No. 2017AP208

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In the Supreme Court of Wisconsin

STATE OF WISCONSIN,
PLAINTIFF-RESPONDENT,

v.

JOHNNY K. PINDER,
DEFENDANT-APPELLANT

On Appeal From The Ozaukee County Circuit Court,
The Honorable Paul V. Malloy, Presiding,
Case No. 2015CF84

RESPONSE BRIEF OF THE STATE OF WISCONSIN

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ISSUES PRESENTED

1. Does a common-law warrant authorizing the use of a GPS tracker need to comply with Wis. Stat. § 968.15's five-day execution requirement?

The circuit court answered yes, and the Court of Appeals answered yes in its certification opinion.

2. Is suppression of evidence required when officers execute a GPS-tracker warrant outside the five-day execution requirement of Wis. Stat. § 968.15(1), in light of Wis. Stat. § 968.22?

The circuit court answered no, and the Court of Appeals certified the question.

3. Is suppression appropriate here when the officer's execution of the warrant was in good faith, reasonable reliance on the GPS-tracker warrant?

Neither the circuit court nor the Court of Appeals answered this question.

4. Did counsel provide ineffective assistance by failing to object to certain jury instructions?

The circuit court answered no, and the Court of Appeals certified the question.

INTRODUCTION

Johnny K. Pinder committed a string of burglaries in Mequon, traveling to each in his silver Chevy Impala. The circuit court issued a standard warrant to install and monitor a Global-Positioning-System (GPS) tracker on the Impala and used the information gleaned from the tracking to apprehend Pinder during yet another burglary. Now, Pinder claims that the evidence obtained from the GPS tracker must be suppressed because the State did not execute the warrant within five days, under Section 968.15.

This Court should reject Pinder's argument for three independently sufficient reasons. First, the GPS-tracker warrant here was not a statutory search warrant, and thus it did not need to comply with Section 968.15's terms. Second, even if Section 968.15 applied, suppression is not appropriate under *State v. Sveum*, 2010 WI 92, 328 Wis. 2d 369, 787 N.W.2d 317, where this Court excused noncompliance with Section 968.15 as a "technical irregularity" under Section 968.22 in the GPS-tracker context. Finally, the evidence here is not subject to suppression under the so-called "good faith" exception because the officer executed the warrant reasonably, consistent with that warrant's facial terms.

ORAL ARGUMENT AND PUBLICATION

By granting the Court of Appeals' certification request, this Court has indicated that the case is appropriate for oral argument and publication.

STATEMENT OF THE CASE

A. The Criminal Investigation

1. In February 2015, a burglar broke into several businesses in Mequon, Ozaukee County, stealing laptops and desktop computers, cash, a credit card, and a stereo. SA2–4. Surveillance cameras near one of these businesses captured footage of the burglar and his car, a silver Chevy Impala with both license plates missing. SA4–5. Other footage captured later at local gas stations showed the burglar, in the same car, purchasing gas for drivers of other vehicles with the stolen credit card, as confirmed by credit-card records. *See* SA5–6.

A confidential informant contacted the authorities with information about the burglar. The informant explained that a man named "JP" is "a really good lock picker and has been using his skills to get into locked areas of hospitals and businesses to steal computers, credit cards, and money" to "support his crack habit." SA6. The informant described JP as having "spent 18 years in prison" and explained that he "got out about two months ago." SA6. JP "brags about being able to pick the lock of a business and enter to take the items he want[s], then leave things like they were prior to the burglary, giving him time to move the product[,] or use the credit [cards,] or [purchase] gas cards." SA7. JP had been so successful that he had "10 to 15 computers available at one time to sell," and "had a bunch of gas cards and would fill up vehicles for cheap." SA6–7. Indeed, the informant's "aunt

recently purchased a computer from [JP]" with an "Aurora sticker on it" for $250. SA6; *compare* SA2 (burglar had burglarized "Aurora Sports Medicine"). When this computer "stopped working," JP told her "to shut the computer off and he would get her another one." SA6.

Police identified Pinder as JP. SA7. Pinder owns a silver Chevy Impala, was on probation for "multiple cases of burglary," and had been suspected of committing another string of recent burglaries using the Impala. SA7–8.

2. On February 27, Detective Cory Polishinski of the Mequon Police Department applied for a court order authorizing the covert installation and monitoring of a GPS-tracking device on Pinder's Impala. SA1, 8. In his affidavit in support of his warrant application, Detective Polishinski recounted the details of the criminal investigation described above, based on his personal knowledge and the reports of other officers he "believe[d] to be truthful and reliable." SA1. He had been "a full-time law enforcement officer for [ ] 15 years, and [ ] had formal training in the investigation of crimes," including "the crime of Burglary in violation of Wisconsin Statute 943.10." SA1. Based on these facts and his experience, he concluded that "there is probable cause to believe" that Pinder's Impala "is presently being utilized in the commission of a crime, to wit, Burglary in violation of Chapter 943.10," and that the use of a GPS tracker on the Impala would aid in the investigation of these crimes. SA8–9. The application explained that "Wisconsin has no explicit

statute . . . that addresses the issue of installing tracking devices on private property," SA8, so the affidavit detailed the procedures for the installation and monitoring of the GPS device. Detective Polishinski would "covertly place[ ]" the device on Pinder's Impala for surveillance "over an extended period of time." SA9–10. The device may draw power from the vehicle itself "in order to extend [its] useful monitoring" life. SA9–10. And this extended monitoring would allow officers "to identify locations and associates [of Pinder] currently unknown." SA10. Specifically, the application "request[ed] that the order be authorized for a period of time not to exceed 60 days from the date the order is signed." SA11.

The court granted Detective Polishinski's application with a signed warrant entitled "Order." SA12–13.[1] The warrant stated that, "[b]ased on the information provided in the affidavit submitted by Detective [ ] Polishinski . . . , there is probable cause to believe that the installation of a tracking device" on Pinder's Impala "is relevant to an ongoing criminal investigation[,] and that the vehicle is being used in the commission of the crime of Burglary." SA12. The warrant "authorized" the State to "install and monitor" the GPS tracker. SA12. The warrant did not require the State to install the GPS tracker within a certain time period, but

[1] "[A] signed court order allowing the installation of a GPS device in [a] vehicle," like the Order here, "constitutes a warrant for Fourth Amendment purposes." *State v. Brereton*, 2013 WI 17, ¶ 11 & n.6, 345 Wis. 2d 563, 826 N.W.2d 369.

rather mandated that the State "remove the electronic-tracking device as soon as practicable after the objectives of the surveillance are accomplished or not later than 60 days from the date the order is signed." SA13.

Ten days later,[2] on March 9, Detective Polishinski installed the GPS tracker on Pinder's Impala and programmed it to alert him when the car entered Mequon. R.67:118–20, 123; R.64:2–3 (date). On March 14, the device alerted that Pinder's Impala had entered Mequon. R.67:119, 123–24. Detective Polishinski then actively monitored the device's signal and observed that the Impala was stopping at "different office buildings in the city," including a business complex at 1025 West Glen Oaks Drive. R.67:124. Once the Impala left this Glen Oaks complex, Detective Polishinski ordered officers to investigate it for evidence of burglary and ordered other officers to follow the Impala. R.67:125.

The officers investigating the Glen Oaks office complex discovered that it had been burglarized. R.67:125. The outer entrance to the complex, which led to a common area, was unlocked and accessible to the public, but the individual office suites within the complex were locked and off-limits to the public. *See* R.67:98–99, 172. The officers discovered that the

[2] The record does not contain specific facts about Detective Polishinski's actions during this ten-day period. However, it does disclose that Detective Polishinski believed that Pinder resided a few blocks away from where his Impala was regularly parked, SA7, and Detective Polishinski disclosed that he could potentially need to move the car covertly to another location to install the GPS tracker, SA10.

locked door to one office suite, shared between A.G. and J.S., had been picked. R.67:173; R.67:102, 110. The suite itself had "a lot of different cabinets and drawers open, as well as papers on the ground," indicating that the area had been "burglarized." R.67:174; *see* R.67:102, 111.

