STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT III

Appeal No. 2017AP000185 - CR

STATE OF WISCONSIN,

Plaintiff- Respondent,

RONALD LEE BARIC,

Defendant- Appellant.

BRIEF AND APPENDIX OF DEFENDANT – APPELLANT

APPEAL FROM THE CIRCUIT COURT FOR OUTAGAMIE COUNTY
THE HONORABLE JOHN A. DES JARDINS PRESIDING

JOHN MILLER CARROLL LAW OFFICE
Attorney for Defendant – Appellant

John Miller Carroll
State Bar. No. 1010478

226 S. State St.
Appleton WI 54911
(920) 734-4878

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Statutes

Cases

ISSUES PRESENTED FOR REVIEW

Was the warrantless multijurisdictional search conducted by Officer Kowalski entitled to Fourth Amendment Protection?

Trial Court: Found there was no search

The Appellant answers: Yes

Did the Trial Court commit clear error by relying exclusively on persuasive precedent from another District rather than binding law in his jurisdiction?

Trial Court: No

The Appellant answers: Yes

Was the interrogation of Ronald Baric the product of Coercion?

Trial Court: No

The Appellant answers: Yes

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Oral argument is requested due to the complexity of the issues, the vastness of the topics application and the evolving nature of the law so that both parties can verbally illustrate their interpretations of law as they apply to the facts of this case. Publication is suggested in order to give further guidance to the bench and bar in this state as to the lawful use of a computer and monitoring software to conduct warrantless searches.

STATEMENT OF CASE

On January 22 2016, the Appellant Ronald Baric, and his counsel were present in Outagamie County Circuit Court for a Motion hearing challenging admissibility of statements allegedly made by the Defendant. (R. 58) similarly, on June 22, 2016 the Appellant and Counsel were present in Outagamie County Circuit Court for a Motion hearing challenging the admissibility of fruits of an unlawful search. (R. 59) The Defendant in its motion argued that a warrantless search of Ronald Baric had occurred prior to the application of a search warrant. (R. 59) The Defendant through counsel argued that the fruits of the warrantless search were the sole basis for granting a warrant, that the affidavit in support contained misstatements of fact, and that the Conduct of Officer Kowalski by using specialty software and servers outside his jurisdiction and state was tantamount to using sense enhancing devices to discover content within the home. (R. 59) (R. 32: 6-11) On April 6th 2016 an Order was entered denying the Defendant Appellants motion to suppress statements. (R. 21) and on June 22 2016, the Appellants motion to suppress fruits of the unlawful search was denied. (R. 59) On August 22, 2016 the Appellant entered a plea of no contest to two counts of Possession of Child Pornography under

Wisconsin Statute §948.12(1m) and was sentenced on October 7th, 2016. This Appeal follows.

STATEMENT OF THE FACTS:

On October 14th, Detective Kowalseki used computer and computer software to conduct a search outside of his jurisdiction. (R 59-14) This search used a Computer Server in Florida and software not available to the public to conduct a national search. (R. 59: 1-17) Detective Kowalski conducted multiple searches prior to obtaining the Appellants information (R. 59: 1-17) (R. 32 6-11) First Detective Kowalski used specialty software to access a CPS sever in Florida that was not Publically available (R. 59: 10-14) (R. 32 6-11) The software on these servers monitor the files automatically stored on personal computers using various torrent networks. (R. 59-14) The CPS software then examines the files to compare them to a control (R. 59-14) this is a nationwide search that might exceed the United States. (R. 59-14) After the specialty software is deployed through a private server in Boca Raton Florida it sifts files on another network to identify specific files for content. (R. 59-14) After finding a suspect file the software then compares the suspect files properties to a control, this is done using the not publically available software. (R. 59: 9-14) Next the specialty software then geo-locates the suspect file to the state of Wisconsin. (R. 59-9). This entire search is being conducted by an Officer of Shawano County who was deputized to conduct these searches subject to the limitation that he works with a FBI agent (R. 59-10) There was not a joint effort in this search with the FBI. (R. 59: 9-10) After conducting this massive search Officer Kowalski completed an Affidavit for a warrant. (R. 32 6-11) The Affidavit contains material misrepresentations of fact in that it states on its face the program used is available to the public. (R. 32 6-11) The warrant was issued.

