

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

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**CLERK OF COURT OF APPEALS
OF WISCONSIN**

STATE OF WISCONSIN,

Plaintiff-Appellant,

v. Appeal No. 2016AP000500 CR

RICHARD L. KELLER,

Defendant-Respondent.

An Appeal from an Order Granting Defendant's Motion to
Suppress Evidence in Washington County Case No.
2015CF000207 entered by the Honorable James K. Muehlbauer,
Circuit Court, Branch II, Washington County

BRIEF OF DEFENDANT-RESPONDENT

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STATEMENT OF THE ISSUES

I. Whether the evidence obtained from Mr. Keller's computers should be suppressed when the search was conducted by a criminal analyst at the Department of Justice without a search warrant at the request of a probation agent and was part of an independent police investigation.

A. Circuit Court's Answer: Yes. The search was an illegal police search.

II. Whether Mr. Keller had a reasonable expectation of privacy in his computers even though he was prohibited from possessing a computer in his rules of community supervision.

B. Circuit Court's Answer: The circuit court did not expressly address this issue, but implicitly found that Mr. Keller has a reasonable expectation of privacy in his computers because the circuit court granted his motion to suppress evidence obtained from his computers based on a Fourth Amendment violation.

POSITION ON ORAL ARGUMENT AND PUBLICATION

Oral argument is unnecessary because the issues can be set forth fully in the briefs. Publication is requested because this case seeks to clarify the definition and scope of a probation search and the privacy interests of probationers in possessing property that is prohibited by the rules of community supervision.

STATEMENT OF THE CASE

Richard Keller was on probation for an arson case. (39:13; App. 126.) His supervision was transferred to a sex offender agent, Nicole Johnson, after the Department of Corrections became aware of his conviction for possession of child pornography. (39:13; App. 126.) Agent Johnson was also assigned to write a presentence investigation report for the possession of child pornography case. (39:13; App. 126.) Mr. Keller was then supervised as a sex offender. (39:13; App. 126.)

As part of the Standard Sex Offender Rules, Mr. Keller was not allowed to purchase, possess or use computer software, hardware or modem, without prior agent approval. (39:18; App. 131.) Agent Johnson informed him that he would not have approval to have a computer at his residence. (39:16; App. 129.) Mr. Keller initially indicated that he did not have a computer at his residence. (39:16; App. 129.)

However, he did use a computer at work. (39:16; App. 129.) Additionally, Mr. Keller informed his agent that his wife and two kids each had their own computer at home, but they were password protected. (39:16; App. 129.)

During Mr. Keller's first scheduled home visit, Agent Johnson noted that there was a locked door off of the

kitchen. (39:24; App. 137.) Mr. Keller said it was his wife's office. (39:24; App. 137.) He unlocked the door and inside the office were papers, computer equipment and tripods. (39:24; App. 137.) Mr. Keller said the computer and camera equipment was for his wife's job. (39:25; App. 138.)

Mr. Keller also informed Agent Johnson that he planned on selling his house. (39:19; App. 132.) Agent Johnson was concerned because the house appeared in disarray, which made her think of his arson case. (39:26; App. 139.)

Later, Agent Johnson learned that Mr. Keller's wife and kids were staying at an apartment while Mr. Keller resided in the house. (39:27-28; App. 140-41.) He was not allowed to stay in the apartment due to ordinance restrictions. (39:28; App. 141.) His plan was to fix and clean up the house before he sold it. (39:19; App. 132.)

Agent Johnson also spoke to Mr. Keller's wife who indicated that she and her kids had possession of their computers at their apartment. (39:29; App. 142.)

Subsequently, Agent Johnson planned to conduct an unscheduled home visit at Mr. Keller's residence with the Washington County Sheriff's Department because she was concerned about the residence and Mr. Keller missing his last appointment. (39:29-30; App. 142-43.) She contacted

the Sheriff's Department to find an officer with a history of working with arson cases and able to spot flammable materials. (39:30; App. 143.)