The officers contacted one of the occupants of the office suite, A.G., whose son then contacted the other occupant, J.S. *See* R.67:101–02 (A.G.); R.67:110 (J.S.). A.G. "immediately went to the office" and noticed that a "wallet was not there" and that "a laptop . . . was missing." R.67:102–03. J.S. also "drove . . . to the office" and found that her "new computer," which was still in its original box, "was gone." R.67:111–12. Both victims made plain that they had not given anyone "permission to enter [the] office or remove" these items. R.67:104, 112–13.

The officers then stopped the Impala and discovered Pinder in the passenger seat, with Darnelle Polk driving. R.67:144–45.[3] The officers searched the Impala after obtaining Pinder's consent and found "the items [ ] taken from the burglary scene," R.67:129, as well as "gloves" and "screwdrivers," R.67:145. Officers also found additional "lock-picking tools" on Pinder's person. R.67:132; R.67:149–50.

Detective Polishinski later performed another search of the car (pursuant to a separate search warrant) and

[3] The State charged Polk with burglary along with Pinder, but the jury found him not guilty. R.67:247–48.

catalogued the items he found: an "[a]ssortment of tools," "the wallet belonging to [A.G.]," "the computers"—one "in a box belonging to [J.S.]" and one "belonging to [A.G.]"—and "several other items" "possibly" tied to burglaries from "other jurisdictions." R.67:126, 131. Detective Polishinski found the tools in a "leather case," and they included "an orange-handled small crow bar" and "a small hammer." R.67:127–28.

Two photos extracted from video footage from a surveillance camera on the Glen Oaks office complex confirmed that Pinder burglarized the building. *See* R.67:89–91. These photos show a silver Impala parked in the complex's parking lot, with a man leaving the car and heading toward the complex while holding a leather case. R.67:91, 120–21; R.27 (Photo 1); R.28 (Photo 2). Pinder fit the description of the man in the surveillance photos and, at the time officers stopped the Impala, was "wearing the exact same clothing" as this man. R.67:120. Further, the leather case found in Pinder's car containing burglarious tools, "appear[ed] to be the same item" carried by the man in the surveillance pictures. R.67:121, 127–28, 137 (describing Exhibit 6).

B. The Criminal Proceedings

1. The State charged Pinder with burglary of a building or dwelling as party to the crime, Wis. Stat. § 943.10(1m)(a), and possession of burglarious tools, Wis. Stat. § 943.12. R.1:1.

Pinder moved to suppress the evidence obtained from the GPS tracker, arguing that the State did not attach the tracker until ten days after the circuit court issued the warrant, in alleged violation of the five-day warrant-execution requirement set out in Wis. Stat. § 968.15. R.10:4; R.64:2–3. In response, the State argued that the warrant was not a "statutory search warrant" governed by Wis. Stat. § 968.15. R.22:1–2.

The circuit court denied Pinder's motion to suppress. SA20. The court held that the warrant satisfied the Fourth Amendment's warrant requirements when issued: it had prior authorization by "a neutral detached magistrate," was supported by "oath or affirmation that there's probable cause," and contained "a particularized description of the place to be searched." SA16. Further, probable cause existed through the date of the warrant's execution. *See* SA16–19. While the court explained that there were "difficulties" with the five-day time limit established in Wis. Stat. § 968.15, it noted that these difficulties "were also present in *Sveum*," where suppression was not ordered. *See* SA19. Indeed, suppression was particularly unwarranted under the facts here: "you can't predict when a burglary [is] going to occur," there "may be a pattern where [the burglar] go[es] at a certain time or a certain day of the week because [he is] going in[to] offices." SA19.

2. The trial evidence of Pinder's guilt was overwhelming. The State presented eight witnesses: W.M.,

the owner of the office complex, R.67:88; A.G. and J.S., R.67:100, 109; Detective Polishinski, R.67:118; and four other officers, R.67:141, 156, 162, 170, who testified to the events described above. Pinder offered no witnesses or exhibits, exercising his right to hold the State to its burden. R.67:189.

Before both sides rested, Pinder moved to dismiss the burglary charge because "the building was open at the time that this incident" occurred. R.67:186. In response, the State moved to amend the pleadings to charge Pinder with burglary of a "room within a building," given that Pinder "entered the building with intent to steal" and "broke into the door" of the office suite. R.67:187; *see* Wis. Stat. § 943.10(1m)(a), (f). The Court denied Pinder's motion and granted the State's motion. R.67:187–88.

In its jury instructions, the court explained that it had replaced the "building or dwelling" language with "office." R.67:190. So, for example, one written instruction stated: "Count 1 . . . charges that . . . Johnny Pinder did intentionally enter an *office*, without the consent of the person in lawful possession . . . with intent to steal, contrary to sec. 943.10(1m) of the Wisconsin Statutes." SA22 (emphasis added). However, a single written jury instruction on burglary—instead of simply stating "office" as the court intended—used "building." SA23. The instructions on the elements of possession of burglarious tools also referred to both a "building" and an "office." SA26–27. The court's oral reading of the instructions similarly used "office" and, at times,

"building" for both counts. *E.g.*, R.67:217 ("enters a building"; "entered an office"); R.67:222 ("building or office"). Pinder's counsel did not object. R.67:192, 238.

The jury convicted Pinder on both the burglary and possession of burglarious tools counts, R.67:248–49, and the circuit court later sentenced him to ten years on the burglary count (five years of initial confinement) and two years on the burglarious-tools count (one year of initial confinement) concurrent with the burglary sentence, R.37:1.

Pinder moved for post-conviction relief, arguing that his counsel was ineffective for failing to object to the jury instructions' alternative use of "building" and "office." R.43:2–3. At a *Machner* hearing, Pinder's trial attorney agreed with the State that there was not "any possible confusion" of the jury. R.70:20–21. The court denied the motion, since "the quantum of evidence was overwhelming that the jury would have convicted Mr. Pinder of the charges." SA49; R.50 (written order denying motion).

3. Pinder appealed, challenging both the circuit court's denial of his pretrial motion to suppress the GPS-tracker evidence and the denial of his post-conviction motion, A101, 116, and the Court of Appeals certified the issues to this Court. A117. On the first issue, the Court of Appeals concluded that *Sveum* defeated Pinder's claim because *Sveum* held that a statutory violation of Wis. Stat § 968.15, in the GPS-tracker-warrant context, did not require suppression. A108, 113. The Court of Appeals was, however, troubled by

the fact that "[t]he *Sveum* court did not address the voiding provision of Wis. Stat § 968.15(2)." A113. Accordingly, the Court believed certification was necessary. A117. On the second issue, the Court explained that it "would not be worthy of certification" by itself, A116, but certification transfers "all issues" to this Court. A116–17. This Court granted certification on March 14, 2018.

STANDARD OF REVIEW

Whether an officer's execution of a search warrant is unlawful—and, if so, whether suppression is appropriate—are questions of law that this Court reviews de novo. *See State v. Tate*, 2014 WI 89, ¶¶ 14–15, 357 Wis. 2d 172, 849 N.W.2d 798. Whether counsel rendered ineffective assistance is a "mixed" factual and legal question: this Court accepts lower-court findings of fact unless "clearly erroneous" and reviews the deficient performance and prejudice issues "de novo." *State v. Sanders*, 2018 WI 51, ¶ 17, __ N.W.2d __ (citations omitted).

SUMMARY OF ARGUMENT

I. There is no basis to suppress the evidence that the State obtained through the GPS tracker.

A. The GPS-tracker warrant was a lawful, common-law warrant, authorizing the State to install and monitor a GPS tracker on Pinder's car for up to 60 days. As a common-law warrant, it need only comply with the Fourth Amendment and, as this Court held in *Tate*, with the "spirit" of non-

applicable statutory provisions governing statutory warrants. Here, of course, the GPS warrant fully complied with all Fourth Amendment requirements, as Pinder concedes.

