STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT IV

Case No. 2017AP1345

STATE OF WISCONSIN,

Plaintiff-Appellant,

v.

MICHAEL J. SCOTT, LORI M. SCOTT,
ALLY FINANCIAL, INC.
a/k/a C T CORPORATION SYSTEM,
A BLACK 1966 OLDSMOBILE AUTOMOBILE
VIN #338676M362750,
A BROWN 2015 CHEVROLET SILVERADO
VIN #1GC1KWE81FF631314,
A 2008 POLARIS RANGER SERIAL
#4XARB50A482701431,
A 2008 SEA DOO "JET SKI" HULL
#YDV13580E808,
A 2008 SEA DOO "JET SKI" HULL
#YDV24947C808,
APPROXIMATELY 55 LBS. OF
TETRAHYDROCANNABINOLS (THC) AND
$22,955.00 IN UNITED STATES CURRENCY,

Defendants-Respondents.

ON APPEAL FROM ORDER GRANTING MOTION FOR SUMMARY JUDGMENT TO DEFENDANTS, ENTERED IN THE CIRCUIT COURT FOR GREEN COUNTY, THE HONORABLE THOMAS J. VALE, PRESIDING

REPLACEMENT BRIEF AND APPENDIX OF PLAINTIFF-APPELLANT

BRAD D. SCHIMEL
Wisconsin Attorney General

MAURA FJ WHELAN
Assistant Attorney General
State Bar #1027974

Attorneys for Plaintiff-Appellant

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-3859
(608) 267-2223 (Fax)
whelanmf@doj.state.wi.us

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ISSUES PRESENTED

1. Does the exclusionary rule apply to civil forfeiture proceedings brought pursuant to Wis. Stat. §§ 961.55 and 961.555? If not, did the circuit court err when it applied the exclusionary rule to exclude evidence in this case?

The circuit court concluded that the exclusionary rule applies to these civil forfeiture proceedings. Accordingly, it excluded evidence seized pursuant to inadequate warrants.

The State asks this Court to reverse the decision of the circuit court because its application of the exclusionary rule to these civil forfeiture proceedings was erroneous.

2. If the exclusionary rule applies to these civil forfeiture proceedings, does the good-faith exception to the exclusionary rule also apply? If so, did the circuit court err when it denied the State's request for an evidentiary hearing on the good-faith issue?

The circuit court denied the State's request for an evidentiary hearing.

The State asks this Court to reverse the circuit court's decision and remand for an evidentiary hearing on the good-faith issue.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Oral argument is unnecessary because the issues presented are fully briefed and can be resolved on the basis of the parties' written arguments. Publication is warranted because the constitutional questions about whether the exclusionary rule and the good-faith exception to that rule apply in civil forfeiture proceedings have not been addressed in a published opinion of this Court or the Wisconsin Supreme Court.

STATEMENT OF THE CASE

On April 20, 2016, pursuant to a warrant, the State Line Area Narcotics Team conducted a search at the home of Michael and Lori Scott in the Town of Jordan in Green County. (R. 1:4–6.) The Team seized controlled substances (approximately 55 pounds of tetrahydrocannabinols) and drug paraphernalia. (R. 1:6.) They also seized several vehicles and nearly $23,000 in cash. (R. 1:5–6.)

The State charged the Scotts with felony possession with intent to deliver tetrahydrocannabinols; felony maintaining a drug trafficking place; and misdemeanor possession of drug paraphernalia. Michael Scott was also charged with felony manufacture/delivery of tetrahydrocannabinols.

The Scotts moved to suppress all the evidence seized. (R. 19:35.) The circuit court granted the suppression motion on the ground that the warrants authorizing the search were inadequate. (R. 19:58–61.) The State dismissed the prosecution. The State did not appeal the circuit court's suppression decision in the criminal case.

