STATE OF WISCONSIN

I N S U P R E M E C O U R T

Case No. 2019AP2150-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

VALIANT M. GREEN,

Defendant-Appellant-Petitioner.

REVIEW OF A DECISION OF THE
WISCONSIN COURT OF APPEALS, DISTRICT II,
AFFIRMING A JUDGMENT OF CONVICTION ENTERED
IN THE KENOSHA COUNTY CIRCUIT COURT, THE
HONORABLE BRUCE E. SCHROEDER, PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

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INTRODUCTION

Police responded to a call that Defendant-Appellant Valiant M. Green was driving drunk around his neighborhood. They arrived and investigated, establishing indisputable probable cause both that Green was intoxicated and that he had driven in the roadway. When Green refused to submit to standard field sobriety tests, a preliminary breath test, or a blood test, the officers sought and obtained a search warrant to draw his blood for chemical testing. The blood test confirmed that Green was intoxicated.

Green claims that the blood draw was improper. The circuit court should have suppressed the results, he says, because the affidavit police submitted in support of the application for the search warrant did not specifically state that he drove in the street as required to establish an OWI violation. He is wrong. As the court of appeals correctly held, the warrant affidavit stated sufficient probable cause to establish that Green committed an OWI offense. But even if it did not, the police reasonably relied on the search warrant when they obtained a sample of Green's blood. Further, the blood draw evidence inevitably would have been discovered. Exclusion is not warranted, and this Court should affirm.

ISSUE PRESENTED

Did the circuit court properly deny Green's motion to suppress the results of the blood draw?

The circuit court concluded that even if the warrant application was faulty, suppression of the blood test results would not serve the purposes of the exclusionary rule because there was no police misconduct present. The circuit court therefore denied Green's motion to suppress.

The court of appeals affirmed, reasoning that the warrant application's statement that Green had driven "at the driveway" of his residence could be understood to mean

that he drove in the road near his home. The court thus concluded that the warrant affidavit did state probable cause.

This Court should affirm.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

As this Court has accepted review of this case, oral argument and publication are customary and appropriate.

STATEMENT OF THE CASE

On the afternoon of Sunday, May 25, 2014, Nancy Trakas called 911 to report that her neighbor, Valiant Green was drunk and had driven through the front yards of two houses before backing into his own driveway. (R. 4:2.) Kenosha Police Officer Mark Poffenberger responded to the call. (R. 4:2.) When he arrived on the scene, Officer Poffenberger saw a group of children playing near Green's driveway. (R. 4:2.) He also saw Green pull his vehicle forward and back it up in the driveway multiple times. (R. 4:2.)

Officer Poffenberger approached the group of children, who reported that they had seen Green's vehicle driving around the neighborhood for several minutes. (R. 4:2.) Green then approached Officer Poffenberger, who noticed that Green was having trouble maintaining his balance, had bloodshot and glassy eyes, and smelled strongly of intoxicants. (R. 4:2.) Green admitted to Officer Poffenberger that he had been drinking. (R. 4:2.) Officer Poffenberger asked Green to perform the horizontal gaze nystagmus test and the walk and turn test. (R. 4:2.) Green refused to cooperate, and Officer Poffenberger arrested him for operating while intoxicated. (R. 4:2.) Police then took Green to the jail, where Green refused to provide a sample for a chemical breath test. (R. 4:2.)

Meanwhile, Kenosha Police Officer Casey Apker spoke with Trakas, who recounted that she was sitting in her home when she heard loud music and saw Green outside singing and "making a fool out of himself." (R. 4:3.) She then watched as Green got into his vehicle, drove across her lawn, jumped the curb, and drove away on 32nd Avenue. (R. 4:3.) A few minutes later, Trakas saw Green return. (R. 4:3.) He pulled into the middle of the road and stopped, blocking traffic and leading several cars to honk at him before he backed into his driveway. (R. 4:3.) He then left and repeated the entire routine about six times before Trakas finally called 911. (R. 4:3.) Trakas signed a sworn statement describing her observations. (R. 26:3.)

After Green refused to cooperate with the breath test, Officer Poffenberger completed an affidavit for a blood draw search warrant. (R. 28:3; 29:1–2.) The affidavit listed the many indicia of intoxication that Officer Poffenberger had observed. (R. 29:1–2.) It stated that Green "drove or operated a motor vehicle at driveway of 3207 45th St." (R. 29:1.) It also noted that Green "was observed to drive/operate the vehicle by a citizen witness named Nancy A. Trakas." (R. 29:1.) Circuit Court Judge Schroeder signed the search warrant, and police took Green to Kenosha Memorial Hospital for medical staff there to draw Green's blood. (R. 26:3.) Chemical analysis of two separate blood draws, taken an hour apart, revealed Green's BAC to be .237 and .214 g/100 mL, respectively. (R. 116:1.)