Agent Johnson, Detective Aaron Walsh and another detective showed up unannounced at Mr. Keller's home. (39:31; App. 144.) Mr. Keller was not home. (39:31; App. 144.) Agent Johnson called him and he indicated he would be home shortly. (39:32; App. 145.) After he arrived home, Agent Johnson conducted the home visit with the detectives. (39:32-33, App. 145-46.)

In the home, Agent Johnson observed two modems. (39:34; App.) She also observed computers, towers and a laptop in the office. (39:34; App. 147.) She then asked Mr. Keller about the computers. (39:36; App. 149.) Mr. Keller indicated he didn't think they worked. (39:36; App. 149.)

Mr. Keller confirmed that he was the only person living in the house. (39:36; App. 149.) He also admitted that he used the laptop the day before to check his email. (39:36; App. 149.) He then provided the email account to Agent Johnson, which was different than the email address he previously provided her with. (39:36; App. 149.)

Agent Johnson contacted her supervisor regarding the computers in Mr. Keller's home. (39:38; App. 151.) Her supervisor told her to seize the computers. (39:38; App.

151.) Agent Johnson seized numerous items, including two computer towers and a laptop. (39:40; App. 153.) The computer equipment appeared to be plugged in and in working condition. (39:40; App. 153.) However, she did not take other computer equipment that she found in the basement that appeared not to be in use. (39:39; App. 152.)

Mr. Keller was placed into custody for the rule violations of possessing the computers and accessing an email account that he did not provide to his agent. (39:42; App. 155.) Detective Walsh transported Mr. Keller to the jail. (37:9; App. 231.) Agent Johnson put the seized items in her vehicle and transported them to the Department of Corrections office. (39:42-43; App. 155-56.) The items were then placed in a locked closet in the office. (39:44; App. 157.)

The day after, Agent Johnson took a written statement from Mr. Keller at the Washington County Jail regarding his use of the computers that were seized. (39:61; App. 174.) Mr. Keller indicated that he used the laptop to access his email, the news, Channel four, Yahoo, YouTube and Facebook. (39:62-63; App. 175-76.) He also found some old CD's that he played in a tower. (39:63; App. 176.) He then destroyed the CD's by burning them because they had child pornography on them. (39:63; App. 176.)

The following day, Detective Walsh also attempted to interview Mr. Keller at the Washington County Jail. (39:83; App. 196.) Detective Walsh testified that he was investigating possible bail jumping charges. (39:84; App. 197.) He was aware that Mr. Keller was on bail for possession of child pornography with conditions that he not possess a computer other than for work or school. (39:83-84, App. 196-97.) Mr. Keller declined the interview. (39:85; App. 198.)

Subsequently, Agent Johnson decided that the computers and towers needed to be searched based on Mr. Keller's history of his offense and that he had been accessing an unreported email account. (39:45, 54-55; App. 158, 167-68.) She was also concerned about potential child pornography, even though she testified that she did not have any evidence to indicate that there was any child pornography on these computers. (39:54, 71; App. 167, 184.)

Agent Johnson did not make any attempts to search the computers or towers herself or even turn them on. (39:68; App. 181.) She indicated that she did not have the ability to search a computer. (39:45; App. 158.) She also indicated that no one in her office had the ability to search a computer. (39:45; App. 158.) Agent Johnson contacted the Washington County Sheriff's Department to search the

computer, but was told they did not do that for probation.
(39:45; App. 158.)

Agent Johnson then contacted a detective from the Sheboygan Police Department, who used to search computers when she was an agent in Sheboygan. (39:45; App. 158.) The detective told her to contact the Wisconsin Department of Justice, Division of Criminal Investigation in Madison about searching the computer. (39:45; App. 158.)

Agent Johnson contacted the Division of Criminal Investigation to get in touch with a forensic analyst to search the computer. (39:47; App. 160.) She spoke with Forensic Analyst Chris Kendrex and made arrangements with him to conduct the search of the computer. (39:47-48; App. 160-61.)

