SUPREME COURT OF WISCONSIN

STATE OF WISCONSIN,

PLAINTIFF-APPELLANT-PETITIONER,

V. Appeal No. 2016AP308-CR

DAWN M. PRADO,

DEFENDANT-RESPONDENT-CROSS-PETITIONER.

BRIEF OF THE DEFENDANT-RESPONDENT-CROSS-PETITIONER

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STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Whether the "good faith" exception to the warrant requirement should be extended to an officer's reliance on law which is not "well established."

The circuit court found that the officer's reliance was not in good faith because it was well established that warrantless blood draws were not permissible and the officer had been trained in the warrant system but not used it.

The Court of Appeals, apparently employing a *de novo* standard of review without articulating as much or referencing the circuit court's findings, decided that the officer had acted in "good faith" reliance on *some* of the law at the time.

2. Whether the "good faith" exception to the warrant requirement should be extended to officers who are not "well trained" in the matter they supposedly exercised "good faith" in.

The circuit court found that the officer did not act in good faith because he was trained in the warrant system but did not use it.

The Court of Appeals did not characterize the officer's training, but found apparently *de novo* that what it imputed was the officer's subjective understanding of some of the law was sufficient to satisfy the "good faith" standard. The Court of Appeals denied a motion for reconsideration squarely presenting the issue.

3. Whether a circuit court's determination that an officer did not act in good faith is a question of fact, law, or both, and what standard of review ought to apply to such determinations, is an issue of first impression requiring a decision from this court.

The circuit court did not have occasion to answer this question.

The Court of Appeals apparently employed without announcing a *de novo* standard of review, and denied a motion for reconsideration squarely presenting the issue.

4. Whether the State has standing to appeal a decision that is not adverse to the State to this Court.

The circuit court did not have occasion to answer this question, but suppressed evidence, which was a decision adverse to the State.

The Court of Appeals did not have occasion to answer this question, but reversed the circuit court, rendering their decision in favor of the State.

This Court granted review of both the State's petition and of the Defendant's, notwithstanding well-established case law precluding the State from seeking review.

STATEMENT OF THE CASE

Dawn Prado was found injured and unconscious at the scene of a two-vehicle motor vehicle crash. Criminal Complaint, R. 1. She had been thrown from a vehicle registered to her, and the other occupant of Dawn's vehicle wandered about the scene, insisting unbidden that he had not been driving. *Id.* The driver of the other vehicle was dead. *Id.* Dawn was transported to a hospital, and her blood was drawn at the instruction of an officer to test for intoxication.[1] *Id.* A warrant was not sought. Order Granting Motion To Suppress, R. 33, App. 44-47.

Dawn sought suppression of the warrantless blood draw. Motion Hearing, December 3, 2015, R. 41, 9-13, App. 57-61. Briefs were submitted, an evidentiary hearing conducted, and more briefing was ordered. *Id.* The circuit court decided that the evidence was obtained in violation of the Fourth Amendment, that Wis. Stat. § 343.305 does not authorize drawing blood from an unconscious person, and that to the extent the statute does it is unconstitutional beyond a reasonable doubt. Order Granting Motion To Suppress, R. 33, App. 44-47. The circuit court also considered the State's "good faith" argument, rejecting it on the basis that the officer admittedly knew of the warrant requirement, had been trained to use it over a year before, had used the warrant system before, and there was no reason to not use it. *Id.*

[1] The State's Petition for Review incorrectly states that Dawn's "blood was drawn for diagnostic purposes." State's Petition at 4. Counsel is aware of nothing in the record to support this assertion.

The State appealed. The Court of Appeals held that the blood draw was unconstitutional beyond a reasonable doubt, but that the officer acted in good faith. Dawn petitions this Court for review solely on the good faith determination.[2]

ARGUMENT

The good faith exception to the warrant requirement is applicable only when an officer who is 1) reasonably well trained, 2) acts in objectively reasonable reliance, 3) on well established law. *State v. Dearborn*, 2010 WI 84, ¶36, 327 Wis. 2d 252, 786 N.W.2d 97; *See also United States v. Leon*, 468 U.S. 897, 926 (1984). If the officer was not reasonably well trained, if the officer's reliance was not objectively reasonable, or if the law was not well settled, the good faith exception thus cannot apply. In this case the officer's actions cannot fall under the good faith exception: Since the law was unsettled, his reliance cannot have been objectively reasonable. If he was unaware the law was unsettled, he cannot have been reasonably well trained. An unreasonable reliance on unsettled law cannot be characterized as "good faith."

