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STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

Case No. 2014AP001980-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

DAVID JEROME GANT,

Defendant-Appellant.

On Notice of Appeal to Review a Judgment of Conviction Entered in the Circuit Court for Milwaukee County, the Honorable Ellen R. Brostrom, Presiding.

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

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ISSUE PRESENTED

Police seized multiple computers from Mr. Gant's home following the apparent suicide of his wife, based on a "general interest" that evidence related to her death might be found on the computers. Police never requested a warrant to search the computer for anything related to his wife's death, but nevertheless held the computers for over ten months, at which point police obtained a warrant to search one of the computers, after police obtained information suggesting that Mr. Gant may have been in possession of child pornography. Did the circuit court err in denying Mr. Gant's motion to suppress the evidence obtained from the computer seized from his home?

The circuit court denied Mr. Gant's motion to suppress following a hearing.

STATEMENT ON PUBLICATION AND ORAL ARGUMENT

Mr. Gant would welcome oral argument. Publication is warranted to develop the law concerning such a lengthy delay between the seizure of evidence and police obtaining a search warrant, and the effect such a delay has on the admissibility of the evidence gathered following a subsequently-obtained warrant.

STATEMENT OF THE FACTS AND CASE

Police responded to Mr. Gant's home on the evening of September 28, 2010 after he discovered his wife hanging in their basement from an apparent suicide. (40:26;App.109[1]). Police seized three computers from their home that evening, without a warrant and without Mr. Gant's consent. (40:33-34,43;App.116-17,126). Police never obtained a warrant to search the computers for anything related to his wife's death, which was confirmed as a suicide by the medical examiner within two days. (40:38-39;App.121-22). The police nevertheless kept the seized computers and denied Mr. Gant's requests to retrieve his computer. (40:78-80;App.161-63). On August 15, 2011—over ten months after police initially seized the computers—police obtained a search warrant to search Mr. Gant's computer after allegations arose that Mr. Gant may have been in possession of child pornography. (40:69;App.152).

A. Case History

The State ultimately charged Mr. Gant with ten counts of possession of child pornography, in violation of Wisconsin Statute § 948.12(1m), for files found on the computer. (2).

Mr. Gant filed a motion to suppress all evidence recovered from the computer and its hard drives. (4). Mr. Gant argued that (1) police lacked a legal basis to seize the computer in the first place; (2) the length of the seizure of the computer without a warrant was unconstitutional; and (3) the warrant obtained many months later on a basis independent from the original seizure did not remedy the illegality of the illegal seizure. (4).

The circuit court, the Honorable Ellen R. Brostrom presiding, denied the motion to suppress following an

[1] The names of children discussed at this hearing have been redacted from the portion of the motion hearing transcript included in the Appendix for privacy purposes.

evidentiary hearing. (40;App.104-185). Following denial of the suppression motion, Mr. Gant entered a plea: in exchange for his plea to the charges in this case, the State agreed to recommend a substantial term of imprisonment and dismiss and read in the charges in three other cases.[2] (41).

The circuit court subsequently sentenced Mr. Gant to ten years initial confinement followed by ten years of extended supervision on each count, with the counts running consecutively for a total length of sentence of one-hundred years initial confinement followed by one-hundred years of extended supervision. (42).

B. The Motion to Suppress Hearing

The State called five witnesses at the suppression hearing, three detectives and two officers. The defense called Mr. Gant as their sole witness.

1. Detective Matthew Goldberg

Detective Goldberg testified that he responded to Mr. Gant's home at about 9:30 pm on September 28, 2010 following Mr. Gant's wife's apparent suicide by hanging in the basement of their home. (40:25-26;App.108-09). Though it was an apparent suicide, police treated the scene like a homicide. (40:26-27;App.109-10). Detective Goldberg stated that someone else at the scene interviewed the Gant's young daughter, who told police that Mrs. Gant had been on a

[2] Pursuant to the agreement, the charges from the following cases were dismissed and read in: Milwaukee County Case Numbers 10-CF-5472 (one count of exposing genitals, in violation of Wisconsin Statute § 948.10(1)), 10-CF-5473 (one count of battery to law enforcement officer in violation of Wisconsin Statute § 940.20(2) and one count of resisting/obstructing an officer in violation of Wisconsin Statute § 946.41(1), and 11-CF-3442 (one count of first degree sexual assault of a child in violation of Wisconsin Statute Section § 948.02(1)(b) and one count of felony bail jumping in violation of Wisconsin Statute § 946.49(1)(b)). (41).

computer prior to her death. (40:27-31;App.110-14). However, Detective Goldberg clarified on cross examination that their daughter had simply told police that her mother had been playing a "Dora computer game," and that it was unclear at what point or on which computer in the house her mother had done so. (40:35-36;App.118-19). Detective Goldberg acknowledged that the statement by their daughter had nothing to do with the police's seizure of the computers. (40:36;App.119).

