STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

Case No. 2014AP1980-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 OF PLAINTIFF-RESPONDENT

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ISSUES PRESENTED

Did the circuit court properly deny Gant's motion to suppress child pornography that police seized pursuant to a search warrant for child pornography where the warrant was

issued months after the police had seized Gant's computer from his residence while investigating his spouse's apparent suicide?

Answer: Yes. The circuit court concluded that the police had probable cause to seize Gant's computer (40:98). Further, it found that the amount of time that the police held the computer was not unreasonable and held that no law required the police to immediately apply for a warrant to immediately search it (40:99-100). Finally, because the police did not search the computer until they obtained a warrant, their actions were reasonable. The circuit court denied Gant's motion to suppress the evidence (40:101).

STATEMENT ON PUBLICATION AND ORAL ARGUMENT

The State believes that neither oral argument nor publication is necessary. The parties have fully developed the arguments in their briefs and the issues presented involve the application of well-settled legal principles to the facts.

SUPPLEMENTAL STATEMENT OF THE FACTS

The state will supplement the statement of the facts and case as appropriate in its argument.

ARGUMENT

Even if officers improperly seized or retained Gant's computer, the circuit court properly denied Gant's motion to suppress the child pornography obtained from Gant's computer pursuant to search warrant that stated probable cause.

A. Introduction.

Gant claims that the police lacked probable cause to seize his computer without a warrant during the investigation of his wife's apparent suicide. Gant's brief at 14-16. Even if the seizure was lawful, Gant contends that the detention became unlawful through the failure of the police to timely secure a warrant to search it. Gant's brief at 16-22. Consequently, Gant argues that the circuit court should have suppressed the child pornography seized from his computer through an otherwise valid search warrant. Gant's brief at 22-24.

The State's position is that the officers had probable cause to seize the computers that were in plain view when they responded to Gant's call for assistance to his home following his discovery of his spouse's death. Officers reasonably inventoried the computers and secured them. While Gant may have requested the return of the computers, he did not pursue his statutory remedies for securing their return. Even if the delay in obtaining the search warrant resulted in an unreasonable seizure of Gant's property, exclusion of the child pornography is not an appropriate remedy. The police did not search the computer until they obtained a search warrant based upon an independent source, *i.e.*, a source independent of the basis for the original seizure. In addition, the connection between any unreasonable delay in searching the computer and

the subsequent search of the computer is sufficiently attenuated to dissipate any taint from any allegedly unlawful seizure.

B. Constitutional provisions interpreted.

The Fourth Amendment to the United States Constitution and article I, section 11 of the Wisconsin Constitution 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 Wisconsin Supreme Court has historically interpreted article I, § 11 and its protections against unreasonable searches and seizures in a manner consistent with the United States Supreme Court's interpretations of the Fourth Amendment. *State v. Felix*, 2012 WI 36, ¶ 38, 339 Wis. 2d 670, 811 N.W.2d 775 (finding no reason "to depart from our customary practice of interpreting Article I, Section 11 in accord with the Fourth Amendment").

C. Standard of review.

Whether police conduct violates the guarantee against unreasonable searches and seizures presents a question of constitutional fact. On review, an appellate court independently reviews questions of constitutional facts. But an appellate court will uphold the circuit court's factual findings unless they are clearly erroneous. *State v. Brereton*, 2013 WI 17, ¶ 17, 345 Wis. 2d 563, 826 N.W.2d 369. "A finding is clearly erroneous if 'it is against the great weight and clear preponderance of the evidence.'" *State v. Arias*, 2008 WI 84, ¶ 12, 311 Wis. 2d 358, 752 N.W.2d 748 (citations omitted).