Meanwhile, the State had timely filed a civil forfeiture complaint against Michael Scott; Lori Scott; the seized vehicles; the seized marijuana and drug paraphernalia; and the seized cash. (R. 1.) The State sought forfeiture pursuant to Wis. Stat. §§ 961.55 and 961.555, which create a process for civil forfeiture of property used in violation of the Controlled Substances Act.

The Scotts moved for partial summary judgment on the civil forfeiture complaint. (R. 15.) Their principal argument was that the exclusionary rule applies to civil forfeiture proceedings pursuant to *One 1958 Plymouth Sedan v. Pennsylvania*, 380 U.S. 693 (1965), and that the evidence excluded in their criminal cases must also be excluded from the civil case. (R. 18:9.) The State argued in response that

Plymouth Sedan was not controlling for various reasons. (R. 22:1–2.) The State also argued that it was entitled to an evidentiary "*Eason* hearing"[1] in which it could prove that the good-faith exception to the exclusionary rule operated in this case to render the evidence admissible. (R. 22:11–13; 45:17, 21, P-A. App. 118, 122.)

The circuit court granted the Scotts' motion for summary judgment. (R. 31, P-A App. 101.) The court concluded it was bound by the *Plymouth Sedan* decision. (R. 45:29, P-A App. 130.) The court did not grant the State an *Eason* hearing, but stated that the warrants "weren't saved by a good faith exception," even though it did not "think there [was] any intentional misconduct by the police." (R. 45:28, P-A App. 129.)

The State appealed. The case was fully briefed by defense counsel and the district attorney. Subsequently, at this Court's invitation, the Department of Justice agreed to file replacement briefs on behalf of the State.

STANDARD OF REVIEW

The circuit court's summary judgment decision is reviewed by this Court de novo. *See, e.g., Schmidt v. N. States Power Co.*, 2007 WI 136, ¶ 24, 305 Wis. 2d 538, 742 N.W.2d 294.

The circuit court's application of constitutional principles to a factual situation is also reviewed de novo by this Court. *See Eason*, 245 Wis. 2d 206, ¶ 95.

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[1] Pursuant to *State v. Eason*, 2001 WI 98, 245 Wis. 2d 206, 629 N.W.2d 625.

ARGUMENT

I. The exclusionary rule does not apply to civil forfeiture proceedings brought pursuant to Wis. Stat. §§ 961.55 and 961.555, and the circuit court erred when it applied the exclusionary rule to exclude evidence in this case.

A. The exclusionary rule is generally inapplicable to civil proceedings and limited to criminal trials.

The exclusionary rule prevents the State's use of evidence obtained in violation of the Fourth Amendment during the prosecution's case-in-chief. *See United States v. Leon*, 468 U.S. 897, 907 (1984); *Hoyer v. State*, 180 Wis. 407, 415, 193 N.W. 89 (1923).

This rule of exclusion is not a constitutional right and is not mandated by the United States or the Wisconsin Constitution. It is "a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved." *United States v. Calandra*, 414 U.S. 338, 348 (1974). The reality is that "[t]he wrong condemned by the [Fourth] Amendment is 'fully accomplished' by the unlawful search or seizure itself." *Leon*, 468 U.S. at 906. "[T]he governments' [trial] use of evidence obtained in violation of the Fourth Amendment does not itself violate the Constitution." *Pa. Bd. of Prob. & Parole v. Scott*, 524 U.S. 357, 362 (1998). Thus, the "sole purpose" of the exclusionary rule is "to deter future Fourth Amendment violations." *Davis v. United States*, 564 U.S. 229, 236–37 (2011). "The rule is calculated to prevent, not to repair." *Elkins v. United States*, 364 U.S. 206, 217 (1960).