Detective Goldberg further explained that in a case of apparent suicide, he looks for computers at the scene since the police "frequently…find notes that are on the computer." (40:31;App.114). He testified that police found multiple computers at the home: "I think, two computers were in the basement and there was another computer upstairs, and there were two or three separate hard drives as well, but I don't remember where they were." (40:31;App.114). Detective Goldberg testified that, later that evening, possibly after midnight, he "confiscated the computers and conveyed them to the Police Administration Building" and "placed them on inventory," including the computers in the basement. (40:31,33-34;App.114,116-17).

When the State asked Detective Goldberg whether the computers in the basement would "have any special interest" to him, the detective answered: "None of any special interest to me. Just a general interest in a case there was [sic] a suicide note or other evidence on the computer." (40:31;App.114).

He testified that, when seized from a scene, computers are stored in the police warehouse and that "if it's determined necessary, we'll try and obtain consent to search the computer, barring—or if we're unable to obtain consent, then someone would offer a search warrant to search the computers." (40:32;App.115). When asked whether, to his knowledge, anyone in his department attempted to get a search warrant to view the computer to look for a suicide

note, he answered: "I assume a warrant was written, but I didn't have any part of that investigation, that part of it." (40:37;App.120). He further explained that he was told that there was a search warrant written, but did not know whether it was specifically to look for a suicide note. (40:37;App.120). He testified that he "assumed" that the warrant issued in August of 2011 was the warrant he was told about. (40:37;App.120).

Detective Goldberg acknowledged that police needed probable cause to seize a computer, and testified that here he believed the probable cause would have been to look for a suicide note; however, he did not know what if anything was done to actually look for a suicide note. (40:38;App.121).

He further acknowledged that Mrs. Gant's death was ruled a suicide by the medical examiner within a day or two. (40:38-39;App.121-22). He testified that he believed that the investigation of her death continued even after her death was ruled a suicide. (40:40;App.123). He also testified, however, that someone would have had to ask the "high tech unit" to search the computer, and that to his knowledge, no one asked them to do so prior to August of 2011. (40:44;App.127).

Detective Goldberg explained that he did not talk with Mr. Gant and did not remember whether he spoke with another detective about whether Mr. Gant had given consent to search the computers. (40:36;App.119).The State, through Detective Goldberg, read into the record a consent form signed by Mr. Gant which provided police with consent to search the house, car, and his cell phone, but *not* the computers: "The part that says 'My personal computers, electronic storage devices, peripheral data storage devices, manuals, books, or any other related materials to include an examination of any data stored,' that's crossed out. And it says, 'No consent on computers,'" (40:43;App.126).

2. Officer Deborah Kranz

The circuit court took judicial notice of the complaint issued in Milwaukee County Case Number 10-CF-5472, signed on October 31, 2010, which alleged that Mr. Gant, on or about October 23, 2010, exposed his genitals to a child at his home. (40:44-45;App.127-28). The circuit court also took judicial notice of the complaint filed in Milwaukee County Case Number 11-CF-3442, signed for filing on July 25, 2011, alleging first-degree sexual assault of a child on or about July 19, 2011, at another address. (40:51;App.134).

Officer Kranz testified that she was involved in investigating allegations that occurred on or about October 23, 2010. (40:45;App.128). She testified that after that investigation, police received information from the Bureau of Child Welfare that Jason Gant, Mr. Gant's brother, had reported that Mr. Gant had admitted to molesting his children. (40:46-47;App.129-130). Officer Kranz testified that she spoke with Jason Gant on April 5, 2011 and that he reported that Mr. Gant had, four or five months earlier, indicated to him that he had been feeling guilty and that "it came down to molesting his kids." (40:48,54,58;App.131,137,141).[3] She also testified that Jason Gant indicated that Mr. Gant had made a comment about having child pornography on his computer. (40:49;App.132).[4] Officer Kranz testified that Jason Gant told her that Mr. Gant sounded "completely out of it" when they had this conversation, and that his brother had a history of smoking marijuana and mental instability. (40:58;App.141).

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[3] Officer Kranz originally testified that the conversation occurred in March of 2011 but subsequently acknowledged that her report reflected that the conversation took place on April 5, 2011. (40:48;54;App.131,137).

[4] On cross, Officer Kranz acknowledged that the manner in which her report was written could be interpreted to reflect Mr. Gant saying that there was child pornography on his brother's computer. (40:56;App.139).