The GPS warrant also complied with the "spirit" of non-applicable statutory provisions for generic search warrants. The only dispute is over Section 968.15, which provides that "[a] search warrant must be executed and returned not more than 5 days after the date of issuance." *Sveum* applied this statute directly to a GPS-tracker warrant, but given *Tate*'s subsequent clarification that such warrants need only comply with the "spirit" of non-applicable statutory provisions, the Court should require only compliance with the "spirit" of Section 968.15. Here, there is no basis to believe that the Legislature would have wanted to require that all GPS-tracker warrants be executed within five days, especially given that these warrants routinely take much longer to achieve their legitimate crime-detection purposes.

This suggested approach to resolving this case is, the State respectfully submits, preferable to the course that this Court charted in *Sveum* because it would make clear to officers and circuit courts that standard, 60-day GPS warrants, supported by probable cause, are *entirely lawful*.

B. Even if this Court holds that the GPS-tracker warrant here must comply with Section 968.15's five-day execution rule, suppression is unjustified because just as *Sveum* concluded under Section 968.22, the State's noncompliance with this statute did not "affect" Pinder's

"substantial rights." As in *Sveum*, the warrant here complied with all Fourth Amendment requirements and the State reasonably executed it.

C. Finally, suppression is also not appropriate because the so-called "good faith" exception applies. Detective Polishinski acted in reasonable reliance on the warrant, and the State complied with the additional requirements for the exception that this Court articulated in *State v. Eason*, 2001 WI 98, 245 Wis. 2d 206, 629 N.W.2d 625. That said, this Court should overrule *Eason*'s explicit departure from United States Supreme Court caselaw and hold that the so-called "good faith" exception requires only a showing of reasonable reliance by officers on a warrant.

II. Pinder's counsel did not render ineffective assistance by failing to object to the jury instructions. Pinder's attorney did not perform deficiently by declining to launch a futile objection to the instructions. And, in any event, the evidence of Pinder's guilt was overwhelming, meaning that he cannot establish prejudice from any failure to object.

ARGUMENT

I. There Is No Basis For Suppressing The Evidence That Police Obtained From The GPS Tracker

The police executed the GPS-tracker warrant here using reasonable means and removed it from Pinder's car well within the 60-day period provided by the warrant. The State submits that the warrant was a lawful common-law warrant, which complied with the Fourth Amendment and is not

governed by the specifics of Section 968.15's five-day execution requirement. But even if this Court finds that the warrant was unlawful because Section 968.15's five-day execution requirement applies directly, the evidence that police obtained should not be suppressed both because any error did not impact Pinder's substantial rights and because police reasonably relied in good faith on the warrant's terms.

A. Police Obtained The Evidence Lawfully Because This Case Involves A Common-Law Warrant Not Governed By Section 968.15's Five-Day Execution Requirement

1. Wisconsin Circuit Courts Have Common-Law Authority To Issue Search Warrants Without Statutory Authorization

"The power to issue a search warrant is a common law power in America as well as England, and in the federal system as well as in the states." *United States v. Torres*, 751 F.2d 875, 879 (7th Cir. 1984) (citations omitted). "Given the Fourth Amendment's warrant requirements, and assuming no statutory prohibition, the courts must be deemed to have inherent power to issue a warrant when the requirements of that Amendment are met." *United States v. Villegas*, 899 F.2d 1324, 1334 (2d Cir. 1990); *accord United States v. Falls*, 34 F.3d 674, 678 (8th Cir. 1994). In 1865, this Court, in the course of holding that a court could deputize a private individual to execute a search warrant without statutory authorization, observed that "at common law[,] a justice of the

peace had a right to direct his warrant to any [ ] person," and "[t]his [common law] authority extended as well to search warrants as others." *Meek v. Pierce*, 19 Wis. 300, 302 (1865).

In *Tate*, this Court held that "[n]o specific statutory authority is necessary [for] the issuance of a valid [search] warrant" in this State, so long as the warrant complies with the requirements of the Fourth Amendment (or its state-law analogue, Article I, Section 11 of the Wisconsin Constitution), and the "spirit" of non-applicable statutory provisions. 2014 WI 89, ¶¶ 31, 42, 50. *Tate* approved a circuit court's issuance of a search warrant for cell-site data, although no statute authorized such a warrant. *Id.* ¶¶ 42, 51. The Fourth Amendment "establish[es] the manner in which warrants shall issue," this Court explained, such that "statutory authorization [is] not necessary in order [for a court] to issue [a search] warrant." *Id.* ¶¶ 27, 31, 42, 51. The Legislature may, of course, "express legislative choices about procedures to employ for warrants." *Id.* ¶ 2 & n.5. When the Legislature does not adopt such "express" language limiting a type of warrant, statutes generally governing other types of warrants are only relevant to the extent that the warrant at issue complies with the "spirit" (even if not the letter) of those statutory provisions. *Id.* ¶¶ 42–50. For example, in *Tate*, the Court held that the search warrant for cell-site data "did comply with the spirit of Wis. Stat. § 968.12 and Wis. Stat. § 968.135," although no "specific statut[e]" authorized the cell-site warrant at issue. *Id.* ¶¶ 2, 51; *but see id.* ¶ 154

(Abrahamson, J., dissenting) (criticizing the "failure of the warrant to comply with multiple requirements of Wis. Stat. § 968.135").

2. The GPS-Tracker Warrant Here Was A Valid Common-Law Warrant

The GPS-tracker warrant in the present case is a valid, common-law warrant because the circuit court issued that warrant consistently with the Fourth Amendment's strictures, and the warrant does not violate the "spirit" of any statutes governing other types of warrants.

a. To comply with the Fourth Amendment, a warrant must satisfy three conditions: first, it must be issued according to "prior authorization by a neutral, detached magistrate"; second, it must be supported by an "oath or affirmation that there is probable cause"; and third, it must contain "a particularized description of the place to be searched." *Sveum*, 2010 WI 92, ¶ 20; *Tate*, 2014 WI 89, ¶¶ 28–30. As the Court of Appeals pointed out, "Pinder does not assert that the search was unlawful because of a Fourth Amendment violation." A103.

As a threshold matter, the first and third requirements of a Fourth Amendment warrant were clearly satisfied in this case. The circuit court—which is a neutral, detached magistrate—issued the warrant. SA13. And the warrant particularly described the object of the search as Pinder's silver Impala. *See* SA12; *accord Sveum*, 2010 WI 92, ¶ 39.

The warrant was supported by an "oath or affirmation that there is probable cause" to monitor the movement of Pinder's car for 60 days. SA1; SA12; *Brereton*, 2013 WI 17, ¶ 35. The warrant issued upon Detective Polishinski's sworn affidavit, detailing the criminal investigation of Pinder. SA1–11. And the warrant's 60-day expiration date was reasonable. As the circuit court explained, one cannot "predict when a burglary [is] going to occur," since there "may be a pattern where [the burglar] go[es] at a certain time or a certain day of the week because [he is] going in[to] offices." SA19. What is more, Pinder intended to commit more burglaries, given that he assured the informant's aunt that "he would get her another [stolen computer]" when hers stopped working. SA6. In *Sveum*, this Court approved of an order authorizing the State to install a GPS tracker for 60 days to investigate stalking. 2010 WI 92, ¶¶ 5–7, 57, 67 ("A search obtaining this type of evidence could not have been completed in a single day.").