D. Officers had probable cause to seize Gant's computers following his wife's apparent suicide.

1. General legal principles related to probable cause and plain view.

To establish probable cause to search, the State must show a "fair probability" that contraband or evidence of a crime will be found in a particular place. *State v. Robinson*, 2010 WI 80, ¶ 26, 327 Wis. 2d 302, 786 N.W.2d 463 (internal quotation marks and citation omitted). Courts evaluate the existence of probable cause objectively and based upon the totality of the circumstances. *Id*. ¶¶ 26-27. While officers may not always act correctly, they must act reasonably. *Id*. ¶ 26. A probable cause determination may be based not only on the arresting officer's knowledge, but also on the collective knowledge of the officer's entire department. *See State v. Kutz*, 2003 WI App 205, ¶ 12, 267 Wis. 2d 531, 671 N.W.2d 660.

"[U]nder the 'plain view' doctrine, an object falling within the plain view of an officer who rightfully is in a position to have that view is subject to valid seizure and may be introduced into evidence." *State v. Carroll*, 2010 WI 8, ¶ 21, 322 Wis. 2d 299, 778 N.W.2d 1. The plain view doctrine applies if the following three conditions are met:

> (1) the evidence must be in plain view; (2) the officer must have a prior justification for being in the position from which she discovers the evidence in "plain view"; and (3) the evidence seized 'in itself or in itself with facts known to the officer at the time of the seizure, [must provide] probable cause to believe there is a connection between the evidence and criminal activity.'

State v. Buchanan, 2011 WI 49, ¶ 23, 334 Wis. 2d 379, 799 N.W.2d 775 (quotation marks and quoted sources omitted; alteration in *Buchanan*).

2. Officers had probable cause to seize the computers from Gant's residence.

Based upon the totality of the circumstances, officers had probable cause to seize the computers. On September 28, 2010, Gant called the police to his Milwaukee home after he found his wife Crystal Gant hanging by her neck from a cable suspended from an I-beam in the basement (4:1). Before anyone arrived, Gant moved her body to her brother's bed, which was "closer to" the seized computer (40:87-88). Milwaukee Police Detective Matthew Goldberg arrived at the scene and observed Crystal Gant on a bed with a piece of coaxial cable around her neck (40:26). Under the Milwaukee Police Department's procedures, officers investigate a potential suicide in the same manner that they would investigate a homicide in case the death, in fact, resulted from a homicide (40:26).

Officers seized several items of evidence including two computers from the basement, a computer upstairs, and two or three hard drives (40:31; 43:13-14). Detective Goldberg stated that he had an interest in the computers in case the computer contained a suicide note or other evidence (40:31). Crystal Gant's daughter informed officers that Crystal Gant had been using a computer sometime prior to her mother's death (40:30, 35). At the time the computer was seized, Detective Goldberg was unaware of the daughter's statement regarding the computer (40:34).

Officers subsequently sought Gant's consent to search his residence along with items of personal property, including the computers (40:42-43). Gant executed a consent search form for his property but expressly declined to consent to a search of his computers (40:43).

Here, Gant consented to law enforcement's entry into his residence when he summoned first responders to his residence following his discovery of Crystal Gant's body. Crystal Gant had apparently died by unnatural and violent means, *i.e.*, hanging. Gant had moved her body prior to the arrival of the police. The officers were not required to accept Gant's word that Crystal hanged herself. Under the circumstances, the circuit court noted that the officers reasonably treated Crystal Gant's death as a potential homicide investigation (40:97-98). Even if Crystal Gant had committed suicide, Gant could still be responsible for the crime of assisted suicide (40:98).

