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SUPREME COURT OF WISCONSIN

STATE OF WISCONSIN,

PLAINTIFF-APPELLANT-PETITIONER,

V. Appeal No. 2016AP308-CR

DAWN M. PRADO,

DEFENDANT-RESPONDENT-CROSS-PETITIONER.

# REPLY BRIEF OF THE DEFENDANT-RESPONDENT-CROSS-PETITIONER

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## ARGUMENT

### *I. None of Our Arguments were Waived.*

The majority of the State's contentions in its Response Brief are addressed in our Brief in Chief and our Response Brief. A few stray contentions remain to be addressed.

The State contends that our argument regarding the interface of Article 1, Section 9 of the Wisconsin Constitution with Article 1, Section 11 of the Wisconsin Constitution and the Fourth Amendment to the U.S. Constitution is not properly before this Court, because we didn't mention it in our petition for review. That mistakes an argument about an issue (Wis. Stat. § 809.19(1)(a), by virtue of Wis. Stat. § 809.63)[1] for the issue itself (Wis. Stat. § 809.62 (2)(a)). The issue, presented in our petition for review, is the "good faith" invention of courts that permits lawlessly obtained evidence in our courtrooms. We explained in our Brief in Chief particularly how even under current case law, the application of that judicially invented imprimatur on Executive Branch lawlessness is inapt. *See* Sections I and II of Argument in our Brief in Chief. We continue with an analysis of how "good faith" is a bad idea, and thoroughly explain why. *See Id.*, Section III.

The State construes our argument as one that "good faith" can never apply. While

[1] In short, Wis. Stat. § 809.62(2)(a) requires that we present issues in our petition (which we did: "good faith"), and once this Court grants review, appellate procedure rules apply to the briefing (Wis. Stat. §809.63), where the argument about those issues is to be located (Wis. Stat. § 809.19 (1)(a)). Note the argument in a petition (Wis. Stat. § 809.62 (2)(e)) is to amplify the criteria to support the petition, whereas the argument in briefing is to contain contentions, reasons, citations to authorities and statutes, etc. about the issues).

it should certainly apply less often, that characterization is not exactly correct. Relative to Article 1, Section 9, our argument is that 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. Because that is exactly what the first clause of the Section says. To the extent that this is a novel argument in itself, or as applied to "good faith" that we're suggesting that the "passage of time or changing circumstances" have made previous decisions "ripe for reexamination," this is exactly the Court to consider those "special and important reasons." Wis. Stat. § 809.62(1r). Note, as in the paragraph and footnote above, "issues before this court" are neither arguments nor criteria for review. We clearly asserted "good faith" as the only issue we were appealing. Issues and arguments and criteria are all different things; were that not so, these cases would be decided on petitions alone, rather than briefs and arguments.

As to the State's characterization that we assert "that the good faith exception should never be applied because doing so violates the Wisconsin Constitution," (State's Response Brief at 12), that is not necessarily true. Perhaps it "almost always" (to adopt a phrase from *Mitchell*). Perhaps this Court can come up with a different remedy for a violation of the Fourth Amendment other than exclusion of lawlessly obtained evidence. Brief in Chief at 11-12. But what it cannot do is take away the only remedy that has existed in order to sanction the Executive's lawlessness and leave a constitutional wrong unremedied. That would be unconstitutional twice over, and abdicate the judiciary's role as a co-equal branch of government. *Marbury v. Madison*, 5 U.S. 137, 177 (1803).

### *II. The State does Not Have Standing To Appeal*

The State does not have standing to appeal because the decision of the Court of Appeals was not adverse to the State. The State was required by statute to include in their brief a "short conclusion stating the precise relief sought." Wis. Stat. § 809.19(1)(f). The State did that thrice over, writing "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 to Court of Appeals at 37; State's Reply Brief to Court of Appeals at 11. "This Court should apply *Mitchell* and *Paull* and reverse the circuit court's order granting the motion to suppress evidence." State's Supplemental Brief to the Court of Appeals at 9.

The State's "precise relief sought" was "reverse the circuit court's order granting" the suppression of evidence, which is exactly what the Court of Appeals did. In terms of the State's standing to petition for review, Wis. Stat. § 809.62 (1g) details what an "adverse decision" is:

> **(1g)** DEFINITIONS. In this section:
> **(a)** "Adverse decision" means 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.
> **(b)** "Adverse decision" includes 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.
> **(c)** "Adverse decision" does not include a party's disagreement with the court of appeals' language or rationale in granting a party's requested relief.