The use of the exclusionary rule to deter future misconduct exacts "substantial social costs." *Leon*, 468 U.S. at 907. Most obviously, it deprives the fact-finder of

information that may be crucial to the accuracy of the decision-making process, with the result "that some guilty defendants may go free or receive reduced sentences as a result of favorable plea bargains." *Id.* at 907. As Justice Cardozo famously put it: "The criminal is to go free because the constable has blundered." *People v. Defore*, 150 N.E. 585, 587 (N.Y. 1926). In addition to the loss of evidence, "[i]ndiscriminate application of the exclusion rule . . . may well 'generat[e] disrespect for the law and administration of justice.'" *Leon*, 468 U.S. at 908 (alteration in original) (quoting *Stone v. Powell*, 428 U.S. 465, 491 (1976)).

To mitigate these social costs and rein in the scope of the rule, the Supreme Court has limited the exclusionary rule as a remedial device to those contexts "where its remedial objectives are thought most efficaciously served." *Calandra*, 414 U.S. at 348. The Court has noted that the exclusion of illegally obtained evidence from a criminal trial "must be assumed to be a substantial and efficient deterrent." *United States v. Janis*, 428 U.S. 433, 453 (1976). The threat of the rule's extension into additional spheres is unlikely to provide greater deterrence to police misconduct. *Id.* at 453–54. Any "additional marginal deterrence provided . . . in a civil proceeding surely does not outweigh the cost to society of extending the rule to that situation. If, on the other hand, the exclusionary rule does not result in appreciable deterrence, then, clearly, its use . . . is unwarranted. Under either assumption . . . the extension of the rule is unjustified." *Janis*, 428 U.S. at 453–54 (footnote omitted).

Accordingly, the Court has generally limited its use to criminal trials and declared it inapplicable in most civil settings. The rule is not available in civil tax proceedings. *See Janis*, 428 U.S. at 454. It has no effect in civil deportation proceedings. *See I.N.S. v. Lopez-Mendoza*, 468 U.S. 1032, 1051 (1984). Nor can it be used in an administrative parole

revocation proceeding. *See Pa. Bd. of Prob. & Parole*, 524 U.S. at 364. It is also inapplicable in a grand jury proceeding. *See Calandra*, 414 U.S. at 351–52.

The Supreme Court of Texas recently held that the exclusionary rule is not applicable in civil forfeiture proceedings. *See State v. One 2004 Lincoln Navigator*, 494 S.W.3d 690 (Tex. 2016). In *Lincoln Navigator*, the police arrested Miguel Herrera, seized his Lincoln Navigator, and found drugs in the vehicle. The State brought drug charges against Herrera and civil forfeiture proceedings against the vehicle, asserting that it was "contraband" under the forfeiture statute. The trial court found that Herrera's arrest was unlawful, and therefore the search incident to the arrest was also illegal. *Id.* at 692. Among other consequences, this meant that the vehicle would be excluded from the civil-forfeiture proceeding. *Id.* The Texas Supreme Court granted review to decide "whether an illegal seizure requires exclusion in a . . . civil-forfeiture proceeding." *Id.* at 692–93. The court held that it does not. *Id.*

The court noted that civil forfeiture proceedings "frequently arise out of criminal proceedings in which property was seized." *Id.* At the same time, the court observed, such proceedings are *not criminal proceedings*, and the exclusionary rule has generally been confined to *criminal proceedings*. *Id.* at 696. Indeed, as the Texas court pointed out, the United States Supreme Court has "repeatedly declined to extend the exclusionary rule to proceedings other than criminal trials." *Id.* (quoting *Pa. Bd. of Prob. & Parole*, 524 U.S. at 363).

The court asserted that the application of the exclusionary rule to a civil forfeiture case like the one before it would come at a "substantial social cost." *Id.* The Navigator was "indisputably relevant—if the state shows by a preponderance of the evidence that the vehicle was 'used or intended to be used in the commission of' a felony under the

Controlled Substances Act, then it is 'contraband." *Id.* "If it qualifies as contraband [under the statute], then it is subject to seizure and forfeiture." *Id.* (citations omitted). The evidence of the car was reliable, probative, and trustworthy. *Id.* In that context, application of the rule would "result in exclusion of evidence central to 'the truth-finding functions of judge and jury.'" *Id.* (citation omitted). On the other hand, the deterrence value of excluding the evidence was "marginal at best." *Id.* The State had already been substantially "punished" by the exclusion of the evidence in the criminal trial. *Id.* "Given this 'substantial and efficient deterrent', any additional deterrence provided by also applying the rule in the civil-forfeiture context is marginal and 'surely does not outweigh the cost to society of extending the rule to that context.'" *Id.* at 697 (citation omitted).