Officer Kranz stated that she then checked the reports and discovered that police had computers related to the death of Mrs. Gant and did "pass along" the information that there may be child pornography on the computers. (40:50;App.133). However, on cross she acknowledged that she did not direct anyone to search the computer at that point, nor did she see any documentation reflecting that any forms were filled out to search the computer. (40:57-59;App.140-42).

Officer Kranz testified that she spoke with Mrs. Gant's mother on August 1, 2011. (40:50-51;App.133-34). She further testified that at this point police were also investigating the allegation of sexual assault of a child. (40:51-52;App.134-35). She explained that Mrs. Gant's mother informed her that she had used Mrs. Gant's computer, and that the computer had crashed. (40:51;App.134). According to Mrs. Gant's mother, she found a case with discs in them and that "several of them were marked data," so she put one of the discs in the computer thinking it would help restore the computer. (40:51;App.134). She said she got these discs going through the basement of the Gant home, and that she found the discs in "the half of the basement that belonged to David." (40:52;App.135). She said that when she put the disc in the computer "it popped up and there was a young child giving an adult man oral sex." (40:53;App.136). Officer Kranz testified that Officer Jody Young then picked up the discs from Mrs. Gant's mother on August 3rd. (40:53;App.136).

3. Officer Jody Young

Officer Young testified that she picked up 17 discs in a case from Mrs. Gant's mother on August 3, 2011 and turned them over to Officer Kranz. (40:60-61;App.143-44). She further testified that she was also involved in an investigation involving a child in late July, and was aware that Officer Kranz had earlier been involved in investigating a different case with a different child which also allegedly involved Mr.

Gant. (40:63;App.146). Officer Young testified that receiving DVDs which may contain child pornography was significant because "with sexual assault cases, unfortunately, sometimes pornography or child pornography is involved." (40:64;App.147). Officer Young testified that though she was not involved in doing so, police at that point applied for a search warrant for the previously-seized computer (40:64-65;App.147-48).

4. Detective Richard McQuown

Detective McQuown testified that he was provided a copy of the search warrant (which was admitted into evidence as Exhibit 2). (40:68-69;App.151-52). He testified that the search warrant affidavit and search warrant itself were both signed on August 15, 2011. (40:69;App.152). He testified that the search warrant authorized the search of the discs as well as an Antec computer tower, recovered from under the stairs in the basement of the Gant residence. (40:68-70;App.151-53).

5. Detective Dawn Jones

Detective Jones testified that she prepared the warrant to search the property taken from Mr. Gant on September 28, 2010 as well as the subsequently-obtained discs. (40:73;App.156). She testified that when seeking the search warrant, police were not looking for a suicide note. (40:74;App.157). She explained that she first became aware of the allegations and involved with this matter on July 29th, 2011, and that she then reviewed the reports and told Officer Kranz that "everything was on inventory with MPD, that we would be able to apply for the search warrant." (40:76;App.159).

6. Mr. Gant

Mr. Gant testified that approximately one to three weeks after the computers were taken from his home, he and

his brother-in-law, Michael Yager, went to the police department: "the Administration Building. I believe First District is what I call it," which he believed was located on "8th and State." (40:78-80;App.161-63). He testified that when they parked and walked in, the police officer by the metal detectors asked them what they wanted: "we explained that we were there to retrieve property from—that was taken from the house during my wife's sudden death investigation." (40:79;App.162). He testified that the officer called and talked to a detective, "and he said that they said that we couldn't get it yet, get any of the property yet." (40:79;App.162). Mr. Gant testified that he then again went to the same place in February of 2011 and "received the same statement." (40:79-80;App.162-63).

On cross, he explained that when he went to the police department with his brother-in-law, they were not provided a reason why they could not get the property back. (40:81;App.164). Mr. Gant acknowledged that when he returned in February 2011, he at that point had been charged with exposing genitals to a minor. (40:81-82;App.164-65). Mr. Gant denied having a conversation with his brother relating to "matters that" he "felt guilty about." (40:83;App.166).

Mr. Gant also acknowledged that the computer underneath the basement stairs was his computer. (40:84;App.167). Mr. Gant also stated that he was aware that his brother-in-law, who had been living in the basement of Mr. Gant's home, was able to retrieve property that belonged to him (Mr. Gant's brother-in-law) in November of 2010. (40:84-85;App.167-68).

The State asked Mr. Gant where his wife hanged herself in relation to the location of the computer under the stairs

> [T]he stairs themselves and underneath the stairs would be the west central area of the basement between north

> and south, and then she was hanging south and then between east and west. So it would be, I don't know, basically, like an L-shape away from each other because you had the stairs to go around and then all the way over by the washer and dryer and the utility sink.