Next, On Thursday, February 19th, 2015 Special Agents from the Wisconsin Department of Justice travelled to a residence located at N2787 State Highway 15, Hortonville, Outagamie County, Wisconsin. (R. 20- 1) Special Agent parked outside the home watching for an opportunity to come inside (R. 20: 1-5) The 5 Agents parked outside notice an elderly man taking out the trash. (R. 20: 1-25) At this time there was a Birthday Party occurring at the residence (R. 20-1) After Special agents attain access to the home, Special Agent Roffers requested to speak with the Appellant. (R. 20: 1-5) After the initial interrogation of the Appellant he was asked for consent to search his laptop. (R. 20: 1-25) Baric refused to consent to the warrantless search multiple times. (R. 20: 1-25) eventually after several extensive compelling conversations consent was attained. (R. 20: 1-35)

AUTHORITY

WARRANTLESS SEARCHES DEPLOYING SENSE ENHANCING DEVICES ARE UNCONSTITUTIONAL

1. Warrantless searches are per se unreasonable unless the state can establish that the search fell within one of the recognized exceptions. *See* Wis. Stat. §§968.10, 968.11, 968.25; *see also Schneckloth v. Bustamonts, 412 U.S. 218 (1973); State v. Denk,* 2008 WI 130, ¶ 36, 315 Wis. 2d 5, 759 N.W.2d 775; *State v Kieffer*, 217 Wis. 2d 531, 541, 577 N.W.2d 352(1998)

2. When the challenged search or seizure was not authorized by a warrant, the state has the burden to show that the action was justified under an exception to the warrant requirement. *See, e.g., State v. Matejka*, 2001 WI 5, ¶ 17, 241 Wis. 2d 52, 62`1 N.W.2d 891.

3. The general burden of proof on suppression issues is a preponderance of the evidence. *See, e.g. State v. Raflik,* 2001 WI 129, ¶¶53-55, 248 Wis. 2d 593, 636 N.W. 2d 690. The Wisconsin Supreme Court has stated, however, that the states burden is showing that an exception to the warrant requirement applies, is the higher clear-and-convincing standard. *Matejka*, 2001 WI 5, ¶ 17, 241 Wis. 2d 52.

4. The U.S. Supreme Court has interpreted the Fourth Amendment to

protect **against non-physical searches of the home.** *See* Kyllo v. United States, 533 U.S. 27,40 (2001) (**holding that the use of a device to gain information about the interior of a home, even absent a physical intrusion into the home, was a search**)

5. In Kyllo V. United States, the U.S. Supreme Court held that the use of an infrared thermal sensor to detect heat being emitted from the defendant's home was an unreasonable search that required a warrant. The sense enhancing device that was used by the officers in Kyllo was capable of detecting both legal and illegal activity within the home, leading the Court to hold that all activity within the home, no matter how trivial, should be protected from government intrusion absent a warrant. *Id*

6. The Court held that the use of "sense-enhancing technology" that is not in use by the public and is able to gather information about activity within the home that, absent the technology, could not be gathered without entering the home, **Constitutes a search of the home within the scope of the 4th Amendment.** *Id at 34, 40 (majority opinion); see* April A. Otterberg, GPS tracking Technology; The case for revisiting knots and shifting the Supreme Courts Theory of the Public Space Under the Fourt Amendment, 46 B.C. L. REV. 661, 693 (2005) (discussing the Kyllos Courts development of this new test.)