Further, the characterization of this issue and the standard of review which ought to apply, implicating what level of deference is due to the circuit court remain undecided.

Finally, the State does not have standing to seek review.

[2] The State cross-petitioned, and both petitions were granted. As addressed below, the State is not authorized to appeal this matter because the State won the exact relief it requested. See below at 15-17.

I. The "good faith" exception to the warrant requirement should not be extended to an officer's reliance on law which is not "well established."

The law the officer purported to rely on could by no means be characterized as "well-established" or "clear and settled." [3] Quite the opposite. While a statute purporting to authorize unconscious blood draws was on the books, that statute was called into question by *State v. Padley*, 2014 WI App 65, 354 Wis. 2d 545, 849 N.W.2d 867, which conflicted with *State v. Wintlend*, 2002 WI App 314, 258 Wis. 2d 875, 655 N.W.2d 745, and was informed by *Missouri v. McNeely*, 569 U.S. 141 (2013). As the circuit court found through the officer's own testimony, a telephonic warrant system had been put in place shortly after *McNeely*, and the officer admitted he was trained in it soon after (well ahead of the instant circumstances). The officer did not recall whether he'd been trained in *Padley*.

The indisputable fact of the matter is that the law was in flux. The existence of a statute does not mitigate that fact. An officer would be no more reasonable in drawing blood from an unconscious person without a warrant than they would in arresting someone for performing an abortion: A statute currently on Wisconsin's books (Wis. Stat. § 940.15) that is nonetheless unenforceable by virtue of binding or superseding authority. One can disagree about whether abortion should be criminal, but what is not in

[3] We argued below, maintain, and the Court of Appeals agrees, that the law was settled, but in exactly the opposite way that a finding of good faith would require. We therefore assume for the sake of this brief that the law was not settled as the Court of Appeals said in this decision, and address how it must be characterized in the absence of that finding: As unsettled.

dispute is that the statutes prohibiting it are unenforceable by virtue of governing authority such as *Roe v. Wade* and its progeny.

So the mere existence of a statute authorizing something cannot, on its own, make that thing "well established." When there is binding precedent against such a statute, the statute is nonetheless illegal. Even in the absence of binding precedent declaring it illegal, the fact that the Court of Appeals and Wisconsin and U.S. Supreme Courts had all been presented with the issue and either come to different conclusions or avoided deciding whether the statute was constitutional means that it was, by definition, not well-established.

Aside from the statute, *Wintlend* and *Padley* informed this issue to opposite results. The Court of Appeals understates it when it assesses "*Padley* may have been in conflict with the earlier *Wintlend*…" As they thoroughly delineated in the decision, *Padley* was in conflict with *Wintlend*. Decision at ¶¶ 34 to 49. And that tension is necessarily the opposite of "well-established law." If *Wintlend* could somehow preempt *Padley*, or if *Padley* could overrule *Wintlend*, either of those would result in "well-established" or "clear and settled" law. But neither could, which is the definition of *not* well-established, of unclear, and unsettled. The cases were clearly in conflict, making the law unsettled.

The fact that the law was unsettled is further evidenced by this Court's and the U.S. Supreme Court's inability to achieve a majority in the cases concerning this issue: The conflict between *Wintlend* and *Padley* and the unconscious driver provision that had

been certified to this Court three times and accepted by the U.S. Supreme Court once. *State v. Howes*, 2017 WI 18, 373 Wis.2d 468, 893 N.W.2d 812; *State v. Hawley*, 2019 WI 98, 389 Wis.2d 33, 935 N.W.25 680; *State v. Mitchell*, 2018 WI 84, 383 Wis.2d 192, 914 N.W.2d 158; *Mitchell v. Wisconsin*, 139 S. Ct. 2525. If a mere majority of justices in the highest courts of the State and the nation cannot agree, it is evident that the law is unsettled.

Thus, the officer's reliance could not have been on well established law, and the good faith exception cannot apply.

II. The "good faith" exception to the warrant requirement should not be extended to officers who are not "well trained" in the matter they supposedly exercised "good faith" in.