On September 5, 2013, Agent Johnson drove to the Division of Criminal Investigation in Madison with the seized items and met with the forensic analyst. (39:48; App. 161.) The computers and towers were taken to his office. (39:49; App. 162.) The analyst then told her to just take a seat, which she did. (39:49; App. 162.)

The analyst searched the computer tower while Agent Johnson watched. (39:49-50; App. 162-63.) When asked what the analyst did, Agent Johnson testified "Well, I don't really know what he did exactly." (39:49; App. 162.)

She was also asked whether there was a potential issue with having law enforcement conduct the search and not the probation agent, to which she responded "I believed that anything can be an issue, right. So, yes, I know that chain of evidence is a dicey thing. However, when present-- we would always be present when the items were searched."

(39:56; App. 169.)

Agent Johnson indicated that she told the analyst that as soon as they found anything illegal, the search would be done and she would contact the Sherriff's Department.

(39:50; App. 163.) Yet, she recalled that "there was a lot of images on that tower..." (39:50; App. 163.)

They loaded the images and "open[ed] each one."

(39:50; App. 163.) There were also "multiple YouTube Videos." (39:50; App. 163.) Agent Johnson "was sitting in the back behind the analyst who was... manning the computer and doing his job." (39:50; App. 163.) She thought there were images that she considered to be children, but the analyst believed that they were not. (39:50; App. 163.) She felt like "he was the expert." (39:50; App. 163.)

The analyst continued searching the images on the computer, until he determined that there was an image of a child. (39:50; App. 163.) Then Agent Johnson said "okay, we're done." (39:50; App. 163.) The analyst then prepared a

preview disc of the images that he found during the search of the computer. (39:52; App. 165.) The preview disc included over thirteen thousand images that the analyst found. (18:27; App. 280.)

Agent Johnson contacted her supervisor and indicated that they had an image that would be considered child pornography. (39:50; App. 163.) Her supervisor said the search was done and to contact the Washington County Sherriff's Department. (39:50; App. 163.)

Agent Johnson called Detective Walsh and told him there were numerous possible child pornography photos on the devices. (37:9; App. 231.) Agent Johnson left the analyst's office with the seized items and the preview disc. (39:51-52; App. 164-65.)

The next day, Detective Walsh picked up Mr. Keller's computers and towers and the preview disc from Agent Johnson's office. (39:52; App. 165, 37:9; App. 231.) He viewed the disc, which included two reports from the analyst and fifty-five photos of nude pubescent females. (18:28; App. 281.)

Detective Walsh then applied for and received a search warrant for the computers. (37:10; App. 232.) In his affidavit for the search warrant, Detective Walsh relied

upon the information in the preview reports provided by the analyst. (18:27-32; App. 280-85.)

The computers were again sent to the Wisconsin Department of Justice, Division of Criminal Investigation, where a criminal analyst conducted a search of the computers. (37:10; App. 232.) A report of the images found, considered to be child pornography, were sent to Detective Walsh. (37:10-14; App. 232-36.)

Based on the images found, Mr. Keller was charged with nine counts of Possession of Child Pornography and nine counts of Felony Bail Jumping. (1:1-6; App. 102-07.) A preliminary hearing was held in which the circuit court found probable cause and Mr. Keller was bound over for trial. (37:27; App. 249.)

Subsequently, Mr. Keller filed a motion to suppress the evidence obtained from the warrantless search of his computers. (18; App. 254.) He argued that the search of the computers on September 5, 2013 by the criminal analyst was unreasonable because it was a police search conducted without a search warrant. (18; App. 254.) The State argued that the search was a lawful probation search. (21; App. 289.)

A motion hearing was held on the issue in which the circuit court granted the motion to suppress, (24; App.

101.) finding that the search of Mr. Keller's computers was an illegal police search. (39:105; App. 218.) The State now appeals.

STANDARD OF REVIEW

In reviewing a motion to suppress, this Court should apply a two-step analysis. *State v. Purtell*, 2014 WI 101, ¶ 19, 358 Wis. 2d 212, 225, 851 N.W.2d 417, 424, *cert. denied*, 135 S. Ct. 736, 190 L. Ed. 2d 460 (2014).

