprecedented good faith exception for warrantless searches made in reliance on court decisions would "take the exception in a new and untenable direction."

1. The United States Supreme Court has carefully limited the good faith exception to cases in which there is a judicial or legislative check on law enforcement discretion.

The United States Supreme Court has never applied the good faith exception to warrantless searches made in reliance on court decisions. "[E]xpanding the good-faith doctrine to permit reliance on case law would take the exception in a new and untenable direction," because it "would for the first time permit use of illegally obtained evidence based on the good faith of the officer alone, unchecked by the judgment of either the legislature (as it was in ***Krull***) or the judiciary (as it was in ***Leon, Evans*** and ***Herring." Peoples,*** at *15. *See also* ***Gonzalez***, 578 F. 3d at 1132.

Because it cannot point to applicable precedent, the state bases its good faith argument on the language of ***Herring v. United States***, 555 U.S. ___, 129 S. Ct. 695 (2009), in which the court applied the good faith exception to an officer's reliance on an arrest warrant from another jurisdiction, which in fact had been withdrawn. The language of ***Herring,*** however, is much broader than its holding, and it does not provide useful guidance to determine whether application of the good faith exception to this very different case, is justified by the policies underlying the doctrine.

Leon, 468 U.S. 897, provides the applicable standard. The court's analysis in ***Leon*** began with "a strong preference for warrants" because a warrant "provides the detached scrutiny of a neutral magistrate, which is a more reliable safeguard against improper searches than the hurried judgment of a law enforcement officer 'engaged in the often competitive enterprise of ferreting out crime.'" ***Id.,*** 913-14.

Leon then based its decision to create a good faith exception for reliance on warrants later found to be defective, on three factors. First, the exclusionary rule was historically designed "to deter police misconduct rather than to punish the errors of judges and magistrates." ***Id.***, 916. Second, there "was no evidence suggesting that judges and magistrates are inclined to ignore or subvert the Fourth Amendment . . . . ***Id.***, 916. Third, there was no basis to believe "that exclusion of evidence seized pursuant to a warrant would have a significant deterrent effect on the issuing judge or magistrate." The court explained that because neutral judicial officers are not adjuncts to the law enforcement team, "they have no stake in the outcome of particular criminal prosecutions." ***Id.***, 917.

Given the ***Leon*** analysis, it is not surprising that most good faith exceptions to the exclusionary rule involve good faith reliance on a search warrant or arrest warrant, later discovered to be invalid. ***Leon, id.***; ***Massachusetts v. Sheppard***, 468 U.S. 981 (1984); ***Arizona v. Evans***, 514 U.S. 1 (1995); ***Herring,*** 129 S. Ct. 695.

In ***Illinois v. Krull***, 480 U.S. 340 (1987), the court followed the ***Leon*** analysis to extend the good faith exception to reasonable reliance on a state statute, later held to be unconstitutional. The error, the court reasoned, was by legislators, who are "not the focus of the rule." There was

little evidence to believe that legislators are inclined to subvert the Fourth Amendment, and legislators are not "adjuncts to the law enforcement team," thus unlikely to be deterred by exclusion of evidence. ***Id.,*** 349-351.

Instead of relying on the general language of ***Herring,*** therefore, the court should return to the three-part analysis of ***Leon,*** noting first that the exception sought by the state is a warrantless search, not subject to the case-by-case scrutiny of a neutral judicial officer, and therefore not preferred by the Fourth Amendment or Article I, § 11 of the Wisconsin Constitution.

As to the first factor, the court must first determine whether police conduct would be the target of the exclusionary rule in the case of reliance upon court decisions. On this point, the difference between reliance on warrants, laws, and court decisions, is material and significant. Reliance on court decisions is materially different than reliance on a warrant, because a warrant is specifically addressed to the particularized and fact-specific targets in a case. Similarly, reliance on court decisions is materially different than reliance on a law which specifically authorizes a search of designated premises engaging in a regulated business. *See* ***Krull***, 480 U.S. at 342-43.