Coercion of Statements

1. Warrantless searches are per se unreasonable unless the state can establish that the search fell within one of the recognized exceptions. *See* Wis. Stat. §§968.10, 968.11, 968.25; *see also Schneckloth v. Bustamonts, 412 U.S. 218 (1973); State v. Denk,* 2008 WI 130, ¶ 36, 315 Wis. 2d 5, 759 N.W.2d 775; *State v Kieffer*, 217 Wis. 2d 531, 541, 577 N.W.2d 352(1998)

2. When the challenged search or seizure was not authorized by a warrant, the state has the burden to show that the action was justified under an exception to the warrant requirement. *See, e.g., State v. Matejka*, 2001 WI 5, ¶ 17, 241 Wis. 2d 52, 62`1 N.W.2d 891.

3. The general burden of proof on suppression issues is a preponderance of the evidence. *See, e.g. State v. Raflik,* 2001 WI 129, ¶¶53-55, 248 Wis. 2d 593, 636 N.W. 2d 690. The Wisconsin Supreme Court has stated, however, that the states burden is showing that an exception to the warrant requirement applies, is the higher clear-and-convincing standard. *Matejka*, 2001 WI 5, ¶ 17, 241 Wis. 2d 52.

4. A seizure has occurred when a person complies with a show of

police authority, under circumstances in which a reasonable person would not have felt that he or she was free to leave or ti disregard a police request. *See, e.g., California v. Hodari D.*, 499 U.S. 621, 627-28 (1991); *State v. Young*, 2006 WI 98, ¶ 26, 294 Wis. 2d 1, 717 N.W.2d 729; *State v. Williams, 2002 WI 94*, ¶ 23, 255 Wis. 2d 1, 646 N.W.2d 834.

5. Thus, a police officer may approach a person and ask questions, as long as a reasonable person would feel free to decline to answer. *United States v. Drayton,* 536 U.S. 194, 203-04 (2002); *Williams,* 2002 WI 94, ¶ 22, 255 Wis. 2d 1.

6. If a reasonable person would not have felt that he or she could disregard the police request, the defense may argue that the consent was tainted by the excessive length of detention. *See State v. Luebeck,* 2006 WI app 87, ¶¶ 15-16, 292 Wis. 2d 748, 715 N.W.2d 639.

7. Where a defendant raises a voluntariness challenge, the State must prove by a preponderance of the evidence that the statement of consent given made by the defendant was voluntary. *Jerrell C.J.,I 283 Wis.2d 145, 699 N.W.2d 110.*

8. Voluntariness is a factual question based on the "totality of the circumstances". *State v. Phillips,* 218 Wis. 2d 180 (1980)

9. The consenting parties knowledge that he has the right to refuse consent is ***highly relevant*** but is not controlling. *U.S. v. Mendenhall,* 100 S.Ct 1870, 1879 (1980)

10. "A defendants statements are voluntary if they are the product of a free and unconstrained will, reflecting deliberateness of choice, as opposed to the result of a conspicuously unequal confrontation in which the pressures brought to bear on the defendant by representatives of the State exceed the defendants ability to resist." *State v. Hoppe,* 2003 WI 43, 261 Wis.2d 294, 661 N.W.2d 407

11. Evidence that may be suppressed includes physical evidence and statements obtained as a result of the arrest. *See, e.g., State v. Anderson,* 165 Wis. 2d 441, 477 N.W.2d 277(1991); *Nadolinski v. State,* 46 Wis. 2d 259, 174 N.W.2d 482 (1970).

ARGUMENT

The Shawano County search of information contained on Baric's computer violated his 4th Amendment rights against Warrantless Searches and Seizures.

7. The Search of Ronald Barics Internet Activity and Monitoring of his personal browsing activity via means of invasive computer forensics constituted a search.