First, this Court will uphold the circuit court's findings of fact unless they are clearly erroneous. *Id.* Second, this Court will apply constitutional principles to those facts de novo. *Id.*

ARGUMENT

This Court should affirm the circuit court's decision that the evidence obtained from a warrantless police search of Mr. Keller's computers should be suppressed. The Fourth Amendment to the United States Constitution and Article I, Section 11 of the Wisconsin Constitution protect people from unreasonable searches and seizures. U.S. Const. amend. IV; Wis. Const. art.1, § 11.

"Probationers are entitled to a certain degree of constitutional protection under the Fourth Amendment..." *Purtell*, 2014 WI at ¶ 22. While probation agents are permitted to conduct a warrantless search of a

probationer's home or property pursuant to Wisconsin Administrative Code Section DOC 328.22 under certain conditions, law enforcement is not.

A violation of the Fourth Amendment based on an unlawful search or seizure can result in the suppression of the illegally obtained evidence pursuant to the exclusionary rule. *State v. Dearborn*, 2010 WI 84, ¶ 15, 327 Wis. 2d 252, 262, 786 N.W.2d 97, 102.

I. THIS COURT SHOULD AFFIRM THE CIRCUIT COURT'S DECISION GRANTING MR. KELLER'S MOTION TO SUPPRESS BECAUSE THE EVIDENCE WAS OBTAINED FROM A WARRANTLESS POLICE SEARCH.

Warrantless searches are presumptively unreasonable, subject to only a few specifically established exceptions. *State v. Griffin*, 131 Wis. 2d 41, 50, 388 N.W.2d 535, 538 (1986), *aff'd*, 483 U.S. 868, 107 S. Ct. 3164, 97 L. Ed. 2d 709 (1987). A probation agent is permitted to search a probationer's home or property without a warrant if the agent obtains supervisory approval prior to the search and has "reasonable grounds to believe the offender possesses contraband or evidence of a rule violation on or within his or her person or property." Wis. Admin. Code §§ DOC 328.22(2)(a) and (7) (Oct. 2015).

Agent Johnson did receive supervisory approval prior to the search. (39:38; App. 151.) She also had reasonable

grounds to believe that Mr. Keller possessed contraband or evidence of a rule violation on his property because he had computers in his house, which he was prohibited from possessing under his rules of community supervision.

(39:18, 34; App. 131, 147.) However, Wisconsin Administrative Code Section DOC 328.22 *only* authorizes a "probation agent" to conduct the search, not law enforcement.

A. The Search of Mr. Keller's Computers was not a Probation Search Because it was not Conducted by a Probation Agent.

Agent Johnson did not conduct the search of Mr. Keller's computers. (39:49-50; App. 162-63.) In fact, she did not even attempt to search or even turn on the computers herself. (39:68; App. 181.) Instead, a criminal analyst of the Wisconsin Department of Justice, Division of Criminal Investigation, conducted the search of the computers. (39:49-50; App. 162-63.)

Agent Johnson claimed that she did not have the ability to search a computer. (39:45; App.) She also indicated that no one in her office had the ability to search a computer. (39:45; App. 158.)

However, in *State v. Purtell*, 2014 WI 101, ¶ 14, 358 Wis. 2d 212, 223, 851 N.W.2d 417, 422, *cert. denied*, 135 S. Ct. 736, 190 L. Ed. 2d 460 (2014), a probation agent did

search a probationer's computer. The defendant was on probation in which part of his conditions were that he "not purchase, possess, nor use a computer, software, hardware, nor a modem without prior agent approval." *Id.* at ¶¶ 5-6.

Purtell was living in a group home and refused to get rid of his computers. *Id.* at ¶ 10. His probation agent learned that Purtell was in possession of computers in violation of his rules and took him into custody. *Id.* at ¶¶ 11-12. Purtell's agent, along with two other probation agents, searched Purtell's room and took his laptop, desktop computer and other computer equipment. *Id.* at ¶ 12.