The Texas court distinguished the supreme court's decision in *Plymouth Sedan*, in which the supreme court held that the exclusionary rule does apply to a civil forfeiture case.[2] The Texas court noted that the supreme court had interpreted the civil forfeiture statute at issue in *Plymouth Sedan* as essentially criminal in nature. *Lincoln Navigation*, 494 S.W.3d at 697 (discussing *Plymouth Sedan*, 380 U.S. at 697–98, 700–01). First, the forfeiture statute was triggered only when there was a proven criminal violation. Second, in that particular case, the forfeiture was clearly a "penalty" for the criminal offense, because it could result in a "greater punishment" than a criminal sentence. *Id.* (quoting *Plymouth Sedan*, 380 U.S. at 697–98, 700–01).

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[2] The State acknowledges that the majority of published cases apply the exclusionary rule to civil forfeiture proceedings, relying on *Plymouth Sedan* as controlling authority. *See, e.g., In re 650 Fifth Ave. & Related Props.*, 830 F. 3d 66, 98 (2d Cir. 2016).

In contrast, civil forfeitures under the Texas statute "are expressly civil and non-punitive" and "*remedial* in nature." *Lincoln Navigation,* 494 S.W.3d at 698. The statute defines as contraband items "used or intended to be used in the commission of" specific crimes. *Id.* (quoting Tex. Code Crim. Proc. Art. 59.01(2)(B)). "While this provision certainly relates to criminal activity, it does not require any proof that a person committed a crime—it only requires that the state prove by a preponderance of the evidence that the *property* is contraband. In other words, '[a] . . . civil[-]forfeiture action is an *in rem* proceeding against *contraband*,' not a quasi-criminal proceeding against a person." *Id.* (alteration in original) (citation omitted). The Texas court concluded that exclusion of evidence in such a proceeding was unwarranted because it would not yield any substantial deterrence. *Id.*

In addition to this analysis, the Texas court observed that "the legal and jurisprudential landscapes have changed significantly since *Plymouth Sedan* was decided in 1965, weakening some of the opinion's underpinnings." *Lincoln Navigation,* 494 S.W.3d at 697–98 (*see Pa. Bd. of Prob. & Parole*, 524 U.S. at 364; *Lopez-Mendoza*, 468 U.S. at 1051; *Janis*, 428 U.S. at 454; *Calandra*, 414 U.S. at 351–52). In 1965, exclusionary rule jurisprudence was not so "discriminating." *Id.* at 698 (quoting *Davis*, 564 U.S. at 237). Since then, the Court has "abandoned the old, 'reflexive' application of the doctrine, and imposed a more rigorous weighing of its costs and deterrence benefits." *Id.* (quoting *Davis*, 564 U.S. at 238). "Thus, the Court's more recent jurisprudence, and its now well-established cost-benefit analysis, controls our analysis." *Id.*

For all these reasons, the Texas court declined to follow *Plymouth Sedan*, and ruled that the exclusionary rule does not apply to civil forfeiture proceedings.

