STATE OF WISCONSIN
SUPREME COURT

Appeal No. 2011AP002956CR

Circuit Court Case No. 2010CF003377

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

GARY MONROE SCULL,

Defendant-Appellant-Petitioner.

An Appeal From an Order Denying Motion to Suppress Evidence and a Judgment of Conviction entered by Branch 12 of the Milwaukee County Circuit Court, the Honorable David Borowski, Presiding

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BRIEF OF DEFENDANT-APPELLANT-PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

United States Supreme Court Cases

United States Court of Appeals Cases

Wisconsin Supreme Court Cases

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The Court already has set oral argument. The reasons for granting review also counsel publication, which rightly is this Court's usual practice.

ISSUE PRESENTED FOR REVIEW

1. As the act of bringing a drug-sniffing dog to the front door of Scull's residence was a Fourth Amendment violation, should the evidence found from the execution of a search warrant, which was heavily based on the illegal dog sniff, be suppressed?

Circuit Court did not answer this question.

Court of Appeals answered: No.

STATEMENT OF FACTS

The facts are undisputed. A confidential informant advised City of Milwaukee police that Gary Monroe Scull was selling cocaine out of Scull's vehicle at various locations in Milwaukee. (COA op. at ¶3). Based on this information, the police took a drug detecting canine to the front entry door of Scull's residence. (Id. at ¶4-5). The dog made an "alert" – a positive indication that controlled substances were contained in the residence. (Id. at ¶5). The police then applied for and received a search warrant to search Scull's residence. (Id. at ¶6). The police executed the search warrant and found drugs and drug-trafficking paraphernalia. (2:2-4).

Armed with this physical evidence, the State charged Scull with Possession With Intent to Deliver Cocaine, Possession With Intent to Deliver THC and Keeping a Drug House. (2).

Scull filed a motion to suppress the items found during the search (5) and the circuit court held an evidentiary hearing to help determine whether there was an unlawful invasion of

the cartilage of Scull's home when the officer deployed the drug-sniffing dog at Scull's residence. (24:4).

The officer testified that he went by the property on two occasions (24:11). The first time he went by the property he did nothing because people were around. (24:12). On the second occasion, the officer initially went to the side door and the front door and the K-9 alerted to the door (24:12). The officer conceded that he did not want anyone to know what he was doing (24:17). His only intention was to bring the dog to the house to see what the dog was going to do. (24:17).

The circuit court ruled that the use of the K-9 dog was valid and denied Scull's motion to suppress. (26:2-3). Scull pled guilty, was sentence and appealed.

While the appeal was pending, the United States Supreme Court issued its decision in ***Florida v. Jardines***, 133 S.Ct. 1409, 185 L.Ed. 495 (2013). ***Jardines*** involved a "dog sniff" of the front door of a suspect's home, without a warrant and without any pretext of going to the home to contact the suspect or anyone else at the property. The Florida Supreme Court held that this constituted a Fourth Amendment violation and the United States Supreme Court affirmed. The court held that although there is a customary invitation allowing visitors to approach a home and knock on the front door, this invitation does not permit law enforcement officers to physically invade the curtilage of a home solely to investigate suspicions of a marijuana grow operation. Therefore, the dog sniff on the defendant's front porch was an invasion of the defendant's curtilage for the purposes of obtaining information and was a trespass which violated the Fourth Amendment.

The Court of Appeals, in a divided opinion, affirmed the circuit court's denial of Scull's motion to suppress evidence. The Court of Appeals' majority held that while the dog sniff was a violation of Scull's Fourth Amendment rights, pursuant to ***Jardines***, the evidence found pursuant to the illegal search should not be suppressed due to the good-faith exception to the exclusionary rule. Scull petitioned the Supreme Court to review the Court of Appeals' opinion and this court agreed to hear the case.

ARGUMENT

I. THE GOOD FAITH EXCEPTION TO THE EXCLUSIONARY RULE DOES NOT APPLY AS THE WARRANT WAS NOT OBTAINED THROUGH A SUBSTANTIAL INVESTIGATION AND AS AT THE TIME OF THE ILLEGAL SEARCH THERE WAS NO BINDING PRECENT THAT LAW ENFORCEMENT COULD HAVE REASONABLY RELIED ON.

The exclusionary rule is a judicially-created concept premised on suppressing evidence that "is *in some sense* the product of illegal governmental activity." ***State v. Knapp***, 2005 WI 127, ¶22, 285 Wis. 2d 86, 700 N.W.2d 899 (emphasis in original; citation omitted). The rule's primary purpose is deterring lawless police conduct, along with preserving judicial integrity. ***Terry v. Ohio***, 392 U.S. 1, 12-13 (1968). The rule is designed to deter police misconduct rather than to punish the errors of judges and magistrates. ***United States v. Leon***, 468 U.S. 897, 913-17 (1984).

Wisconsin's courts have a long-standing commitment to excluding illegally seized evidence from use at trial. Indeed, this Court was one of the earliest state courts to recognize the exclusionary rule. The exclusionary rule's application dates back to 1923, "when this Court held that for 'the Bill of Rights as embodied in constitutions to be of substance rather than mere tinsel,' a conviction may not rest on unlawfully seized evidence." ***State v. Hess***, 2010 WI 82, ¶ 46, 327 Wis.2d 524, 785 N.W.2d 568. Moreover, Wisconsin has a long history of treating the exclusionary rule as a substantive protection with constitutional, rather than judicial, underpinnings. ***State v. Orta***, 2000 WI 4, 231 Wis. 2d 782, 786-791, 604 N.W.2d 543 (Prosser, J., concurring).

Courts have established a good-faith exception to the exclusionary rule. There are two "varieties" of good-faith exception involved here. The first and longest-standing exception involves police reliance on a search warrant. In Wisconsin, to avail itself of this good-faith exception the state must prove that the process by which the warrant was

obtained included "significant investigation." ***State v. Eason***, 2001 WI 98, 74, 245 Wis. 2d 206, 629 N.W.2d 625. Thus, one question in the case is whether the "significant investigation" requirement was met.

The second, more recently minted good-faith exception involves police reliance on "clear and settled Wisconsin precedent," ***State v. Dearborn***, 2010 WI 84, ¶51, 327 Wis. 2d 252, 786 N.W.2d 97. This exception arises because, as part of their investigation, the police took a drug-detection dog on to Scull's front porch, an act now clearly unlawful under ***Jardines***. The court of appeals applied this exception to excuse the unlawful dog-sniff search, thus allowing the dog's "alert" to count as part of the "significant investigation" supporting the warrant.

For the reasons that follow, neither ***Eason*** nor ***Dearborn***, nor any of the other applicable case law, justify application of the good faith exception to the exclusionary rule here and the Court of Appeals decision must be reversed.

A. ANALYSIS OF EASON, LEON & KRULL.

Wisconsin has adopted a good faith exception to the exclusionary rule. ***See State v. Eason***, 2001 WI 98, 245 Wis. 2d 206, 629 N.W.2d 625 ¶74. Wisconsin's exception is modeled after the federal good faith exception: "where police officers act in objectively reasonable reliance upon the warrant, which had been issued by a detached and neutral magistrate, a good faith exception to the exclusionary rule applies." ***Id.*** The Wisconsin Supreme Court has also followed the United States Supreme Court in concluding that the application of the exclusionary rule is not absolute, but rather is connected to the public interest, which requires a balancing of the relevant interests. ***Id.*** at ¶43. Said another way, the good faith exception carves out an exception to the exclusionary rule allowing the admission of evidence when law enforcement officers did what they were supposed to—they followed through in objective good faith, but someone made an accidental clerical or technical error or the judge erred in concluding that the law enforcement's application fulfilled the requirements for a warrant.

This is not a case in which there is a trivial clerical or technical error in the law enforcement's application for the warrant. This is not a case where the police simply reasonably relied on a facially valid search warrant and where the police did not engage in any misconduct. This case involved law enforcement's willful violation of Scull's Fourth Amendment rights by bringing the drug sniffing dog to his residence and having the drug sniffing dog sniff the inside of the residence. Since a law enforcement act invalidated the search warrant, the good faith exception cannot apply. The purpose behind the exclusionary rule – deterring police from making illegal searches and seizures – is furthered by excluding the evidence found during and after the execution of the tainted search warrant.

In ***Leon*** and ***Eason***, the court applied the good faith exception because the State showed that the police officers acted in objective reasonable reliance on a search warrant that had been issued by a detached and neutral magistrate. However, the exception operates only in those close cases where a reviewing court finds that the issuing magistrate erroneously concluded that there was probable cause of reasonable suspicion. ***Eason***, 2001 WI 98 at ¶ 55. The rationale behind applying the good faith exception in these cases was that excluding the evidence would punish the officers, and society, for an error of the magistrate and no deterrence would result. ***Id***. at ¶73.

In ***Krull***, the officers acted in objectively reasonable reliance upon a statute authorizing warrantless administrative searches but the statute was ultimately found unconstitutional. ***Illinois v. Krull***, 480 U.S. 340, 342 (1987).

The principal conclusion from ***Leon*** and its progeny is that there is no benefit in applying the exclusionary rule where it will have no deterrent effect. To the contrary, if exclusion of evidence obtained pursuant to a subsequently invalidated warrant is to have any deterrent effect it must alter the behavior of individual law enforcement officers or the policies of their departments. ***United States v. Leon***, 468 U.S. 897, 918 (1984).