The State charged Green with one count of operating while intoxicated, one count of operating with a prohibited alcohol concentration, and one count of resisting an officer. (R. 101:1–2.) Green moved to suppress the results of the blood draw. (R. 99:1.) He argued that the warrant affidavit lacked a factual basis for the search because it did not describe Green driving on a "highway" as required under Wis. Stat. § 346.61. (R. 99:3.) The Kenosha County Circuit Court, the Honorable

Bruce E. Schroeder, presiding, denied Green's motion. (R. 161:23.) The court referenced Trakas's statement to police that Green had been driving in "the street" and reasoned that there was clearly enough probable cause for a warrant. (R. 161:7.) The court concluded that because there was no police misconduct to deter, suppression was not warranted. (R. 161:21–23.)

Green proceeded to a jury trial, where he was convicted as charged of operating while intoxicated and operating with a prohibited alcohol concentration. (R. 165:113.) The State moved to dismiss the OWI count and the court entered a judgment of conviction on the PAC charge.[1] (R. 165:116.) On January 23, 2019, the court sentenced Green to two years of initial confinement and seven months of extended supervision. (R. 166:8.)

Green appealed his conviction, arguing that the circuit court improperly denied his motion to suppress the blood draw. (Pet-App. 27.) The court of appeals affirmed, concluding that the warrant affidavit's statement that Green drove "at" the driveway of his address could be understood to mean that he drove "near" the driveway—*i.e.*, in the street. (Pet-App. 29–30.) Green petitioned this Court for review, and this Court granted the petition.

STANDARD OF REVIEW

Review of a decision denying a motion to suppress evidence presents an appellate court with a question of constitutional fact that requires a two-step analysis. *State v. Iverson*, 2015 WI 101, ¶¶ 17–18, 365 Wis. 2d 302, 871 N.W.2d 661. First, the court applies a deferential standard to the circuit court's findings of historical fact, "upholding them unless they are clearly erroneous." *Id.* ¶ 18. Second, the court

[1] Pursuant to Wis. Stat. § 346.63(1)(c).

independently applies the relevant constitutional principles to these facts. *Id.*

ARGUMENT

The circuit court properly denied Green's motion to suppress blood draw evidence showing he was intoxicated.

In the court of appeals, the State argued for the narrowest ground for affirmance that coincided with the circuit court's decision, contending that even if the warrant affidavit was faulty, the police nevertheless reasonably relied on the search warrant to conduct the blood draw and the circuit court properly denied Green's motion to suppress. *See State v. Blalock*, 150 Wis. 2d 688, 703, 442 N.W.2d 514 (Ct. App. 1989) (stating that appellate courts should decide cases on the narrowest possible grounds). The State argued in the alternative that the doctrine of inevitable discovery also warranted admission of the blood test results. Contrary to Green's assertion, however, the State did not concede that the warrant affidavit lacked probable cause. (Green's Br. 19.)

Given the court of appeals' determination that the warrant affidavit was not faulty, the State argues first that the court of appeals was correct. Now that this Court has granted review of the issue, the State's argument that the affidavit did contain sufficient probable cause for the warrant to issue is proper. *See State v. Weber*, 164 Wis. 2d 788, 791, 476 N.W.2d 867 (1991) ("Once an issue is raised in a petition for review, any argument addressing the issue may be asserted in the brief of either party or utilized by this [C]ourt."). The State further argues that even if the warrant affidavit was faulty, the circuit court was correct in determining that police reasonably relied on the warrant. In the alternative, the State continues to contend that in a situation such as this, where police are seeking a warrant and

indisputably have probable cause to obtain that warrant, the doctrine of inevitable discovery applies.

A. The warrant issued based on probable cause in the warrant affidavit.

1. Appellate courts review a warrant-issuing magistrate's probable cause determination with deference.

A search warrant shall issue "if probable cause is shown." Wis. Stat. § 968.12(1). Before issuing a search warrant, the magistrate must be "apprised of 'sufficient facts to excite an honest belief in a reasonable mind that the objects sought are linked with the commission of a crime, and that the objects sought will be found in the place to be searched.'" *State v. Higginbotham*, 162 Wis. 2d 978, 989, 471 N.W.2d 24 (1991) (quoting *State v. DeSmidt*, 155 Wis. 2d 119, 131–32, 454 N.W.2d 780 (1990)); *see State v. Marquardt*, 2005 WI 157, ¶ 37, 286 Wis. 2d 204, 705 N.W.2d 878.

