STATE OF WISCONSIN

COURT OF APPEALS – DISTRICT III

Case No. 2019AP1317-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

DANIEL J. VAN LINN,

Defendant-Appellant.

Appeal of a judgment entered in the
Oconto County Circuit Court,
the Honorable Michael T. Judge, presiding

REPLY BRIEF

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ARGUMENT

I. The blood test result was inadmissible as the fruit of the prior unlawful (and suppressed) search.

A. Van Linn raised his suppression claim in the circuit court; it is not waived.

The state claims that Van Linn waived his claim that the Fourth Amendment barred the state's use of the hospital blood test against him. The state is wrong, for several reasons.

First, Van Linn did argue below that the illegal police blood draw—and the circuit court's exclusion of the evidence derived from it—should lead to exclusion of the hospital results. In his motion to suppress, he said that

> The exclusionary rule is a judicially created remedy in response to violations of the Fourth Amendment prohibition against unreasonable searches and seizures. The United States Supreme Court, in *Herring v. United States*, 555 U.S. 135, 139, 129 S.Ct. 695, 699 (2009), stated that the Court had established an "exclusionary rule that, when applicable, forbids the use of improperly obtained evidence at trial." The Court has "stated that this judicially created rule is designed to safeguard Fourth Amendment rights generally through its deterrent effect…. In the present case, the State seeks to introduce privileged medical information only after the suppression of the blood draw obtained by law enforcement. If the exclusionary rule is to be given proper purpose and effect, the admission of

> the privileged medical information requested by the State cannot be allowed.

(32:3; App. 105; see also 27:2-3).

So the state is just wrong when it says "defense counsel asserted only that Van Linn's medical records were privileged." Resp. 11. It's plain that he raised a Fourth Amendment claim in addition to his statutory one.

It's true that Van Linn didn't use the phrase "independent source" in the trial court. *See* Resp. 7. But the independent source rule is an *exception* to the exclusionary rule—that is, it's an argument typically raised by the state, not the defendant. The state didn't discuss it below, but does argue it extensively now. Resp. 13-19. That's legitimate; as Respondent the state can argue any ground for affirmance. But it's equally legitimate for Van Linn to anticipate and preemptively respond to this argument, as he has. App. 4-7.

Even if the state were correct that Van Linn is raising a new argument (*see, e.g.*, Resp. 2) the supreme court has distinguished between "issues" (which generally may be forfeited by failure to raise them) and specific "arguments" in support of or opposition to those issues—which are not forfeited. *State v. Weber*, 164 Wis. 2d 788, 789, 476 N.W.2d 867 (1991). In fact it specifically described the "issue" before it as "the constitutionality of the search and seizure-not separate arguments that could be made defending or attacking the constitutionality of the

seizure." *Id.* at 790. Similarly here, Van Linn has claimed all along that the use of the hospital test against him violated the Fourth Amendment; on appeal he's simply made more explicit the problem with the state's argument that the two searches are unrelated.

Finally, forfeiture is a rule of judicial administration addressed to this Court's discretion. All the facts necessary to decide Van Linn's claim were adduced in the trial court—the claim is cleanly presented. And contrary to the state's suggestion, Resp. 11-12, there's no concern that the circuit court would be blindsided by Van Linn's Fourth Amendment argument; that court's decision did not even address Van Linn's argument on that point in its decision, mentioning only the privilege statute. (37:1-3, App. 101-03).

In sum, Van Linn's Fourth Amendment claim is properly before this Court, and this Court should decide it.

B. The state's subpoena for the hospital blood test results is the fruit of the illegal search and must be suppressed.

The state argues that the subpoena for the hospital blood test results—which it sought and received after the circuit court suppressed the results of its own illegal blood draw—is an "independent source" of evidence and is thus not subject to the exclusionary rule. Resp. 14-18.

The state agrees with Van Linn about the legal requirements of this doctrine: the state must show both that state's "decision to seek" the subpoena was not "prompted by what [it] had" learned from the illegal search, and that the court's "decision to issue" it was unaffected by "information obtained" by the illegal search. Resp. 14; *Murray v. United States*, 487 U.S. 533, 542 (1988).

Van Linn also agrees with the state that the information available to its agents, excluding the ill-gotten BAC result, meets the legal standard of probable cause (this is, of course, why the officer should have sought a warrant in the first place). Resp. 16-17. He further allows that this fact satisfies the second prong of the independent source test—that the court's decision to issue the subpoena was not influenced by the illegal search.

Van Linn does not agree, though, that the state can meet the first prong of that doctrine here. This is because the state's decision to seek the subpoena was clearly the result of the illegal search. This is not a typical independent-source case, in which evidence becomes available soon after or contemporaneously with the illegal search—and not because of it. Here, the prosecution obtained the results of the unlawful blood draw and took no further action to investigate. It was only after several months—and specifically after the circuit court had ordered the illegal blood draw suppressed—that the state sought the subpoena. Obviously, it would have had no reason to seek a subpoena had the earlier search not been

illegal. In this sense, the fact of the earlier illegality "prompted" the later subpoena.

But the decision to seek the subpoena was also motivated specifically by the "information obtained" via the unlawful blood draw. *Id.* If the unlawful search had shown that Van Linn's blood contained little or no alcohol, the state would have had no incentive to seek out another means of proving this fact. It was only because the state *knew* what the result would be—because it had learned from the illegal search—that it had any reason at all to obtain the same information from another source. This is precisely the position of the government agents in *Silverthorne Lumber Co. v. United States*, 251 U.S. 385, 391 (1920)—the state sought to "use the knowledge that it [had] gained" to obtain the same knowledge in a "more regular form."

CONCLUSION

For the reasons given above and in his initial brief, Van Linn respectfully requests that this Court vacate his plea, conviction and sentence, and that it remand the case with directions that the BAC evidence be suppressed.

Dated this 13th day of December, 2019.

Respectfully submitted,

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CERTIFICATIONS

I hereby certify that this brief conforms to the rules contained in § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 1,112 words.

I hereby certify that I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of § 809.19(12). I further certify that this electronic brief is identical in content and format to the printed form of the brief filed on or after this date.

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 § 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; (3) a copy of any unpublished opinion cited under § 809.23(3)(a) or (b); and (4) 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 instead of full names of persons,

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.

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 13th day of December, 2019.

Signed:

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Assistant State Public Defender