The police deliberately brought the drug-sniffing dog to Scull's front door. The police misconduct in bringing the drug sniffing dog to Scull's property without a warrant or probable cause resulted in the quashing of the warrant (assuming that the dog sniff is declared an unreasonable search). As such, suppression of the evidence acquired during and after the execution of the warrant serves to deter police misconduct. The rationale behind the good faith exception – basically that suppression would not deter police misconduct – is not present and the good faith exception does not apply. The Supreme Court must uphold the exclusionary rule in this case.

Moreover, the information provided by the confidential informant alone, as outlined in the search warrant affidavit, did not establish probable cause for issuance of the warrant. If it did, the police would not have brought their drug-sniffing dog to Scull's home; they would have simply obtained a warrant. The State needed the dog sniff because the confidential informant had no personal knowledge of Scull keeping contraband in his home.

When an affidavit in support of a search warrant includes information from a confidential informant, "the sufficiency of the affidavit and, specifically, the sufficiency of the allegations of reliability of an informant, should be assessed by evaluating the totality of the circumstances in indicating the informant's information is reliable." ***U.S. v. Hendrix***, 752 F.2d 1226, 1233 (7th Cir. 1985). When an assertion of probable cause is based on a confidential informant's tip, a court's totality of the circumstances inquiry "focuses on the informant's reliability, veracity, and basis of knowledge." ***U.S. v. Dismuke***, 593 F.3d 582, 586 (7th Cir. 2010). The five factors that inform the analysis include: (1) the degree to which the informant has acquired knowledge of the events through firsthand observation; (2) the amount of detail provided in the informant's statement; (3) the interval between the date of the events and the police officer's application for the search warrant; (4) the extent to which the police have corroborated the informant's statements; and (5) whether the informant appeared before the magistrate who issued the warrant. ***U.S. v. Hollingsworth***, 495 F.3d 795, 804 (7th Cir. 2007).

The informant did not establish a date and/or time during which he or she observed Scull selling cocaine. The search warrant affidavit makes it impossible to know whether the informant's knowledge was stale or fresh. The affidavit does not specify that the informant purchased drugs directly from Scull. The affidavit does not state how the informant received firsthand knowledge of Scull selling drugs out of Scull's truck, does not state whether he was riding with Scull at the time of the deals or who Scull sold the drugs to. The informant does not provide the location of the drug deals or whether there were any drugs in Scull's truck. Finally, the informant provides no basis to support a search of Scull's home. In fact, the only piece of evidence linking drugs to Scull's home is the supposed alert from the drug sniffing dog.

The lack of credibility of the confidential informant coupled with the fact that it was an act of the police that caused the Fourth Amendment violation prove that the good faith exception should not apply. Unlike ***Leon*** and ***Eason***, this case did not involve a mistake by a magistrate. Unlike ***Krull***, this case did not involve an officer reasonably relying on a statute that is later ruled unconstitutional.

B. DEARBORN.

In ***Dearborn***, the court applied the good faith exception where officers conducted a search in objectively reasonable reliance upon clear and settled Wisconsin precedent which was later deemed unconstitutional by the United States Supreme Court. ***State v. Dearborn***, 2010 WI 84 ¶4, 327 Wis. 2d 252, 786 N.W.2d 97. In particular, the Dearborn court noted that their holding did not affect the vast majority of cases where neither this court nor the United States Supreme Court have spoken with specificity in a particular fact situation. ***Id***. at ¶46.

Unlike ***Dearborn***, this case did not involve a police officer reasonably relying on clear and settled Wisconsin precedent. There was *no* precedent, let alone established precedent, that covered the legality of dog sniffs on doors of residences. Therefore, contrary to the Court of Appeals'

majority, the good faith exception does not apply to counsel against suppression of evidence in this case.

The parties acknowledged to the Court of Appeals that the Scull case was a case of first impression in Wisconsin and that the Scull case would be governed by the United States Supreme Court ruling in ***Jardines***. At one point the State even asked for a briefing stay. The Court of Appeals acknowledged this in their opinion:

"At the time the court commissioner signed the search warrant in this case, there was no case directly addressing this issue in the state courts of Wisconsin". (COA op at ¶21 n.5).

The Court of Appeals confirmed there was no precedent. They then illogical applied the good faith exception and did not suppress the evidence. Moreover, instead of remanding the matter to develop a further record regarding the officer's beliefs at the time of the illegal search the Court of Appeals chose to make certain assumptions about those beliefs and concluded that the good-faith exception applied. The Court of Appeals' majority noted the existence of Wisconsin federal courts decisions permitting dog sniffs of vehicles as permissible searches as support for their conclusion that the officer in Scull acted reasonably. (COA op. ¶21 n.5). The Court of Appeals is wrong for three reasons. First, the dog sniff in this case occurred at a residence, not at a vehicle and courts generally conclude that a person's privacy interest is paramount in one's residence as opposed to in one's automobile. Second, the record developed at the motion hearing did not include testimony regarding the officer's thoughts and beliefs on the state of the law regarding dog sniffs at the time he approached Scull's house with the drug-sniffing dog. Third, the main case noted in the footnote described earlier, the ***Jones*** opinion from the Eastern District of Wisconsin, is a 2011 case. The Scull search warrant was signed in 2010 so Jones would not have been in effect at the time the officer brought the drug sniffing dog to Scull's residence and relied on the 2010 search warrant.

C. CONCERN ABOUT THE GOOD-FAITH EXCEPTION SWALLOWING THE EXCLUSIONARY RULE.

The Court of Appeals holding validates the fears of the dissent in ***Davis v. United States***, 564 U.S. ___, 131 S.Ct. 2419 (2011), the U.S. Supreme Court's counterpart to ***Dearborn***. The ***Davis*** majority held that the "sole purpose" of the exclusionary rule is deterrence and claimed the rule has never been applied "to suppress evidence obtained as a result of nonculpable, innocent police conduct." 131 S.Ct. at 2426, 2429. Thus, when an officer acts with an objectively reasonable good-faith belief that his or her conduct is lawful, exclusion is not justified because "suppression would do nothing to deter police misconduct in these circumstances." ***Id***. at 2423. When the police act with an objectively "reasonable good-faith belief" that their conduct is lawful, or when their conduct involves only simple, "isolated" negligence, the deterrence rationale loses much of its force and exclusion cannot "pay its way." ***Id***. at 2427-28 (quoted sources omitted). As the ***Davis*** dissent points out, however:

[A]n officer who conducts a search that he believes complies with the Constitution but which, it ultimately turns out, falls just outside the Fourth Amendment's bounds is no more culpable than an officer who follows erroneous "binding precedent." Nor is an officer more culpable where circuit precedent is simply suggestive rather than "binding," where it only describes how to treat roughly analogous instances, or where it just does not exist. Thus, if the Court means what it now says, if it would place determinative weight upon the culpability of an individual officer's conduct, and if it would apply the exclusionary rule only where a Fourth Amendment violation was "deliberate, reckless, or grossly negligent," then the "good faith" exception will swallow the exclusionary rule. Indeed, our broad dicta in Herring—dicta the Court repeats and expands upon today—may already be leading lower courts in this direction.

Davis, 131 S. Ct. at 2439 (Breyer, J., dissenting).

Scull strongly believes that deterrence would be achieved if the evidence recovered from the execution of the search warrant is suppressed. This is because the warrant was not obtained through significant investigation and the police officer who conducted the dog sniff did not rely on

established Wisconsin precedent to do so. Public policy also favors suppression of the evidence so that we do not continue on the road to the good-faith exception swallowing up the exclusionary rule and eroding Fourth Amendment protection.

CONCLUSION

The circuit court was wrong when it denied Scull's suppression motion. The Court of Appeals was wrong when it applied the good faith exception and refused to suppress the evidence found during the execution of the search warrant. Based upon the above argument and authorities, Gary Monroe Scull respectfully requests this Court to reverse the Court of Appeals decision and for this Court to remand the matter to the circuit court for proceedings consistent with their opinion.

Dated this ___ day of June, 2014.

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CERTIFICATION

I certify that this brief conforms with the rules contained in WIS. STAT. §§ 809.19(8)(b) and (c), for a brief produced using proportional serif font. The length of the portions of this brief described in WIS. STAT. § 809.19(1)(d), (e) and (f) is 3,050 words. *See* WIS. STAT.§ 809.19(8)(c)1.

I hereby certify that filed with this brief, as a separate document, is an appendix that complies with Wis. Stat. § 809.62(2)(f).

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.

I hereby certify that an electronic copy of this brief was submitted, which conforms to the rules contained in Wis. Stat. § 809.62(4)(b)(c) and (d). I also certify that the text of the electronic copy of the brief is identical to the text of the paper copy of the brief.

Basil M. Loeb

STATE OF WISCONSIN

IN SUPREME COURT

No. 2011AP2956-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

GARY MONROE SCULL,

Defendant-Appellant-Petitioner.

ON REVIEW OF A DECISION OF THE COURT OF APPEALS, DISTRICT I, AFFIRMING AN ORDER DENYING MOTION TO SUPPRESS EVIDENCE ENTERED IN MILWAUKEE COUNTY CIRCUIT COURT, THE HONORABLE DAVID L. BOROWSKI, PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

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TABLE OF CONTENTS

Page

Cases

Page

STATE OF WISCONSIN

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BRIEF OF PLAINTIFF-RESPONDENT

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

By granting review, this court has indicated that oral argument and publication are appropriate.