The United States Supreme Court has explained that, when considering an application for a search warrant, a magistrate must "make a practical, common sense decision whether, given all the circumstances set forth in the affidavit before him, including the 'veracity' and 'basis of knowledge' of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place." *Illinois v. Gates*, 462 U.S. 213, 238 (1983). Courts give great deference to the issuing magistrate's determination that probable cause supports issuing a search warrant. *State v. Ward*, 2000 WI 3, ¶ 21, 231 Wis. 2d 723, 604 N.W.2d 517. And courts will uphold the determination of probable cause if there is a substantial basis for the warrant-issuing magistrate's decision. *Id.* A magistrate's probable cause determination must stand unless the defendant shows the facts are "clearly insufficient" to support the probable cause finding. *State v. Tate*, 2014 WI 89,

¶ 14, 357 Wis. 2d 172, 849 N.W.2d 798; *Marquardt*, 286 Wis. 2d 204, ¶ 23 (citing *Higginbotham*, 162 Wis. 2d at 989). This deferential standard of review "further[s] the Fourth Amendment's strong preference for searches conducted pursuant to a warrant." *State v. Kerr*, 181 Wis. 2d 372, 379, 511 N.W.2d 586 (1994) (citations omitted).

The magistrate reviewing a warrant application may draw reasonable inferences from the evidence presented in the affidavit. *State v. Benoit*, 83 Wis. 2d 389, 399, 265 N.W.2d 298 (1978). The inference drawn must be reasonable, but it need not be the only reasonable one. *See Ward*, 231 Wis. 2d 723, ¶ 28; *State v. Jones*, 2002 WI App 196, ¶ 10, 257 Wis. 2d 319, 651 N.W.2d 305.

The quantum of evidence needed to establish probable cause for issuance of a warrant is less than that required for a bindover after a preliminary hearing. *State v. Lindgren*, 2004 WI App 159, ¶ 20, 275 Wis. 2d 851, 687 N.W.2d 60. The probable cause determination is made on a case-by-case basis after reviewing the totality of the circum-stances. *State v. Schaefer*, 2003 WI App 164, ¶ 17, 266 Wis. 2d 719, 668 N.W.2d 760.

When giving deferential review in the close case, the reviewing court should resolve all doubts in favor of the magistrate's probable cause determination: "It is the established policy of our appellate courts, however, that marginal cases regarding a warrant-issuing magistrate's determination of probable cause should be largely determined by the strong preference that officers conduct their searches pursuant to a warrant." *Lindgren*, 275 Wis. 2d 851, ¶ 20 (citing *Higginbotham*, 162 Wis. 2d at 990). "Accordingly, we resolve doubtful or marginal cases regarding a probable cause finding in light of the Fourth Amendment's strong preference for searches conducted pursuant to a warrant." *State v. Sveum*, 2010 WI 92, ¶ 26, 328 Wis. 2d 369, 787 N.W.2d 317.

2. The affidavit in support of the search warrant contained probable cause that Green operated while intoxicated.

The warrant affidavit sufficiently alleged a violation of the state's OWI statutes when it explained the reasons for Officer Poffenberger's belief that Green was intoxicated and drove "at [the] driveway" of his home address. First, the warrant affidavit properly alleged that Green had admitted to drinking, had red or pink and glassy eyes, slurred his speech, was unsteady on his feet, and emitted a strong odor of intoxicants. (R. 29:1–2.) Indeed, Green does not contend that the affidavit lacked facts to establish intoxication, only that it failed to state that Green drove on a "highway" as required to constitute an OWI offense. (Green's Br. 15–16.)

With respect to Green's driving on a highway, the affidavit stated that the OWI incident occurred "at driveway of 3207 45th St." in Kenosha. (R. 29:1.) The court of appeals correctly noted that while "'at' could mean 'in' or 'on,' it could also mean 'near.'" (Pet-App. 30.) *See* AT, Black's Law Dictionary (6th ed. 1990) ("A term of considerable elasticity of meaning, and somewhat indefinite. A function word to describe or indicate presence or occurrence in, on, or near")[2]; AT, The American Heritage Dictionary of the English Language (5th ed. 2016) ("In or near the area occupied by; in or near the location of"); *see also Chesapeake & O. Ry. Co. v. Hill*, 284 S.W. 1047, 1048 (Ky. 1926) ("[W]e had occasion to inquire into the meaning of the word 'at' and came to the conclusion that the word in referring to a place primarily means 'near to' that place.").