In a concurring opinion in *United States v. Marrocco*, 578 F.3d 627, 642–43 (7th Cir. 2009), then-Chief Judge Frank Easterbrook similarly questioned the continuing viability of *Plymouth Sedan*. On the one hand, he noted that, although *Plymouth Sedan* involved a civil forfeiture proceeding, the *Janis* Court later stated that "that forfeiture was intended as a criminal punishment." *Marrocco*, 578 F.3d at 642 (Easterbrook, C.J., concurring) (citing *Janis*, 428 U.S. at 447 n.17). On the other hand, the Supreme Court had subsequently held that the exclusionary rule was not applicable in taxation, deportation, and probation revocation cases. *Id.* Furthermore, he reasoned, "[s]uppressing the *res* in a civil proceeding, even though the property is subject to forfeiture, would be like dismissing the indictment in a criminal proceeding whenever the defendant was arrested without probable cause. The Supreme Court has been unwilling to use the exclusionary rule to 'suppress' the body of an improperly arrested defendant. Why then would it be sensible to suppress the *res*?" *Id.* (citations omitted).[3]

Wisconsin has never expressly discussed the *Plymouth Sedan* holding, but two early Wisconsin Supreme Court opinions cite the decision in dicta.

In *State ex rel. White v. Simpson*, 28 Wis. 2d 590, 596, 137 N.W.2d 391 (1965), a paternity action, the court noted that an individual's rights under the Fourth Amendment (and its Wisconsin counterpart) were the same in criminal and civil actions. "The right of an individual to be protected from improper arrests or searches applies with equal vitality to those which stem from civil actions as well as those which stem from criminal actions. The immediate impact on the individual is precisely the same whether the arrest arises

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[3] Then-Chief Judge Easterbrook addressed the exclusionary rule issue in a concurring opinion because it had not been raised by the *Marrocco* parties. *Id.* at 642.

from one type of case or the other. *See One 1958 Plymouth Sedan v. Pennsylvania* (1965), 380 U.S. 693." *Id.* While it noted that individual *rights* were the same in both types of cases, *White* said nothing about the *remedies* available to the individual. Specifically, it did not address *Plymouth Sedan*'s holding that the exclusionary rule applies to civil forfeiture proceedings or any other kind of civil proceeding.

In *State v. Voshart*, 39 Wis. 2d 419, 434 n.31, 159 N.W.2d 1 (1968), the court quoted *Plymouth Sedan* to explain the difference between "per se" and "derivative" contraband. After successfully moving to suppress obscene materials seized pursuant to an invalid warrant, the defendant sought return of the materials. *Id.* at 423, 432. The court explained that property found to be contraband "per se" is not returnable. *Id.* Whether a particular item is contraband per se "derives from the inherent nature of a thing or article. . . . it is the nature of the beast that makes it subject or not subject to being declared contraband." *Id.* at 435. The court compared the legislation declaring obscene materials to be contraband per se with the facts of *Plymouth Sedan*. In *Plymouth Sedan*, the car was not contraband per se; it was "derivative contraband" because it was used to transport liquor in violation of Pennsylvania's liquor laws. 380 U.S. at 699. "There is nothing even remotely criminal in possessing an automobile. It is only the alleged use to which this particular automobile was put that subjects Mr. McGonigle to its possible loss." *Voshart*, 39 Wis. 2d at 434 (quoting 380 U.S. at 699). The court's quotation of *Plymouth Sedan* was limited to illuminating the "per se" versus "derivative" contraband concept. The court did not address the exclusionary rule aspect of the case.

B. Analysis.

There is no controlling precedent in Wisconsin applying the exclusionary rule to civil forfeiture proceedings brought under Wis. Stat. §§ 961.55 and 961.555. The holding in *Plymouth Sedan* has not been applied to these statutes by the Wisconsin Supreme Court. Significantly, the creation of these statutes postdates *Plymouth Sedan* by six years. *See State v. Guarnero*, 2015 WI 72, ¶ 56, 363 Wis. 2d 857, 867 N.W.2d 400 (Bradley, J., dissenting) (Uniformed Controlled Substances Act enacted in Wisconsin in 1971). This Court should hold that the exclusionary rule does not apply to civil forfeiture proceedings under these statutes.