SUPPLEMENTAL STATEMENT OF THE CASE AND FACTS

The defendant-appellant-petitioner, Gary Monroe Scull, appeals a published opinion of the court of appeals, *State v. Scull*, 2014 WI App 17, ¶ 22, 352 Wis. 2d 733, 843 N.W.2d 859 (Pet-Ap. 7).[1] The court of appeals affirmed the Milwaukee County Circuit Court's decision denying Scull's motion to suppress drug evidence recovered during the execution of a search warrant for his residence in 2010. *Scull*, 352 Wis. 2d 733, ¶¶ 3-8 (Pet-Ap. 2-3).

The court of appeals held that although the United States Supreme Court's subsequent decision in *Florida v. Jardines*, 569 U.S. __, 133 S. Ct. 1409 (2013), established that the police violated Scull's Fourth Amendment rights when they brought a drug detection dog to his front door without a warrant or probable cause, the good-faith exception to the exclusionary rule applied to the related search warrant that the officers obtained based, in part, on the improper dog sniff. *Scull*, 352 Wis. 2d 733, ¶ 1 (Pet-Ap. 1-2).[2]

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[1]The court of appeals opinion is appended to the petitioner's brief (Pet-Ap. 1-10).

[2] The court noted that:

> Scull argues that the State forfeited its right to argue that the good-faith exception applies because it did not raise the issue before the circuit court. We disagree. First, we may affirm a circuit court's decision on any grounds. *See State v. Milashoski*, 159 Wis. 2d 99, 108-09, 464 N.W.2d 21 (Ct. App. 1990). Second, the good-faith exception never came up before the circuit court because the circuit court ruled on the issue prior to the United States Supreme Court's decision in *Jardines* and concluded that the dog sniff was not a search. Therefore, the circuit court did not need to explore the contours of the exclusionary rule in this case.

ARGUMENT

ALTHOUGH *JARDINES* NOW ESTABLISHES THAT THE DOG SNIFF AT SCULL'S DOOR WAS A SEARCH WITHIN THE MEANING OF THE FOURTH AMENDMENT, THE GOOD FAITH EXCEPTION APPLIES AND SUPPRESSION OF THE EVIDENCE RECOVERED IS NOT REQUIRED.

A. *Jardines.*

The relevant facts in *Jardines* are virtually identical to the facts in this case. In both cases, police received information from a confidential informant that the defendant was manufacturing/delivering illicit drugs. Based on the tip, officers went to the defendant's home with a trained drug detection dog and had the dog sniff around the front door area. Based on the dog's alert to the odor of drugs, the officers then obtained a search warrant for the residence and eventually discovered illegal drugs when they executed the warrant.

Under these circumstances, the Supreme Court held for the first time that the dog sniff was a "search" under the Fourth Amendment:

> At the [Fourth] Amendment's "very core" stands "the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion." This right would be of little practical value if the State's agents could stand in a home's porch or side garden and trawl for evidence with impunity; the right to retreat would be significantly diminished if the police could enter a man's property to observe his repose from just outside the front window.
>
> We therefore regard the area "immediately surrounding and associated with the home" – what

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Scull, 352 Wis. 2d 733, ¶ 13 n.3 (Pet-Ap. 5, 10). The court of appeals was correct, and Scull has chosen not to pursue his forfeiture argument in this court.

> our cases call the curtilage – as "part of the home itself for Fourth Amendment purposes."

Jardines, 133 S. Ct. at 1414 (citations omitted). The court recognized that police officers without a warrant, like private citizens, have an "implied license" to approach and knock on a suspect's door with the hope of speaking to the suspect. *Id*. at 1415-16. The court held, however, that deploying a drug detection dog was an "unlicensed physical intrusion" into the constitutionally protected area of the home and its curtilage. *Id*.

The Supreme Court also cited its decision in *Kyllo v. United States*, 533 U.S. 27 (2001) (holding that law enforcement's use of a thermal-imaging device to detect heat emanations from a home believed to contain a marijuana-growing operation constituted a Fourth Amendment "search," which is presumptively unreasonable without a warrant), and noted that: "[S]urveillance of the home is a search where 'the Government uses a device that is not in general public use' to 'explore details of the home that would previously have been unknowable without *physical intrusion*.'" *Jardines*, 133 S. Ct. at 1417 (citation omitted) (emphasis in original). The court explicitly held that: "The government's use of trained police dogs to investigate the home and its immediate surroundings is a 'search' within the meaning of the Fourth Amendment." *Jardines*, 133 S. Ct. at 1417-18.

In light of *Jardines*, it is <u>now</u> clear that the dog sniff at Scull's front door was a Fourth Amendment "search." *Jardines*, however, was a significant and novel development in the law regarding the government's use of drug detection dogs. The dog sniff at issue in this case took place well before that decision came down, and the existing law at that time strongly indicated that it was permissible.

B. The Law Before *Jardines*.

Not only was *Jardines* the first controlling case to take up the issue of whether a dog sniff outside the front door to a house is a search under the Fourth Amendment, the decision was a significant and novel development in the law. Prior to *Jardines*, two lines of cases in particular supported the position that such dog sniffs were not searches. The first line held that dog sniffs were not searches; the second line established that people do not have a reasonable expectation of privacy in walkways and entryways to houses.

When the police conducted the dog sniff at Scull's front door, courts consistently had held that dog sniffs simply were not Fourth Amendment searches.

The United States Supreme Court first held that a dog sniff is not a search in *United States v. Place*, 462 U.S. 696 (1983). *Place* involved a dog sniff of luggage at an airport. The United States Supreme Court held that the dog sniff was not a search. It noted that dog sniffs were limited both in scope and what they revealed:

> A "canine sniff" by a well-trained narcotics detection dog, however, does not require opening the luggage. It does not expose noncontraband items that otherwise would remain hidden from public view, as does, for example, an officer's rummaging through the contents of the luggage. Thus, the manner in which information is obtained through this investigative technique is much less intrusive than a typical search. Moreover, the sniff discloses only the presence or absence of narcotics, a contraband item. Thus, despite the fact that the sniff tells the authorities something about the contents of the luggage, the information obtained is limited. This limited disclosure also ensures that the owner of the property is not subjected to the embarrassment and inconvenience entailed in less discriminate and more intrusive investigative methods.
>
> In these respects, the canine sniff is *sui generis.* We are aware of no other investigative

> procedure that is so limited both in the manner in which the information is obtained and in the content of the information revealed by the procedure.

Id. at 707.

The Supreme Court reached a similar conclusion in *Illinois v. Caballes*, 543 U.S. 405 (2005). *Caballes* involved a dog sniff around a vehicle. In that case, the court reaffirmed its decision in *Place* that dog sniffs by well-trained drug detection dogs do not generally "implicate legitimate privacy interests" because they only reveal contraband. *Caballes*, 543 U.S. at 408-09.

This court took up the issue of whether dog sniffs are searches in *State v. Arias*, 2008 WI 84, 311 Wis. 2d 358, 752 N.W.2d 748. *Arias* involved a dog sniff around a vehicle in a public place just like *Caballes* did. This court held that the dog sniff was not a search. It discussed *Place* and *Caballes* and noted that it historically interpreted "Article I, Section 11 of the Wisconsin Constitution in accord with the [United States] Supreme Court's interpretation of the Fourth Amendment." *Arias*, 311 Wis. 2d 358, ¶¶ 14-16, 20. The court provided two reasons for continuing the practice for dog sniffs. First, it "note[d] that there is no constitutionally protected interest in possessing contraband" under either the United States or the Wisconsin Constitution. *Id.* ¶ 22. Second, it explained that "a dog sniff is much less intrusive than activities that have held to be searches" because "a dog sniff gives limited information that is relevant only to contraband for which there is no constitutional protection." *Id.* ¶ 23 (citation omitted).

In addition to the cases holding that dog sniffs were not searches under the Fourth Amendment, the law in Wisconsin indicated that individuals did not have a reasonable expectation of privacy in the walkways and entryways to their houses.

In *State v. Edgeberg*, 188 Wis. 2d 339, 524 N.W.2d 911 (Ct. App. 1994), our court of appeals held that police

do not conduct searches just by entering public access ways to private houses. The officer in *Edgeberg* went to a house in response to complaints of a barking dog. *Id.* at 342. He went through a screened door, and into a screened-in porch area, to get to a house's front door. *Id.* at 343. He saw marijuana plants in plain view inside the house as he knocked on the front door. *Id.* at 344. He got a search warrant based on his observations and recovered the marijuana. *Id.* The defendant moved to suppress the marijuana, arguing that the officer saw the marijuana plants during an illegal search. This court held that the officer was not searching when he saw the marijuana. It distinguished public entryways from curtilage:

> Regarding protected areas in residential premises, " '[a] sidewalk, pathway, common entrance or similar passageway offers an implied permission to the public to enter which necessarily negates any reasonable expectancy of privacy in regard to observations made there.' " 1 WAYNE R. LAFAVE, SEARCH AND SEIZURE § 2.3(c) at 392-93 (2d ed. 1987). " '[P]olice with legitimate business may enter the areas of the curtilage which are impliedly open to use by the public' " and in doing so " 'are free to keep their eyes open....' " [*Id.*] at 393. This means that if police use normal means of access to and from the house for some legitimate purpose, it is not a fourth amendment search for police to see from that vantage point something in the dwelling. *Id.* at 393–94.