Finally, the officers executed the warrant consistently with its terms, *see Brereton*, 2013 WI 17, ¶ 45, while probable cause still existed, *State v. Edwards*, 98 Wis. 2d 367, 372–73, 297 N.W.2d 12 (1980), and in an otherwise reasonable manner, *see Sveum*, 2010 WI 92, ¶ 53. The warrant authorized the "install[ation] and monitor[ing]" of a "tracking device" on Pinder's Impala, subject only to two restrictions: the device must be installed by "the Mequon Police Department" or "the Wisconsin Department of Justice," and

the officers "shall remove the electronic-tracking device as soon as practicable after the objectives of the surveillance are accomplished or not later than 60 days from the date the order is signed." SA12–13. Detective Polishinski installed the GPS tracker on Pinder's car ten days after the court issued the warrant, and all monitoring occurred over the next six days. *Supra* p. 6. Probable cause existed at the time the State executed the warrant: as of the date that Detective Polishinski installed the tracker on Pinder's car, the burglaries remained unsolved, Pinder possessed a significant stockpile of stolen goods, and he intended to sell these goods and to commit more burglaries. *Supra* pp. 3–4. And the execution was reasonable in all other respects. *See supra* p. 6.

b. As noted above, in *Tate*, this Court examined certain non-applicable statutes to ascertain whether the warrant at issue complied with the "spirit" of those provisions. *Tate*, 2014 WI 89, ¶¶ 42–50. Here, no specific statutory provisions govern the warrant, and the warrant complied with the "spirit" of all non-applicable provisions.

The Wisconsin Statutes include provisions dealing with a generic statutory "search warrant," defined as "an order signed by a judge directing a law enforcement officer to conduct a search of a designated person, a designated object or a designated place *for the purpose of seizing designated property or kinds of property*." Wis. Stat. § 968.12(1) (emphasis added); *see also id.* § 968.10(3) (authorizing searches pursuant to warrants). Section 968.13 delineates

the categories of property that may be seized: "[c]ontraband," "fruit[s]" of crime, non-document "evidence," and "documents . . . under the control of [the named] person." Section 968.12(1) also provides that a "judge shall issue a search warrant if probable cause is shown." Section 968.14 authorizes police to use "[a]ll necessary force . . . to execute a search warrant or to effect any entry into any building or property." Section 968.16 authorizes the "reasonabl[e] detain[er] and search of any person" present at a searched location for police protection or the prevention of destruction of items described in the warrant. Section 968.18 through Section 968.20 prescribe procedures for the receipt, custody, and return of property police seize during a warrant's execution. Further, most directly in dispute here, Section 968.15 provides that "*[a] search warrant must be executed* and returned not more than 5 days after the date of issuance," and "[a]ny search warrant not executed within the time provided in sub. (1) shall be void and shall be returned to the judge issuing it." And Section 968.17 requires "[t]he return of the search warrant" "to the clerk designated in the warrant" "within 48 hours after execution."

Chapter 968 also contains multiple specific warrant provisions authorizing different types of search warrants. For example, Wis. Stat. § 968.373(4) authorizes 60-day warrants to "track the location of a communications device."

The provisions for a generic search warrant do not apply to GPS-tracker warrants. The provisions for generic

search warrants apply *only* to "an order signed by a judge directing a law enforcement officer to conduct a search of a designated person, a designated object or a designated place *for the purpose of seizing designated property or kinds of property*." Wis. Stat. § 968.12(1) (emphasis added). A GPS-tracker warrant permits the attachment of a "tracking device to an individual's vehicle, and subsequent use of that device . . . monitor[s] the vehicle's movements on public streets." *United States v. Jones*, 565 U.S. 400, 402 (2012). While this involves a physical trespass on the vehicle owner's property, *id.* at 410, and/or violates "a subjective expectation of privacy that society recognizes as reasonable," *id.* at 414 (Sotomayor, J., concurring) (citation omitted); *see Brereton*, 2013 WI 17, ¶ 34, the tracker does not involve "a search of a designated person, a designated object or a designated place *for the purpose of seizing designated property or kinds of property*," Wis. Stat. § 968.12(1), such as the kinds of "property" enumerated in Wis. Stat. § 968.13.

Here, the warrant complied with the "spirit" of the rules governing generic warrants under Wis. Stat. § 968.12. The warrant satisfies the three requirements of Section 968.12(1). It is "an order signed by a judge directing a law enforcement officer to conduct a search." *Tate*, 2014 WI 89, ¶ 43 (quoting Wis. Stat. § 968.12(1)). It "designate[s]" a particular person and object to search, Pinder's Chevy Impala. *Id.* (quoting Wis. Stat. § 968.12(1)). And "probable cause is shown" by the extensive affidavit of the Detective describing, among other

things, Pinder's burglary spree through Mequon with the Impala. *Id.* (quoting Wis. Stat. § 968.12(1)). Further, the Detective used no "[un]necessary force," Wis. Stat. § 968.14, did not detain any person, Wis. Stat. § 968.16, and did not seize any property in the course of executing the warrant, Wis. Stat. §§ 968.18–20. Finally, as discussed in more detail below, given the specific nature of GPS-tracker warrants, the warrant here complied with the "spirit" of Section 968.15's five-day execution requirement (and Section 968.17(1)'s return requirement) because it included a 60-day expiration deadline. Indeed, in terms of timing, the warrant's compliance with Wis. Stat. § 968.373(4)'s authorization of 60-day warrants to "track the location of a communications device" is far more analogous.

3. The GPS-Tracker Warrant Here Complied With The "Spirit" Of The Five-Day Execution Requirement

In the pre-*Tate* decision in *Sveum*, this Court adjudicated the legality of a GPS-tracker warrant by reference to the *specific* statutory rules governing generic statutory search warrants and did not consider the view adopted later in *Tate* that non-statutory, common-law warrants need only comply with the "spirit" of the statutory rules rather than their specific letter. *Sveum*, 2010 WI 92, ¶ 55; *see also id.* ¶ 154 (Abrahamson, J., dissenting) ("No claim is made in the majority opinion or by the parties that the circuit courts have inherent power to issue search

warrants."). As explained in Part I.B of this brief, if this Court holds that *Sveum* means that Section 968.15's five-day execution requirement applies directly to GPS-tracker warrants, then this Court should reach the same result as in *Sveum*, holding that suppression is not an appropriate remedy here. *See infra* pp. 27–34.

The State submits that there is a better way to resolve this case, more consistent with *Tate* and the fact that Section 968.15 does not actually apply to GPS-tracker warrants as a matter of statutory text. *See supra* pp. 20–21. In particular, this Court should hold that a GPS-tracker warrant that expires within 60 days of issuance fully *complies* with the "spirit" of Section 968.15's five-day provision governing the timing of the execution of different kinds of warrants because the execution of a GPS warrant within five days is, as a general matter, unreasonable and something the Legislature could not have intended. This approach is preferable to the one this Court adopted in *Sveum* including because it would make clear to police officers and circuit courts that 60-day expiration GPS-tracker warrants are *entirely legal*, so long as they are supported by probable cause throughout that period.[4]

[4] *Sveum*'s *stare decisis* effect poses no barrier. *Sveum* did not consider the argument that the warrant was a common-law warrant, *see supra* p. 22, and, accordingly, this Court simply proceeded under the assumption that the letter of the generic search-warrant statutes applied to search warrants not falling squarely within Section 968.12(1)'s definition, *see Sveum*, 2010 WI 92, ¶¶ 68–69; *see Hohn v. United States*, 524 U.S. 236, 251 (1998). Further, this Court's post-*Sveum* decision in

Section 968.15's text requires the State to "execute" a generic search warrant within five days of the warrant's issuance. Wis. Stat. § 968.15(1). To "execute" means "[t]o perform or complete." *Execute*, *Black's Law Dictionary* (10th ed. 2014). Thus, to "execute" a warrant is to complete the order to search or seize contained within it—it is "to *do*" the search or "*make*" the seizure, not just to *begin* to "do" or "make." *Warrant*, *Black's Law Dictionary* (10th ed. 2014) (emphases added). This Court in *Sveum* recognized that this is what it means to "execute" a GPS-monitor warrant. This Court described an ongoing search as "executing" a warrant, 2010 WI 92, ¶ 36, and explained that "the execution of the search" is subject to constitutional review for reasonableness, *id.* ¶¶ 53–54. Further, in one paragraph the Court recounted the installation of the GPS tracker (the beginning of the search), the State's monitoring for 35 days (the continuation of the search), and the removal of the device (the end of the search). *Id.* ¶ 59. The Court then described this entire completed procedure as the search's "[e]xecution." *Id.*