Purtell's probation agent then searched one of Purtell's computers without a warrant. *Id.* at ¶ 14. His agent turned the computer on and "several titles to images popped up on the screen that involved females engaged in sexual activity with animals and images of what appeared to be underage females." *Id.* The agent informed her supervisor of the images found and they contacted law enforcement. *Id.*

Law enforcement then obtained two search warrants to search Purtell's computers. Purtell filed a motion to suppress the evidence seized from his computers, arguing that his agent lacked a warrant and reasonable grounds to search his computers. *Id.* at ¶ 15. The court ultimately concluded that the search conducted solely by the probation

agent without a warrant was reasonable. *Id.* at ¶ 20.

Unlike the search in *Purtell*, the search in this case was not conducted by the probation agent. (39:49-50; App.) Wisconsin Administrative Code Section DOC 328.22 *only* authorizes a “probation agent” to conduct a warrantless search upon certain findings.

Agent Johnson was only authorized to search Mr. Keller’s computers, not law enforcement. If she was not capable of searching the computers, then it should be left to law enforcement to properly obtain a search warrant to search the computers.

The search of the computers should not be considered a probation search because it was not conducted by a probation agent. This Court should consider the totality of the circumstances in determining whether a search is a police or probation search. *State v. Devries*, 2012 WI App 119, ¶ 3, 344 Wis. 2d 726, 729, 824 N.W.2d 913, 915.

B. The Search of Mr. Keller’s Computers was a Police Search Because it was Conducted by a Criminal Analyst at the Department of Justice and was Part of an Independent Police Investigation.

A probation agent cannot use his or her authority to help law enforcement circumvent the Fourth Amendment’s warrant requirement. *State v. Wheat*, 2002 WI App 153, ¶ 20, 256 Wis. 2d 270, 281, 647 N.W.2d 441, 446. The search in

this case was done by a law enforcement agency and was part of an independent police investigation.

The search of Mr. Keller's computers was done by a law enforcement agency. The search was conducted by a criminal analyst of the Wisconsin Department of Justice, Division of Criminal Investigation (DCI). (39:49-50; App. 162-63.) "DCI is charged with a purely criminal investigative mission and function." (22:Def Ex 6; App. 290.) DCI also "employs Special Agents who are sworn law enforcement officers..." (22:Def Ex 6; App. 290.) "DCI Special Agents work closely with local, county, state and federal officials to investigate and prosecute crimes..." (22:Def Ex 6; App. 290.)

DCI is also the same agency that was used by Detective Walsh of the Washington County Sheriff's Office to search Mr. Keller's computers after he obtained a search warrant. (37:10; App. 232.) The search of the computers by a criminal analyst at DCI that was requested by Detective Walsh would certainly be considered a police search. Similarly, a search conducted by the same entity, a criminal analyst at DCI, that was requested by Agent Johnson should also be considered a police search.

Although cooperation between a probation agent and law enforcement does not transform a probation search into a

police search, *State v. Hajicek*, 2001 WI 3, ¶ 32, 240 Wis. 2d 349, 366, 620 N.W.2d 781, 788, there was more than mere cooperation in this case. The criminal analyst conducted the entire search of the computers himself. (39:49-50; App.) Agent Johnson only “watched” the search take place. (39:49-50; App. 162-63.)

Even though Agent Johnson initiated the search by contacting a criminal analyst at DCI to conduct the search (39:47; App. 160.), she had no further participation in the search of the computers other than being a bystander. (39:49-50; App. 162-63.) The search was also part of an independent police investigation.

A search initiated by a probation agent in which law enforcement assists is a probation search if law enforcement is not independently conducting a police investigation or search. *Devries*, 2012 WI App at ¶ 8. In *Devries*, the court found that a police officer assisting a probation agent by administering a PBT to a probationer at the probation agent’s request was a probation search because the officer “was not independently conducting a police investigation or search.”