(40:85;App.168). Mr. Gant testified that after finding his wife he moved her to her brother's bed on the northeast side of the basement, closer to the computer under the stairs. (40:87;App.170).

Mr. Gant testified that the property was taken before he returned to the house after being taken to the police station for questioning, at which point he stated police handed him a document to sign and he refused to give consent to search the computers. (40:82,88;App.165-171).

7. The Circuit Court's Fact-Findings and Conclusions of Law

The circuit court made the following fact-findings concerning the officers at the scene:

> So the officers are called to the scene, there is a dead woman. The Defendant claims she hung herself. The officers don't know if she hung herself. She's no longer hanging. She's laying on a bed, and the Defendant claims that she was—hung herself elsewhere in the basement, that he took her down and moved her to a bed. The officers are required as investigators as serious crime not necessarily to take Mr. Gant's word for it, but to treat it as a homicide investigation, and that is indeed what the first witness testified they did.

(40:97-98;App.180-81). The court noted that "the computers were in plain view. There's no dispute about that." (40:98;App.181).

The circuit court held that police had probable cause to seize the computers based on potential evidence on the computers:

> I don't think it's unreasonable for the officers to assume that the computers may have relevant information to their investigation. For example, a suicide note, which is what the original witness testified to. That was important information because it could potentially exonerate Mr. Gant from a potential homicide.
>
> On the contrary, it could be evidence for an assisted suicide. And in addition, I think that—strike that. So there's—there's probable cause to consider that there is potentially evidence relevant to a crime, sitting there in front of them, and so they seized it.

(40:98;App.181).

The court further held that "[t]here's no case law that says there's sort of a time constraint that they immediately need to apply for a warrant and immediately need to view what's on the computer." (40:99;App.182).

The circuit court made further fact-findings with regard to the subsequent series of events:

> Then the Defendant comes roughly a week or two or three, we don't know exactly when, to the Administration Building with Mr. Yager, and he wants those computers back, but the investigation of a very serious event is ongoing, and he is told this information—these items cannot yet be released.
>
> Very quickly thereafter, within less than a month of the suicide, it is alleged that Mr. Gant commits the first crime, the exposure, and almost exactly a month after the seizure of the computer, that investigation has gotten so far developed that the State believes there's probable cause to charge the Defendant with a crime. And on October 31st, he is, in fact, charged with that exposure count.
>
> So now, all of a sudden, the landscape has changed. I don't think anyone could argue that in a case of alleged exposure of an adult man's penis to a very young child, a computer would not potentially have relevant

> information associated with that. After that, in February, the Defendant goes back to get his computer again, but at that point, he's already been charged with a child sexual abuse crime and is denied.
>
> By April of 2011, there's this conversation with Jason Gant that the officers—this team of officers receives and reacts to, and again, I think it's important to remember the different units, the different officers, the way they work together, the high tech unit separate from the homicide unit, separate from a Sensitive Crimes unit, separate from officers that are on the street. They're allowed to rely on each other, but as a practical matter, these things don't happen at lightening speed.

(40:99-100;App.182-83).

The circuit court held that the computer was "legally seized" at the time police confiscated it. (40:97;App.180). The court further held that the amount of time the computer was held was not unreasonable because "in pretty rapid fashion, while the investigation of the original suicide potential homicide, potential assisted suicide was going on, there was very significant information coming in about Mr. Gant." (40:100-01;App.183-184). The court further noted that police "didn't just open up the computer and read it," but that they ultimately obtained a warrant. (40:101;App.184). The court concluded that the actions of the police were reasonable and denied the motion. (40:97-101;App.180-184).

Mr. Gant subsequently filed a notice of intent to pursue post-conviction relief and notice of appeal, and now appeals the circuit court's decision denying his motion to suppress.[5]

[5] A defendant may appeal an order denying a suppression motion despite a guilty plea. Wis. Stat. § 971.31(10).

ARGUMENT

Both the United States and Wisconsin Constitutions protect "[t]he right of the people to be secure in their persons, houses, papers, and effects" against unreasonable searches and seizures. U.S. Const. amend. IV; Wis. Const. art. I. § 11. The U.S. Supreme Court has held that, in the ordinary case, warrantless seizures of personal property is per se unreasonable under the Fourth Amendment. *See* ***United States v. Place***, 462 U.S. 696, 701 (1983). At the same time, seizures of property "generally are considered less intrusive than searches, based on the type of rights infringed: '[a] seizure affects only the person's possessory interests; a search affects a person's privacy interests.'" ***State v. Brereton***, 2013 WI 17, ¶ 23, 345 Wis. 2d 563, 826 N.W.2d 369 (quoting ***Segura v. United States***, 468 U.S. 796, 806 (1984)).