Id. at 347 (citations omitted). Together with the dog sniff cases, *Edgeberg* strongly supported a good-faith,

reasonable belief that deploying a drug detection dog at the public entryway to Scull's residence was permissible.[3]

C. The Good-Faith Exception.

The good-faith exception applies when excluding evidence will not advance the purposes behind the exclusionary rule.

This court discussed the exclusionary rule at length in *State v. Dearborn*, 2010 WI 84, 327 Wis. 2d 252, 786 N.W.2d 97. The court emphasized that it is "a judicially created remedy, not a right, and its application is restricted to cases where its remedial objectives will best be served." *Id*. ¶ 35 (citing *Herring v. United States*, 555 U.S. 135, 141 (2009)). "That means that just because a Fourth Amendment violation has occurred does not mean the exclusionary rule applies. [R]ather, exclusion is the last resort. The application of the exclusionary rule should focus on its efficacy in deterring future Fourth Amendment violations." *Id*. As a result, "the exclusionary rule should be applied as a remedy to deter police misconduct and most appropriately when the deterrent benefits outweigh the substantial costs to the truth-seeking and law enforcement objectives of the criminal justice system." *Id*. ¶ 38.

The *Dearborn* court also noted that "the exclusionary rule serves to deter deliberate, reckless, or

[3]At the time, the vast majority of courts in other jurisdictions agreed. Numerous courts—including the Seventh Circuit and Eastern District of Wisconsin—had held that dog sniffs at private residences were not searches, when conducted in public entryways or when conducted by an officer with authority to be inside a house. *See United States v. Brock*, 417 F.3d 692 (7th Cir. 2005); *United States v. Roby*, 122 F.3d 1120 (8th Cir. 1997); *United States v. Jones*, 2011 WL 294842 (E.D. Wis. Jan. 26, 2011); *United States v. Broadway*, 580 F. Supp. 2d 1179 (D. Colo. 2008); *United States v. Tarazon-Silva*, 960 F. Supp. 1152 (W.D. Tex. 1997); *People v. Jones*, 755 N.W.2d 224 (Mich. Ct. App. 2008); *Fitzgerald v. State*, 864 A.2d 1006 (Md. 2004); *Porter v. State*, 93 S.W.3d 342 (Tex. Ct. App. 2002); *but see United States v. Whitehead*, 849 F.2d 849 (4th Cir. 1988), *and United States v. Thomas*, 757 F.2d 1359 (2d Cir. 1985).

grossly negligent conduct, or in some circumstances recurring or systemic negligence." *Dearborn*, 327 Wis. 2d 252, ¶ 36 (quoting *Herring*, 555 U.S. at 144). The court then explained that the test for determining whether an officer's reliance on current precedent was reasonable "is an objective one, querying 'whether a reasonably well trained officer would have known that the search was illegal' in light of 'all of the circumstances.'" *Id*. (quoting *Herring*, 555 U.S. at 145) (emphasis added). As the United States Supreme Court stated in *Herring*, "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.'" *Herring*, 555 U.S. at 143 (emphasis added).

Both the United States Supreme Court and this court have held that the good-faith exception applies in cases like this one, in which police objectively relied on a search warrant.

In *United States v. Leon*, 468 U.S. 897 (1984), the Supreme Court held that the exclusionary rule should not be applied to suppress evidence police obtained while executing a later-invalidated search warrant, provided that their reliance on the search warrant was objectively reasonable. *Id.* at 922. The court reasoned that "the marginal or nonexistent benefits produced by suppressing evidence obtained in objectively reasonable reliance on a subsequently invalidated search warrant cannot justify the substantial costs of exclusion." *Id.*

In addition, the *Leon* court explained that:

> "[S]earches pursuant to a warrant will rarely require any deep inquiry into reasonableness" for "a warrant issued by a magistrate normally suffices to establish" that a law enforcement officer has "acted in good faith in conducting the search." Nevertheless, the officer's reliance on the magistrate's probable-cause determination and on the technical sufficiency of the warrant he issues must be objectively reasonable, and it is clear that in some

> circumstances the officer will have no reasonable grounds for believing that the warrant was properly issued.

Leon, 468 U.S. at 922-23 (citations omitted). The court then described a number of situations in which reliance on a warrant would not be objectively reasonable, none of which is analogous to this case. The list included: instances of falsehood on an affidavit, in which a magistrate judge wholly abandoned his role, in which an affidavit was '"so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable,"' or in which a warrant fails to particularize "the place to be searched or the things to be seized." *Id.* at 923 (citation omitted).

In *State v. Eason*, 2001 WI 98, 245 Wis. 2d 206, 629 N.W.2d 625, this court adopted the good faith exception to the exclusionary rule, holding that "where police officers act in objectively reasonable reliance upon the warrant, which had been issued by a detached and neutral magistrate, a good-faith exception to the exclusionary rule applies." *Id.* ¶ 74. The court also held that two additional requirements must be met for the good faith exception to apply in Wisconsin:

> [I]n order for a good faith exception to apply, the burden is upon the State to show that the process used in obtaining the search warrant included a significant investigation and a review by either a police officer trained and knowledgeable in the requirements of probable cause and reasonable suspicion, or a knowledgeable government attorney.

Eason, 245 Wis. 2d 206, ¶ 74. The court engaged in the same cost-benefit analysis performed in *Leon* and applied the good-faith exception:

> The police would not be deterred because they reasonably relied upon a warrant issued by an independent magistrate. Excluding evidence would punish the officers, and society, for an error of the magistrate. No deterrence would result. . . . [T]he exclusionary rule "cannot be expected, and should not be applied, to deter objectively reasonable law

> enforcement activity." *Leon*, 468 U.S. at 919, 104 S.Ct. 3405.

Eason, 245 Wis. 2d 206, ¶ 73. The same rationale applies here.

A court commissioner issued the warrant in this case based on his review of a supporting affidavit from a law enforcement officer with nineteen years' experience (32:1-4). That affidavit not only detailed the investigation of Scull's suspected drug dealing, including the drug dog's credentials and alert at Scull's residence, it was "reviewed and approved by ADA Christopher Ladwig" (32:4). Scull has never claimed that the court commissioner who issued the warrant was not "detached and neutral," nor has he argued that the prosecutor who reviewed and approved the warrant affidavit was not "a knowledgeable government attorney." *Eason*, 245 Wis. 2d 206, ¶ 74. Instead, he focuses exclusively on the propriety of the dog sniff, as determined by *Jardines*.

In doing so, Scull ignores the fact that, before *Jardines* was decided, the dog sniff at his front door would have been lawful according to the existing law in many jurisdictions, including Wisconsin. Given the state of law at the time of the investigation and dog sniff, Scull cannot fairly characterize law enforcement's actions as "misconduct" and a "willful violation of [his] Fourth Amendment rights" (*see* Scull Br. at 8). Nor can he impugn the court commissioner or prosecutor for their review and approval of the warrant affidavit and subsequent search warrant.

Under the circumstances, the court of appeals correctly applied precedent, including *Dearborn* and *Eason*, and held that:

> In light of the reliability of the process used to obtain the search warrant for Scull's home and the state of the law at the time the search warrant was issued, we conclude that the police '"acted in objectively reasonable belief that their conduct did

> not violate the Fourth Amendment'" when they executed the search warrant and searched Scull's home. *See Dearborn*, 327 Wis. 2d 252, ¶33 (citation omitted). As such, application of the exclusionary rule in this case would not act to "deter police misconduct" nor would the deterrent benefits of the rule "outweigh the substantial costs to the truth-seeking and law enforcement objectives of the criminal justice system." *See id.*, ¶38. Therefore, we conclude that the good-faith exception to the exclusionary rule applies in this case, and we must affirm the circuit court.

Scull, 352 Wis. 2d 733, ¶ 22 (Pet-Ap. 7).

This court should affirm that decision.

CONCLUSION

For the foregoing reasons, this court should affirm the court of appeals' decision affirming the circuit court's denial of Gary Monroe Scull's motion to suppress.

Dated this 8th day of July, 2014.

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 3199 words.

Dated this 8th day of July, 2014.

_____
Nancy A. Noet
Assistant Attorney General

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 8th day of July, 2014.

_____
Nancy A. Noet
Assistant Attorney General

STATE OF WISCONSIN
SUPREME COURT

Appeal No. 2011AP002956CR

Circuit Court Case No. 2010CF003377

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

GARY MONROE SCULL,

Defendant-Appellant-Petitioner.

An Appeal From an Order Denying Motion to Suppress Evidence and a Judgment of Conviction entered by Branch 12 of the Milwaukee County Circuit Court, the Honorable David Borowski, Presiding

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REPLY BRIEF OF DEFENDANT-APPELLANT-PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

United States Supreme Court Cases

Wisconsin Supreme Court Cases

Wisconsin Court of Appeals Cases

REPLY ARGUMENT

I. APPLYING THE GOOD FAITH EXCEPTION HERE WOULD RENDER THE EXCLUSIONARY RULE MEANINGLESS AND WILL NOT ACT TO DETER ILLEGAL POLICE CONDUCT IN THE FUTURE.

A. *Jardines*

The State concedes that in light of ***Jardines***, the dog sniff at Scull's front door was a Fourth Amendment "search" and violated Scull's Fourth Amendment rights. (State Br. at 4). The State further acknowledges that the ***Jardines*** decision represented a "significant and novel development in the law regarding the government's use of drug detecting dogs." (State Br. at 4). The State hits the nail on the head – there was absolutely no binding precedent that the police could have relied on when they brought their drug sniffing dog to sniff Scull's front door.