Wisconsin should follow the Texas Supreme Court and decline to extend the 53-year-old *Plymouth Sedan* holding to the forfeiture proceedings in this case. In the years since that case was decided, Supreme Court "legal and jurisprudential landscapes have changed significantly . . . weakening some of the opinion's underpinnings." *Lincoln Navigation,* 494 S.W.3d at 697–98. Specifically, the Court has consistently refused to apply the exclusionary rule to non-criminal proceedings. *See Pa. Bd. of Prob. & Parole*, 524 U.S. at 364; *Lopez-Mendoza*, 468 U.S. at 1051; *Janis*, 428 U.S. at 454. For this reason, the Court has itself steadily undermined the reasoning of *Plymouth Sedan* since the Court decided it in 1965. Moreover, the result of the case is illogical. As Judge Easterbrook observed, if a criminal defendant arrested without probable cause can still be prosecuted, why should a *res* seized with a defective warrant be immunized from civil forfeiture? *Marrocco*, 578 F.3d at 642 (Easterbrook, C.J., concurring).

This Court should adopt the Texas Supreme Court's reasoning and conclusion in *Lincoln Navigator*. That case presents a carefully reasoned, detailed critique of *Plymouth Sedan*, and provides a compelling argument for why it should not be applied in this case. *See supra* at 6–8.

Wisconsin has multiple forfeiture statutes. Wisconsin Stat. §§ 973.075 and 973.076, general sentencing provisions, create both civil and criminal forfeiture proceedings applicable to property used in a variety of crimes. The provisions at issue in this case, Wis. Stat. §§ 961.55 and 961.555, create only civil forfeiture proceedings, and are applicable only to property used in violation of the Controlled Substances Act. Sections 961.55 and 961.555, like the Texas statute, are "expressly civil and non-punitive" and "*remedial* in nature." *Lincoln Navigator*, 494 S.W.3d at 698.

Like the Texas statute, section 961.55 subjects to forfeiture property (including vehicles) used or intended to be used to commit specific crimes (here, violations of the Controlled Substances Act). *Compare* Tex. Code Crim. Proc. Art. 59.01(2)(B), *with* Wis. Stat. § 961.55(1)(c), (d). Further, it subjects to forfeiture drug paraphernalia and property "derived from or realized through the commission of any crime under the [Controlled Substances Act]." Wis. Stat. § 961.55(f), (g). Like the Texas statute, section 961.55 "certainly relates to criminal activity, [but] does not require any proof that a person committed a crime." *Lincoln Navigator*, 494 S.W.3d at 698. On the contrary, it requires proof that the *res* subject to forfeiture was used in the commission of a controlled-substances crime or derived from the commission of such a crime. *See* Wis. Stat. § 961.555(3). The statute does not authorize the forfeiture of property unrelated to violations of the Controlled Substances Act.

The Wisconsin civil-forfeiture proceeding is distinctly civil, not criminal. The proceeding is commenced by filing a summons and complaint pursuant to ch. 801 (a civil procedure statute), and the defendant responds with an answer. *See* Wis. Stat. § 961.555(2)(a), (b). In contrast, a criminal defendant does not file an answer in a criminal forfeiture proceeding. *See* Wis. Stat. § 973.076(2m). If no answer is filed in the civil forfeiture proceeding, "the court may render a

default judgment as provided in s. 806.02 [a civil procedure statute]." *Id.* at (2)(d). In contrast, there is no such thing as a "default judgment" in criminal forfeiture proceedings. *See* Wis. Stat. § 973.076(2m).

This Court should not apply the exclusionary rule to the civil forfeiture proceeding in this case because it is a civil rather than a criminal proceeding. Moreover, the rule should not be applied here because it will effect no substantial deterrence beyond that created by the dismissal of the criminal prosecution. *See Janis*, 428 U.S. at 453; *Calandra*, 414 U.S. at 351–52. The members of the State Line Area Narcotics Team who investigated this case and seized the property at issue put a great deal of effort into this investigation. (R. 1; 2.) Due to an inadequate warrant, all the seized evidence was excluded from the criminal prosecution. (R. 19:58–61.) Consequently, the case became impossible to prosecute. Surely, this was quite a blow to the team, and will provide a "substantial and efficient deterrent" in their future investigations. *Janis*, 428 U.S. at 453. Any "additional . . . deterrence" from excluding this evidence from a civil forfeiture proceeding will be "marginal" at best. *Id.* Therefore, the rule should not be extended to this civil proceeding, because it "surely does not outweigh the cost to society of extending the rule to [this] situation." *Id.* at 453–54.