The State bears the burden of proving that the search and seizure at issue falls within one of the few, "narrowly-drawn exceptions." ***State v. Milashoski***, 159 Wis. 2d 99, 110-11, 464 N.W.2d 21 (Ct. App. 1990).

In reviewing the denial of a motion to suppress evidence, this Court will uphold a circuit court's fact-findings unless clearly erroneous. ***State v. Sveum***, 2010 WI 92, ¶ 16, 328 Wis. 2d 369, 787 N.W.2d 317. On the other hand, the "question of whether police conduct violated the constitutional guarantee against unreasonable searches and seizures is a question of constitutional fact" which this Court reviews independently. ***Id.*** (quoting ***State v. Arias***, 2008 WI 84, ¶ 11, 311 Wis. 2d 358, 752 N.W.2d 748).

Mr. Gant does not challenge the circuit court's fact-findings, but does assert that under those facts police lacked any lawful basis to seize and keep his computer for over ten months, and further, that the subsequently-obtained search warrant was insufficient to dissipate the taint of the flagrancy of the police action.

I. Police Had No Lawful Basis to Seize Mr. Gant's Computer Following His Wife's Suicide.

"Probable cause requires an assessment of whether, under the totality of the circumstances, given all the facts and circumstances…there is a fair probability that contraband or evidence of a crime will be found in a particular place." ***State v. Sutton***, 2012 WI App 7, ¶ 10, 338 Wis. 2d 338, 808 N.W.2d 411 (quoting ***State v. Sveum***, 2010 WI 92, ¶ 24, 328 Wis. 2d 369, 390-91, 787 N.W.2d 317).

> Where law enforcement authorities have probable cause to believe that a container holds contraband or evidence of a crime, but have not secured a warrant, the Court has interpreted the [Fourth] Amendment to permit seizure of the property, *pending issuance of a warrant* to examine its contents, *if the exigencies of the circumstances demand it or some other exception to the warrant requirement is present*.

Place, 462 U.S. at 701 (emphasis added).

In ***United States v. Place***, 462 U.S. 696, the United States Supreme Court held that, if police do not have probable cause to seize a container, then "the principles of ***Terry***[6] and its progeny" would allow the police to detain the container "briefly to investigate the circumstances that aroused its suspicion, provided that the investigative detention is properly limited in scope." ***Id.*** at 706.

Here, police had neither probable cause nor reasonable suspicion to seize the computers from the Gant home. Both standards require *specific* facts suggesting a link between the computers and criminal activity. The State presented no specific facts which suggested any link whatsoever between the computers in the home and criminal activity. Though the State attempted to suggest that their young daughter's statement that her mother had used the computer was

[6] ***Terry v. Ohio,*** 392 U.S. 1 (1968).

relevant, Detective Goldberg, who seized the computers, made clear that their daughter simply told police her mother had been playing a "Dora" computer game at some point on one of the computers, though police did not know when or on which computer. (40:35-36;App.118-19). And he acknowledged that the daughter's comment had nothing to do with the seizure of the computers. (40:36;App.119). Even further, Detective Goldberg, who seized the computers, explicitly rejected the idea that the computers in the basement had any "special interest" to him at all, and explained that instead he just had a "general interest" in case there was a "suicide note or other evidence on the computer." (40:31;App.114).

To accept the State and circuit court's rationale—that police had probable cause to seize all of the computers because perhaps a suicide note could be found—would be to conclude that an apparent suicide in-and-of-itself *always* creates probable cause to seize any and all computers located in the home where the person is discovered. If some persons who commit suicide leave a note on a computer, then presumably other persons who commit suicide leave a note on a piece of paper. Does this mean that any time police respond to an apparent suicide, police have probable cause to seize every piece of paper in the house?

In concluding that police had probable cause, the circuit court explained that it did not think it was "unreasonable for the officers to assume that the computers *may* have relevant information to their investigation." (40:98;App.181) (emphasis added). The circuit court also held that there was "probable cause to consider that there is *potentially* evidence relevant to a crime." (40:98;App.181) (emphasis added). The problem is, *may* and *potentially* are not the "fair probability" required to establish probable cause.

The State presented nothing more than general speculation as a basis for the seizure, which flies in the face of Fourth Amendment requirements. The police lacked a

lawful basis to seize Mr. Gant's computer from his home, without his consent.

II. Police Had No Lawful Basis to Keep Mr. Gant's Computer for Over Ten Months Prior to Obtaining a Warrant to Search It.