Interpreting the "spirit" of Section 986.15, *Tate*, 2014 WI 89, ¶ 51, to require the execution of GPS-tracker warrants within just five days is unreasonable given that electronic-tracking warrants routinely require more than five days to

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Tate has made clear that when dealing with statutory search-warrant provisions not governing common-law warrants, the focus is on the "spirit," not the letter, of the non-applicable provisions. *Tate*, 2014 WI 89, ¶¶ 2, 51.

achieve their legitimate crime-detection purposes. *See, e.g.*, *Sveum*, 2010 WI 92, ¶ 59 (execution took 35 days); *Jones*, 565 U.S. at 403 (execution took 28 days); *see also* Wis. Stat. § 968.373(4) (authorizes 60-day warrants to "track the location of a communications device"); Fed. R. Crim. P. 41(e)(2)(C) (allows for a "tracking-device warrant" for a period "not [to] exceed 45 days," which may be renewed). Given that unavoidable reality, the Legislature could not have intended the "spirit" of Section 968.15 effectively to preclude the State's practical, effective use of GPS-tracker warrants.

The Court of Appeals properly rejected an alternative definition of "execute[d]" in search-warrant statutes as just "beginning" a search. A112–13. As the Court of Appeals correctly noted, and in addition to the above discussion and sources, the context of Chapter 968 forecloses this alternative reading. A112–13. For example, Wis. Stat. § 968.17(1) requires "[t]he return of the search warrant" within 48 hours "*after execution*," "accompanied by a written inventory of any property taken." *Id.* (emphasis added). The only way for the State to submit a complete "inventory of any property taken [pursuant to a search warrant]" is to compile such an inventory *after* the search is completed. If "execute" meant the initiation of the search, then, for a sufficiently long multi-day search, the State could not comply with this provision.

Pinder, in turn, only obliquely argues in favor of this definition of "execute," noting that the Court of Appeals'

certification opinion identified a couple of out-of-state courts that have defined "execute" as the beginning of a search. *See* Opening Br. 19 (citing A112 n.9). But, as the Court of Appeals explained, these decisions "[d]epend[ ] on the statutory language" at issue there, A112 n.9; here, as noted above, the language at issue only supports defining "execute" as the "completion" of the search.

But even if this Court were to atextually interpret Section 968.15's five-day execution requirement in the manner that Pinder vaguely suggests—that is, reading Section 968.15's text as requiring only the *beginning* of a search within five days—there would still be no basis to conclude that the Legislature intended such a rule to apply directly in the GPS-tracker context. The precise time needed to install a GPS tracker covertly is necessarily unknown and often exceeds five days. Officers must locate the suspect's car—which may be hidden away in an enclosed garage or missing entirely from the jurisdiction—and then wait for an opportunity to safely install the tracker without detection. *See, e.g.*, *Jones*, 565 U.S. at 403 (11 days needed to attach GPS-tracker warrant); *Brereton*, 2013 WI 17, ¶ 10 (officers had car towed to private lot in order to install tracker safely); *Sveum*, 2010 WI 92, ¶ 8 (tracker installed "[i]n the early morning hours"). More generally, the probable cause supporting a GPS-tracker warrant does not dissipate nearly as quickly as with the typical search warrant authorizing the search and seizure of contraband. *See generally* 2 Wayne R.

LaFave et al., Search & Seizure: A Treatise On The Fourth Amendment § 4.7(a) (5th ed.) (discussing "staleness" concerns with probable cause). A GPS-tracker warrant is premised on the suspect's past suspicious or unlawful conduct giving rise to the reasonable inference that he will engage in similar unlawful conduct in the near future. *See, e.g.*, *Sveum*, 2010 WI 92, ¶¶ 5–7; *Brereton*, 2013 WI 17, ¶¶ 11, 55. Such probable cause could dissipate only if the police somehow learn that the past conduct was not in fact suspicious or unlawful. *Compare* LaFave, *supra*, § 4.7(a) ("new events known to the police may dissipate the recent probable cause showing"). This differs starkly from a typical search warrant to seize contraband, of the type governed by Section 968.12 and its related provisions, which contraband a suspect may easily destroy before the warrant's execution. *See id.*

B. Even If This Court Holds That Section 968.15's Five-Day Execution Rule Applies, Suppression Is Not Justified Because There Was No "[E]ffect" On "Substantial Rights"

If this Court declines to adopt the State's argument that, in light of *Tate*, the search here was lawful because the warrant complied with the "spirit" of Section 968.15's execution requirement, it should uphold the circuit court's rejection of Pinder's suppression motion for the same reason this Court offered in *Sveum*: any error did not violate the suspect's "substantial rights" under Section 968.22. Pinder's contrary arguments fail to distinguish *Sveum*.

1. In *Sveum*, this Court considered the State's execution of a GPS-tracker warrant that began the day after the circuit court issued the warrant and ended 35 days later. 2010 WI 92, ¶¶ 5, 7–8, 59. This Court held that while the order complied with the Fourth Amendment, *id.* ¶¶ 53, 58–60, the State had violated the execution-and-return provisions in Sections 968.15 and 968.17 because of the "officers' failure to execute and return the warrant within 5 days after the date of issuance," *id.* ¶¶ 69–71.

Despite finding these statutory violations of Sections 968.15 and 968.17, this Court held that suppression was inappropriate because of Section 968.22, which the Legislature designed to "cabin[ ]" the "effect[s]" of technical warrant "errors." *Id.* ¶¶ 57, 72. Section 968.22 provides that "[n]o evidence seized under a search warrant shall be suppressed because of technical irregularities not affecting the substantial rights of the defendant." Accordingly, "a mere statutory violation or a technical irregularity of search warrant procedure" does not, standing alone, justify suppression. *Sveum,* 2010 WI 92, ¶ 57 (quoting *State v. Popenhagen*, 2008 WI 55, ¶ 126, 309 Wis. 2d 601, 749 N.W.2d 611 (Prosser, J., concurring)). *Sveum*'s understanding of Section 968.22 as requiring a violation of *substantial* rights for a suppression remedy is consistent with the general principle that the exclusionary rule is a "prudential," court-devised "doctrine," designed to "compel" law enforcement's "respect for [ ] constitutional guarant[ees]." *Davis v. United*

States, 564 U.S. 229, 236 (2011) (citations omitted); *State v. Dearborn*, 2010 WI 84, ¶ 35, 327 Wis. 2d 252, 786 N.W.2d 97; *California v. Greenwood*, 486 U.S. 35, 43 (1988) (violation of state statutes regulating searches does not render a search unreasonable under Fourth Amendment).

Applying this understanding of Section 968.22, *Sveum* concluded that the State's "failure to execute and return the warrant within 5 days after the date of issuance" did not "violate" the defendant's "substantial rights." *Sveum*, 2010 WI 92, ¶¶ 71–72. The warrant complied with the Fourth Amendment. *Id.* ¶ 39. Of particular note, probable cause existed at the time the State executed the warrant: the State was investigating a "complex, ongoing" crime of stalking, which requires actions across multiple days. *Id.* ¶¶ 42–49, 67. And the execution of the warrant otherwise "was reasonable," as the Fourth Amendment commands, *id.* ¶ 71: the "[i]nstallation was achieved simply," "well within the confines of the authority granted by the order," *id.* ¶ 59; and there was "no indication that law enforcement's intrusion went beyond what was necessary to install and remove the equipment," *id.* ¶ 60 (citation omitted). Thus, the State's noncompliance with Sections 968.15 and 968.17 was only a "technical irregularit[y]," not a violation of "substantial rights" warranting suppression. *See Sveum,* 2010 WI 92, ¶¶ 58, 72.