Reliance on court decisions, on the other hand, requires complex and discretionary decision-making. If an officer is to be entrusted with case law interpretation, she must first decide which court she will turn to for applicable case law. In ***McCane,*** 573 F. 3d at 1945, the court sanctioned reliance "upon the settled case law of a United States Court of Appeals." Is one court of appeals opinion well-established? If different courts of appeals have reached different results, may the officer choose which one? What if the decisions of

the federal court are different than that of the state's highest court? What if the issue has not been decided by a Wisconsin appellate court but was decided by another jurisdiction?

Second, the officer must extrapolate legal principles from fact-specific scenarios, and determine how those principles do or do not apply to fact-specific scenarios. This is the definition of legal research and analysis, which in the Fourth Amendment context, is "a challenging task even for those charged with doing so on a daily basis." ***Peoples,*** at *16.

Gant itself proves the point that even a "rule" can be subject to disputation, exceptions, and nuanced refinements. The court noted that ***Belton*** was "widely understood [by courts] to allow a vehicle search incident to the arrest of a recent occupant even if there is no possibility the arrestee could gain access to the vehicle at the time of the search," despite the clear statement in ***Belton*** that it "in no way alter[ed] the fundamental principles established in the ***Chimel*** case." ***Gant,*** 129 S. Ct., 1718-1719 (quoting ***Belton***). But at the same time, some courts rejected or restricted the ***Belton*** rule to avoid inconsistencies with the rationale for searches incident to arrest adopted in ***Chimel***. *See,* e.g., ***State v. Pallone***, 2000 WI 77, ¶ 89-91, 236 Wis. 2d 162, 613 N.W. 2d 568 (Abrahamson, C.J., dissenting) (collecting cases). Even courts "that have read ***Belton*** expansively are at odds regarding how close in time to the arrest and how proximate to the arrestee's vehicle an officer's first contact with the arrestee must be to bring the encounter within ***Belton***'s purview and whether a search is reasonable when it commences or continues after the arrestee has been removed from the scene". ***Gant***, 129 S. Ct. 1720-21. As ***Gant*** concludes: "The rule has generated a great deal of

uncertainty, particularly for a rule touted as providing a 'bright line.'" ***Id.,*** 1721.

Third, if an officer is able to correctly extrapolate principles from a case, the officer must determine if the principles are "settled" or subject to dispute. ***McCane,*** 573 F. 3d at 1945. Is it settled if it has been widely criticized by commentators, or its application in a new setting is questioned by a Supreme Court justice in a dissent? *See* ***Thornton v. United States***, 541 U.S. 615, 625-629 (2004).

Because reliance on case law requires complex, discretionary judgments to correctly interpret the governing law, it is the officer, not the court that issued the opinion based on a different fact scenario, whose discretion is at issue in the ***Leon*** analysis.

Therefore, as to the first ***Leon*** factor, the purpose of the exclusionary rule, to deter police misconduct, is served by the application of the rule. When applied to warrantless searches undertaken in reliance on court decisions, the rule is aimed precisely at police conduct – the officer's interpretation of relevant and governing case law, and application of that interpretation to the facts of the new situation. Expansion of the rule as argued by the state, "would for the first time permit use of illegally obtained evidence based on the good faith of the officer alone, unchecked by the judgment of either the legislature (as it was in ***Krull)*** or the judiciary (as it was in ***Leon, Evans,*** and ***Herring***)." ***Peoples***, 2009 U.S. Dist. Lexis, 100766, *15.

As to the second factor, "the judgment of a law enforcement officer engaged in the often competitive enterprise of ferreting out crime," is considerably less reliable than a neutral decision maker. ***Leon,*** 913-14. Applications of the good-faith exception show that courts do not trust law

enforcement with the unilateral power to make constitutional determinations based on case law. Rather, each expansion of the good faith doctrine has been carefully crafted so that some other tool—a warrant, a legislative enactment—permits the police to act *without* having to engage in the interpretative activities generally reserved to the courts. ***Peoples***, 2009 U.S. Dist. Lexis, 100766, *18-*19.