B. Pre-***Jardines***.

The State outlines the state of the law regarding dog sniffs before ***Jardines***. While the outline provided is commendable and is an accurate summary of the case law, the State misses the point: the law in Wisconsin did not permit the sniff at the time of the dog sniff.

Moreover, the cases cited by the State are distinguishable from the facts in ***Jardines*** and the facts here, which are nearly identical.

The dog sniff in ***United States v. Place***, 462 U.S. 696 (1983) involving sniffing luggage at an airport. The court authorized the sniff as an alternative to an officer rummaging through the contents of one bag and potentially exposing the owner to embarrassment and inconvenience. Additionally, the sniff did not involve a sniff at someone's private residence which is subject to greater Fourth Amendment scrutiny. Similarly, ***Illinois v. Caballes***, 543 U.S. 405 (2005) and ***State v. Arias***, 2008 WI 84, 311 Wis. 2d 358, 752 N.W.2d 748 involved a dog sniff around a vehicle, not a private residence.

Courts will employ a different scrutiny when reviewing a dog sniff at an airport of an individual's automobile as opposed to a person's private residence. This is exactly why the United States Supreme Court reviewed and issued its decision in the ***Jardines*** case. The pre-***Jardines*** cases that hold that dog sniffs are not searches under the Fourth Amendment do not justify the police action in the case and do not support the application of the good faith exception.

Moreover, ***State v. Edgeberg*** does not bolster the State's position. In that case, police travelled to Edgeberg's home to investigate a complaint about a barking dog. ***State v. Edgeberg***, 188 Wis. 2d 339, 343, 524 N.W.2d 911 (Ct. App. 1994). As the officer knocked on the door, the officer observed marijuana plants growing in the living room. ***Id***. at 344. Based on this observation, the officer obtained a search warrant. ***Id***. The court held that the officer's conduct was not a search because a person has no reasonable expectation of privacy in an item which is in plain view. ***Id***. at 345 (citation omitted). Similarly, that which is knowingly exposed to the public is not subject to Fourth Amendment protection. ***Katz v. United States***, 389 U.S. 347, 351 (1967). Scull's case does not involve any contraband in plain view. ***Edgeberg*** did not involve a drug sniffing dog and involved an officer investigating a specific complaint.

C. The Good-Faith Exception.

The State and everyone else involved in this case acknowledges that the ***Jardines*** opinion constituted a novel ruling in the law regarding dog sniffs. The pre-***Jardines*** cases do not show that a dog sniff conducted at a private residence would pass constitutional muster. ***State v. Edgeberg*** does not suggest that a dog sniff at a front door of an individual's residence would pass constitutional muster. As such, the police were not reasonably acting based on past binding precedent and the good faith exception does not apply.

Furthermore, the State fails to recognize that this case is not about an officer's objective reliance on a facially valid search warrant (see ***Leon, Ward***), or an officer's reasonable reliance on a statute (see ***Krull***), or an officer's objective

reliance on well settled law (see ***Dearborn***). As such, the good faith exception does not apply.

Scull recognizes that exclusion of evidence is a remedy of last resort. But it is a resort that is needed here in order to deter future Fourth Amendment violations in fact scenarios where the law is not settled. The officers in Scull did not and could not have been relying on established precedent when they took their drug sniffing dog to Scull's front door without a warrant. They could not have reasonably believed that their conduct was lawful. Simply put, they were not acting in good faith. Their Fourth Amendment violation should not be swallowed up by the good-exception.

D. Alternatively, an evidentiary hearing is required.

If this court is inclined to adopt the State's argument, Scull contends that the matter should be remanded for an evidentiary hearing to establish a record regarding the police officer's attempts at obtaining a search warrant so that this court may then be able to properly apply the test for the good faith exception. At the remand hearing, the police officer should offer testimony regarding significant investigation and review by a knowledgeable police officer or government attorney. The State argues that Scull has not made certain arguments regarding the commissioner who issued the search warrant or the prosecutor who reviewed and approved the warrant affidavit. (State Br. at 11). Scull is not in a position to make these arguments – as previously discussed the good-faith exception was never discussed before the circuit court. Scull maintains his argument that the good-faith exception does not apply due to the fact that the ***Jardines*** ruling was novel and that none of the other factors necessary for application of the exception are present. If this court is inclined to apply the exception, the case should first be remanded for further fact-finding regarding the circumstances surrounding the warrant application.

CONCLUSION

Based upon the above argument and authorities and on the argument and authorities provided in his initial brief, Gary Monroe Scull respectfully requests this Court to reverse the Court of Appeals decision and for this Court to remand the matter to the circuit court for proceedings consistent with their opinion.

Dated this ___ day of July, 2014.

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CERTIFICATION

I certify that this reply brief conforms with the rules contained in WIS. STAT. §§ 809.19(8)(b) and (c), for a brief produced using proportional serif font. The length of the portions of this brief described in WIS. STAT. § 809.19(1)(d), (e) and (f) is 1,018 words. *See* WIS. STAT.§ 809.19(8)(c)1.

I hereby certify that an electronic copy of this reply brief was submitted, which conforms to the rules contained in Wis. Stat. § 809.62(4)(b)(c) and (d). I also certify that the text of the electronic copy of the reply brief is identical to the text of the paper copy of the reply brief.

Basil M. Loeb

STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2011AP002956-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

GARY MONROE SCULL,

Defendant-Appellant-Petitioner.

On Review of a Decision of the Court of Appeals
Affirming a Judgment of the
Circuit Court for Milwaukee County,
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TABLE OF CONTENTS

CASES CITED

CONSTITUTIONAL PROVISION CITED

OTHER AUTHORITIES CITED

INTRODUCTION

The police executed a search warrant at Gary Scull's house and seized drugs and drug-trafficking paraphernalia. ***State v. Scull***, 2014 WI App 17, ¶6, 352 Wis. 2d 733, 843 N.W.2d 859. The warrant was based in part on the "alert" of a drug dog at the front door of Scull's house. ***Id.***, ¶¶5-6. Scull argued the warrant was invalid because the use of the dog was an unlawful warrantless search, but the circuit court rejected his claim. ***Id.***, ¶8.

While Scull's appeal was pending, ***Florida v. Jardines***, 569 U.S. ___, 133 S. Ct. 1409 (2013) was decided. The court of appeals recognized that the use of the drug detection dog in this case was unlawful under ***Jardines***, but held the evidence seized from Scull's house was saved by the good-faith exception to the exclusionary rule under ***United States v. Leon***, 468 U.S. 897 (1984), and ***State v. Eason***, 2001 WI 98, 245 Wis. 2d 206, 629 N.W.2d 625. ***Scull***, 352 Wis. 2d 733, ¶¶1, 10-13, 21-22.

The court of appeals did not analyze the effect on the warrant of the officers' use of the drug dog. It did, however, say that at the time of the search "[r]elevant caselaw" from Wisconsin and other jurisdictions arguably allowed the police officers' conduct and that between the search warrant and the case law the police "'acted in the objectively reasonable belief that their conduct did not violate the Fourth Amendment[.]'" ***Id.***, ¶22, *quoting* ***State v. Dearborn***, 2010 WI 84, ¶33, 327 Wis. 2d 252, 786 N.W.2d 97.

The court of appeals' application of the good-faith exception to the exclusionary rule is flawed. The exception under ***Leon*** and ***Eason*** does not apply when a predicate

illegality provides part of the probable cause for the warrant. Further, the exception based on the officers' reliance on case law cannot save the search because under ***Dearborn*** the case law must be clear and settled Wisconsin precedent, and there was no such precedent allowing police to act as they did here. Thus, the evidence obtained by the use of the dog is not saved by a good-faith exception and cannot be part of the probable cause determination.

ARGUMENT

The Good-Faith Exception to the Exclusionary Rule Adopted in ***Leon*** and ***Eason*** Does Not Apply to Warrants Based in Part on Unlawful Conduct by the Police.

A. The good-faith exceptions to the exclusionary rule are limited to police reliance on the legal authority of a third party.

The cases adopting good-faith exceptions to the exclusionary rule make clear that the exceptions are applicable only when the police relied on an apparently authoritative assurance of an official other than a police officer that the conduct would be lawful.

Leon held that the exclusionary rule is not applicable where an officer obtains evidence relying on a search warrant that is ultimately found to be unsupported by probable cause. 468 U.S. at 900. This holding was premised on the exclusionary rule's deterrence function, which is meant to "deter police misconduct rather than to punish the errors of judges and magistrates." ***Id.*** at 916. Exclusion deters police from conducting unconstitutional searches only when police are responsible for the constitutional error. ***Id.*** at 920–21.

Because penalizing the officer for the magistrate's error does not deter constitutional violations by the police, exclusion is inappropriate when the magistrate is responsible for the error. ***Id.*** at 921–22.

Eason adopted ***Leon*** for purposes of Wisconsin law, though it added the requirement that the process for obtaining the search warrant include a significant investigation and a review by a police officer or government attorney knowledgeable about the requirements of probable cause and reasonable suspicion. 245 Wis. 2d 206, ¶¶28-52, 63.

Illinois v. Krull, 480 U.S. 340 (1986), permitted the admission of evidence obtained during a search conducted by a police officer in reliance on a statute that was later declared unconstitutional. As in ***Leon***, the Court found there would be no appreciable deterrent effect in suppressing the evidence because the Fourth Amendment violation was due not to the officer's mistake, but to the legislature's erroneous enactment of the unconstitutional statute. ***Id.*** at 349-53.