2. In the present case, the State did not violate Pinder's "substantial rights" for precisely the same reasons that *Sveum* articulated, making suppression impermissible under

Section 968.22. As in *Sveum*, the warrant itself complied with all Fourth Amendment requirements—including a neutral magistrate (the circuit court), probable cause (the ongoing burglaries in Mequon involving a silver Impala), and particularity (Pinder's Impala). *See supra* pp. 17–19; *Sveum*, 2010 WI 92, ¶ 39. Similarly, like in *Sveum*, the "[i]nstallation was achieved simply" and "well within the confines of the authority granted by the [O]rder," *id.* ¶ 59, which in both cases provided for GPS-tracking for up to 60 days, SA12–13; *Sveum*, 2010 WI 92, ¶ 7. And, again as in *Sveum*, there was "no indication that law enforcement's intrusion went beyond what was necessary to install and remove the equipment." *Id.* ¶ 60 (citations omitted).

The tracking here was also timely and supported by probable cause throughout the entire 16-day execution period. The police installed the tracker ten days after issuance and used the tracker for only six days thereafter, all while the State had probable cause to support the warrant. *See id.* ¶ 67. This 16-day execution period was less than half of the 36 days between the issuance and the execution of the warrant in *Sveum*, and the circuit courts in both cases found probable cause for monitoring of 60 days from the date of the warrant's issuance. SA12–13; *Sveum*, 2010 WI 92, ¶ 7. Throughout the entire time that the State installed the GPS tracker and then tracked his car, Pinder—already responsible for several burglaries of Mequon businesses—remained at large. *Supra* pp. 3–4. He had stockpiled a significant amount of stolen

items, including "10 to 15 computers" and "a bunch of gas cards," which he was actively selling. *Supra* p. 3. Notably, Pinder does not even attempt to argue that probable cause for the installation of the GPS tracker dissipated at any relevant point.

3. Pinder's contrary arguments are legally wrong.

Pinder claims that the police violated his "substantial rights"—whereas there was no such violation in *Sveum*—because *Sveum* allegedly involved only the "ministerial" failure to "return . . . a warrant," while this case involves "a core requirement of a warrant," "probable cause, which is inconsistent and may be fleeting." Opening Br. 21. But in *Sveum*, the police *tracked the suspect's car for 35 days*—much longer than Section 968.15's five-day execution requirement. *See Sveum*, 2010 WI 92, ¶ 67. *Sveum* nevertheless held that the failure to follow each of the execution *and* return requirements in Sections 968.15 and 968.17 were mere "technical irregularities" "not affect[ing] a substantial right," because the execution of the warrant was reasonable, complied with Fourth Amendment requirements, and probable cause existed throughout the 35-day search. *See id.* ¶¶ 58, 71.

Contrary to Pinder's suggestion, Opening Br. 21, *Sveum* unambiguously dealt with the officers' violation of the five-day *execution* requirement—by executing the warrant for 35 days—not merely their violation of the return requirement in Sections 968.15 and 968.17, 2010 WI 92, ¶¶ 69–71. That is

why, for example, *Sveum* specifically "note[d] that under the Federal Rules of Criminal Procedure, which explicitly govern warrants for tracking devices, officers may use a tracking device for a period not more than '45 days from the date the warrant was issued.'" *Id.* ¶ 71 (quoting Fed. R. Crim. P. 41(e)(2)(C)). Had *Sveum* intended to grapple with only the violation of the statutory return requirements—and not Section 968.15's execution requirement—that passage would have been a non sequitur.[5]

More generally, Pinder's effort to distinguish the situation in *Sveum*—where the search lasted for 35 days, but the actual attachment of the GPS monitor occurred quickly—and the present case—where the search lasted for only six days, but it took the officers ten days to attach the GPS monitor—has no relation to his "*substantial rights*." Wis. Stat. § 968.22 (emphasis added). The right at issue is the Fourth Amendment right to be free from unreasonable searches and seizures—that is, to be subject to warrant-based searches based only upon probable cause. *Jones*, 565 U.S. at 404; *Sveum*, 2010 WI 92, ¶ 24. In this case, just as in *Sveum*,

[5] Given *Sveum*'s holding that the violation of Section 968.15's execution provision did not justify suppression under Section 968.22, the Court of Appeals' citations to a California intermediate case from 33 years ago, A115 (citing *California v. Brocard*, 216 Cal. Rptr. 31, 33 (Ct. App. 1985), and to a 27-year-old Supreme Court of Tennessee decision, A114 (citing *Tennessee v. Evans*, 815 S.W.2d 503 (Tenn. 1991)), do not suggest any contrary approach. Neither case dealt with a statute like Section 968.22, and neither conducted an independent analysis as to whether suppression is an appropriate remedy for a particular statutory violation.

the circuit court found that probable cause existed for GPS monitoring for up to 60 days after the warrant's issuance. SA12–13; *Sveum*, 2010 WI 92, ¶ 7. Pinder offers no reason to believe that when the circuit court finds that there is probable cause for 60 days of monitoring, this probable cause evaporates if the police cannot manage both to locate the car and to install covertly the GPS monitor within five days. And Pinder does not even attempt to argue that probable cause dissipated during the 16-day period after the circuit court issued the warrant here. *See supra* pp. 17–18. So while Pinder asserts that his position is necessary to avoid "eviscerat[ing]" the "safeguard of judicial control over the search which the [F]ourth [A]mendment is intended to accomplish," Opening Br. 18, that is wrong because the judiciary decides whether probable cause has, in fact, expired, such that the warrant is too "stale" to be executed, *see Edwards*, 98 Wis. 2d at 372 (citation omitted).

Finally, Pinder's reliance on Section 968.15(2), Opening Br. 17, is misplaced. That Section provides that a "search warrant not executed within [Section 968.15(1)'s five-day execution deadline] shall be void and shall be returned to the judge issuing it." Wis. Stat. § 968.15(2). To begin, Section 968.15(2) was in force at the time that this Court decided *Sveum*, and the dissent discussed it at length. 2010 WI 92, ¶¶ 87–91 (Abrahamson, J., dissenting). Nevertheless, this Court held that the officer's alleged violation of Section 968.15's execution requirement—because the warrant there

was not executed for 35 days—was not a violation of "substantial rights" warranting suppression, Wis. Stat. § 968.22, without finding any complications resulting from Section 968.15(2)'s voiding provision.

In any event, *Sveum*'s holding—that noncompliance with Section 968.15(1)'s execution time limit may be excused by Section 968.22—is entirely consistent with the text of both Section 968.15(2) and Section 968.22. Section 968.22 provides that "[n]o evidence seized under a search warrant *shall be suppressed* because of technical irregularities not affecting the substantial rights of the defendant." Wis. Stat. § 968.22 (emphasis added). This instruction, as a textual matter, refers to *all* technical irregularities not affecting substantial rights, *even ones that could lead to a "void" warrant under Section 968.15(2)*. As the present case demonstrates, *see supra* pp. 32–33, violations of Section 968.15 can, in appropriate circumstances, be mere "technical irregularities," that do not violate "the substantial rights of the defendant." The issue of whether suppression is an appropriate remedy is, after all, a separate inquiry from whether certain subsequent developments have voided the warrant. For example, the Supreme Court has twice held that even when police mistakenly execute warrants that were quashed after initial issuance, this did not automatically justify suppression. *See, e.g.*, *Herring v. United States*, 555 U.S. 135 (2009); *Arizona v. Evans*, 514 U.S. 1 (1995). Under Section 968.22, in other words, if the police execute a warrant that becomes void

because of Section 968.15(2), suppression is not appropriate unless that execution *also* violates the defendant's "substantial rights," which violation did not occur here.