The circuit court erred in applying the exclusionary rule to this civil forfeiture proceeding. This Court should rule that *Plymouth Sedan* does not apply to these proceedings.

II. If the exclusionary rule applies in this case, the good-faith exception to the rule applies as well, and the circuit court erred by not granting the State's request for an evidentiary hearing on the good-faith issue.

A. Legal principles.

In *United States v. Leon*, 468 U.S. 897 (1984), the Supreme Court enunciated the good-faith exception to the exclusionary rule. The Court began from the premise that the purpose of the exclusionary rule is to curb police misconduct. 468 U.S. at 916. It is not designed "to punish the errors of judges and magistrates." *Id.* Therefore, as a general rule, evidence obtained by the police pursuant to a search warrant will not be excluded from the prosecution's case-in-chief where the officers acted in "reasonable reliance on a search warrant issued by a detached and neutral magistrate but ultimately found to be unsupported by probable cause." *Id.* at 900.

The Court explained that the focus of the remedy is on the police rather than the magistrate because magistrates, unlike police officers, are unlikely to be deterred by the exclusion of evidence in a criminal case. *Id.* at 916–17. Moreover, it is unreasonable to expect officers to second-guess the legal findings of magistrates. *Id.* at 921. "Penalizing the officer for the magistrate's error, rather than his own, cannot logically contribute to the deterrence of Fourth Amendment violations." *Id.* This is true even where the magistrate's decision is based on the investigating officer's own affidavit. "It is the magistrate's responsibility to determine whether the officer's allegations establish probable cause and, if so, to issue a warrant comporting in form with the requirements of the Fourth Amendment. In the ordinary case, an officer cannot be expected to question the magistrate's probable-

cause determination or his judgment that the form of the warrant is technically sufficient." *Id.*

For the good-faith exception to apply, however, the officer's reliance on the warrant must be "objectively reasonable." *Id.* at 922. Suppression must follow where the magistrate "was misled by information . . . that the affiant knew was false or would have known was false except for his reckless disregard of the truth." *Id.* at 923. Suppression is also required where the issuing magistrate is not neutral and detached. *Id.* (citing *Lo-Ji Sales, Inc. v. New York*, 442 U.S. 319 (1979)). If the officer executing the warrant knows that the affidavit was "so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable," the good-faith exception will not apply. *Id.* (citations omitted). And there can be no good faith where a warrant is "so facially deficient—i.e., in failing to particularize the place to be searched or the things to be seized—that the executing officers cannot reasonably presume it to be valid." *Id.*

The Wisconsin Supreme Court adopted the good-faith exception to the exclusionary rule in *State v. Eason*, 2001 WI 98, ¶ 2, 245 Wis. 2d 206, 629 N.W.2d 625. But, finding that "Article I, Section 11 of the Wisconsin Constitution guarantees more protection than the Fourth Amendment provides under the good faith exception as adopted in *Leon*," the *Eason* court imposed a stricter showing on the State before the exception would be applied. *Id.* ¶ 60. "[W]e require that in order for the good faith exception to apply, the State must show that the process used attendant to obtaining the search 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.