Arizona v. Evans, 514 U.S. 1 (1995), declined to exclude evidence obtained after an officer relied on the state's computer system, which erroneously indicated the defendant had an outstanding arrest warrant. Once again, the Court reasoned there would be no deterrent effect to exclusion because the error was made by court employees rather than police. ***Id.*** at 14-16. Similarly, ***Herring v. United States***, 555 U.S. 135 (2009), allowed admission of evidence seized by an officer who relied on a police clerk's mistaken report that there was an arrest warrant for the defendant. Since the error would only marginally deter future mistakes by officers themselves, suppression was not justified. ***Id.*** at 140, 145-47.

Finally, there is a good-faith exception based on police reliance on binding case law that is subsequently overruled. ***Dearborn***, 327 Wis. 2d 252, ¶4; ***State v. Ward***, 2000 WI 3, 231 Wis. 2d 732, 604 N.W.2d 517; ***United States v. Davis***, 564 U.S. ___, 131 S. Ct. 2419 (2011). These cases also rely on the lack of deterrent value of exclusion given that the police are relying on governing appellate decision, for "this is exactly what officers *should* do." ***Dearborn***, 327 Wis. 2d 252, ¶44. *See also* ***Ward***, 231 Wis. 2d 732, ¶49; ***Davis***, 131 S. Ct. at 2429.

Because the good-faith exceptions are premised on the conclusion that exclusion is inappropriate where there is no police misconduct to deter, it follows there cannot be a good-faith exception based on police officers' reliance on their *own* error. That in turn means the good-faith exception based on officers' reliance on a warrant does not apply where the warrant itself is based on an unlawful search that police conducted based on their own misapplication of the law, without relying on some other legal authority.

B. The good faith exception based on police reliance on a search warrant does not apply where the warrant is based on evidence from an unlawful search.

While the search of Scull's *home* was conducted pursuant to a warrant, the police used the dog on Scull's property *without* a warrant and *before* the involvement of the warrant-issuing magistrate. Because the use of the dog was not undertaken in reliance on a magistrate's assurance of legality, it was exactly the kind of police-initiated conduct that exclusion is intended to deter. Thus, contrary to the court of appeals' conclusion, the good-faith exception based on the *subsequently* issued warrant does not apply.

The Supreme Court has not addressed this issue, but other courts have. One leading case on the issue is ***United States v. Vasey,*** 834 F.2d 782, 788 (9th Cir. 1987), where a police officer conducted an unlawful warrantless search and later used evidence from that search in support of an application for a search warrant. ***Id.*** at 788-89. The court held ***Leon*** was inapplicable because the initial unlawful search "precludes any reliance on the good faith exception." ***Id.*** at 788. Unlike ***Leon***, where the officer presented *lawfully* obtained evidence to a magistrate, and the magistrate erred in finding that the evidence established probable cause, the evidence in Vasey's case that was included in the affidavit was *unlawfully* obtained:

> The constitutional error was made by the officer in this case, not by the magistrate as in ***Leon***. The ***Leon*** Court made it very clear that the exclusionary rule should apply (i.e. the good faith exception should not apply) if the exclusion of evidence would alter the behavior of individual law enforcement officers or the policies of their department.

Id. at 789. Many (though not all) other courts have reached the same conclusion. *See* ***United States v. McClain***, 444 F.3d 537, 543-51 (6th Cir. 2006) (Martin, J., dissenting from denial of rehearing *en banc*) (collecting cases).

Nor does it matter that two other actors reviewed the warrant in this case. The first review, by the court commissioner who signed the warrant, does not reduce the deterrent effect of exclusion of the evidence obtained by the officers' use of the dog *before* they obtained a warrant. Nor does it matter that the court commissioner apparently did not question the legality of the use of the dog. As ***Vasey*** persuasively explains, the limited nature of the judge's review of a search warrant cannot sanitize the initial unlawful search:

> A magistrate's role when presented with evidence to support a search warrant is to weigh the evidence to determine whether it gives rise to probable cause. *A magistrate evaluating a warrant application based in part on evidence seized in a warrantless search is simply not in a position to evaluate the legality of that search.* Typically, warrant applications are requested and authorized under severe time constraints. Moreover, warrant applications are considered without the benefit of an adversarial hearing in which the evidentiary basis of the application might be challenged. Although we encourage magistrates to make all possible attempts to ensure that a warrantless search was legal before relying on the fruits of that search, we are mindful of the limitations on a magistrate's fact-finding ability in this context. We therefore conclude that a magistrate's consideration does not protect from exclusion evidence seized during a search under a warrant if that warrant was based on evidence seized in an unconstitutional search.

Id. at 789-90 (emphasis added). *Cf*. ***State v. Cummings***, 199 Wis. 2d 721, 739-40, 546 N.W.2d 406 (1996) (proceeding for issuing a search warrant is an *ex parte* proceeding, not an adversary one). Similarly, the review by a lawyer or supervisor required under ***Eason*** could not remove the taint of the initial unlawful search because that review is limited to "the legal vagaries of probable cause or reasonable suspicion." 245 Wis. 2d 206, ¶63. Thus, after-the-fact reviews of the warrant application do not allow the police to reasonably rely on a warrant that was itself based on unlawful conduct they engaged in before the granting of the warrant.

The government's law enforcement officers have a different stake and play a different role than judges, legislatures, and clerical employees of the state. That police are engaged in the "competitive enterprise of ferreting out

crime," ***Johnson v. United States***, 333 U.S. 10, 13-14 (1948), shows they should not be given the last word about the correct application of the Fourth Amendment. But that is the result of the court of appeals' application of the good-faith exception here, for its holding allows an initial illegality to be, in essence, "laundered" through a warrant, given that the warrant-issuing process provides neither an incentive nor a mechanism for litigating the legality of the initial evidence collection.

While police frequently and honestly believe they are complying with the Fourth Amendment, it does not follow that their determination should be given the benefit of the doubt by foreclosing exclusion when they turn out to be wrong. Exclusion, after all, provides the most meaningful deterrent for Fourth Amendment violations and has transformed American policing for the better by developing Fourth Amendment law. Failing to exclude evidence illegally obtained, especially if there was "relevant caselaw" that appears arguably to support the police conduct, will encourage police to push the limits of the law and stunt development of Fourth Amendment law. Albert Alschuler, **Herring v. United States:** ***A Minnow or a Shark?*** 7 Ohio St. Jr. Crim. L. 463, 500-12 (2009). It also disregards the clear directive in ***Leon*** and its progeny that if there is police misconduct that violates the Fourth Amendment and that may be meaningfully deterred, then exclusion is the proper remedy.

Because it was based on a previous illegal search, the warrant to search Scull's home cannot provide a basis for applying the good-faith exception under ***Leon*** and ***Eason***. This brings us to the second good-faith exception implicated in this case—namely, the exception based on police reliance on case law recognized in ***Dearborn***. The court of appeals did

not directly invoke this exception, but for the following reasons it does not apply in this case.

C. The good-faith exception recognized in ***Dearborn*** covers only conduct authorized by clear and settled Wisconsin law.

Dearborn explained its holding clearly: "the good faith exception precludes application of the exclusionary rule where officers conduct a search in objectively reasonable reliance upon *clear and settled Wisconsin precedent* that is later deemed unconstitutional by the United States Supreme Court." 327 Wis. 2d 252, ¶4 (emphasis added). The court made clear that:

> ...under our holding today, the exclusionary rule is inappropriate *only when the officer reasonably relies on clear and settled precedent*. Our holding does not affect the vast majority of cases where *neither this court nor the United States Supreme Court have* [sic] *spoken with specificity in a particular fact situation*. …

Id., ¶46 (emphasis added). The court made this comment when rejecting the claim that defendants will lack incentive to litigate Fourth Amendment issues if case law from any jurisdiction can serve as authority for police conduct. ***Id.***, ¶45. By limiting its holding to Wisconsin and U.S. Supreme Court precedent, ***Dearborn*** recognized there will be incentive to litigate except in the small number of cases where a similar search has already been held to be lawful, and that "[t]he vast majority of cases, particularly in the fact-intensive Fourth Amendment context, will not fall into this category." ***Id.***, ¶46.

Davis likewise limits its holding to binding precedent, for the Court refers repeatedly to "binding" precedent, not to "persuasive" precedent or some broader formulation.

131 S. Ct. at 2423–24, 2428, 2429, 2432–34. Moreover, the officers in ***Davis*** acted "in strict compliance" with binding precedent and that the precedent "specifically authorize[d] a particular police practice." ***Id.*** at 2428, 2429. And like ***Dearborn***, ***Davis*** says that defendants in jurisdictions in which a Fourth Amendment question remains open have incentive to litigate the issue even if other courts have ruled on it, ***id.*** at 2433, which means merely persuasive or analogous authority not precisely addressing the search at issue is not determinative.

There are compelling reasons for limiting ***Dearborn*** and ***Davis*** to binding precedent. First, this limitation is in keeping with the deterrence rationale articulated by the good-faith exception cases. Under those cases, police action is objectively reasonable when there is legal authority for the action. Thus, the good-faith exceptions do not require an analysis of officer culpability, for police action undertaken with legal authority is obviously not culpable and requires no deterrence. But deterrence *does* matter when police lack clear legal authority. In that situation, police must guess at what the law might be rather than rely on what binding legal authority says it is. Exclusion has strong deterrence value in this situation, for it encourages police to respect the basic constitutional judgment that a citizen's privacy and security (especially of the home) can be breached only as allowed by clear legal authority.