In order for the good faith exception to apply, an officer must be "reasonably well trained" in the matter they're supposed to be exercising "good faith" in. *Dearborn* at ¶36. In this case, the officer admitted that he had been trained in a telephonic warrant system after *McNeely*, and did not recall whether he had been trained in *Padley*. The Court of Appeals noted that *Padley* could not overrule *Wintlend*. Even upon a motion for reconsideration, though, the Court of Appeals did not address that neither could *Wintlend* invalidate *Padley*. The Court of Appeals further imputed to the officer a subjective understanding of just *some* of the law in existence at the time. Obviously, an officer's subjective, erroneous understanding of some law is not the correct standard to employ *State v. Dearborn*, 2010 WI 84, ¶¶ 33-51.

The summation of the Court of Appeals decision on this issue was:

> Despite these concerns, we are persuaded that in this case, the State has met its burden to show that the officer who directed the warrantless blood draw acted in objective good-faith reliance on the incapacitated driver provision. At the time that Prado's blood was drawn, the incapacitated driver provision had been on the books for decades, and its constitutionality had not been challenged in any published appellate decision.[ ] *Wintlend* was the law in Wisconsin and had not yet been overruled by *Birchfield*. The officer testified that he was familiar with *McNeely*, that he had been trained to use the Dane County telephone warrant system developed in *McNeely's* wake, and that he had used the system approximately a dozen times, all in situations involving conscious drivers who refused to consent to chemical testing. However, the officer also testified that he had never attempted to obtain a search warrant for a blood draw from a person who was unconscious, and that based on the incapacitated driver provision, it did not occur to him that he might have to do so. As we understand it, the implication of this testimony is that the officer did not read *McNeely* to prohibit officers from relying on the implied consent of incapacitated drivers, which, as discussed above, the statute presumes has not been withdrawn.

Decision at ¶71. The Court of Appeals observes in a footnote:

> We recognize that *Padley* had been decided six months before Prado's blood draw, and that, for the reasons explained above, a careful reader of *Padley* might have drawn conclusions about the constitutionality of the incapacitated driver provision. *See supra* ¶¶34-35. However, and also as explained above, we cannot overrule our own precedent. *Padley* may have been in conflict with the earlier *Wintlend*, but it could not and did not overrule it. Accordingly, we cannot conclude that at the time Prado's blood was drawn, an objectively reasonable officer would have read *Padley* to mean that the incapacitated driver provision was unconstitutional.

There are several problems with this analysis which are fatal to its conclusion. Perhaps most importantly, they ignore the circuit court's findings that the officer did not act in good faith, and the facts supporting that finding.

First, the Court of Appeals purports to understand that the "implication of this testimony is that the officer did not read *McNeely* to prohibit officers from relying on the implied consent…" To be clear, the Court of Appeals is imputing a subjective

understanding of the officer. Who cares what the officer understood *McNeely* to mean? The officer's subjective, erroneous understanding is not the standard. It is the opposite of the "objectively reasonable reliance on settled law" standard.

Second, imputing a subjective understanding, the Court of Appeals cites only portions of the officer's testimony, ignoring his lack of recollection regarding whether he'd been trained in *Padley*. The Court of Appeals thus avoids any discussion (even after the issues were squarely presented in a motion for reconsideration) of the factors—including whether the officer was reasonably well-trained—that must be present for a finding of good faith.

Third, his subjective understanding is irrelevant as is whether he was trained in *Padley* or not: The "objectively reasonable reliance" necessitates a "reasonably well trained officer." A reasonably well-trained officer would be trained in *Padley* within six months after it was decided. If not half a year, how long can the police conveniently ignore the dictates of the courts? While the Court of Appeals is entirely correct that *Padley* could not overrule *Wintlend*, neither could *Wintlend* invalidate *Padley*: A necessarily true inverse that the Court of Appeals must ignore (and did, on a motion for reconsideration) in order to reach a conclusion of "good faith." Again, while the Court of Appeals notes that *Birchfield v. North Dakota*, 136 S. Ct. 2160 (2016) had not yet overruled *Wintlend*, *Padley* (consistent with what *Birchfield* later established) had thrown *Wintlend* into doubt.

Where there are conflicting precedents, the best that can be said of finding "good

faith" is that it will incentivize ignorance on the part of police. Even worse, not recognizing the inapplicability of "good faith" will allow police to pick and choose which precedent is most convenient for them to follow. "If the letters and private documents can thus be seized and held and used against a citizen in an offense, the protection of the Fourth Amendment declaring his right to be secure against searches and seizures is of no value, and, so far as those thus placed are concerned, might as well be stricken from the constitution." *Weeks v. U.S.*, 232 U.S. 383. 393 (1914).