Consistent with these definitions, it was reasonable for the issuing magistrate to interpret the affidavit as stating

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[2] The word "at" has been removed from more recent editions of Black's Law Dictionary, but prior editions contain a substantially similar definition.

that Green had driven on the road near the driveway of 3207 45th Street. Indeed, this would be true for virtually any OWI warrant affidavit that offers a street address for the location of the offense. If, for example, an affidavit stated that a suspect drove drunk "at 123 Main Street," and if 123 Main Street is a private residence, that does not require the inference that the suspect drove only on private property. Rather, a judge may make the reasonable inference that the address provided in the affidavit is a reference for where *in the street* the suspect drove. *See Ward*, 231 Wis. 2d 723, ¶ 28; *Benoit*, 83 Wis. 2d at 399. Given the deference owed to the issuing judge's decision to grant the warrant, this interpretation should control here. *See Ward*, 231 Wis. 2d 723, ¶ 21; *Kerr*, 181 Wis. 2d at 379.

Green contends that the inclusion of the word "driveway" changes the meaning of the statement in the affidavit. (Green's Br. 18.) He claims that there would be no reason for Officer Poffenberger to include the word "driveway" if the affidavit simply meant that Green had driven in the street near his home. (Green's Br. 18.) But the officer's reasoning for including the word "driveway" in the affidavit is irrelevant. The question is whether the affidavit itself states probable cause. The affidavit can be interpreted as stating that Green drove in the street "near" his driveway, and that interpretation—if used to support the issuance of a warrant—is entitled to deference.[3]

[3] Moreover, there may be occasions where reference to the driveway of an address is a useful location marker. For example, locations near large rural properties or corner lots may sometimes be more accurately described by reference to a driveway. While that does not seem to be the case here, the State urges this Court not to adopt a rule mandating that reference to a driveway in a warrant affidavit can only be interpreted to mean that a suspect drove in said driveway.

Green also argues that it is "significant" that Officer Poffenberger's warrant affidavit was a "fill-in-the-blank" form. (Green's Br. 18.) It is not. The information in the affidavit is what the issuing judge uses in order to issue a warrant, regardless of whether it is a form document or drafted from scratch. Green cites no legal authority supporting his claim that certain words in the affidavit should be afforded less weight simply because they are pre-printed. Indeed, such a holding would run counter to the reason for having such forms in the first place—they exist as a guide to make sure that certain language and information is included, even if not mandatory. *See, e.g.* Wis. Stat. § 968.23 (providing form language for a search warrant affidavit).

For the above reasons, the court of appeals correctly held that the search warrant affidavit stated probable cause.

B. The police officers reasonably relied on the search warrant in good faith.

1. The exclusionary rule generally does not apply where police officers conduct a search in good-faith reliance on a search warrant.

The Fourth Amendment to the United States Constitution "contains no provision expressly precluding the use of evidence obtained in violation of its commands." *Arizona v. Evans*, 514 U.S. 1, 10 (1995). Rather, courts exclude such evidence pursuant to a judicially created rule designed to deter future Fourth Amendment violations by police. *See id.* at 11–15. To that end, the exclusionary rule is not generally applicable to judicial errors because a judicial officer has no stake in the outcome of any particular case. *United States v. Leon*, 468 U.S. 897, 917 (1984). "Thus, the threat of exclusion of evidence could not be expected to deter such individuals from improperly issuing warrants, and a judicial ruling that a warrant was defective [is] sufficient to

inform the judicial officer of the error made." *Illinois v. Krull*, 480 U.S. 340, 348 (1987).

The "good-faith" exception to the exclusionary rule is derived from these principles. The exception provides that the exclusionary rule does not apply when police act with "objectively reasonable reliance" on a warrant that is later determined to be invalid. *Leon*, 468 U.S. at 922 & n.23. Courts should not apply the good-faith exception if: (1) the court "was misled by information in an affidavit that the affiant knew was false or would have known was false except for his reckless disregard of the truth"; (2) the court "wholly abandoned [its] judicial role in the manner condemned" by the Court in *Lo–Ji Sales*[4]; (3) "no reasonably well trained officer should rely on the warrant" because the affidavit is "so lacking in indicia of probable cause"; or (4) the warrant is "so facially deficient" "that the executing officers cannot reasonably presume it to be valid." *Leon*, 468 U.S. at 923 (citation omitted). "[U]nder *Leon*'s good-faith exception, [the Court has] 'never applied' the exclusionary rule to suppress evidence obtained as a result of nonculpable, innocent police conduct." *Davis v. United States*, 564 U.S. 229, 240 (2011) (citation omitted).