The defendant met with her probation agent at the probation office. *Id.* at ¶ 2. The agent detected an odor of alcohol from the defendant and requested that a police

officer come the office to administer a PBT to her. *Id.* The police officer administered the PBT to Devries which indicated a blood alcohol concentration of .128. *Id.* The agent then placed Devries on a probation hold. *Id.*

The court considered the following factors in determining that it was a probation search: the agent initiated the search, it was conducted at the probation office, the officer only assisted with the administration of the PBT and the officer was not aware until "after" he administered the PBT to Devries that she had driven to the office - giving him reason to suspect that Devries may have committed a crime and prompting his police investigation for OWI. *Id.* at ¶ 5.

The court concluded the administration of the PBT was a probation search because it was not administered for any independent police purpose, it was a limited search, it was executed at the request of the agent and it occurred during a probation meeting, in the probation office, for probation purposes. *Id.* at ¶ 7.

Unlike the search in *Devries*, the search in this case was not conducted at the probation office, the search was not limited and there was an independent police investigation. The search in this case did not occur during a probation meeting at the probation office. Instead, Agent

Johnson seized Mr. Keller's computers from his home (39:40; App. 153.) and took them to DCI in Madison to be searched by a criminal analyst. (39:48-49; App. 161-62.)

The search of the computers was also very extensive, not limited. The analyst located over thirteen thousand images during the search. (18:27; App. 280.) Agent Johnson testified that she told the analyst that as soon as they found anything illegal the search would be done. (39:50; App. 163.) However, she thought there were images that she considered to be children, but the analyst believed that they were not. (39:50; App. 163.) The analyst continued searching the images on the computer, until "he" determined that there was an image of a child. (39:50; App. 163.)

Agent Johnson certainly was not directing the criminal analyst's search of the computers. (39:49-50; App. 162-63.) Agent Johnson was basically told to just take a seat and she "watched" the search. (39:49-50; App. 162-63.) When asked what the analyst did during the search, Agent Johnson testified "Well, I don't really know what he did exactly." (39:49; App. 162.)

The analyst also prepared two preview reports on a disc that was given to Detective Walsh. (18:28; App. 281.) These reports and the images on them led to Detective Walsh obtaining a search warrant to search Mr. Keller's

computers. (18:27-32; App. 280-85.) The information obtained from the search was used as part of an independent police investigation. (18:27-32; App. 280-85.)

The search of the computers was part of an independent police investigation because Detective Walsh was involved and kept informed throughout the entire process. Detective Walsh was aware that Mr. Keller was on probation and was out on bail for possession of child pornography. (39:83-84, App. 196-97.)

Detective Walsh was also present at the unscheduled home visit at Mr. Keller's residence when Agent Johnson seized his computers. (39:31, 40; App. 144, 153.) Detective Walsh then transported Mr. Keller to the jail when he was placed on a probation hold. (37:9; App. 231.) He even attempted to interview Mr. Keller in jail as part of his independent investigation. (39:83; App. 196.)

Detective Walsh testified that he was investigating possible bail jumping charges. (39:84; App. 197.) He was aware that Mr. Keller was on bail for possession of child pornography with conditions that he not possess a computer other than for work or school. (39:83-84, App. 196-97.) But Mr. Keller declined the interview. (39:85; App. 198.)

Detective Walsh also testified that he was aware that Agent Johnson "had the ability to conduct a search of [Mr.

Keller's] computers." (37:9; App.) Agent Johnson called Detective Walsh from DCI after the computers were searched by the analyst and informed him they located numerous possible child pornography photos on the devices. (37:9; App. 231.)

Detective Walsh met with Agent Johnson the following day, in which she gave him the items seized from Mr. Keller's home, including the computers. (37:9; App. 231.) Detective Walsh was also given the preview disc prepared by the analyst that contained two reports and fifty-five photos of nude pubescent females. (18:27-28; App. 280-81.)

Detective Walsh then relied upon this information in his investigation to secure a search warrant for the computers. (18:27-32; App. 280-85.) The computers were searched again by a criminal analyst at DCI. (37:10; App. 232.) The images found from the search led to Mr. Keller being charged with nine counts of Possession of Child Pornography and nine counts of Felony Bail Jumping. (1:1-6; App. 102-07.)