Further, permitting an officer to rely on case law to excuse suppression permits law enforcement to conduct an illegal search without penalty so long as the officer could point to a case from which she could reasonably extrapolate that her actions were legal. "[O]fficers would have the first crack at interpreting the Fourth Amendment and determining what the law permits in a new situation, without risking any sanction if they overstep." ***Id.,*** *20. It would, at a minimum, encourage officers to test the limits of what case law would permit. At worst, it would create a serious and recurring threat to the privacy of countless individuals. ***Id.*** *21.

As to the third factor, because law enforcement is part of the prosecution team, exclusion of evidence from warrantless searches conducted in reliance on overturned precedent will provide a powerful positive incentive for police to refrain from conducting unreasonable searches. Viewed from the standpoint of deterrence, the good faith exception is more appropriately applied when an officer *and* a magistrate have followed existing law in obtaining a warrant. This deters police overreaching, and encourages the Constitutionally-preferred method of obtaining warrants.

These were the reasons the Seventh Circuit Court of Appeals refused to extend the good faith exception to searches "conducted in naked reliance upon subsequently overruled case law." In ***United States v. Real Property at***

15324 County Highway E, 332 F. 2d 1070, 1076 (7th Cir. 2003), the court explained:

> We decline to extend further the applicability of the good-faith exception to evidence seized during law enforcement searches conducted in naked reliance upon subsequently overruled case law—as distinguished from the subsequently invalidated statute at issue in ***Krull***—absent magistrate approval by way of a search warrant. Such expansion of the good-faith exception would have undesirable, unintended consequences, principal among them being an implicit invitation to officers in the field to engage in the tasks – better left to the judiciary and members of the bar more generally—of legal research and analysis.

A good faith exception for warrantless searches made in reliance on an officer's interpretation of court decisions fails the test set forth in ***Leon.*** Therefore, this court should decline the state's invitation to radically expand the good-faith doctrine to this situation.

2. The Wisconsin Constitution does not support a good faith exception broader than that recognized by the United States Supreme Court.

The state argues that the Wisconsin Supreme Court has recognized a good faith exception for searches in which law enforcement relied upon state case law at the time of the search, later overturned.

The three cited cases, ***State v. Ward***, 2000 WI 3, 231 Wis. 2d 723, 604 N.W. 2d 517; ***State v. Eason***, 2001 WI 98, 245 Wis. 2d 206, 629 N.W. 2d 625, and ***State v. Loranger***, 2002 WI App 5, 250 Wis. 2d 198, 640 N.W. 2d 555, do express the opinion that police officers and magistrates are

permitted to rely on prior pronouncements of the state Supreme Court (***Ward, Eason***), and published decisions of the Court of Appeals (***Loranger***).

However, the salient fact in every one of those cases, is that police had obtained a search warrant from a judge or court commissioner. In ***Ward***, 231 Wis. 2d 723, ¶¶ 4-10, and ***Eason***, 245 Wis. 2d 206, ¶ 4, the magistrates had issued no-knock warrants in reliance on ***State v. Richards***, 201 Wis. 2d 845, 549 N.W. 2d 218 (1996) (overruled by ***Richards v. Wisconsin***, 520 U.S. 385 (1997)). In ***Loranger***, 250 Wis. 2d 198, ¶¶ 3-6 a magistrate issued a warrant based in part on a warrantless thermal imaging analysis of a home, approved in ***State v. McKee***, 181 Wis. 2d 354, 510 N.W. 2d 807 (Ct. App. 1993), but later disapproved in ***Kyllo v. United States,*** 533 U.S. 27 (2001).

Therefore it was both the police officers applying for the warrant, and the magistrates who issued the warrant, who acted in reliance on case law later overturned. In each of these cases, the search was based on a good faith reliance on a search warrant later found to be flawed. Each search fell within the constitutional preference for a warrant. As a result, each of the searches may be justified under the good faith exception for reliance on a flawed search warrant announced in ***Leon***, 468 U.S. 897. *See also,* ***15324 County Highway E,*** 332 F. 2d 3d, at 1076. Unnecessary language and opinions in these cases is *dicta*, and is not controlling. ***State v. Sartin*****,** 200 Wis. 2d 47, 60, 546 N.W. 2d 449 (1996).