The circuit court found that the officers observed the computers in plain view (40:98). The computer in question was found in the basement, near the room where Gant placed Crystal Gant's body (40:85, 88). While Detective Goldberg may have been unaware of Gant's daughter's statement regarding Crystal Gant's recent computer use, this information was within the department's collective knowledge and supports the officers' probable cause basis to seize the computers. Further, because the computers may have contained information relevant to their investigation, such as a suicide note, that could have a bearing on whether Crystal Gant's death was a suicide or a homicide, the officers acted reasonably in seizing them (40:98). Prior case law demonstrates that a seized computer's Internet browsing history may provide relevant information that supports a homicide prosecution and undermines a defendant's claim that the victim committed suicide. *See State v. Jensen*, 2011 WI App 3, ¶¶ 37 and 93, 331 Wis. 2d 440, 794 N.W.2d 482 ("[I]n this age of modern technology, persons have increasingly become more reliant on computers not only to store information, but also to communicate with others."). Based upon the totality of the circumstances, a fair probability existed that evidence related to Crystal Gant's unnatural and violent death was on the computers. The circuit court

appropriately concluded that the officers' seizure of the computers was reasonable (40:98).

E. The police department's continued retention of Gant's property did not violate Gant's Fourth Amendment rights.

Over ten months elapsed between the computer's original seizure on September 28 or 29, 2010, and the issuance of the search warrant for child pornography on August 15, 2011 (40:26, 33, 69). Gant asserts that the "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." Gant's brief at 16.

The State disagrees. On a regular basis, officers lawfully seize property during investigations, both with and without search warrants. Officers then inventory the seized property and secure it for safekeeping. An individual may seek the return of his or her seized property pursuant to established statutory procedures.

Courts have long recognized the police interests in securing seized property.

> These procedures developed in response to three distinct needs: the protection of the owner's property while it remains in police custody; the protection [of] the police against claims or disputes over lost or stolen property; and the protection of the police from potential danger.

South Dakota v. Opperman, 428 U.S. 364, 369 (1976) (citations omitted). The inventory search is a recognized exception to the exclusionary rule. The police may inventory property that comes into its possession following an arrest, impoundment or by some other lawful means. *State v. Weide*, 155 Wis. 2d 537, 548, 455 N.W.2d 899 (1990). The reasonableness of a police

inventory must be based on the facts and circumstances of each case. *State v. Callaway*, 106 Wis. 2d 503, 511, 317 N.W.2d 428 (1982). The analysis is a two-step inquiry, involving first the reasonableness of the seizure of the property in the first instance and then the reasonableness of the scope of its subsequent search. *State v. Weber*, 163 Wis. 2d 116, 132-33, 471 N.W.2d 187 (1991). Finally, even property properly secured on police inventory is not insulated from a subsequent investigative search or seizure. *State v. Betterley*, 191 Wis. 2d 406, 423, 529 N.W.2d 216 (1995) (officers seized jewelry from inmate's property without a warrant after realizing it may have constituted evidence of a crime).

Police agencies, including the Milwaukee Police Department,[1] have adopted policies regulating the safeguard and return of property. Wisconsin Stat. § 968.20 provides a procedural mechanism that persons like Gant may follow to secure the return of seized property from law enforcement custody when a police agency declines to return it. The Milwaukee County Circuit Court has adopted procedures to facilitate the return of this property. *See* Milwaukee Co. Cir. Ct. Rules, CR 4.6 (http://county.milwaukee.gov/ImageLibrary/Groups/cntyCourts/documents/lrgencivcrimfam4152010.pdf) (last viewed January 8, 2015). The Milwaukee County Clerk of Court makes forms available to individuals seeking the return of their property under Wis. Stat. § 968.20. *See* (http://county.milwaukee.gov/ImageLibrary/Groups/cntyCourts/documents/PetitionforReturnofPropertyFor.pdf) (last viewed January 8, 2015).

[1] *See, e.g.*, Milwaukee Police Department Standard Operating Procedure, 560--Property, General Order 2014-95 (http://city.milwaukee.gov/ImageLibrary/Groups/mpdAuthors/SOP/560-PROPERTY.pdf) (last viewed February 2, 2015).

Here, Detective Goldberg seized the computers in question along with several items and placed them on Milwaukee Police Department property inventory assigned number 1531685 (4:1-2). Detective Goldberg stated that the computers are then stored in a warehouse, to be searched later with proper consent or a search warrant (40:32).