Here, the State got exactly what it wanted, but disagrees with the Court of Appeals' language or rationale in granting a party's requested relief. As the statute specifically says that's not an adverse decision, the State lacks standing under Wis. Stat. § 809.62 (1m), which permits a petition for review only of an adverse decision.

The State offers three arguments to the contrary:

First, they imply that we waived or forfeited our opportunity to point out their lack of standing by not mentioning it in our cross petition or by filing a response.

Second, they assert that they did not merely want the suppressed evidence in, but they wanted it in because the statute was declared constitutional, so they really haven't gotten the "full relief sought."

Third, that they have "more than an interest in the constitutionality of Wisconsin's laws" because of their statutory obligation, recognized by courts, to defend statutes.

None of these assertions withstand scrutiny.

As to the implication that we waived or forfeited our objection to the State's petition, the State offers no authority in support of that implication. Absent any authority requiring us to object to their standing prior to when we did, the State's observation is meaningless. Why note that we didn't object if we weren't required to, other than to imply that it somehow bars us from now making that observation? As a practical matter, that ours is characterized as a "cross petition" and the State's as "petition" seems to have been luck of the draw: They were submitted on the same day, and counsel had no knowledge that the State either intended to or had petitioned until that information was

available online. *I.e.*, our "cross petition" was composed without assumption that the State would be petitioning. Even so, we were privileged to object to the State's petition by virtue of the statute that permits a response to petitions. However, that statute merely says we "may," not that we "must," nor that the absence of any objection works to forfeit or waive it. Wis. Stat. § 809.62. To do so would be absurd, of course: Under the same statute a party may respond with "any alternative ground supporting the court of appeals' result…" Surely it's not the State's contention that failing to object via cross petition or response that there's an alternative ground to support the court of appeals somehow works to waive those grounds when briefing actually happens.

As to the assertion that the State didn't merely want the evidence in, but wanted it in because it was declared constitutional, this is exactly what the statute and precedent prohibits. *See* Brief in Chief at 20-22. The State's assertions in their Response Brief neither rebut the black-letter precedent we cited nor provide any explicit authority to appeal their win. Nor do they provide any argument that existing law should be changed to accommodate them. To permit their petition on this ground would be to invite the sort of mischief that would undermine applicable precedent: Parties will begin to assert in their conclusions that they want X *only* because of Y, and if they get X because of Z then they get to appeal. This is an end-run around both the statute and the case law. Does this make such a decision insulated from review? As to a particular case, yes, as it absolutely and obviously should. The State has several of these warrantless unconscious blood draw

cases pending, and can argue that *Prado* was wrongly decided in one of those. What they can't do is appeal their win.

It seems the State is not content with the unlevel playing field they already have: That they get an interlocutory appeal as of right, putting this case on hold for years while the Defendant remains subject to bond conditions and incessant motions[2] to increase them (where of course a defendant is entitled to only discretionary review); That the State's agents get the benefit of "good faith" and "reasonable mistake of fact" and "reasonable mistake of law," while "strict liability" applies to its citizens' supposed omniscience of law (*see* Brief in Chief at 17-18); Now the State wants to be able to appeal its wins as well, so they can insist on winning the way they want to, a right not enjoyed by any other litigant.

As to their interest in the constitutionality of Wisconsin's laws based on their statutory obligation to defend them: They have defended them, as part of their argument in this case, and lost. Winning that argument was not essential to getting the relief they particularly sought in this case. They get to argue about that in any of the other several cases they have pending, but not in this one.

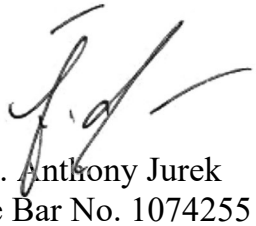
[2] This case originated in 2015; A "speedy trial" demand has been pending since 2018; Per CCAP, the State has filed at least eight (8) bond modification motions, on 1/22/20, 11/06/19, 10/8/19, 1/4/19, 12/11/18, 11/19/18, 7/26/18, 7/10/18.

## 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: March 3, 2021

AJ Attorney, the Law Office of Anthony Jurek



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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 2,291 words.

Dated: March 3, 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