**STATE OF WISCONSIN**
**COURT OF APPEALS**
**DISTRICT II**

---

**Appellate Case No. 2024AP2629-CR**

---

**STATE OF WISCONSIN,**

Plaintiff-Respondent,

-vs-

**TIMOTHY J. PETRIE,**

Defendant-Appellant.

---

**APPEAL FROM A JUDGMENT OF CONVICTION ENTERED IN THE CIRCUIT COURT FOR CALUMET COUNTY, BRANCH I, THE HONORABLE JEFFREY S. FROEHLICH PRESIDING, TRIAL COURT CASE NO. 2023-CT-69**

---

# REPLY BRIEF OF DEFENDANT-APPELLANT

---

**MELOWSKI & SINGH, LLC**

Sarvan Singh, Jr.
State Bar No. 1049920

524 South Pier Drive
Sheboygan, Wisconsin 53081
Tel. 920.208.3800
Fax 920.395.2443
sarvan@melowskilaw.com

## ARGUMENT

### I. THE "INDEPENDENT SOURCE" AND "FRUIT OF THE POISONOUS TREE" DOCTRINES ARE *FACT*-BASED INQUIRIES WHICH REQUIRE TESTIMONY, AND AS SUCH, THE LOWER COURT COMMITTED REVERSABLE ERROR WHEN IT MADE FINDINGS OF FACT WITHOUT AFFORDING MR. PETRIE THE RIGHT TO CONFRONT HIS ACCUSER REGARDING THE VERY FACTS WHICH GIVE RISE TO THE APPLICATION OF THESE DOCTRINES.

In the court below, Mr. Petrie unequivocally moved the circuit court to suppress not only the preliminary breath test in this matter, but additionally, under the fruit of the poisonous tree doctrine, the evidence which was gathered after the unconstitutional seizure of his breath. R13 at pp. 8-9, ¶¶ 17-18.

In its brief and conclusory rebuttal, the State posits that because Mr. Petrie's counsel made a statement during oral argument that the issue before the court was a "fairly narrow" one, somehow—and it does not explain *how*—any further inquiry into the application of the fruit of the poisonous tree doctrine and the State's "independent source" rebuttal is foreclosed. State's Response Brief, at p.7 [hereinafter "SRB"].[1] This position misapprehends the law related to the application of these doctrines because they are questions of constitutional *fact*, and as such, should have permitted Mr. Petrie to cross-examine the arresting officer in this matter.

As a starting point, the term-of-art "constitutional fact" must be defined. According to the Wisconsin Supreme Court, a "constitutional fact"

[1] Mr. Petrie will refer to specific pages of the State's brief as though it had been properly paginated under Wis. Stat. § 809.19(8)(bm) which requires "**sequential [Arabic] numbering starting at '1' on the cover**." Wis. Stat. § 809.19(8)(bm) (2025-26). The State begins numbering the pages of its response brief with the notation that its actual page two is page "i," and then continues sequentially therefrom using lower case **Roman** numerals until it reaches its *actual* page four where it begins its Arabic sequence. The State left its cover page unnumbered as well. The State's numbering format is contrary to the statutory rule. Given this discrepancy, Mr. Petrie will, therefore, refer to specific pages of the State's brief not by the erroneous page numbering it employed, but rather, by the page's actual cardinal position if the cover of its brief had been treated as an Arabic numbered page one (1) as it should have been.

> is a **mixed question of law and fact** subject to a two-step standard of review. *State v. Phillips*, 218 Wis. 2d 180, 189, 577 N.W.2d 794 (1998). As we recently explained in *Phillips*, 218 Wis. 2d at 190, **a circuit court determining an issue of constitutional fact must first make decisions regarding pertinent evidentiary or historical facts**. Black's Law Dictionary defines evidentiary facts as "**those facts** which are necessary for determination of the ultimate facts; they are the premises upon which conclusions of ultimate facts are based." Black's Law Dictionary 557 (6th ed. 1990).

*State v. Martwick*, 2000 WI 5, ¶ 16, 231 Wis. 2d 801, 604 N.W.2d 552 (emphasis added). Since findings must "first" be made "regarding *pertinent* evidentiary . . . *facts*," it naturally follows that each party will want to adduce those *facts* favorable to its position while simultaneously cross-examining the source of those facts to take the luster off the opposing party's position. This can only be accomplished through an *evidentiary* hearing—a hearing which Mr. Petrie was never afforded.