At the hearing, Gant testified that he went to the police department to obtain the return of his computers on two occasions. The first was approximately one week after Crystal Gant's death (40:78). Officers told Gant that he could not get the property back at that time (40:79). On a second occasion, in February 2011, Gant returned to the police station and was again denied return of the property (40:79-80). By this time, Gant had been charged with exposing his genitals to a minor (40:82).

After the police department declined to return his property, Gant did not bring a motion for its return under Wis. Stat. § 968.20 (40:94). This is a remedy that Gant recognizes is available to persons whose property the police have seized. Gant's brief at 24. During the period that the police department retained Gant's property, the officers did not attempt to exploit an evidentiary benefit from its possession without first obtaining a warrant. Any harm to Gant from the police department's continued retention of the property was minimal. Under the circumstances, the police department's retention of Gant's property at the police department is constitutionally reasonable.

In support of Gant's position that the police unlawfully detained his computers, Gant relies upon *United States v. Place*, 462 U.S. 696 (1983). In *Place*, the court concluded that the detention of a traveler's luggage exceeded the narrow authority of police to detain the luggage based on reasonable suspicion to suspect it contains narcotics. *Id*. at 710. The seizure in Gant's

case is different as the circuit court found it rested on probable cause (40:98), rather than the lower reasonable suspicion standard in *Place*.

Gant also relies upon *United States v. Burgard*, 675 F.3d 1029 (7th Cir. 2012), which recognizes that a delay between the seizure of property and its subsequent search may become constitutionally unreasonable. In *Burgard*, the court considered several factors in determining whether a delay in obtaining a warrant was unreasonable. These factors include (a) the strength of the basis for the initial seizure; (b) whether a party ever asserted a possessory claim to it; (c) whether the police acted diligently in pursuing the investigation. *Id*. at 1033-34.

Here, as the State explained in Section D. 2. above, the officers had a strong basis to seize the computer. While Gant informally requested its return, he undertook no efforts to follow through on its return by bringing a motion for its return. The circuit court noted that at the time of Gant's first request shortly after Crystal Gant's death, the investigation into her death was ongoing (40:99). The State is unaware of any evidence in the record that suggests that police were still diligently pursuing the death investigation at the time of Gant's request. But as the circuit court noted, a month after Crystal Gant's death and well before his second request for his property's return, Gant was charged with exposing his genitals to a child. "[T]he landscape has changed. I don't think anyone could argue that . . . a computer would not potentially have relevant information associated with that [crime]" (40:99). The information concerning Gant's other conduct began to "snowball" and the court concluded the retention of the computer was not an unreasonable violation of Gant's rights (40:101).

Even if this court concludes that the circuit court's analysis does not satisfy the criteria for reasonableness

identified in *Burgard*, the State distinguishes *Burgard* on three grounds. First, *Burgard* does not address law enforcement's interest in maintaining seized property and releasing it pursuant to established procedures. Gant did not follow these procedures to obtain the return of his computer. Second, *Burgard* involved the subsequent search of a computer for the crime that justified its original seizure. Here, the subsequent search had nothing to do with the reason for the computer's original seizure. Police acquired the information supporting the search for a different crime well after the computer was secured on inventory. Third, even if the delay in searching Gant's computer became unreasonable, *Burgard* recognized that application of the exclusionary rule may not always be an appropriate remedy. *Burgard*, 675 F.3d at 1036. Here, the search of Gant's computer fell within recognized exceptions to the exclusionary rule that the Seventh Circuit did not consider in *Burgard*.

F. Even if the delay in searching Gant's computer became unreasonable under the Fourth Amendment, application of the exclusionary rule is not warranted in this case.