C. Suppression Is Also Unwarranted Under The So-Called "Good Faith" Exception

1. Both this Court and the United States Supreme Court have adopted the so-called "good faith" exception[6] to the exclusionary rule, under which if a police officer reasonably relies upon a facially valid warrant, the courts will not suppress evidence obtained in violation of the Fourth Amendment. *See Dearborn*, 2010 WI 84, ¶ 36; *United States v. Leon*, 468 U.S. 897, 916–17 & n.18 (1984). Given that this doctrine applies to violations of the Constitution, it logically applies to statutory violations as well. *See Sveum*, 2010 WI 92, ¶ 58 n.12 (a "strong argument supportive of [ ] good faith . . . could have been made"). This is consistent with the Supreme Court's holding that because the exclusionary rule is a "judicially fashioned [ ] rule aimed at deterring violations of Fourth Amendment rights," that rule does not automatically apply upon a showing of a violation of statutory warrant requirements. *United States v. Giordano*, 416 U.S. 505, 524 (1974); *accord* LaFave, *supra*, § 1.5(b).

Under this Court's caselaw, the so-called "good faith" exception, as relevant here, has two elements. First,

[6] The Supreme Court has "perhaps confusingly" labeled this the "good faith" exception, even though it involves an entirely "objective" inquiry. *Herring*, 555 U.S. at 142–45.

consistent with United States Supreme Court doctrine, the officer must have conducted the search in "objective, reasonable reliance upon a facially valid search warrant." *See Eason*, 2001 WI 98, ¶¶ 36, 52, 73. Second, the State must show that its process to obtain the warrant "included a significant investigation and a review by a police officer trained in, or very knowledgeable of, the legal vagaries of probable cause and reasonable suspicion, or a knowledgeable government attorney." *Id.* ¶ 63. The Court looks to multiple considerations on this factor: the role of the affiant used to support the warrant application; the affiant's use of government resources, like "confidential files," a "confidential informant," police and public "records," and "arrest records"; whether the warrant application and affidavit were reviewed by "one or more government lawyers," which would show they are the work of "advanced legal training" (this factor may be satisfied if the "warrant [application] and affidavit are replete with terms normally found in attorney-drafted documents"); whether the application and affidavit were "written to comport with the dictates of Fourth Amendment law"; and whether the affiant has "extensive training and experience." *Id.* ¶¶ 70–71. The Court added this element based on Article 1, Section 11 of the Wisconsin Constitution, not the Fourth Amendment. *Id.* ¶ 63.

2. Here, the officers' execution of the GPS-tracker warrant satisfies both elements that this Court has adopted for the application of the so-called "good faith" exception.

First, Detective Polishinski acted in objective, reasonable reliance on the standard time limits in the warrant. The warrant authorized GPS tracking on Pinder's Impala for up to 60 days from the issuance of the warrant, making no mention of Section 968.15(1) or its five-day requirement. R.20:2. A reasonable officer could not know that Section 968.15(1)'s five-day execution requirement would rigidly apply under the circumstances here. As explained above, the warrant does not fall within the definition of a statutory search warrant and so would not trigger Section 968.15(1). *Supra* pp. 20–21. And in *Sveum*, this Court held a GPS-tracker warrant's noncompliance with Section 968.15(1) was a mere "technical irregularity" and that, in addition, a "strong argument supportive of [ ] good faith . . . could have been made." 2010 WI 92, ¶¶ 57, 58 n.12, 71.

Second, the State's warrant application and affidavit satisfy *Eason*'s added element. Detective Polishinski, who submitted the warrant application and provided the affidavit in support, is "a State certified law enforcement officer" with 15 years' experience and "formal training in the investigation of crimes . . . including the crime of Burglary." R.19:1; *compare Eason*, 2001 WI 98, ¶¶ 70–71 (role and "extensive training and experience" of affiant). Detective Polishinski relied on "reports and conclusions of fellow peace officers," reports of burglary and dispatch calls received by Mequon police officers, surveillance video, credit-card records, the detailed disclosure of a confidential informant, jail records,

and Department of Transportation vehicle-registration records. R.19:1–5, 7; *compare Eason*, 2001 WI 98, ¶¶ 70–71 (use of government resources). The affidavit bears the influence of "advanced legal training," given that it cites Wisconsin statutes and supporting caselaw, R.19:1, 8, 11, and uses "terms normally found in attorney-drafted documents," like "affiant," "therein," "personal knowledge," "specific and articulable facts," "exercises dominion and control," "aforementioned," "probable cause," and "to wit." *E.g.*, R.19:1, 7–8; *compare Eason*, 2001 WI 98, ¶¶ 70–71. And the affidavit is "written to comport with the dictates of Fourth Amendment law": it is directed at a neutral magistrate—a circuit court judge—extensively details facts supporting probable cause, and specifically identifies Pinder's Impala by its VIN and registration. R.19:1–8; *compare Eason*, 2001 WI 98, ¶¶ 70–71.

3. While the State satisfied *Eason*'s added element here, it respectfully requests that this Court overrule this portion of *Eason*. This Court recognizes that "there are particular circumstances" in which it will "overturn prior decisions," despite the Court's "scrupulous[ ]" following of "the doctrine of stare decisis." *Johnson Controls, Inc. v. Emp'rs Ins. of Wausau*, 2003 WI 108, ¶¶ 94, 96, 264 Wis. 2d 60, 665 N.W.2d 257; *see also State v. Denny*, 2017 WI 17, ¶ 69, 373 Wis. 2d 390, 891 N.W.2d 144. When a prior decision is "unsound in principle" or "detrimental to coherence and consistency in the

law," the Court's overruling of that decision is appropriate. *Johnson Controls*, 2003 WI 108, ¶¶ 98–99.

Here, *Eason*'s added element is "unsound in principle." Under United States Supreme Court precedent, the so-called "good faith" exception provides that an officer's objective, reasonable reliance on a facially valid warrant will not lead to suppression if that warrant is subsequently found unlawful. *See Leon*, 468 U.S. at 911, 920–21. For the exception to apply, the officer's reliance must be *objectively reasonable*, and the facts supporting the warrant must have arguably established probable cause. *Id.* at 926; *see also United States v. Otero*, 495 F.3d 393, 398–99 (7th Cir. 2007). *Eason*'s added element essentially requires a reprise of much of this analysis, asking whether the officers had enough experience and sources to reach the probable-cause conclusion. Moreover, *Eason* inappropriately injects questions of legal acumen into the so-called "good faith" exception analysis, asking whether the warrant application includes enough legalese. Yet establishing probable cause to support a warrant is a *factual* inquiry—whether it is likely that evidence of a crime will be found—not a legal one. *Sveum*, 2010 WI 92, ¶ 24. It is "*not* a technical, legalistic concept, but a flexible, common-sense measure of the plausibility of particular conclusions about human behavior." *Id.* (emphasis added, citations omitted).

And *Eason* is "detrimental to coherence and consistency in the law." This Court has "historically interpreted the Wisconsin Constitution's protection[ ] [against unreasonable

searches and seizures]," found in Article 1, Section 11, "identically to the protections under the Fourth Amendment." *Dearborn*, 2010 WI 84, ¶ 14. That makes sense, of course, because the text of Article 1, Section 11 is nearly indistinguishable from the Fourth Amendment. Yet *Eason* jettisoned this tradition, without even an attempt to ground the disparity in the Wisconsin Constitution's text or history.

II. Counsel Did Not Provide Ineffective Assistance By Failing To Object To The Jury Instructions

Both the federal and the Wisconsin Constitutions entitle criminal defendants to the effective assistance of counsel. *State v. Trawitzki*, 2001 WI 77, ¶ 39, 244 Wis. 2d 523, 628 N.W.2d 801 (citing U.S. Const. amend. VI and Wis. Const. art. I, § 7). When raising such a challenge, a defendant must show that: (1) counsel rendered deficient performance; and (2) this deficiency resulted in prejudice. *See Strickland v. Washington*, 466 U.S. 668 (1984). Here, Pinder claims that his counsel was ineffective for failing to object to certain jury instructions. Opening Br. 23. This argument fails both because an objection would have been meritless and because no prejudice resulted from the jury instructions.