Law enforcement would not have been able to search the computers without the information provided by Agent Johnson and the criminal analyst from the first search. The State even concedes that there was insufficient probable cause to obtain a search warrant.

However, the lack of probable cause for a search warrant does not justify a search conducted by law enforcement under the guise that it is a probation search simply because a probation agent initiated the search. See *Wheat*, 2002 WI App at ¶ 20. The fact that Agent Johnson only initiated the search should not make the search a probation search.

If a search was considered a probation search only because a probation agent "initiated" the search then law enforcement could conduct all searches involving probation and parole as long as the agent initiated it. This would significantly undermine the rights guaranteed to people under the Fourth Amendment by allowing law enforcement to evade the warrant requirement.

Courts have found that a search is a probation search when the probation agent actually "conducts" the search of a probationer's home or property while law enforcement are only "present" for protective purposes. See *Griffin v. Wisconsin*, 483 U.S. 868, 871, 880, 107 S. Ct. 3164, 3167, 3172, 97 L. Ed. 2d 709 (1987) (finding that the search of the defendant's home while police officers were present, but "carried out entirely by the probation officers under the authority of Wisconsin's probation regulation" was reasonable.); *Hajicek*, 2001 WI at ¶ 29 (concluding that the

search of the defendant's home was a probation search because the probation officers conducted the search while law enforcement officers were only present for protective purposes.); *Wheat*, 2002 WI App at ¶ 23 (concluding that the search of the defendant's home was a lawful probation search and not a law enforcement search because the probation officer conducted the search while law enforcement officers were present only for protective purposes.); and *State v. Jones*, 2008 WI App 154, ¶¶ 15-16, 314 Wis. 2d 408, 418-19, 762 N.W.2d 106, 111 (finding that the search of the defendant's room was a probation search and not a police search because the probation agent initiated and conducted the search, while police officers were only present at the residence for protective purposes.)

Conversely, if law enforcement "conducts" the actual search of a probationer's home or property and the probation agent is only "present," the search should be considered a police search. In this case, the search was a police search because it was conducted by a criminal analyst at DCI while Agent Johnson was only present and it was part of an independent police investigation. The evidence was obtained without a warrant in violation of the Fourth Amendment. Therefore, the evidence obtained should

be suppressed.

II. Mr. Keller had a Reasonable Expectation of Privacy in His Computers.

Even though probationers' "rights against warrantless searches and seizures are significantly curtailed," they are still "entitled to a certain degree of constitutional protection under the Fourth Amendment." *Purtell*, 2014 WI at ¶ 22. The protections of the Fourth Amendment apply when a person has a reasonable expectation of privacy in the property or location. *State v. Rewolinski*, 159 Wis. 2d 1, 12, 464 N.W.2d 401, 405 (1990).

A person has a reasonable expectation of privacy if (1) the person exhibited an actual, subjective expectation of privacy and (2) the expectation of privacy is one that society is willing to recognize as reasonable. *Id.* at 13, 464 N.W.2d at 405. Mr. Keller has the burden to show that he had a reasonable expectation of privacy in his computers. *Id.* at 16, 464 N.W.2d at 406.

In determining whether the expectation of privacy is one that society is willing to recognize as reasonable, the Court should consider the totality of the circumstances. *Id.* at 17, 464 N.W.2d at 407. The Court should also consider the following factors: (1) "whether the defendant had a property interest in the premises;" (2) "whether he

was legitimately (lawfully) on the premises;" (3) "whether he had complete dominion and control and the right to exclude others;" (4) whether he took precautions customarily taken by those seeking privacy;" (5) "whether he put the property to some private use;" and (6) "whether the claim of privacy is consistent with historical notions of privacy." *Id.* at 17-18, 464 N.W.2d at 407. Although these factors are relevant, they are not controlling or exclusive. *Id.* at 17, 464 N.W.2d at 407.