In this regard, the State fails to recognize that it hoisted itself upon its own petard when it proffered its argument. More specifically, the State relied upon *State v. Van Linn*, 2022 WI 16, 401 Wis. 2d 1, 971 N.W.2d 478, for the proposition that Mr. Petrie is not entitled to lay the groundwork for his proposition that the independent source doctrine does not apply to the circumstances of his case. SRB at pp. 5-6. Remarkably, the State utterly overlooked (or wholly ignored) that the *Van Linn* court treated the "independent source" question before it as a "question of 'constitutional **fact**.'" *Van Linn*, 2022 WI 16, ¶ 10 (emphasis added). If the "constitutional fact" standard of review was appropriately applied in *Van Linn*, then Mr. Petrie enjoyed the right to establish those facts favorable to his position through an evidentiary hearing.

Notably, in reaching its conclusion regarding the application of the independent source doctrine to the facts of Van Linn's case, the court observed:

> It follows that excluding illegally obtained evidence "does not mean that the facts thus obtained become sacred and inaccessible," provided **the State's knowledge of them is gained from a source unrelated to the State's illegal conduct**.
>
> That idea is the foundation of the independent-source doctrine. The doctrine is an exception to the exclusionary rule in that it allows for the admissibility of evidence or information tainted by an illegal evidence-gathering activity **when the State otherwise acquires the same information-or**

> **"rediscover[s]" it-by lawful means "in a fashion untainted" by that illegal activity**.

SRB at pp. 6-7 (citations omitted; emphasis added). Undoubtedly, the determination of whether the State's *knowledge* has been gleaned from a *source unrelated* to the State's illegal conduct *in a fashion untainted* by that illegal activity presents questions of *fact*. To identify a few of these questions by way of example: What was the officer's source? Was it truly independent of the underlying investigation? What was the extent of the officer's knowledge at the time? In the absence of the illegally-obtained evidence, was it even possible for it to be "rediscovered"?

Instead of affording Mr. Petrie an opportunity to explore these questions, the circuit court simply "took as gospel" the facts set forth in the criminal complaint. *This is where Mr. Petrie's argument germinates*. How was Mr. Petrie afforded a meaningful opportunity to rebut the inferences the circuit court drew from the complaint if he is not permitted an opportunity to rebut the same by cross-examining the arresting officer?

Similarly, the application of the fruit of the poisonous tree doctrine is also a question of constitutional *fact*. As the Wisconsin Supreme Court noted in *State v. Anson*, 2005 WI 96, 282 Wis. 2d 629, 698 N.W.2d 776, "[t]he question of whether evidence is the fruit of a prior constitutional violation or whether 'the evidence was sufficiently attenuated so as to be purged of the taint' is one of **constitutional fact**." *Id.* ¶ 18 (emphasis added), quoting *State v. Hajicek*, 2001 WI 3, ¶ 25 n.7, 240 Wis. 2d 349, 620 N.W.2d 781, citing *State v. Anderson*, 165 Wis. 2d 441, 447-48, 477 N.W.2d 277 (1991). Like the independent source doctrine, if the application of the fruit of the poisonous tree doctrine raises a question of constitutional *fact*, due process afforded Mr. Petrie the right to confront his accusers regarding the basis for the application of the doctrine to the circumstances of his case. By failing to afford him this opportunity, the circuit court committed a reversible error.

## CONCLUSION

The State has failed to recognize that the lower court made findings of fact without offering Mr. Petrie an opportunity to confront his accusers. The State's ignoring the unconstitutionality inherent in a court making findings of fact based

only upon a criminal complaint is fatal to its rebuttal, and merits reversal of the lower court's decision.

Dated this 22nd day of April, 2025.

Respectfully submitted:

**MELOWSKI & SINGH, LLC**

Electronically signed by:
**Sarvan Singh, Jr.**
State Bar No. 1049920
Attorneys for Timothy J. Petrie
Defendant-Appellant

## CERTIFICATION OF LENGTH

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b), (bm), and (c) for a brief. The length of this brief is 1,383 words.

Finally, I hereby certify that I have submitted an electronic copy of this brief which complies with the requirements of Wis. Stat. § 809.19(12).

Dated this 22nd day of April, 2025.

**MELOWSKI & SINGH, LLC**

Electronically signed by:
**Sarvan Singh, Jr.**
State Bar No. 1049920
Attorneys for Timothy J. Petrie
Defendant-Appellant