A. Counsel renders deficient performance only where "his conduct '[falls] below an objective standard of reasonableness' for an attorney in the same position." *Sanders*, 2018 WI 51, ¶ 29 (quoting *Strickland*, 466 U.S. at 688). Relevant here, "[c]ounsel does not perform deficiently by failing to bring a meritless [objection]." *Id.* ¶ 29. A jury

instruction, in turn, is erroneous if it "stat[es] the law incorrectly or in a misleading manner." *Dakter v. Cavallino*, 2015 WI 67, ¶ 32, 363 Wis. 2d 738, 866 N.W.2d 656. Review looks to the instructions "as a whole" in order to consider the "overall meaning communicated by [them]"—not to the challenged instruction "in isolation." *Id.* ¶¶ 25, 32, 87 (quoting *Fischer by Fischer v. Ganju*, 168 Wis. 2d 834, 850, 485 N.W.2d 10 (1992)). "[T]he instruction as a whole [must] correctly state[ ] the law and comport[ ] with the facts of the case." *Weborg v. Jenny*, 2012 WI 67, ¶ 42, 341 Wis. 2d 668, 816 N.W.2d 191. While this Court reviews the instructions' statement of the law de novo, *Dakter*, 2015 WI 67, ¶ 32, circuit courts enjoy "broad discretion in crafting jury instructions," *id.*, ¶ 31. Courts have discretion to use "common synonym[s]" in instructions without danger that the instructions will be condemned as "confusing." *Ganju*, 168 Wis. 2d at 852 n.3.

Here, Pinder claims only that the jury instructions for the burglary charge, not for the possession-of-burglarious-tools charge, were either incorrect or misleading because they used both "building" and "office." Specifically, on 14 occasions, the instructions define the crime here as the burglary of "an office." SA22–26; *supra* p. 10. Only in a single instance do the written jury instructions on burglary use "building": one instruction states, "Burglary, as defined in § 943.10 of the Criminal Code of Wisconsin, is committed by one who intentionally enters a *building* without [ ] consent . . . and with intent to steal." SA23 (emphasis added).

This use of "building" and "office" is legally correct, making any objection hypothetically raised by counsel meritless. *See Sanders*, 2018 WI 51, ¶ 29. Section 943.10 defines burglary as "intentionally enter[ing]," among other enumerated categories, a "building" or a "room within [a building]" "without the consent of the person in lawful possession and with intent to steal or commit a felony in such place." Wis. Stat. § 943.10(1m)(a), (f). Here, the State ultimately charged Pinder under the room-within-a-building category, *supra* p. 10, and "office" is a ready synonym under the circumstances. Indeed, Black's Law Dictionary states that "an office" may be "a *suite of rooms in [a] building*, or an individual *room within the building* or suite." *Office*, *Black's Law Dictionary* (10th ed. 2014) (emphasis added); *accord* 10 *Oxford English Dictionary* 730 (J.A. Simpson & E.S.C. Weiner eds., 2d ed. 1989) (defining "office" as "[a] room or department"). The instructions' single use of "building"—the first enumerated category in Section 943.10(1m)—accurately describes the law of burglary generally, while the immediately subsequent instruction (and the multiple other references to "office") calibrates the offense to the specific facts here. So, when read "as a whole," the instructions "correctly state[ ] the law and comport[ ] with the facts of the case." *Weborg*, 2012 WI 67, ¶ 42.

Pinder argues that the instruction stating that "Burglary . . . is committed by one who intentionally enters a building," R.34:2, was an incorrect statement of the law,

considering that this case was about his entering an office, not the public-access portions of a building. Opening Br. 26. This argument impermissibly reads this one line in isolation, rather than in the context of the instructions as a whole. *See Weborg*, 2012 WI 67, ¶ 74 (instruction "clarified" by "immediately succeeding instruction"). Immediately below the quoted language, the instructions define the elements of burglary—in separated and numbered paragraphs—with the phrase "entered an office" *three times*. R.34:2. Further, the instructions repeatedly state that entry must be *without consent*, R.34:1–2, 4, 6, which, given the context of the trial, could refer only to Pinder's entering the office suite within the building, *supra* p. 7.

Pinder also claims that the use of the word "office" misstates the law because it is not one of the enumerated places in Wis. Stat. § 943.10(1m). Opening Br. 27. But circuit courts have "broad discretion" to "craft[ ]" jury instructions to fit the "facts and circumstances of the case," *Dakter*, 2015 WI 67, ¶ 31, including the authority to use "common synonym[s]," *Ganju*, 168 Wis. 2d at 852 n.3. Black's Law provides that an "office" may be "a suite of rooms in [a] building," or "an individual room within the building or suite." *Office*, *Black's Law Dictionary* (10th ed. 2014). Thus, "under the facts and circumstances here," the word "office" easily qualifies as an allowable synonym for "room within a building."

Pinder finally argues that the jury instructions were confusing or misleading because the use of "building" and

"office" led the jury to believe it could convict either for entry into a building or for entry into an office. *See* Opening Br. 28. Yet the circuit court found that the "jury didn't seem to have any confusion" with the wording and that "[t]hey tracked along." R.71:8. Indeed, as the court noted, the jurors acquitted Polk of burglary—despite receiving the same allegedly confusing instructions—which strongly suggests that they understood the instructions and their obligations. R.71:8–9; *accord supra* p. 7. And given that the burglary-count instructions use "office" 14 times and "building" only once, the jury could not have been misled.

B. Even if there were some error in the instructions, Pinder cannot show prejudice from any failure to object.

In order to prevail on an ineffective assistance of counsel claim, Pinder must establish that there is a "reasonable probability" that, but for counsel's failure to object to the instructions, the result of the trial would have been different. *Strickland*, 466 U.S. at 694. A "reasonable probability" is "a probability sufficient to undermine confidence in the [proceedings'] outcome"—here, a guilty verdict on the burglary count. *Id.* Because the alleged error here is a jury-instruction error, there could be no prejudice if there is no reasonable probability that the jury would have acquitted Pinder under the proper instruction.

If the circuit court had phrased the jury instructions in the manner that Pinder now wants, this would not have altered a reasonable juror's finding of guilt, based on the

evidence presented against Pinder. The State presented overwhelming evidence on the four elements of burglary: Photos taken from the surveillance footage show Pinder walking toward the office complex holding his burglarious tools. *Supra* p. 8; Wis. Stat. § 943.10(1m) ("intentionally enters"). Pinder picked at least one locked door within the office complex leading to an office suite and entered. *Supra* pp. 6–7; Wis. Stat. § 943.10(1m)(f) ("enters" "room within"). The door bore telltale signs of a forced entry, given that it "had pry marks on it," had "small chips in the wood on the door and the door frame" "where the latch might have been or near the jamb," and had "shavings directly underneath." R.67:173; Wis. Stat. § 943.10(1m)(f) ("enters" "room within"). Further, the owners of the office suite unequivocally stated that Pinder did not have their consent to enter, and numerous items were missing or out of place. *Supra* p. 7; Wis. Stat. § 943.10(1m)(f) ("enters" "room within" "without consent"). Finally, officers apprehended Pinder with the computers and other items stolen from the burglarized office, and he had an ongoing practice of selling stolen goods. *Supra* pp. 3–4, 7–8; Wis. Stat. § 943.10(1m) ("intent to steal"). Pinder offered no evidence in response to any of this powerful evidence, and thus there is no reasonable probability that the jury would have voted to acquit under Pinder's desired instructions.

CONCLUSION

The decision of the circuit court should be affirmed.

Dated: June 4, 2018.

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), (c) for a brief produced with a proportional serif font. The length of this brief is 10,802 words.

Dated: June 4, 2018.

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MISHA TSEYTLIN
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I hereby certify that:

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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.

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Dated: June 4, 2018.

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