Mr. Gant is unaware of any Wisconsin case law addressing a situation such as this where police have seized an item for one stated purpose, never searched the item, and then continued to hold that item for *months* until they became aware of a new, completely unrelated reason to search the item. The circuit court in this case held that "[t]here's no case law that says there's sort of a time constraint that they immediately need to apply for a warrant and immediately need to view what's on the computer." (40:99;App.182). The circuit court was wrong, as case law makes clear that police *cannot* keep such an item, seized without a warrant, indefinitely, without any effort to obtain a warrant to search it.

In ***United States v. Place***, 462 U.S. 696, the United States Supreme Court held unconstitutional a *90-minute* seizure of a man's luggage to conduct a dog sniff based on reasonable suspicion that the luggage contained illegal drugs. In so doing, the Court acknowledged that the "intrusion on possessory interests occasioned by a seizure of one's personal effects can vary in both its nature and extent." ***Id***. at 705.

Where police do not have probable cause to seize personal property, and are instead acting on reasonable suspicion that a person's property may contain evidence of a crime, the "length of the detention" is central to the analysis of whether the police action was reasonable: "the brevity of the invasion of the individual's Fourth Amendment interests is an important factor in determining whether the seizure is so minimally intrusive as to be justifiable on reasonable suspicion." ***Id.*** at 709. Also central to this analysis is "whether the police diligently pursue their investigation." ***Id.***

The Court concluded that the 90-minute detention of the defendant's luggage rendered the seizure unreasonable and therefore unconstitutional. ***Id.*** at 710.

Even if police do have probable cause to seize something or someone to perform a search, police nevertheless must still have a warrant, unless one of a few "jealously and carefully drawn" exceptions applies. ***State v. Lee***, 2009 WI App 96, ¶ 6, 320 Wis. 2d 536, 771 N.W.2d 373 (internal citations omitted). Indeed, in ***Place***, the U.S. Supreme Court explained:

> Where law enforcement authorities have probable cause to believe that a container holds contraband or evidence of a crime, but have not secured a warrant, the Court has interpreted the Amendment to permit seizure of the property, pending issuance of a warrant to examine its contents, if the exigencies of the circumstances demand it or some other recognized exception to the warrant requirement is present.

Place, 462 U.S. at 701.

Thus, after seizing an item, police must obtain a search warrant within a reasonable period of time. *See, e.g.,* ***Segura v. United States***, 468 U.S. 796, 812 (1984)("[A] seizure reasonable at its inception because based on probable cause may become unreasonable as a result of its duration").

Consider, as an example, the Seventh Circuit's Fourth Amendment analysis of a delay of *six days* from police seizing a man's cell phone to applying for a warrant to search it. In ***U.S. v. Burgard***, 675 F.3d 1029 (7th Cir. 2012), a friend of the defendant's informed police that he had seen sexual images of young girls on the defendant's phone. ***Id.*** at 1031. The friend subsequently text-messaged police when he was with the defendant, and police came and seized the defendant's phone. ***Id.*** The officer who seized the phone wrote a report about the phone and forwarded it to another officer. ***Id.*** Due to "shift differences," the two officers were

unable to speak about the phone for a few days; the day after they did, one officer contacted the U.S. Attorney's office explaining that they intended to draft a warrant. ***Id.*** An armed robbery subsequently occurred, which police then addressed prior to completing the warrant. ***Id.*** A warrant was ultimately completed, and signed by a judge six days after police seized the phone. ***Id.***

The defendant then argued that the evidence obtained from the phone should be suppressed given the six-day delay. ***Id.*** The Seventh Circuit explained that, under the U.S. Supreme Court's holding in ***Place***, courts must "assess the reasonableness of a seizure by weighing the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion." ***Id.*** at 1033 (quoting ***Place***, 462 U.S. at 703)(internal quotations omitted). On the individual's side, the Court explained, the "longer the police take to seek a warrant, the greater the infringement on the person's possessory interest will be." ***Id.*** The Court explained that this is true not only for the obvious reason that more time is a greater infringement, but also because "unnecessary delays" "prevent the judiciary from promptly evaluating and correcting improper seizures." ***Id.***

The Seventh Circuit explained that whether the "person from whom the item was taken ever asserted a possessory claim to it" is also relevant to this analysis, though not essential, as it reflects whether the seizure in fact affected the person's possessory interests. ***Id.***

With regard to the government's interest, the Seventh Circuit explained that the strength of the State's basis for the seizure was a "key factor" in the analysis. ***Id.*** Also central to the analysis is whether police acted with diligence: "When police neglect to seek a warrant without any good explanation for that delay, it appears that the state is indifferent to searching the item and the intrusion on an individual's possesssory interest is less likely to be justifiable." ***Id.***

In ***Burgard***, the Seventh Circuit ultimately concluded that though the defendant had a strong possessory interest in the cell phone, and though there was "police imperfection," the delay was not unreasonable given that the officer's delay was not the "result of complete abdication of his work or failure to see any urgency." ***Id.*** at 1034 (internal quotation omitted).