In *Eason*, the Wisconsin Supreme Court adopted the good-faith exception to the exclusionary rule under article I, section 11 of the Wisconsin Constitution, but added two additional requirements. *State v. Eason*, 2001 WI 98, ¶¶ 63, 66, 74, 245 Wis. 2d 206, 629 N.W.2d 625. First, "the State must show that the process used attendant to obtaining the search warrant included a significant investigation," and second, there must be "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. It is the State's burden to demonstrate

[4] *Lo–Ji Sales, Inc. v. New York*, 442 U.S. 319 (1979).

that these requirements are met and the good-faith exception to the exclusionary rule applies. *Id.*

2. Even if the warrant affidavit was insufficient, suppression was not necessary because police reasonably relied on the search warrant.

This Court recently noted that the decision not to apply the exclusionary rule to a situation is usually described as falling within the "good faith" exception to the exclusionary rule. *See State v. Burch*, 2021 WI 68, ¶ 21 n.6. However, the distinction in terminology between whether the "good faith exception" to the exclusionary rule applies and whether the exclusionary rule should not apply in the first instance can be confusing. *See id.* This brief discusses this concept using the "good faith exception" terminology for the sake of consistency with *Leon* and *Eason*. Nevertheless, the two terms conceptually and practically ask the same question: whether the evidence in question must be suppressed.

Burch does raise an interesting question in the context of this case, however. There, this Court concluded that suppression of certain evidence—obtained without a warrant—was not necessary because "there was no police misconduct to trigger application of the exclusionary rule." *Id.* ¶ 26. Because no warrant was obtained, this Court did not discuss the four *Leon* scenarios or the two *Eason* requirements used to determine whether reliance on a faulty warrant requires suppression. It is notable that, despite the strong preference for searches being conducted pursuant to a warrant—*see Sveum*, 328 Wis. 2d 369, ¶ 26—the state of the law seemingly requires the prosecution to satisfy six factors—the absence of four possible scenarios discussed in *Leon* and meeting two additional requirements discussed in *Eason*—in order to establish good-faith reliance on a search warrant. Where no warrant is concerned, however, *Burch* requires the prosecution only to establish an absence of police misconduct.

One way to harmonize this apparent dissonance is to interpret the *Leon*/*Eason* factors as simply providing a guide for determining whether police misconduct occurred in a case involving a warrant, not as establishing a higher bar for avoiding suppression. Under that rubric, where police misconduct is the focus, the good faith exception clearly applies in this case because there was no police misconduct—Officer Poffenberger undeniably had probable cause, he sought a warrant based on that probable cause, he received the warrant, and he conducted a search pursuant to that warrant. Any mistake in wording in the warrant affidavit was nothing more than simple negligence, not requiring suppression. *See Davis*, 564 U.S. at 238.

However, even if the State must satisfy a rigid application of the *Leon*/*Eason* factors, the good faith exception still applies because none of the four disqualifying *Leon* scenarios are present, and the State meets the additional *Eason* requirements. With respect to the first *Leon* scenario, the warrant-issuing judge was not misled by information in an affidavit that the affiant knew was false. *See Leon*, 468 U.S. at 923. This is not a case in which the police sought a warrant and attempted to hide a questionable probable cause determination. Rather, Green's argument is that information was missing from the affidavit. Even if Officer Poffenberger's affidavit was faulty for what it did not contain, it was not meant to—and could not have been meant to—mislead the judge into believing probable cause existed where there was none.

Second, the issuing court did not abandon its judicial role in the manner condemned by the Court in *Lo-Ji Sales*. *See Leon*, 468 U.S. at 923. In *Lo-Ji Sales*, the warrant-issuing magistrate himself became a member, if not the leader, of the search party that executed the warrant. *Lo-Ji Sales, Inc. v. New York*, 442 U.S. 319, 327 (1979). Nothing comparable occurred here, and there is no suggestion that the judge who

issued the warrant was not neutral or had any sort of conflict of interest related to this case.