An officer's subjective understanding of conflicting, binding authorities is not the standard. The fact that the law was indisputably unsettled in light of the conflict between two cases decided well before the circumstances at hand means that the law was as a matter of fact not settled, and if the officer did not know that, he was not reasonably well trained. Therefore, the good faith exception cannot apply.

III. "Good Faith" is a Bad Idea

The judiciary's integrity has been diminished by its complicity with the executive branch's unlawfulness, exemplified in various ways by the issue now before this Court. A discussion of the applicability of the "good faith" doctrine cannot be had without reviewing both the origins of the exclusionary rule and the invasive, overwhelming creep of the "exception" to the extent that "good faith" has become the rule *rather* than an exception. The application of "good faith" leaves a constitutional wrong unremedied.

The Wisconsin Constitution requires that this Court—even if the U.S. Supreme

Court does not—provide a remedy to the wrong suffered by a person whose Fourth Amendment—and Article 1, Section 11 of the Wisconsin Constitution—rights have been violated. "Every person is entitled to a certain remedy in the laws for all injuries, or wrongs which he may receive in his person, property, or character; he ought to obtain justice freely, and without being obliged to purchase it, completely and without denial, promptly and without delay, conformably to the laws." Wisconsin Constitution, Article 1, Section 9. What this means is that while federal courts may shrug at the wrong of a Constitutional violation and declare that "the exclusionary rule is not an individual right," nor that "exclusion is a necessary consequence of a Fourth Amendment violation," (*Herring v. U.S.*, 555 U.S. 135, 129 S. Ct. 695, 700 (2009)) this court cannot. While suppression may not be a right, violation of a person's Fourth Amendment right is undeniably a wrong, and under our State constitution a remedy is required. If not suppression, then what? Unremedied wrongs are unconstitutional here.

This is not merely flowery prose. "Where an adequate remedy or forum does not exist to resolve disputes or provide due process, the courts, under the Wisconsin constitution, can fashion an adequate remedy." *D.H. v. State*, 251 N.W.2d 196, 76 Wis.2d 286 (1977); Looking to Article 1, Section 9 relative to contracts and legislative action, this Court found long ago that remedies can be adjusted "so that they leave the parties a substantial remedy, according to the course of justice as it existed at the time the contract was made." *Von Baumbach v. Bade*, 9 Wis. 599 (1859). Likewise, regarding the same but without direct reference to Article 1, Section 9: "Where a right has accrued to a party to

have or demand something of another, such a right cannot, against the will of the party to be injuriously affected, be divested, modified or controlled by any subsequent legislation." *Cornell v. Hichens*, 11 Wis. 353 (1860). An apt analog (though not specifically citing Article 1, Section 9): "Remedy may not be taken away altogether, but may be changed or modified, **provided adequate remedy is left.**" *State v. Diehl*, 223 N.W. 852, 198 Wis. 326 (1929)(emphasis added).

To sum: Where there is a wrong, there must be a remedy under our Wisconsin Constitution. Courts are entitled to fashion an adequate remedy. The exclusionary remedy was sufficient to redress the wrong of a Fourth Amendment violation. But the government is not entitled to simply take away a remedy. The application of "good faith" takes away the only remedy for the wrong of a Fourth Amendment violation.

The application of "good faith" to inject unconstitutionally obtained evidence leaves a constitutional wrong unremedied, and that is unconstitutional in Wisconsin. While it is oft-repeated that "exclusion is not a right," the Fourth Amendment still is, and this Court must provide a remedy when the executive violates it.

The Fourth Amendment, like the other rights in the Bill of Rights, is not established or created by our Federal or State constitutions. Rather, they are pre-existing rights that the government—every branch, both federal and state—is prohibited from infringing on. *State v. Roundtree*, 2021 WI 1, ¶108-116 (J. Hagedorn, dissenting). Can there be any serious doubt that the founders—writing "secure in their persons"—would have countenanced that taking of blood from a body? If a right to "papers and effects,"

how much more a right to one's very blood?

