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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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

RULE 809.19(12)(f) CERTIFICATION

I hereby certify that the text of the electronic copy of this brief is identical to the text of the paper copy of the brief.

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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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