Even if this court finds that the officers' retention of the computer violated Gant's Fourth Amendment rights, this court must still decide whether to apply the exclusionary rule and exclude the evidence seized from the search. Here, Gant acknowledges that the exclusionary rule does not apply if sufficient attenuation exists from the original illegality to dissipate the taint. He then argues that the independent source doctrine should not apply because of the flagrancy of the police conduct. Gant's brief at 22-23.

The State's position is that the independent source doctrine and attenuation doctrine are two distinct exceptions to

the exclusionary rule. Both exceptions apply to Gant's case. The police obtained their search warrant relying upon a source independent of the basis for the original seizure. Further, the seizure of the child pornography through the authority of the search warrant is sufficiently attenuated from any unlawful seizure or retention of the searched computer. The application of either exception leads to the conclusion that exclusion of the evidence is not an appropriate remedy for any violation that may have occurred.

1. General legal principles related to the exclusionary rule.

The exclusionary rule may forbid the use at trial of evidence obtained in violation of a person's Fourth Amendment rights. *Herring v. United States*, 555 U.S. 135, 139 (2009); *see also Hoyer v. State*, 180 Wis. 407, 193 N.W. 89, 92 (1923) (following federal law and adopting the exclusionary rule in Wisconsin). But a finding that officers violated an individual's Fourth Amendment rights does not automatically trigger the application of the exclusionary rule. This is because the exclusionary rule is not an individual right, but a judicial remedy intended to deter future Fourth Amendment violations. *Herring*, 555 U.S. at 141.

Whether to apply the exclusionary rule "requires the balancing of the rule's remedial objectives with the 'substantial social costs exacted by the exclusionary rule.'" *Felix*, 339 Wis. 2d 670, ¶ 30 (quoting *Illinois v. Krull*, 480 U.S. 340, 352-53 (1987)). The exclusionary rule's application results in the suppression of the truth by prohibiting a fact finder from considering reliable, trustworthy evidence. It also may lead to setting a criminal loose without punishment. *Davis v. United*

States, ___ U.S. __, 131 S. Ct. 2419, 2427 (2011). Because of the exclusionary rule's "costly toll upon truth-seeking and law enforcement objectives," "[s]uppression of evidence . . . has always been our last resort, not our first impulse." *Hudson v. Michigan*, 547 U.S. 586, 591 (2006).

To this end, the United States Supreme Court has recognized several rules that limit the exclusionary rule's application. These include (a) the inevitable discovery exception, (b) the independent source doctrine, (c) the attenuation doctrine, (d) the good faith exception, and (e) standing principles. *See Davis*, 131 S. Ct. at 2431-2432.

Gant argues that the court's failure to suppress the evidence here will "actively encourage" the type of police behavior that occurred in this case. Gant paints a picture of police seizing property and holding it indefinitely, unless a person petitions for its return. The harm Gant identifies by the police department's continued retention is the "immediate access" of the police to the property if it later becomes the subject of a separate investigation. Gant's brief at 23-24.

But Gant's analysis ignores two important considerations. First, the police did not have immediate access to the computer's contents. They only searched it after a neutral and detached magistrate approved the search warrant authorizing the intrusion into a place where Gant retained a privacy interest.

Second, suppression of the child pornography imposes substantial societal costs by setting Gant free. Possession of child pornography is not a benign offense. As the circuit court noted, child pornography is a "crime scene video capturing and memorializing some of the most heinous ways of victimizing

an innocent child . . . ." (42:34). People who view hardcore child pornography present a substantial risk for engaging in hands-on child sex abuse (42:36). The danger that consumers of child pornography pose to the community is not theoretical in Gant's case. As part of his plea, a child sexual assault charge was dismissed and read-in (42:37).

Assuming *arguendo* that officers unlawfully seized the computers in the first instance, or that their seizure subsequently became unlawful, suppression of the child pornography is not appropriate. Application of the independent source doctrine or the attenuation doctrine avoids the costly societal toll that would result from application of the exclusionary rule in Gant's case.

2. Independent source doctrine.

a. General legal principles related to the independent source doctrine.