The differences between the facts of that case and Mr. Gant's case are stark. Here, police had no lawful basis to seize Mr. Gant's computer in the first place. But even if this Court concludes that they did have a lawful basis to seize the computer, they had no lawful grounds to keep the computer for *over ten months* prior to even applying for a warrant.

The evidence the State presented established that the police made no effort to try and obtain a search warrant to look for a suicide note or anything else related to Mrs. Gant's death. *See* (40:32,37;App.115,120). Despite the fact that the medical examiner had confirmed her death a suicide within "a day or two," Detective Goldberg testified that he believed that the investigation of her death continued after that point. (40:40;App.123). The State, however, presented absolutely no evidence to explain what that meant; instead, what the State did establish is that is that no one even attempted to search that computer until police obtained the warrant to search it for child pornography in August of 2011. (40:44;App.127).

The circuit court concluded that the delay was not unreasonable because, "within less than a month of the suicide," it was alleged that Mr. Gant exposed himself to a child and that information was coming in about Mr. Gant "in pretty rapid fashion." (40:97-101;App.180-84). Consider, however, the events in order, and in relation to the date police seized the computers:

Date	**Event**
September 28, 2010	Police arrive to Mr. Gant's home following

	his wife's apparent suicide. (40:25-26;App.108-09).
September 28 or 29, 2010	Police seize the computers from Mr. Gant's home. (40:31,33-34;App.114,116-17).
September 29, 2010	Mr. Gant signs the form denying police consent to search the computers. (40:43;App.126).
September 30-October 1, 2010	Mrs. Gant's death is ruled a suicide. (40:38-39;App.121-22).
Between Approximately October 6 and October 20, 2010 (1-3 weeks after seizure of the computer)	Mr. Gant goes to the police department with his brother-in-law to retrieve his computer, and is told that he cannot have it yet. (40:78-80;App.161-63).
October 31, 2010 (approximately 1 month after seizure of the computer)	The complaint is signed in Milwaukee Case Number 10-CF-5742, charging Mr. Gant with exposing his genitals to a child at his home. (40:44-45;App.127-28).
November, 2010	Mr. Gant's brother-in-law is able to retrieve his own property from the police department. (40:84-85;App.167-68).
February, 2011	Mr. Gant returns to the police department to try and retrieve his computer and is again told he cannot have it. (40:79-80;App.162-63).
April 5, 2011 (approximately 6 months after seizure of the computer)	Officer Kranz speaks with Jason Gant, who allegedly states that Mr. Gant said he felt guilty for molesting his children and further that he made a comment about having child pornography on his computer. (40:48-49,54,58;App.131,137,141).
July 25, 2011	The complaint is signed for filing in Milwaukee Case Number 11-CF-3442, charging Mr. Gant with first-degree sexual assault of a child at a separate address. (40:51;App.134).
July 28 or 29, 2011	Officer Kranz receives a message from Mr.

	Gant's mother "saying that she had some videos regarding David Gant." (40:50;App.133).
July 29, 2011	Detective Jones, who ultimately drafts the warrant and affidavit, first becomes aware of the allegations against Mr. Gant and first becomes involved in the case. (40:76;App.159).
August 1, 2011 (approximately 10 months after seizure of the computer)	Officer Kranz speaks with Mrs. Gant's mother, who indicates that she believes she has found child pornography on a disc in a case in Mr. Gant's "half of the basement." (40:52-53;App.135-36).
August 3, 2011	Officer Young obtains the case containing the 17 discs from Mrs. Gant's mother. (40:60-61;App.).
August 15, 2011 (approximately 10.5 months after seizure of the computer)	The affidavit in support of the warrant to search Mr. Gant's computer is signed, and the warrant itself is signed. (40:69;App.152).

The first mention police received that suggested that Mr. Gant may have been in possession of child pornography did not occur until April 5, 2011—approximately *six months* after the computer was seized. The circuit court pointed to the fact that Mr. Gant was charged with exposing himself to a child about a month after the seizure, but the State presented no evidence to suggest that that offense had anything to with a computer. And even when Officer Kranz did obtain that first information suggesting that Mr. Gant may have been in possession of child pornography, she still did not direct anyone to search the computer at that point. (40:57-59;App.140-42).