In addition, allowing reliance on nonbinding precedent will limit the development of Fourth Amendment law. As ***Dearborn*** noted, the "vast majority" of Fourth Amendment cases will not be governed by binding precedent. 327 Wis. 2d 252, ¶46. But given the plethora of Fourth Amendment cases from across the country, there will often be nonbinding authority that supports a claim that police action was lawful.

If the state can successfully invoke a good-faith exception based this vast store of case law and thereby deprive defendants of the remedy of exclusion, defendants will have incentive to raise only issues for which there is no law at all, while issues that have been litigated but are not definitively settled will remain unsettled. *See* Orin Kerr, ***Fourth Amendment Remedies and Development of the Law: A Comment on* Camreta v. Greene *and* Davis v. United States**, 2011 Cato Sup. Ct. Rev. 237, 253-60. This in turn means the courts will engage in far less review of police conduct under the Fourth Amendment, effectively leaving the ultimate determination of complex Fourth Amendment questions to the police.

Lastly, the simplicity of the binding-precedent standard makes it easier for police officers to avoid violations and, thus, avoids the costs of exclusion. It also provides clarity for those providing officer training. By contrast, opening the door to nonbinding precedent creates difficult questions, such as how many courts have to authorize a practice, which level of court decisions matter, and how to deal with disagreement among persuasive opinions.

As the court of appeals acknowledged, at the time the police used the drug dog in this case there was no clear and settled Wisconsin or U.S. Supreme Court precedent holding that conduct was permissible under the Fourth Amendment. Instead, the court of appeals refers to cases from other jurisdictions that authorized this conduct, and analogized to two binding case allowing drug a dog sniff of the exterior of a car. 352 Wis. 2d 733, ¶21 & n.5 (citing ***State v. Arias***, 2008 WI 84, ¶14, 311 Wis. 2d 358, 752 N.W.2d 748, and ***Illinois v. Caballes***, 543 U.S. 405, 408-09 (2005)). This is in contrast to jurisdictions which before ***Jardines*** had binding precedent allowing the use of a dog on a person's property.

Appropriately, courts in those jurisdictions have held that police reliance on the pre-***Jardines*** precedent was objectively reasonable. *See* ***United States v. Gutierrez***, ___ F.3d. ___, 2014 WL 3728170 (7th Cir. 2014); ***United States v. Davis***, ___ F.3d ___, 2014 WL 3719097 (8th Cir. 2014); ***United States v. Thomas***, 726 F.3d 1086, 1094-95 (9th Cir. 2013).

Because there was no binding precedent permitting the use of the drug dog on Scull's property, the good-faith exception adopted in ***Dearborn*** does not save the evidence collected using the drug dog and that evidence cannot be used as part of the probable cause determination.

CONCLUSION

For the reasons given above, the court of appeals erroneously concluded that the police acted in the objectively reasonable belief their conduct did not violate the Fourth Amendment when they executed the search warrant and searched Scull's home. Therefore, the decision of the court of appeals should be reversed.

Dated this 22nd day of August, 2014.

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 2,996 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 22nd day of August, 2014.

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STATE OF WISCONSIN
IN SUPREME COURT

Appeal No. 2011AP2956-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

GARY MONROE SCULL,

Defendant-Appellant-Petitioner.

NONPARTY BRIEF OF WISCONSIN ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

On Appeal from an Order Entered in the Circuit Court for Milwaukee County, the Honorable David Borowski Presiding

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutions, Statutes and Rules

Other Authorities

STATE OF WISCONSIN
IN SUPREME COURT

Appeal No. 2011AP2956-CR

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NONPARTY BRIEF OF WISCONSIN ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

The Wisconsin Association of Criminal Defense Lawyers ("WACDL") submits this non-party brief to address the law concerning whether an officer, acting on a search warrant based in part upon an unconstitutional search involving a drug-sniffing dog, can be deemed to be acting in good faith when no binding legal precedent held that the underlying search was constitutional.

ARGUMENT

THE GOOD FAITH EXCEPTION TO THE EXCLUSIONARY RULE DOES NOT AND SHOULD NOT APPLY WHEN LAW ENFORCEMENT RELIES UPON LEGAL PRECEDENT WHICH IS NOT LEGALLY BINDING AT THE TIME OF THE SEARCH

When a search of a home violates the Fourth Amendment, the usual remedy is that courts exclude the fruits of that search from evidence, *see* ***Davis v. United States***, 564 U.S. ___, 131 S. Ct. 2419, 2423 (2011), and also any derivative evidence, if obtained "by exploitation of that illegality." ***Wong Sun v. United States***, 371 U.S.

471, 487–88 (1963). Thus, when probable cause for a second warrant is, at least in part, the fruit of an illegal search, the mere existence of the warrant does not prevent exclusion of evidence from the second search. *See, e.g.*, ***State v. Starke***, 81 Wis. 2d 399, 260 N.W.2d 739 (1978). Application of these rules means that a search based in part upon the fruits of an unconstitutional dog sniff on the curtilage of a home, *see* ***Florida v. Jardines***, ___ U.S. ___, 133 S. Ct. 1409 (2013), itself would be unconstitutional and would result in the exclusion of any evidence found.

However, an exception to the exclusionary rule exists in circumstances where law enforcement acts in good faith. *See* ***United States v. Leon***, 468 U.S. 897 (1984). One such circumstance is where binding legal precedent existing at the time of the search holds that the search was constitutional. *See* ***Davis***, 131 S. Ct. 2419 (good faith exception applies where officers conduct a search in objectively reasonable reliance upon binding appellate precedent); ***State v. Dearborn***, 2010 WI 84, 327 Wis. 2d 252, 786 N.W.2d 97 (good faith exception applies where officers conducted search based on reasonable reliance on clear and settled case law, subsequently overturned). Wisconsin should not extend the good faith exception to a situation such as this one in which the case law is unsettled and no legally binding precedent exists.

A. At the Time of the Dog Sniff Search in this Case, No Binding United States or Wisconsin Precedent Permitted Dog Sniff Searches at the Entry of a Home.

When the police conducted the search at issue in this case, no case law in the United States Supreme Court or Wisconsin Supreme Court permitted dog sniffs at the entry point of a home. In a decision issued while this case was on direct appeal in the Wisconsin Court of Appeals, the United States Supreme Court held that a dog sniff at the door of a home was an unreasonable search in violation of the Fourth Amendment. *See* ***Jardines***. Applying the rule from ***Griffith v. Kentucky***, 479 U.S. 314, 328 (1987), changes in criminal law are "to

be applied retroactively to all cases, state or federal, pending on direct review or not yet final." Therefore, application of ***Jardines*** retroactively establishes that the search on Scull's home was unreasonable and unconstitutional.

Before the search, not a single Wisconsin case addressed the use of dogs, either at the curtilage or in a house. Dog sniff searches targeting cars simply are not the same constitutionally as those directed toward the home. Constitutional law provides the home greater protection than vehicles because the home is at the "very core" of the Fourth Amendment. ***Silverman v. United States***, 365 U.S. 505, 511 (1961) (intruding a fraction of an inch into a home is a search).

The law traditionally protects cars less than homes because, unlike homes, they are mobile, ***California v. Carney***, 471 U.S. 386, 390 (1985) ("the ready mobility of the automobile justifies a lesser degree of protection"), so it is unreasonable for an officer to apply case law concerning cars to homes. Unlike the curtilage of a home, the public nature of the area surrounding a car typically gives an officer license to approach it. *See* ***United States v. Jones***, 565 U.S. ___, 132 S. Ct. 945, 949 (2012). The officer's search of a car, unlike a search of a home, does not involve a trespass unless the officer comes in contact with the car. ***Id***. Therefore, Wisconsin cases involving cars, *see, e.g.*, ***State v. Arias***, 2008 WI 84, 311 Wis. 2d 358, 752 N.W.2d 748, simply do not create the requisite legally binding precedent.

Wisconsin case law at the time of the search here established that an officer violates the Fourth Amendment when trespassing on a defendant's real property. *See* ***State v. Wilson***, 229 Wis. 2d 256, 600 N.W.2d 14 (Ct. App. 1999). The analysis in ***Wilson***, a case decided long before the dog sniff search here, provided reason for law enforcement to have suspected that the initial search was not constitutional. In ***Wilson***, an officer approached a house to determine if a suspect was on the premises. 229 Wis. 2d at 260. The officer

walked into the backyard where children were playing and asked if they had seen the suspect. ***Id***. The officer followed a child to the back door as she called to her parents and in the process smelled marijuana several feet away from the closed door. ***Id***. at 263-264. The court suppressed all subsequent evidence because the officer "unlawfully penetrated the curtilage of Wilson's home." ***Id***. at 269.

The officer in ***Wilson*** violated his limited license to enter the property: the officer was free to approach the front door in an attempt to speak with the residents, but he was not free to approach the rear door once he determined the suspect was not present in the backyard. ***Id***. at 266. "There are no facts indicating that [the officer] was invited to the location where he detected the marijuana odor." ***Id***. Although an officer is free to approach the front door of a home, the officer must receive permission to deviate at all from his limited license.

