STATE OF WISCONSIN CIRCUIT COURT BROWN COUNTY

In the Matter of the Return of Property
to Ronald Van Den Heuvel Case No. 2015CV1614

VAN DEN HEUVEL'S RESPONSE TO STATE'S REPLY TO MOTION FOR RETURN OF PROPERTY

The state's initial position is that the petitioner's motion should be denied because the state will need the seized items as evidence in a future criminal prosecution.

The state does not contest that a motion for return of property is the appropriate procedure for a person not charged with a crime to seek the return of property seized by the police. *See, e.g., Supreme Video v. Schauz*, 808 F. Supp. 1380 (E.D. Wis. 1990). This is in fact the manner in which the Wisconsin Supreme Court addressed some of the claims brought by the petitioners in the recent John Doe litigation. *See, State ex. rel. Two Unnamed Petitioners v. Peterson*, 2015 WI 85, ¶11, 12, 29, 95, 363 Wis. 2d 1, 866 N.W.2d 165 (affirming John Doe judge's granting of motion for return of property under Wis. Stats. §968.20 where no charges had been brought against the moving parties, who were subjects of the investigation).

The state's position is that the seized items are needed as evidence. The petitioner's position is that the items have been illegally seized in violation of the Fourth Amendment and thus cannot be used, or needed, as evidence in any future prosecution. The petitioner's motion, in essence, presents a motion to suppress evidence brought prior to the issuance of

charges. There is no question that the petitioner is entitled to seek such a remedy at this time. The Court should address the merits of the motion.

On the merits, the petitioner's first claim is that the warrants on their face are overbroad with respect to the seizure of documents, and the seizure and searching of computers. The state responds by invoking the "permeated by fraud" doctrine as set forth in *State v. Lacount*, 310 Wis. 2d. 85, 750 N.W.2d 780 (2008) and *State v. Desmidt*, 155 Wis. 2d 119, 454 N.W.2d 780 (1990). For several reasons, those cases do not serve as an adequate basis to find that the search warrants issued here, or their execution, were in compliance with the Fourth Amendment prohibition against general warrants and searches.

First, the permeated by fraud exception to the Fourth Amendment particularity requirement is certainly the minority legal position, at least when compared to the weight of authority prohibiting general warrants, as set forth in the petitioner's opening brief (pgs. 5-11). It does not appear that the United States Supreme Court has specifically adopted the permeated by fraud exception although, as cited by the state, the concept is generally referred to in a footnote in *Anderson v. Maryland*, 427 U.S. 463, 480 n.10, 96 S. Ct 2737, 49 L. Ed. 2d 267 (1976).

Second, the affidavit, although lengthy, establishes that the warrant could have been more narrowly drafted to focus on the alleged offenses set forth. In fact, those alleged frauds are quite capably and specifically set forth in the state's reply brief, which summarizes the allegations in the affidavit as follows: "[t]he affidavits contain allegations demonstrating that

once Mr. Van Den Heuvel obtains investments and loans from others for his Green Box entities, he uses the funds for personal expenditures and personal debts. *Id.* at ¶7-26. These specific investment and loan conversion allegations include: Dr. Marco Arajuo's $600,000 equity investment into Green Box, WEDC's $1,300,000 loan for Green Box, foreign EB-5 investments into Green Box, Ken Dardis's $500,000 investment into Green Box, Dodi Management, LLC $100,000 investment into Green Box." Reply Brief, p. 11-12.

The face of the warrant could have and should have been limited to those alleged offenses.

Third, as the petitioner has pointed out, the face of the warrant does not even specifically delineate one of the alleged offenses, which is described as "securities fraud," but cites the entire Chapter 551 of the Wisconsin Uniform Securities Laws.

Fourth, the affidavit contains many facts which support the conclusion that the petitioner was running a legitimate business. These include the employment of legitimate employees, such as a chief financial officer, and the ownership of legitimate assets.

And fifth, in arguing for the permeated by fraud exception, the state does not address the petitioner's claim that the warrant contains no protocol for the searching of the numerous computers and devices that were seized.

For these reasons, the Court should reject the application of the permeated by fraud exception, and find that the warrants on their face were overbroad.

The petitioner's second legal claim is that, even if the warrants contained adequate specificity, those parameters were flagrantly disregarded by the police.

The state does not specifically address this argument, nor does the state submit any affidavits or factual submissions to dispute the scope of the illegal seizures as set forth in the affidavits contained in the petitioner's appendix of exhibits.

Presumably the state's position on the scope of the seizures is encompassed in its position that the permeated by fraud exception applies. But even the permeated by fraud exception cannot justify seizures that go well beyond the scope of the warrant issued by Judge Zuidmulder. Those seizures are set forth in the petitioner's supporting exhibits, and are summarized at pages 14-21 of the petitioner's opening brief.

In addition to the vast array of business records seized, no reasonable officer could have believed that the items seized concerning the petitioner's family – as set forth in the sealed affidavit – were authorized by Judge Zuidmulder's warrant.

Moreover, the affidavits establish that the police physically removed computers (as opposed to copying them), seized the personal devices of numerous employees (yet to be returned), and disabled data lines at the Green Box office. Again, the state has submitted no factual submissions to the contrary. Such conduct, the petitioner asserts, firmly establishes that the police flagrantly disregarded the terms of the warrant. The remedy is to suppress all of the evidence seized. *See, State v. Pender*, 2008 WI App 47, ¶9, 308 Wis. 2d 428, 748 N.W.2d 471; *State v. Rindfleisch*, 2014 WI App 121, ¶22, 359 Wis. 2d 147, 857 N.W.2d 456.

The state's final position is that, even if the Court finds the warrants and/or the subsequent seizures to have been illegal, the good faith exception to the Fourth Amendment exclusionary rule would apply.

The petitioner disagrees that the good faith exception applies. The petitioner asserts that the warrants were general warrants, and any reasonable investigator or prosecutor could not have believed otherwise under long standing Supreme Court precedent. Moreover, as indicated, any limitations contained on the face of the warrants were flagrantly disregarded by the police, and this was not done in good faith.

If the good faith exception is reached by the Court, it will require an evidentiary hearing at which the state will have the burden of proving that the exception applies.

Dated at Milwaukee, Wisconsin this 24th day of November, 2015.

Respectfully submitted,

RON VAN DEN HEUVEL

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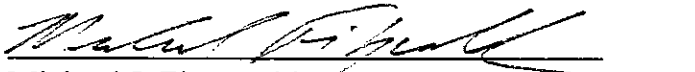

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