Under the independent source doctrine, courts will not exclude evidence when the challenged evidence has an independent source. When a search warrant application includes both tainted and untainted evidence, a court will uphold the warrant if the untainted evidence is sufficient to support a finding of probable cause. *See Carroll*, 322 Wis. 2d 299, ¶ 44. The State bears the burden of establishing that "no information gained from the illegal entry affected either the law enforcement officers' decision to seek a warrant or the magistrate's decision to grant it." *Murray v. United States*, 487 U.S. 533, 540 (1988).

Courts apply a two-pronged test to determine whether the untainted evidence and tainted evidence are independent of one another. "First, the court determines whether, absent the illegal entry, the officer would have sought the search warrant. Second, it asks if information illegally acquired influenced the magistrate's decision to authorize the warrant." *Carroll*, 322 Wis. 2d 299, ¶ 45. If the circuit court fails to address the first question, an appellate court may remand for "an explicit finding as to whether the law enforcement agents would have sought the warrant absent the tainted evidence." *Id.* ¶ 50. However, remand is unnecessary if "a clear inference could compel the conclusion that law enforcement agents would have sought a warrant had they not obtained tainted evidence." *Id.*; s*ee also State v. Lange*, 158 Wis. 2d 609, 463 N.W.2d 390 (Ct. App. 1990) (court applies independent source test and remands for hearing to determine whether agent would have sought warrant absent evidence obtained through unlawful means).

b. The independent source doctrine applies in Gant's case.

Gant argues that the independent source doctrine should not apply in this case based upon the flagrancy of the police conduct. Gant's brief at 22-23. Whether the conduct is flagrant has no bearing on the independent source analysis, but may be an appropriate consideration under the attenuation doctrine. *See* Section F. 3. below.

In asserting that the independent source doctrine does not apply, Gant appears to implicitly acknowledge the following: the search warrant itself states probable cause to search the computers for child pornography. Neither in the circuit court nor in this court has Gant challenged the court

commissioner's finding that the warrant stated probable cause to search the computer (4; 43:3-4).

The warrant's supporting affidavit states probable cause to search Gant's computer. The officers obtained the search warrant to look for evidence of the crime of possession of child pornography and sexual assault of a child (43:6-7). The police relied upon information from T.J.,[2] Crystal Gant's mother, to establish probable cause to believe that the computer contained child pornography. On August 1, 2011, T.J. stated that while she was going through property at Gant's residence, she discovered a DVD that depicted a young girl engaged in oral sex with an adult male. The DVD was marked "4 year old" (40:52-53; 43:7). As a result of this information, officers sought the warrant to search several disks that T.J. provided to the police along with evidence, including a computer tower, seized at the time of Crystal Gant's death (43:9, 14).

This court should find that the independent source doctrine applies and decline to suppress the evidence. First, based upon the record, the officer would have sought a search warrant for Gant's computers based on the information developed independently of the initial seizure. Here, the investigation of Crystal Gant's death and the child pornography investigation were two separate and distinct matters. Different investigators participated in the death investigation and child sexual assault and pornography investigation. Detective Matthew Goldberg participated in the investigation of Crystal Gant's death, but was not involved in the subsequent investigation that led to Gant's prosecution for child pornography and sexual assault charges (40:25-44).

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[2] For confidentiality purposes the State will refer to the citizens whose names are referenced in the record by their initials.

Detective Dawn Jones sought the search warrant for Gant's computer to look for child pornography (40:73-74; 43:10). Detective Jones developed her probable cause based upon information she obtained from the disks containing child pornography, unrelated to the seizure of the computer (40:73-74). The police learned about the disks from T.J., who informed Officer Deborah Kranz that she found a disk in the basement of the Gant home and discovered that it contained an image of a child giving an adult male oral sex (40:51-53). Officer Kranz had been involved in an investigation of Gant following Gant's statements to his brother that Gant had molested his brother's children (40:47). T.J. subsequently provided several disks to Officer Jody Young who provided them to Officer Kranz (40:60-61).