Moreover, other established case law at the time of the search provided that entry onto the curtilage of a house, even by police officers, required an otherwise legitimate reason for entering the property. ***State v. Edgeberg,*** 188 Wis. 2d 339, 347, 524 N.W.2d 911 (Ct. App. 1994), was precedent for the premise that police had to have a legitimate purpose for entering the property. "[P]olice with legitimate business may enter the areas of the curtilage which are impliedly open to use by the public and in doing so are free to keep their eyes open." ***Id***. (internal quotes omitted). In ***Edgeberg***, the officer had a legitimate purpose for entering the property and knocking on the defendant's door, which was to speak with the defendant regarding a neighbor's complaint of a barking dog. ***Id***. at 342. The officer observed, in plain view, marijuana plants growing and applied for a search warrant. ***Id***. at 344. Conversely, it is not a legitimate purpose for officers to enter onto a property with the sole purpose of determining what is within the home.

Officers are expected to use "normal means of access to and from the house for some legitimate purpose." 188 Wis. 2d at 347.

"Normal means" does not give the officer the right to approach every door of the home. In ***Wilson***, the officer was free to approach the front door to attempt to speak with the residents as a member of the public would, but this action became a search when he approached the rear door. 229 Wis. 2d at 266. *See also* ***Silverman v. United States***, 365 U.S. 505, 512 (1961) ("mildest and least repulsive" trespass is still a search). As mentioned in ***Jardines***, an average member of the public would call the police if they saw someone wandering their pathways with a dog without asking permission. 133 S. Ct. at 1416. Therefore, the officer's conduct here, in bringing a dog to both doors of the home without alerting the residents, cannot be considered the normal means of access.

Determining what is within a home is not a reasonable purpose for entering the property and, as in ***Jardines***, "is not what anyone would think [an officer] had license to do." 133 S. Ct. 1417. Officers are limited to approaching a home as a member of the public would. An officer attempting to secretly enter and exit a property does not display a reasonable purpose. In this case, the officer's purpose was not reasonable because he entered the property only to determine what was within the house. (24:12). The officer brought the dog to both doors and left without notifying the residents, the whole time attempting to avoid the public. (24:12).

But this line of cases was simply ignored as inconvenient to the result that the police and prosecutor wished to obtain. Legal cherry-picking is not the same thing as relying on settled law.

Furthermore, precedent from other jurisdictions is of no help because the law of other jurisdictions is not binding on Wisconsin courts, *see, e.g.,* ***Winkelman v. Kraft Foods, Inc.,*** 2005 WI App 25, ¶29, 279 Wis.2d 335, 693 N.W.2d 756, and, in any event, other jurisdictions split on the question. Compare ***United States v. Jackson***, 2004 U.S. Dist. LEXIS 15676, 16, 2004 WL 1784756 (S.D. Ind. Feb. 2, 2004) (invalidating warrant and suppressing evidence based upon a dog sniff on the back door of a defendant's

home) with ***People v. Jones***, 279 Mich. App. 86, 755 N.W.2d 224 (2008) (dog sniff triggers no privacy interests). It is not reasonable to randomly pick precedent from other jurisdictions as support for the constitutionality of a search.

B. The Good Faith Exception Should Not Be Extended to Situations in Which the Law is Unsettled Because Doing So Will Have Detrimental Consequences for the Courts, Police, and the Fourth Amendment.

The good faith rule was originally created to prevent exclusion of evidence, where exclusion would not deter culpable police conduct. *See* ***Leon*** *supra*. Where officers reasonably relied upon an explicit grant by warrant, statute, or binding precedent, excluding evidence would not deter an officer's future conduct. ***See Illinois v. Krull***, 480 U.S. 340 (1987) (invalidated statute); ***see also State v. Dearborn***, 2010 WI 84, 327 Wis. 2d 252, 786 N.W.2d 97 (overruled binding case law). Scull's case is not one in which the officer "has scrupulously adhered to governing law." ***Davis***, 131 S. Ct. 2419, 2434 (2011). Extending the good faith exception when prior precedent is unclear does not achieve the same result.

Requiring police to point to binding precedent authorizing an otherwise unconstitutional search before the prosecution can invoke the good faith exception, as ***Davis*** does, reigns in the police and provides better guidance and training. It allows the writing of good training materials and allows lawyers such as prosecutors and attorneys general to write memoranda providing clear guidance to police officers. Moreover, when officers are in training they can receive clear answers on what types of searches are permissible. In the absence of such clear guidance, officers will know to seek a warrant with the information they have, and will be discouraged from proceeding with abandon, hoping someone somewhere can later find a case authorizing their behavior.

Requiring legally binding precedent also prevents the public from relying on the police to think like trained lawyers. It simplifies

the complex job that officers are expected to perform. Allowing searches on unsettled precedent puts complex legal decision-making into the officers' hands. Officers will have to research existing case law, determine the strengths of the potentially applicable precedent, and decide, as lawyers do, whether a particular case was similar enough to the present situation to be binding.

In addition, allowing law enforcement to cherry-pick precedent with no penalty for sloppy legal research immunizes "recurring or systemic negligence." As ***Davis*** recognized, exclusion is appropriate for "recurring or systemic negligence." ***Id***. at 2428. Police lack the training law school provides and are more likely to err in determining the state of the law especially when such errors are to their benefit. Thus, the protections of the Fourth Amendment will become subordinate to the officer's interest in punishing criminals, instead of protecting the public's interests in privacy and property. *See* Orin S. Kerr, *Good Faith, New Law, and the Scope of the Exclusionary Rule*, 99 Geo. L.J. 1077 (2011). Prosecutors will determine what cases higher courts will see and these selected cases will often involve the expansion of police powers.

If good faith applies when officers act in unsettled law which is later found to be unconstitutional, defendants will be left without a remedy for these violations of their constitutional rights. The exclusionary rule would not apply to any conduct that was not expressly forbidden by clearly binding precedent and any evidence seized as a result of this conduct would not be suppressed. "To an aggrieved party a right without a remedy is doubtlessly not much better than no right at all." ***Triad Assocs. v. Robinson***, 10 F.3d 492, 499 (7th Cir. 1993).

Without a remedy, defendants whose constitutional rights have been violated will have no incentive to challenge the unlawfully

obtained evidence and the Fourth Amendment will stagnate.[1] The ***Davis*** court, in rejecting the stagnation argument for binding precedent, stated that search and seizure law will advance with "defendants in jurisdictions in which the question remains open." 131 S. Ct. 2419, 2433 (2011). If this court authorizes police searches without binding precedent it will contravene this statement from ***Davis***.

C. The Good Faith Exception Should Not Allow Subsequent Issuance of a Warrant to Cure the Unconstitutionality of an Earlier Search.

The issuance of a warrant based upon an earlier search cannot deter police bad conduct in conducting that earlier search. A warrant should not immunize searches. Although magistrates are encouraged to try their best to apply law correctly, the procedure for issuing warrants cannot ensure the legality of previous searches. ***United States v. Vasely***, 834 F.2d 782, 789 (9th Cir. 1987); *but see* ***United States v. McClain***, 444 F.3d 556, 566 (6th Cir. 2005)(holding otherwise but only in "unique cases" in which the first search was so close to "the line of validity" that the officer's belief in the constitutionality of the first search was "objectively reasonable"). Magistrates are limited to assessing the facts under time constrains and without the defense side present. ***Id***. In ***Vasely***, the court determined that where police conduct an illegal search, and the magistrate later issues a warrant based upon that illegal search, the good faith exception should not apply. ***Id***.

Additionally, the process for receiving a warrant allows important facts to be left out of the probable cause determination. Officers seeking issuance of a warrant are required to draft an affidavit that explains their basis for believing probable cause has

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[1] Occasionally, defense attorneys may convince clients to challenge searches in hopes of making future changes to the law but courts may decline to issue an "advisory opinion." *See* ***Preiser v. Newkirk***, 422 U.S. 395, 401 (1975). For more in depth analysis see David McAloon, Note, *Davis v. United States: Good Faith, Retroactivity, and the Loss of Principle,* 71 Md. L. Rev. 1258 (2012).

been established. Because officers and prosecutors have an interest in prosecuting crimes, the information about underlying searches becomes questionable. There is no defense present to challenge the officer's claims or to raise challenges to the constitutionality of the underlying conduct. Culpable police conduct, which could be deterred, is likely being overlooked in the current warrant system.

With modern technology, officers no longer have to see the magistrate, but rather, can request a warrant by telephone. Wis. Stat. §968.12(3) (2014). Magistrates may not receive all the necessary facts for determining probable cause. Furthermore, magistrates do not need to research the officer's underlying conduct, instead they simply determine whether probable cause is established.

CONCLUSION

For these reasons, WACDL asks that the Court hold that an officer, acting on a search warrant based in part upon an unconstitutional search, cannot be deemed to be acting in good faith when no binding legal precedent held that the underlying search was constitutional.

Dated at Milwaukee, Wisconsin, August 22, 2013.

Respectfully submitted,

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RULE 809.19(8)(d) CERTIFICATION

This brief conforms to the rules contained in Rule 809.19(8)(b) & (c) for a non-party brief produced with a proportional serif font. The length of this brief is 2,698 words.

_____
Ellen Henak

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_____
Ellen Henak

CERTIFICATE OF MAILING

I hereby certify pursuant to Wis. Stat. (Rule) 809.80(4) that, on the 22nd day of August, 2014, I caused 22 copies of the Nonparty Brief of Wisconsin Association of Criminal Defense Lawyers to be mailed, properly addressed and postage prepaid, to the Wisconsin Supreme Court, P.O. Box 1688, Madison, Wisconsin 53701-1688.

_____

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