In considering the first prong, Mr. Keller had an actual, subjective expectation of privacy in his computers because he was keeping them in a locked office at his home. (39:24; App. 137.) Additionally, once his wife and children moved out of the house, Mr. Keller was the only person living in the home and he still kept the computers in the office. (39:27-28, 34; App. 140-41.)

In considering the second prong, Mr. Keller's expectation of privacy is one that society is willing to recognize as reasonable. In applying the six factors they weigh in favor of finding that his expectation of privacy is reasonable.

First, Mr. Keller had a property interest in the premises. He owned the computers, had possession of them and kept them in his home where he resided by himself.

(39:27-28, 34; App. 140-41, 147.) This weighs in favor of finding that his expectation of privacy was reasonable.

Second, he was prohibited from possessing a computer by his rules of community supervision. (39:18; App. 131.) This weighs against finding that his expectation of privacy was reasonable.

Third, he had dominion and control over the computers that he kept in his home and had the right to exclude others from his home, except that he was subject to home visits from his probation agent and his agent had the ability to seize his computers. This weighs against finding that his expectation of privacy was reasonable.

Fourth, he took precautions customarily taken by those seeking privacy. Mr. Keller kept the computers in a locked office in his home. (39:24; App. 137.) This weighs in favor of finding that his expectation of privacy was reasonable.

Fifth, he put the property to some private use. Mr. Keller told Agent Johnson that he used the laptop to access his email, the news, Channel four, Yahoo, YouTube and Facebook. (39:62-63; App. 175-76.) This weighs in favor of finding that his expectation of privacy was reasonable.

Sixth, the claim of privacy of a computer is consistent with historical notions of privacy. See *Riley v. California*, 134 S. Ct. 2473, 2489, 2495, 189 L. Ed. 2d 430

(2014) (finding that arrestees have a legitimate expectation of privacy in their cell phones, many of which are in fact minicomputers.) This weighs in favor of finding that his expectation of privacy was reasonable.

A probationer's expectation of privacy in his computers is diminished when he is on probation and the use of the computers is prohibited by a condition of his probation. *Purtell*, 2014 WI at ¶ 29. However, the fact that a person "has diminished privacy interests does not mean that the Fourth Amendment falls out of the picture entirely." *Riley*, 134 S. Ct. at 2488.

"When privacy-related concerns are weighty enough a search may require a warrant, notwithstanding the diminished expectations of privacy." *Id.* In *Riley*, the Supreme Court of the United States found that although arrestees have a diminished expectation of privacy, they still have a reasonable expectation of privacy in their electronic devices. *Id.* at 2488, 2495.

Although the court in *Purtell* found that a probationer's privacy in his computers is diminished when the possession of computers is prohibited by a condition of that probation, the court only then concluded that "in most situations a *probation agent* would presumably have reasonable grounds to search the contents of the item."

Purtell, 2014 WI at ¶ 30 (emphasis added).

The court did not find that because of the diminished expectation of privacy of probationers possessing contraband, that the Fourth Amendment no longer applies and police are permitted to search the computers without a warrant. Again, only the probation agent is permitted to search without a warrant based on reasonable grounds. *Id.*

In this case, the search of Mr. Keller's computers was not done by Agent Johnson. The search was conducted by law enforcement without a warrant. Mr. Keller had a reasonable expectation of privacy in his computers. Therefore, the evidence obtained from the warrantless police search should be suppressed.

CONCLUSION

For the foregoing reasons, Mr. Keller respectfully requests that this Court affirm the circuit court's decision granting his motion to suppress evidence.

Dated this _____ day of August, 2016.

Respectfully Submitted,

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CERTIFICATION OF BRIEF

I hereby certify that this brief conforms to the rules contained in s. 809.19 (8) (b) and (c) for a brief and appendix produced with a monospaced font. The length of this brief is 28 pages.

Dated this ____ day of August, 2016.

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CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that: I have submitted an electronic copy of this brief, excluding the appendix, 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 as of this date.

A copy of this certificate has been served with the paper copies of this brief with the court and served on all opposing parties.

Dated this ____ day of August, 2016.

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