So, balancing Mr. Gant's interests against the government's interests: police did not seek a warrant until over ten months after seizing his computer; Mr. Gant made two attempts to retrieve his computer, which reflects that the

seizure "in fact affected" his possessory interest, *see* ***Burgard***, 675 F.3d at 1033; police had no basis to seize the computer in the first place, and attempted to justify the seizure based only on a "general interest" that perhaps there might be information on the computer related to Mrs. Gant's suicide; police then made *no attempt* to obtain a warrant to search it for the information they allegedly seized it to obtain in the first place, and held it for over ten months before obtaining a warrant to search it for child pornography—which police had no idea would even possibly be on the computer until six months after the seizure. The actions of the police in this case were in flagrant disregard of Mr. Gant's Fourth Amendment rights.

III. The Search Warrant Obtained Over Ten Months After the Computer Was Seized Did Not Render the Evidence Retrieved from the Illegally-Seized and Detained Computer Admissible, Given the Flagrant Disregard Shown by Police

The evidence obtained from the computer must be suppressed as fruit of the poisonous tree, given the flagrant disregard police showed for Mr. Gant's constitutional rights.

The exclusionary rule requires courts to suppress evidence "obtained through the exploitation of an illegal search or seizure." ***Wong Sun v. United States***, 347 U.S. 471, 488 (1963). "This rule applies not only to primary evidence seized during an unlawful search, but also to derivative evidence acquired as a result of the illegal search, unless the State shows sufficient attenuation from the original illegality to dissipate that taint." ***State v. Carroll***, 2010 WI 8, ¶ 19, 322 Wis. 2d 299, 778 N.W.2d 1.

The question is whether the subsequent seizure is "genuinely independent of an earlier, tainted one." ***Murray v. U.S.***, 487 U.S. 533, 542 (1988). The U.S. Supreme Court and this Court have held that evidence obtained following an unlawful seizure need not be suppressed if a lawful warrant

was subsequently obtained and was based on information gathered independently of the illegal seizure (referred to as the "independent source doctrine), *see*, *e.g.* ***Segura v. U.S.***, 468 U.S. 796 (1984), ***State v. Gaines***, 197 Wis. 2d 102, 113-14, 539 N.W.2d 723 (Ct. App. 1995).

Here, however, the independent source doctrine should not apply given the flagrancy of the police action. As Professor LaFave, quoting Justice Powell, has explained: "The notion of 'dissipation of the taint' attempts to mark the point at which the detrimental consequences of illegal police conduct become so attenuated that the deterrent effect of the exclusionary rule no longer justifies its cost." 6 Wayne LaFave, Search and Seizure: A Treatise on the Fourth Amendment § 11.4(f), at 446 (5th ed. 2012). Thus, the underlying rationale is that suppression becomes unnecessary when the illegality is so separate from the evidence obtained that suppressing the evidence does not actually serve to deter police misconduct.

Here, police exhibited complete disregard for Mr. Gant's Fourth Amendment rights to his property. To say that, under these circumstances, the evidence obtained following the illegal seizure should nevertheless be admissible would be to completely ignore the entire purpose of the exclusionary rule: to deter police misconduct. Not only would this fail to deter the egregious misconduct that occurred in this case— it would actively *encourage* this type of illegal police behavior.

Consider the ramifications: Police are called into a home for one reason or another (perhaps the home of someone with no prior history, or, instead, someone with a criminal history or a person who police suspect—without any admissible evidence—may be involved in criminal activity). Without any lawful basis for believing that a particular piece of property contains evidence of a crime—property such as a computer or cell phone which invariably contains a great deal of personal information—police seize it. Police then hold that property indefinitely. If the person never becomes the suspect

of any criminal behavior, then that property sits indefinitely unless the person is able to retrieve it through a return of property petition. If, on the other hand, that person does become the subject of a separate criminal investigation, then police have immediate access to that person's property.

This Court should make clear that such extreme disregard for a person's Fourth Amendment rights will not be tolerated, and reverse the circuit court's decision denying Mr. Gant's motion to suppress.

CONCLUSION

For these reasons, Mr. Gant respectfully requests that this Court reverse the decision of the circuit court denying his motion to suppress evidence seized from his home following the death of his wife.

Dated this 17th day of November, 2014.

Respectfully submitted,

_____

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CERTIFICATION AS TO FORM/LENGTH

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is: proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line of body text. The length of the brief is 6,857 words.

CERTIFICATE OF COMPLIANCE WITH RULE 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 § 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.

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 17th day of November, 2014.

Signed:

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CERTIFICATION AS TO APPENDIX

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; 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 first names and last initials 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.

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* Children's names have been redacted from this document in the Appendix for privacy purposes.