Rights are not meaningful unless they're respected, guarded, and enforced. To give meaning to the Fourth Amendment, the U.S. Supreme Court decided in 1914 that evidence obtained in violation of the Fourth Amendment would be excluded in the prosecution of individuals whose rights were violated. *Weeks v. U.S.*, 232 U.S. 383 (1914). Like all of the other fundamental rights protected by the Amendments to the Constitution, the exclusionary rule was later incorporated against the individual States. Fourteenth Amendment; *Mapp v. Ohio,* 367 U.S. 643 (1961). Originally (and aptly in this case) the exclusionary rule emanated not merely from the Fourth Amendment, but also from the Fifth, on recognition that evidence seized in violation of the right to privacy was tantamount to self-incrimination. *Weeks*, 232 U.S. 383 (1914)

Wisconsin bravely jumped the gun in 1923, without even citing *Weeks*, to conclude that the Wisconsin Constitution prohibited unlawfully obtained evidence from being used in prosecution as the federal courts later held applied to the United States Constitution. *Hoyer v. State*, 180 Wis. 407 (1923).

While the *Mapp* decision was variously grounded, later courts held that the "pragmatic" objective of deterring police misconduct was "principle." Thus, a main rationale of the exclusionary rule is to deter police misconduct, and it has become such that it is the only ground courts will now use; the injustice is unremedied if it won't deter future injustices. It should be obvious that's nonsense. Allowing unlawful evidence not only corrupts what is supposed to be a lawful prosecution, it leaves an injustice

unremedied. Courts that countenance as much pretend that two wrongs make a right (unconstitutionally obtained evidence plus judicial complicity in it results somehow in justice being done).

Nonetheless, after the establishment of the exclusionary remedy and its incorporation against the states, the remedy was quickly watered down. Illegally obtained evidence was permitted in grand juries. *Stone v. Powell*, 428 U.S. 465 (1976). It was permitted in impeachment, to "prevent perjury and assure the integrity of the trial process." *Id*. Let's be clear again: To maintain the lawfulness of a proceeding, courts admitted unlawfully obtained evidence. This is nonsensical.

When police act in "good faith" on well-settled law, courts may decline to apply the exclusionary rule, and permit evidence to be used against a defendant even though it was obtained in violation of their rights. This rather disastrous notion was instituted less than 40 years ago in *U.S. v. Leon*, 468 U.S. 897 (1984) and *Massachusetts v. Sheppard*, 468 U.S. 981 (1984). The dissent of Justice Brennan in *Leon* was, of course, wholly prescient.[4] The slow creep of the exception began when it was applied merely to a police officer's reliance on a warrant which later was found to be lacking probable cause (*Leon*) or containing clerical errors (*Sheppard*).

[4] Indeed, the full impact of the Court's regrettable decisions will not be felt until the Court attempts to extend this rule to situations in which the police have conducted a warrantless search solely on the basis of their own judgment about the existence of probable cause and exigent circumstances. When that question is finally posed, I for one will not be surprised if my colleagues decide once again that we simply cannot afford to protect Fourth Amendment rights. *U.S. v. Leon*, 468 U.S. 897, 959 (1984) (Justice Brennan, dissenting).

Interestingly, just as Wisconsin had adopted exclusion before its incorporation against the States and without citing Weeks, so also it found "good faith" before the U.S. Supreme Court did: "Where the state's defense is that an officer acted upon an erroneous report or failed to interpret properly a report or direction, the state bears a heavy burden. It is incumbent upon **the state in such case to establish beyond a reasonable doubt its good faith**." *State v. Taylor*, 210 NW 2d 873, 60 Wis. 2d 506, 519 (1973) (emphasis added). Taylor is still oft cited for the notion that the State bears the burden in suppression motions, but without articulating what that burden is (beyond a reasonable doubt).

We would urge this court to expand its view of the exclusionary rule, and propose that rather than merely deterring police misconduct, it should be applied as a remedy for actual violations of Constitutional rights. To not do so compounds the injustice occasioned by a rights-violating search: It leaves a wrong unremedied. Article 1, Section 9 of the Wisconsin Constitution. When this is not done, it sullies the judiciary.

Thus, this Court should announce that Wisconsin's Constitution affords its citizens more protection than the federal courts have recognized. "The people of this state shaped our constitution, and it is our solemn responsibility to interpret it." *State v. Knapp*, 2005 WI 127, 285 Wis.2d 86, 700 N.W.2d 899.

If the exclusionary rule is a judicially created remedy, how much more then the exception to it? This Court's allegiance must not be to its own policy-implicated

doctrines, but to the Constitution and the citizens the Constitution was made by and for.