Because each of these searches was based upon a warrant, the Wisconsin Supreme Court has not stepped in front of the United States Supreme Court by adopting the state's proposed radical expansion of the good faith exception. Rather, its decisions have been consistent with its

stated policy of following United States Supreme Court Fourth Amendment jurisprudence for purposes of clarity and consistency. ***State v. Fry,*** 131 Wis. 2d 153, 172-74, 388 N.W. 2d 565 (1986).

Notably, the only departure from federal jurisprudence was in, ***Eason***, 2001 WI 98, ¶ 60, concluding that the Wisconsin Constitution "guarantees more protection" than the Fourth Amendment's "good faith exception." The ***Eason*** court imposed additional requirements 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." ***Id.*** ¶ 63.

The extra protection our state constitution demands in the application of a good faith exception, precludes adoption of the radical expansion of the exception urged by the state in this case, without precedential support from the United States Supreme Court, and in violation of the retroactivity rule and the policy considerations behind the exclusionary rule, under the guise of a state constitutional ruling.

III. The Officer's Ostensible Reliance on the Decisions in ***Belton*** and ***Fry*** Was Not Objectively Reasonable.

If this court rejects Mr. Dearborn's arguments on the applicability of the exclusionary rule to this case, it must consider whether Warden Stone reasonably relied upon existing case law when he searched Mr. Dearborn's locked truck. Both the Fourth Amendment exclusionary rule and the Wisconsin Constitution's exclusionary rule stand or fall upon the existence of "objectively reasonable reliance" by the police officers, generally. ***Herring***, 129 S. Ct. 701; ***Leon,*** 468 U.S. 919 at n. 20; ***Eason,*** 2001 WI 98, ¶29 at n.9. In

particular, the officers must be reasonably knowledgeable about the applicable law. ***Leon***, *supra*; ***Eason***, *supra*, ¶36 at 236, ¶74 at 266.

For this reason, the fundamental premise of the state's argument is that United States Supreme Court's decision in ***Belton,*** 453 U.S. 454, authorized the search of Mr. Dearborn's locked truck, even though he was handcuffed and secured in a squad car; that the Wisconsin Supreme Court's decision in ***Fry***, 131 Wis. 2d 153, was a correct pronouncement of Fourth Amendment law; and that the ***Gant*** decision effected a material change in Fourth Amendment law. The state is wrong.

Belton involved a single officer who was confronted with four unsecured arrestees near the vehicle. The court held that in that circumstance, when an officer made "a lawful custodial arrest of the occupant of an automobile, he may, as a contemporaneous incident of that arrest, search the passenger compartment of that automobile." ***Id.,*** 460. The court carefully noted, however, at footnote 3, that the holding "does no more than determine the meaning of *Chimel*'s principles in this particular and problematic context. It in no way alters the fundamental principles established in the *Chimel* case . . . ." ***Id.,*** 460.

In ***Gant***, the court did not overrule ***Belton***, but instead held that courts who had interpreted ***Belton*** so broadly as to apply to cases in which the car was no longer within reaching distance of the arrestee, were wrong. It explained: "To read *Belton* as authorizing a vehicle search incident to every recent occupant's arrest would thus untether the rule from the justifications underlying the *Chimel* decision. . . ." ***Gant,*** 129 S. Ct. 1719. Indeed, the ***Gant*** court observed that its

prior decisions were "so easily distinguished" from any misinterpretation of them. ***Id.*** at 1722.[3]

The United State Supreme Court's careful reaffirmance of the "reaching distance" restriction set forth in ***Chimel v. California***, 395 U.S. 752, 763 (1969) should have warned Warden Stone, as a reasonably knowledgeable law enforcement officer, that he could not place objective reasonable reliance on ***Fry*** or any other lower court authority that failed to honor the reaching-distance test of ***Chimel***. A reasonably knowledgeable officer would know that the United States Supreme Court is the final arbiter about the true meaning of the Fourth Amendment, and that the high court's decisions are the supreme law of the land. ***State v. Jennings***, 2002 WI 44, ¶18, 252 Wis. 2d 228, 237-38, 647 N.W.2d 142. A reasonably knowledgeable officer would also know that the state courts may impose greater restrictions on police activity than is required by the federal constitution, ***Oregon v. Hass***, 420 U.S. 714, 719 (1975), but they may not authorize police conduct which trenches upon federal constitutional rights. ***Sibron v. New York***, 392 U.S. 40, 61 (1968).