Crystal Gant's death had nothing to do with the search of Gant's computer. The officers were motivated to search the computers based upon the information that they developed as a result of their sexual assault investigation of Gant as well as T.J.'s assertions that disks in the Gant basement contained child pornography. Following T.J.'s discovery of the disk with the child pornography, officers would have sought to search Gant's computer, whether it remained in police custody or had been returned to him.[3] That the computer tower happened to be on

[3] Even if the computer had been returned, it is reasonable to believe that the officers would still have sought a search warrant to locate it. Detective Dawn Jones' supporting search warrant affidavit reflects that people who possess child pornography transfer it to various electronic devices and share it with others. Further, they typically retain the child pornography (43:8). As this court has previously observed, child pornography differs from possession of other contraband for two reasons. First, the images remain on the computer even after they may have been deleted. Second, pedophiles have a proclivity to retain child pornography. *State v. Gralinski*, 2007 WI App 233, ¶ 30, 306 Wis. 2d 101, 743 N.W.2d 448 (finding warrant issued two years after transaction for a membership at a website focused

(footnote continutes on next page)

police inventory simply made their task easier in locating it following T.J.'s complaint.

Second, information related to Crystal Gant's death investigation simply did not influence the magistrate's decision to authorize the warrant. The warrant was based upon information that officers developed later from Crystal Gant's mother. The only information in the affidavit that related to the computer's seizure is a passing reference to the fact that the police had previously taken possession of some of the items to be searched following Crystal Gant's death (43:7). Nothing in the affidavit suggests that Crystal Gant's death was itself related to the possession of child pornography or a child sexual assault charge or even provided any basis to search the computer for evidence of those crimes. Under the circumstances, the magistrate was simply not influenced by any information acquired in a constitutionally unreasonable manner.

Under the circumstances, the search warrant was based upon an independent source and the suppression would not be an appropriate remedy for any Fourth Amendment violation that may have occurred.

3. Attenuation doctrine.

a. General legal principles related to the attenuation doctrine.

The exclusionary rule does not apply if the evidence was not obtained by exploitation of a prior police illegality or the means were sufficiently attenuated so as to purge it of such a

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on child pornography was not stale and that child pornography would be found on the computer even after the passage of time).

taint. *See State v. Anderson*, 165 Wis. 2d 441, 448, 477 N.W.2d 277 (1991). Under the attenuation doctrine, a court will not suppress evidence if "the State can show a sufficient break in the causal chain between the illegality and the seizure of evidence." *State v. Phillips*, 218 Wis. 2d 180, 204-05, 577 N.W.2d 794 (1998). "The object of attenuation analysis is 'to mark the point at which the detrimental consequences of illegal police action become so attenuated that the deterrent effect of the exclusionary rule no longer justifies its cost.'" *State v. Artic*, 2010 WI 83, ¶ 65, 327 Wis. 2d 392, 786 N.W.2d 430 (citation omitted).

In *Brown v. Illinois*, 422 U.S. 590 (1975), the Supreme Court identified three factors that courts should consider when assessing whether the causal chain has been sufficiently attenuated. These factors include (1) the temporal proximity of the official misconduct and seizure of the evidence; (2) the presence of intervening circumstances; (3) the purpose and flagrancy of the official misconduct. *Id*. at 603-604.

b. A sufficient break exists in the causal chain between any illegality and the seizure of the child pornography from Gant's computer.

Applying *Brown's* three-factor test, the record demonstrates that a sufficient break occurred in the causal chain between the seizure of Gant's computer and its subsequent search so as to dissipate any taint from the police conduct.