This could, as in *Knapp*, be accomplished by declaring a greater right under the Wisconsin Constitution than under the federal. However, this Court could also say that while it holds the same view of the federal constitution as the U.S. Supreme Court does, the Wisconsin Constitution requires that we address the federal *or* state constitutional violation, even if the federal constitution does not. Ergo, it doesn't matter if this Court finds the remedy emanating from the Fourth Amendment or Article 1, Section 11 of the Wisconsin Constitution: The remedy for wrong section requires both of them remedied.

Will suppression in this case have a deterrent effect on the bad behavior of police in the future? That is unfortunately a pivotal question, the answer to which has increasingly rendered "good faith" the rule rather than the exception to the rule. We need not spend much time on it because in order to get to the question of whether there would be a deterrent effect, one would have to suppose that good faith existed in the first place: That there was objectively reasonable reliance on well settled law by a well trained officer. There was not, so deterrence is a question we need not answer. But it is important to address, at least briefly, as it goes to the discussion of who would have the burden to show deterrent effect.

How have courts prophesied the effects their rulings will have on police? The utter lack of sociologically sound foundation was evident from the very beginning of the exception. *U.S. v. Leon*, 468 U.S. 897, 959 (1984) (Justice Brennan, dissenting).

Consulting the works of Nostradamus or purchasing a Ouija board would provide

a more sound basis for courts' prognostication, as so far courts have offered nothing in support of their ideations about deterrence or the lack of it, but rather rely on their own *ipse dixit* about what will or won't result in deterrence. What should be created, in the absence of anything else, is an incentive to err on the side of constitutional behavior. The *Leon* proposal was untrue when it was adopted by the U.S. Supreme Court. Now, in the wake of *Dearborn*, it has become a self-fulfilling prophesy. By assuming there will be no deterrent effect, the courts have employed good faith to make sure there's no deterrent effect.

As long as we're engaging in prognostication, though, undersigned counsel would like to note two important points: First, that this Court's decision in this case is likely to have no practical effect on any other case than this one because of the ridiculously broad (one might say categorical) exception carved out by *Mitchell*; Second, practical inconsequence aside, a decision in this case is of the utmost importance to principle. The State does not get to legislate away constitutional rights (absent a constitutional amendment) nor should the judiciary be complicit in aiding the executive in violating citizens' constitutional rights, as they by definition are every time they find "good faith" to let in bad evidence. If we're to assess the social costs of the exclusionary rule, so much more the cost of "good faith." The cost of that is the court's integrity. That's too high a cost.

It is obscene that the average citizen is presumed to know the law such that strict liability is the rule, whereas the folks we entrust with guns to enforce the law are graced

with "good faith" to let their violations of citizens' constitutional rights go unchecked. The standard for citizens is that "ignorance of the law or negligence as to the existence of the law is not a defense." *State v. Collova*, 79 Wis.2d 473, 488, 255 N.W.2d 581 (1977). The standard for police is much more generous: Even when an officer is undeniably wrong as a matter of law, as long as he was "reasonably" wrong or violated a constitutional right in "good faith" judges will allow illegal evidence into their courtrooms. *Heien v. North Carolina*, 574 U.S. 54 (2014); *Herring v. U.S.*, 555 U.S. 135 (2009).

The violence the judiciary has done to language ("reasonably wrong," "good faith," "implied consent") is second only, perhaps, to the violence it has done to its own reputation as a co-equal branch of government entrusted with protecting the rights of citizens. As lamented by Justice Brennan, there seems no end to which the judiciary will not go to sanction the executive's lawlessness after the fact.

IV. Characterizing a circuit court's determination of no good faith as a matter of fact, law, or both (and its implications on what standard of review is to be applied), is an issue of first impression and requires a decision by this court.

Which standard of review applies to the issue of good faith in this factual context is not clear. Most frequently suppression issues are regarded as a mixed question of fact and law. *See e.g. State v. Hess*, 2010 WI 82, ¶19. We maintain, as with constitutional questions like competency, that the facts are inextricably tied to the constitutional determination, and therefore the circuit court is owed clearly erroneous deference. *See State v. Garfoot*, 207 Wis. 2d 214 (1997). Whereas previous cases have applied a standard of review when considering an officer's reliance on statute, on pronunciations of the court, on a warrant, etc. (*See State v. Blackman*, 2017 WI 77, ¶70), here it is the officer's supposed reliance on a statute at odds with case law the officer admits he was trained in and other case law he either was or should have been trained in. Regardless, Courts have characterized the application of the "good faith" exclusion as a balancing test. *See* Decision at ¶69; *State v. Dearborn*, 2010 WI 84, (dissent at footnote 21). To the extent the circuit court engaged in such a balancing test, it is owed deference unless clearly erroneous, and a reviewing Court should search the record for grounds in support. *See State v. LaCount*, 2008 WI 59, ¶15. Which standard of review to apply therefore affects most particularly reviewing courts' treatment of the circuit court's findings of fact.