Several cases from other jurisdictions have applied the good-faith exception analysis in civil forfeiture actions before determining whether evidence should be excluded. *See, e.g.*, *In re 650 Fifth Ave. & Related Props.*, 830 F.3d 66, 106 (2d Cir. 2016); *United States v. $92,422.57*, 307 F.3d 137, 145 (3d Cir. 2002); *United States v. Real Prop. Located at 15324 Cty. Hwy. E*, 301 F. Supp. 2d 868, 872 (W.D. Wis. 2002), *aff'd*, 332 F.3d 1070 (7th Cir. 2003); *United States v. One Parcel of Prop. Located at 18 Perkins Rd.*, 774. F. Supp. 699, 706–07 (D. Conn. 1991); *United States v. One Parcel of Land Commonly Known as 4204 Cedarwood*, 671 F. Supp. 544, 546 (N.D. Ill. 1987); *State v. Canada*, 164 So.3d 1003, 1008–09 (Miss. 2015).

Where the State asserts that the good-faith exception to the exclusionary rule applies in Wisconsin, the circuit court holds "a good faith hearing consistent with *Eason*." *State v. Marquardt*, 2001 WI App 219, ¶ 22, 247 Wis. 2d 765, 635 N.W.2d 188. The burden is on the State to show that the good-faith exception to the exclusionary rule applies because the police officers reasonably relied upon a warrant issued by an independent magistrate, and that the process used to obtain the warrant included a significant investigation and a review by either a knowledgeable government attorney or a police officer trained in and conversant with probable cause and reasonable suspicion requirements. *Eason*, 245 Wis. 2d 206, ¶ 3.

B. Analysis.

In this case, the State argued that, even if the circuit court concluded that the exclusionary rule is applicable to civil forfeiture proceedings, an *Eason* hearing was necessary to enable the State to prove that the good-faith exception to the exclusionary rule applies. (R. 45:11, 17, 21, Pl-App. App. 112, 118, 122.) Instead of ruling on the State's request for a hearing, the court declared: "[The warrants] weren't saved by

a good faith exception. I don't think there is any intentional misconduct by the police certainly, but . . . there were some mistakes and omissions." (R. 45:28, P-A App. 129.)

The circuit court erred by not granting the State's hearing request. If this Court concludes that the exclusionary rule applies, it should remand this case to the circuit court to conduct an evidentiary hearing to determine whether the good-faith exception applies in this case. *See Marquardt*, 247 Wis. 2d 765, ¶ 22.

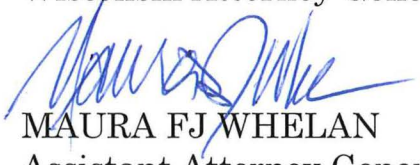
CONCLUSION

For the reasons stated, the State of Wisconsin respectfully requests that this Court reverse the circuit court's order dismissing the State's civil forfeiture complaint and reinstate the complaint for further proceedings. In the alternative, the State requests that this Court reverse the dismissal order and remand the case to the circuit court to conduct an evidentiary hearing pursuant to *State v. Eason*.

Dated this 2nd day of April, 2018.

Respectfully submitted,

BRAD D. SCHIMEL
Wisconsin Attorney General



MAURA FJ WHELAN
Assistant Attorney General
State Bar #1027974

Attorneys for Plaintiff-Appellant

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-3859
(608) 267-2223 (Fax)
whelanmf@doj.state.wi.us

CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 4810 words.

Dated this 2nd day of April, 2018.

MAURA FJ WHELAN
Assistant Attorney General

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § 809.19(12).

I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 2nd day of April, 2018.

MAURA FJ WHELAN
Assistant Attorney General

APPENDIX CERTIFICATION

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with Wis. Stat. § 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; and (3) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using one or more initials or other appropriate pseudonym or designation, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

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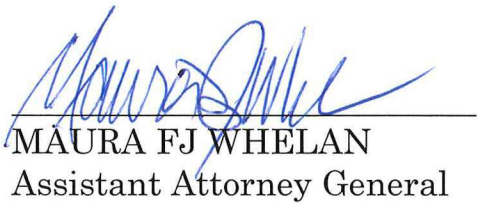

MAURA FJ WHELAN
Assistant Attorney General