Third, the affidavit was not so lacking in indicia of probable cause that a reasonably well-trained officer could not rely on the warrant. *See Leon*, 468 U.S. at 923. Even if the warrant affidavit's statement that Green operated his vehicle "at" his driveway did not sufficiently allege that Green drove on a "highway," the affidavit also noted that "[t]he arrestee was observed to drive/operate the vehicle by a citizen witness named Nancy A. Trakas." (R. 98:1.) When Trakas spoke to Officers Poffenberger and Apker about Green, she said that Green had driven across her lawn and onto 32nd Avenue, then returned and obstructed traffic while attempting to back into his driveway multiple times. (R. 4:3.) The mention of Trakas as a witness in the affidavit was an implicit reference to these facts relevant to the probable cause analysis. A reasonably well-trained officer thus would not view the affidavit as so lacking in probable cause that the warrant was unreliable.

Fourth, the warrant was not facially deficient. *See Leon*, 468 U.S. at 923. It was issued by a neutral and detached court and described the object of the search—a draw and test of Green's blood. Even if the affidavit did not include all the facts constituting probable cause, the warrant was requested, signed, and returned using the usual police procedures and it listed the particulars of the search; on its face, the warrant gave police no reason to question its validity. *See id.*

Turning to the *Eason* requirements unique to the Wisconsin Constitution, the State first argues that these requirements should not apply in a case like this one. In a situation where there is undisputedly probable cause to obtain a warrant, the *Eason* requirements are not necessary because the reasoning underpinning those requirements focused on guarding against "speculative searches," not on ensuring the warrant's technical accuracy or the completeness of the probable cause statement. *See Eason*, 245

Wis. 2d 206, ¶¶ 61, 63 n.28. Application of the *Eason* requirements here would do nothing to further that goal.

But even if the requirements do apply, the facts here also satisfy the additional *Eason* requirements. Law enforcement engaged in a significant investigative process before seeking the warrant. *See Eason*, 245 Wis. 2d 206, ¶ 63. As detailed in the police reports from Officers Poffenberger and Apker, police spoke with eyewitnesses who said that Green had driven in the street. (R. 4:2–3.) Police also attempted to conduct field sobriety tests to determine Green's level of intoxication. (R. 4:2–3.) And indeed, as Green freely admits, the police investigation established probable cause that Green had driven drunk. (Green's Br. 16.)

Moreover, a reasonable, well-trained officer would not have believed that the search was illegal despite the court's issuance of the warrant. *See State v. Scull*, 2015 WI 22, ¶ 37, 361 Wis. 2d 288, 862 N.W.2d 562. Again, Officer Poffenberger's affidavit relayed the details he discovered when he investigated the incident, including Green's apparent intoxication and the report by the citizen witness. Even if that reference might not have met the threshold necessary to establish probable cause in the warrant affidavit itself, the affidavit was not so lacking in the indicia of probable cause that it was unreasonable for the officers executing the warrant to rely on it.

Green's argument that the State cannot establish the applicability of the good-faith exception is unavailing. He argues that the affidavit could not have been reviewed by "a knowledgeable government attorney or by a police officer trained and knowledgeable in the requirements of probable cause and reasonable suspicion" because such a person would have realized that the probable cause statement was lacking. (Green's Br. 22–23.) But the logic underpinning this reasoning would read the good faith exception out of existence entirely. If police can rely in good faith on a warrant issued in

the absence of probable cause only if it was reviewed by an appropriately trained officer or attorney, and if courts assume—as Green would have them do—that an officer or attorney who fails to identify the probable cause error was not adequately trained, the good faith exception would never apply. Myriad cases, including *Eason*, say otherwise. *See, e.g.*, *Eason*, 245 Wis. 2d 206, ¶ 72; *Scull*, 361 Wis. 2d 288, ¶ 44; *State v. Dearborn*, 2010 WI 84, ¶ 49, 327 Wis. 2d 252, 786 N.W.2d 97; *Marquardt*, 286 Wis. 2d 204, ¶ 55.

Green further argues that *Eason* requires someone other than the affiant to review an affidavit for the good-faith exception to be available to the State. (Green's Br. 23.) While *Eason* can be interpreted as including such a requirement, *see Eason*, 245 Wis. 2d 206, ¶ 63 (citing Donald Dripps, *Living With Leon*, 95 Yale L.J. 906, 932 (1986)), *Eason* also expressly stated that review by the magistrate, court commissioner, or judge issuing the warrant was not sufficient but made no similar pronouncement regarding the ability of an officer trained in the Fourth Amendment to review his own affidavit. *See Eason*, 245 Wis. 2d 206, ¶ 63 n.29. This omission suggests that review by the affiant himself meets this requirement, as long as the affiant is an officer or attorney trained in Fourth Amendment law.[5]

Regardless of this Court's original intent in creating this requirement in *Eason*, this Court should now clarify that in a situation where an officer has substantial training, his or her preparation and review of the warrant affidavit is sufficient to meet the *Eason* requirement. This holding is appropriate for at least two reasons. First, it is consistent