This Court should articulate the appropriate characterization of the issue and standard of review when a circuit court makes a finding of good faith (or lack of it) and a reviewing court's obligation of deference.

V. The State Lacks Standing to Petition this Court for Review

The State won this case before the Court of Appeals, obtaining exactly the relief they asked for thrice over. While the State is unhappy with how it won, the State's unhappiness does not entitle it to petition for review of the decision.

It is well-established that the State lacks standing[5] to petition for review of a decision which is not adverse to it when they're merely unhappy with the grounds they won on. The Statute authorizing petitions for review limits such petitions to appeal only of "adverse decisions." This Court has at least twice already resolved this issue, clarifying that a party who wins cannot appeal merely because they don't like how they won. Wis. Stat. § 809.62 (1g), *Neely v. State*, 89 Wis.2d 755, 279 N.W.2d 255 (1979), *State v. Castillo*, 213 Wis.2d 488, 570 N.W.2d 44 (1997).

An "adverse decision" includes "a final order or decision of the court of appeals, the result of which is contrary, in whole or in part, to the result sought in that court by any party seeking review" and "the court of appeals' denial of or failure to grant the full relief sought or the court of appeals' denial of the preferred form of relief," but does *not* include "a party's disagreement with the court of appeals' language or rationale in

[5] Standing is "a parties right to make a legal claim or seek judicial enforcement of a duty or right." Black Law Dictionary 3rd Pocket Edition.

granting a party's requested relief." Wis. Stat. § 809.62(1g). The State quite succinctly stated the full relief they sought in the Conclusion of their brief in chief, their reply brief, and their supplemental brief as they were required by Wis. Stat. § 809.19(2)(f): "For the reasons explained above, the State respectfully requests that this Court reverse the circuit court's order granting Prado's motion to suppress evidence." State's Brief in Chief at 37; State's Reply Brief at 11; Supplemental Brief of the State at 9 (with slightly different wording). The Court of Appeals then granted exactly the relief the State asked for.

The State cites to *In re Refusal of Bentdahl*, 2013 WI 106, 351 Wis.2d 739, 840 N.W.2d 704 in support of its contention that the State can petition for review of a decision that is even partially adverse to the State. In *Bentdahl*, the State asked not only for a reversal of the circuit court, but a remand with instructions that the circuit court enter a refusal conviction. Instead, the Court of Appeals reversed the circuit court and remanded with instructions that the circuit court exercise its discretion: Clearly not everything the State had asked for. The Court of Appeals' decision in *Bentdahl* was therefore contrary "in part" to what the State had asked for. Here, not at all. The State in its petition fails to articulate what relief they'd sought and failed to obtain, as articulated in their conclusions thrice over. The State is correct that they could appeal if the Court of Appeals' decision was partially adverse, but it's not: The State got exactly what they asked for.

That State cannot appeal its win merely because it dislikes how it won. Undersigned counsel suspects this Court will either as an exercise of discretion or as a

subsidiary issue consider the issues presented in the State's petition nonetheless. While this Court should not, if it does, it should make clear that it is doing so as an exercise of discretion or a subsidiary issue and that the State's petition was improvidently granted, lest well-established law relating to petitions and adverse decisions be thrown into question.

CONCLUSION

For the foregoing reasons, Dawn M. Prado respectfully requests that the court reverse the Court of Appeals as to "good faith" and affirm the circuit court's suppression of evidence.

Dated: January 12, 2021

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CERTIFICATION

I certify that this brief conforms to the rules contained in Wis. Stat. §§ 809.19(8)(b) and 809.62(4)(a) for a petition produced using a proportional serif font: Minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points, maximum of 60 characters per full line of body text. The length of this petition from introduction to conclusion is 6,337 words.

Dated: January 12, 2021

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CERTIFICATION OF COMPLIANCE WITH WIS. STAT. § 809.19(12)(f)

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. § 809.19(12)(f).

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 petition for review filed with the court and served on all opposing parties.

Signed

Signature