A reasonably knowledgeable officer would also know that ***Fry*** extended the authority to perform a warrantless vehicle search far beyond the facts of ***Belton***, to apply to a situation involving a single arrestee who had been handcuffed and secured in a police car before the search was conducted.

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[3] It is true that Justice Brennan's dissenting opinion in ***Belton***, 453 U.S. 454, at 463-72, viewed the court's holding in that case differently. It is also true that Justice Alito's dissenting opinion in ***Gant***, 129 S. Ct. 1710, at 1726-32, viewed the court's holding in that case to have overruled ***Belton***. But the dissenters' opinions do not define the scope of the majority's holding.

Id. 131 Wis. 2d 158, 186 (Bablitch, J., dissenting). The decision in ***Fry*** further extended ***Belton*** beyond its facts to authorize a warrantless search to a locked glove compartment. ***Id.*** at 178.

A reasonably knowledgeable officer would have understood that these material factual differences between ***Belton*** and ***Fry*** raised uncertainty about the validity of the ***Fry*** rule, and hence that a judicial warrant should have been requested. This is particularly true when the majority pronouncement in ***Fry*** arose from a slender 4-3 voting margin, and the sharply critical dissent pointed out both the factual distinctions, and the fact that ***Belton*** provided a "shaky basis" for court reliance, given critical commentary and the division of the United States Supreme Court. ***Id.*** at 186-8.

Under these circumstances, too, a reasonably knowledgeable officer would have understood that the correct rule of Fourth Amendment law was uncertain, at best. Indeed, this uncertainty was amplified by the fact that the Wisconsin Supreme Court, itself, had previously ruled that a locked motor vehicle is beyond the scope of a warrantless search incident to the lawful arrest of a recent vehicle occupant. *See* ***Soehle v. State***, 60 Wis. 2d 72, 78-79, 208 N.W.2d 341 (1973).[4]

[4] The court of appeals decided that ***Soehle v. State*** was implicitly overruled by ***State v. Fry***. ***State v. Littlejohn***, 2008 WI App 45, ¶15, 307 Wis. 2d 477, 484, 747 N.W.2d 712. But this conclusion is suspect because ***Soehle*** was neither briefed by the parties nor addressed by the court in ***Fry***. *Cf*. ***State v. Mueller***, 201 Wis. 2d 121, 136-37 at n.5, 549 N.W.2d 455 (Ct. App. 1996)(a statement by a court regarding an issue never briefed is not a holding).

For these reasons, the Warden Stone could not have had an objectively reasonable reliance that ***Belton*** authorized the search of Mr. Dearborn's locked truck when he was no longer in reaching distance, and could not have an objectively reasonable reliance that ***Fry*** represented settled Fourth Amendment law. Therefore, the good faith exception to the exclusionary rule should not be applied to the fruits of the search in this case.

IV. Mr. Dearborn Was Denied His Right to Unanimous Verdict by a Jury Instruction That Defined Proof of One Element as Assault or Resistance or Obstruction.

The state's brief on this issue essentially repeats the reasoning of the court of appeals' decision. Because Mr. Dearborn addressed that decision in his brief-in-chief, he will not iterate his arguments in this reply brief.

CONCLUSION

For the reasons stated in this brief and the brief-in-chief, Mr. Dearborn respectfully requests that the court reverse his convictions, and remand the case to the trial court with instructions to suppress the evidence found in his truck, and to instruct the jury that they must be unanimous as to whether he obstructed the warden, or resisted the warden.

Dated this 8th day of February, 2010.

Respectfully submitted,

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CERTIFICATION AS TO FORM/LENGTH

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 of body text. The length of the brief is 5,690 words.

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of § 809.19(12). I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed on or after this date.

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

Dated this 8th day of February, 2010.

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