[5] Although Officer Poffenberger's training and experience appear not to have been discussed at any of the hearings related to Green's motion to suppress, he testified in the 2018 trial that he had been an officer with the Kenosha Police Department for "over 11 years." (R. 165:39.)

with achieving the goals set out in *Living With Leon*, the article underlying the *Eason* requirements. *Living With Leon* discussed the need to reject or defer "[u]nsound applications . . . until a stronger showing can be made." *Living With Leon*, 95 Yale L.J. at 932–33. Preparation of a warrant affidavit by an officer well-versed in Fourth Amendment law achieves this result just as well as review of the warrant affidavit by a third party well-versed in Fourth Amendment law.

Second, such a holding acknowledges the practical circumstances that police face when obtaining search warrants in OWI cases. Notably, *Eason* was decided before *Missouri v. McNeely*, 569 U.S. 141 (2013), which held that the natural dissipation of alcohol in the bloodstream of a suspect was not a per se exigency that justified an exception of the warrant requirement. Following *McNeely*, police must obtain a search warrant in virtually every OWI case where the suspect does not consent to a blood draw.[6] These warrants are often sought late at night and when time is of the essence. A requirement that police officers have a third party review every such warrant application is almost certainly not the intent behind *Eason*.

Green next argues that exclusion is required because "there was police misconduct as required under *Leon*" in this case. (Green's Br. 24.) The "misconduct" in question? Unclear. Green faults the police for their reliance on the warrant because, he says, the warrant affidavit lacked probable cause. But as discussed, the police undoubtedly had probable cause to obtain the warrant. If Officer Poffenberger failed to include all the necessary facts in the warrant affidavit, such failure was not "misconduct," it was a simple, honest mistake.

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[6] Exigent circumstances may still justify an exception to the warrant requirement in certain cases, such as where an OWI suspect is unconscious. *See, e.g.*, *Mitchell v. Wisconsin*, 139 S. Ct. 2525 (2019).

Green's cited cases do not mandate his desired outcome, either. Green points to cases such as *Evans*,[7] *Herring*,[8] *Kerr*,[9] and *Burch* as support, claiming that the "central theme" is that "the investigating officers did absolutely nothing improper." (Green's Br. 30.) But none of those cases sets the outer limit for the applicability of the good-faith exception to the exclusionary rule; they offer only examples of the good-faith exception in action.

The true "central theme" of the good-faith exception to the exclusionary rule is not the absolute lack of police culpability, it is the need for deterrence. "[W]hen the police act with an objectively 'reasonable good-faith belief' that their conduct is lawful, or when their conduct involves only simple, 'isolated' negligence, the 'deterrence rationale loses much of its force,' and exclusion cannot 'pay its way.'" *Davis*, 564 U.S. at 238 (citations omitted). Query whether Officer Poffenberger's inarticulately stating where Green drove drunk was misconduct in need of deterrence or "simple, isolated negligence." It must be the latter; Officer Poffenberger gained nothing by writing the word "driveway" on the warrant affidavit. Exclusion under these circumstances would not deter misconduct, it would only punish an honest mistake.

In sum, probable cause supported the issuance of the warrant, and the police officers' reliance on that warrant was reasonable. Even if the totality of the facts supporting a probable cause determination were not included in the affidavit in support of the warrant, the good-faith exception to the exclusionary rule should apply.

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[7] *Arizona v. Evans*, 514 U.S. 1 (1995).

[8] *Herring v. United States*, 555 U.S. 135 (2009).

[9] *State v. Kerr*, 2018 WI 87, 383 Wis. 2d 306, 913 N.W.2d 787.

C. Alternatively, the blood draw evidence is admissible under the doctrine of inevitable discovery.

1. Under the doctrine of inevitable discovery, otherwise excluded evidence may be admissible if police would have discovered it by lawful means.

Finally, another well-established exception to the exclusionary rule is the inevitable discovery doctrine. *See Nix v. Williams*, 467 U.S. 431, 444 (1984). Under this doctrine, evidence that police seize that "is tainted by some illegal act may be admissible" if police would have discovered that tainted evidence by lawful means. *State v. Jackson*, 2016 WI 56, ¶ 47, 369 Wis. 2d 673, 882 N.W.2d 422 (citing *State v. Lopez*, 207 Wis. 2d 413, 427, 559 N.W.2d 264 (Ct. App. 1996)). In order to establish the applicability of the inevitable discovery doctrine, the State must show by a "preponderance of the evidence that it inevitably would have discovered the evidence sought to be suppressed" even in the absence of the constitutional violation. *Id.* ¶ 66.