Temporal proximity of the official misconduct and seizure of the evidence. Even a temporal separation as short as one and

one-half hours may weigh in favor of attenuation. *See State v. Tobias,* 196 Wis. 2d 537, 549, 538 N.W.2d 843 (Ct. App. 1995) (finding sufficient attenuation between an illegal arrest and a voluntary statement that occurred one and one half hours after arrest as the statements were not obtained by exploitation of the illegal arrest). Here, there was no temporal proximity between the allegedly illegal seizure of Gant's computer and its subsequent search with a search warrant some ten months later. The significant time span between the computer's seizure and its subsequent search supports application of the attenuation doctrine.

The presence of intervening circumstances. The presence of other intervening circumstances weighs in favor of attenuation.

Here, the officers seized and held the computer following Crystal Gant's death at her home under violent and unnatural circumstances. But Crystal Gant's death played no role in motivating the police to search the computer for child pornography. Crystal Gant's mother, T.J., claimed that she had played a computer disk found in Gant's basement and saw that it contained child pornography. T.J. provided several disks to the police (40:51-53; 43:7). Based upon information related to the child pornography allegations rather than the death investigation, officers obtained a search warrant for the previously seized computer as well as the disks that Crystal Gant's mother provided (40:74-75; 43:7). The officers did not exploit the prior seizure of the computer in their efforts to search it later for child pornography.

Under the circumstances, the presence of a separate and independent line of investigative inquiry and magistrate's probable cause finding constitutes a compelling intervening

circumstance that supports the attenuation doctrine's application.

The purpose and flagrancy of the official misconduct. The purpose and flagrancy of the official misconduct also weighs in favor of attenuation.

Here, the officers did not engage in flagrant misconduct that compels suppression. Gant summoned first responders to his house following his discovery of his spouse's body hanging from a basement beam (40:26-27). Officers seized a computer in plain view, reasonably believing that it might contain a suicide note or other information related to Crystal Gant's death (40:98). Gant declined to consent to a search of his computers and the officers honored his directive (40:42-43). While the police declined Gant's requests for the return of the seized property (40:99), Gant did not avail himself of his statutory remedies to seek its return (40:94). Crystal Gant's death did not prompt the police to develop a renewed interest in the computer. Instead, officers received information that disks located at Gant's residence contained child pornography (40:51-53). Finally, the officers did not attempt to search the computer without first applying for a search warrant from a neutral and detached magistrate for approval (40:67-68). The officers acted reasonably and did not engage in flagrant conduct that warrants suppression.

The passage of time, the presence of intervening circumstances, and the lack of flagrancy and purposefulness to the officers' conduct all support application of the attenuation doctrine. As such, this court should not apply the exclusionary rule to suppress the child pornography seized from Gant's computer.

4. This court may remand the matter for further proceedings if the record supporting application of an exception to the exclusionary rule is insufficient.

In this case, the circuit court upheld the lawfulness of the officers' seizure and subsequent search of the computers (40:98-100). As such, it did not consider whether exclusion was the appropriate remedy if the seizure or continued retention of Gant's property violated the Fourth Amendment. Should this court conclude that a Fourth Amendment violation occurred and that the record is not adequate to support application of the independent source doctrine or attenuation doctrine, this court should remand the case for a hearing on the applicability of these exceptions. *See Lange*, 158 Wis. 2d at 627-628 (court remands for hearing on first prong of independent source test but finds second prong of independent source test had been met); *see also State v. Marquardt*, 2001 WI App 219, ¶ 22, 247 Wis. 2d 765, 635 N.W.2d 188 (court remands case to trial court to determine whether good faith exception applies when the trial court had not addressed that issue).

CONCLUSION

For the above reason, the State respectfully requests the court to affirm Gant's judgment of conviction.

Dated this 5th day of January, 2015.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 5,612 words.

Dated this 5th day of February, 2015.

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CERTIFICATE OF COMPLIANCE
WITH WIS. STAT. § (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 Wis. Stat. § (Rule) 809.19(12).

I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of 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 5th day of February, 2015.

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