2. Even if the circuit court had not issued the warrant based on the allegedly deficient affidavit, police still would have lawfully obtained the evidence because they would have revised the warrant affidavit.

It is clear that police would have been able to legally obtain a sample of Green's blood even in the absence of the allegedly unlawful warrant. If the court had denied Officer Poffenberger's warrant application because the affidavit lacked an allegation that Green had driven in the street, Officer Poffenberger easily could have updated the affidavit with the relevant facts and resubmitted it. There is no question that the court would have issued the warrant, and

there is no question that a warrant issued on all the probable cause in this case would have been valid.

This Court recently addressed the inevitable discovery doctrine in *Jackson*. There, the court held that, for the inevitable discovery doctrine to apply, the State must prove by a preponderance of the evidence that law enforcement would have inevitably discovered by lawful means the evidence sought to be suppressed. *Jackson*, 369 Wis. 2d 673, ¶ 66. To meet that burden, the *Jackson* court explained, the State need not prove that police were actively pursuing alternate lines of investigation or the absence of bad faith in the officer's illegal conduct. *Id.* ¶¶ 66, 70.

In *Jackson*, police illegally interrogated Jackson during a murder investigation. After that interrogation, Jackson led police to her home, where police were already executing a valid warrant, and led her interrogators to incriminating evidence. *See Jackson*, 369 Wis. 2d 673, ¶ 2. The court held that the State showed that, had police done everything correctly and not violated Jackson's rights, they would have still found the evidence in executing the valid search warrant. *Id.* ¶¶ 87–89.

This Court's decision in *Jackson* brought the inevitable discovery doctrine in closer alignment with a "closely related" doctrine, independent source. *See id.* ¶ 52; *State v. Carroll*, 2010 WI 8, ¶¶ 43–44, 322 Wis. 2d 299, 778 N.W.2d 1. The independent source doctrine is borne from the principle that "[w]hen the challenged evidence has an independent source, exclusion of such evidence would put the police in a worse position than they would have been in absent any error or violation." *Murray v. United States*, 487 U.S. 533, 537 (1988) (quoting *Nix*, 467 U.S. at 443). "So long as a later, lawful seizure is genuinely independent of an earlier, tainted one . . . there is no reason why the independent source doctrine should not apply." *Id.* at 542; *accord Carroll*, 322 Wis. 2d 299, ¶ 44.

When a warrant is involved, under either an independent-source or inevitable-discovery inquiry, the State may satisfy its burden by showing that law enforcement possessed probable cause to obtain a warrant absent the tainted evidence. *See Jackson*, 369 Wis. 2d 673, ¶¶ 76–77; *see also Carroll*, 322 Wis. 2d 299, ¶ 44 ("As applied to circumstances where an application for a warrant contains both tainted and untainted evidence, the issued warrant is valid if the untainted evidence is sufficient to support a finding of probable cause to issue the warrant."). Under this inquiry, courts may review the untainted portions of a warrant affidavit to determine if such probable cause existed. *Jackson*, 369 Wis. 2d 673, ¶¶ 76–77; *Carroll*, 322 Wis. 2d 299, ¶ 44.

Here, although the facts do not implicate the independent-source doctrine, the lessons of *Jackson* and its references to *Carroll* are still apt. As in *Jackson*, police could have—and certainly would have—discovered the evidence even in the absence of any constitutional violation because if the court rejected the initial warrant application for failing to allege Green drove on a highway, police could have corrected the error and obtained a lawful warrant based on probable cause. (R. 161:6–7.) Police established this probable cause without the aid of any tainted evidence. (R. 161:7–8.) There is no reason to "put the police in a worse position than they would have been in absent any error or violation." *See Nix*, 467 U.S. at 443.

CONCLUSION

For the reasons discussed, the State respectfully requests that this Court affirm the court of appeals.

Dated this 16th day of December 2021.

Respectfully submitted,

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FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § (Rule) 809.19(8)(b), (bm) and (c) for a brief produced with a proportional serif font. The length of this brief is 6,257 words.

Dated this 16th day of December 2021.

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CERTIFICATE OF EFILE/SERVICE

I certify that in compliance with Wis. Stat. § 801.18(6), I electronically filed this document with the clerk of court using the Wisconsin Supreme Court and Court of Appeals Electronic Filing System, which will accomplish electronic notice and service for all participants who are registered users.

Dated this 16th day of December 2021.

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