8. Using the Sense enhancing device of a computer and software specifically targeted and deployed for the purpose of locating a computer inside the home as well as to monitor the websites and content that an individual visits qualifies under the Kyllo Courts interpretation as a search using a "sense enhancing device:"

9. The Kyllo Court also commented on the use of a thermal imaging device to see the contents within the home.

10. In Kyllo V. United States, the U.S. Supreme Court held that the use of an infrared thermal sensor to detect heat being emitted from the defendant's home was an unreasonable search that required a warrant. The sense enhancing device that was used by the officers in Kyllo was capable of detecting both legal and illegal activity within the home, leading the Court to hold that all activity within the home, no matter how trivial, should be protected from government intrusion absent a warrant. *Id*

11. The search deployed by the Shawano County Sheriff's office used sense enhancing devices in the form of a computer, two servers and police software to effectively search via the tor network and various servers for content located on a personal computer within a home protected by the 4th amendment. (R. 59)

12. Without the use of these Sense Enhancing devices to monitor and search for conduct being carried out within the home these officers would not have been capable of detecting nor following the Defendants internet activity. They would not have been capable of ascertaining known files on the Defendants computer. (R. 59)

13. On October 14th, 2014 Detective Gordon Kowaleski of the **SHAWANO COUNTY SHERIFFS DEPARTMENT,** conducted a search, outside of his jurisdiction using sense enhancing devices to intrude into the home and personal effects of Ronald Baric, without a warrant. *Exhibit One to*

Defendants Motion To Suppress date June 17th, 2016, Affidavit of Gordon Kowaleski (R 32-6)

14. This search intruded into the home and the personal effects of many residents throughout the state. (R. 59-14) *"Q is it nationwide, do you know, A My understanding is yes",* (R. 59: 11,12) *"I think to better explain to, when somebody runs eMule and they download the program, when, files are created - - or folders are created by default. The incoming folder and attempt folder as that person does searches or downloads files of* ***any nature,*** *the files come in in chunks.* ***The chunks are stored initially in the temp folder*** *(NOTE: this is the same folder that was created on the user's computer by downloading and running the software) When the file is complete, it gets moved to the incoming folder. (another folder that is created by default on the user's computer) As you build files as a user of the eMule, the software reports the hash values and file names up the eMule servers. When I as a user go to do a search the server will say this person, this person, or however many people have the file you are looking for* ***and will hand me off to the individual peer.*** *And then I as a user download from there."*

15. On October 14th, Detective Kowalseki used computer and computer software to conduct a search outside of his jurisdiction. (R 59-14)

16. On October 14th, Detective Kowalseki used a computer and computer software to locate, follow and electronically enter the home of Ronald Baric. (R. 59) (R. 32-6) *Exhibit One to Defendants Motion To Suppress date June 17th, 2016, Affidavit of Gordon Kowaleski*

17. From 4:24 GMT to 13:46, nearly twelve hours, investigators from **SHAWANO COUNTY** used sense enhancing tools and methods to intrude into the home and personal effects of the Defendant Ronald Baric. Who is a resident of Outagamie County. (R. 32-6) *Affidavit of Gordon Kowaleski*

18. In deploying a search using the Gneuttela network investigator Kowaleski was able to search computers throughout the **STATE OF WISCONSIN** for specific information. (R. 32 -6) (R. 59 11-12)

19. Specifically, Dectective Kowaleski used a computer and **software not available to the public** to enhance his ability to search through material online throughout entire state of Wisconsin for specific information. (R. 59 8-9)

20. Detective Kowaleski testified on June 22, 2016 that the software he used to search and find Baric through searching his files "is not publically

available". *See June 22nd 2016 transcript page 8-9. (R. 59 8-9)*

21. This is inconsistent with the affidavit submitted to the Court in applying for the very warrant that was at issue that represents: "this Detective could then use **publicly available** software to request a list of internet network computers…" (R. 32 6-11) Affidavit of Kowalski

22. "The Court held that the use of "sense-enhancing technology" that is not in use by the public and is able to gather information about activity within the home that, absent the technology, could not be gathered without entering the home, **Constitutes a search of the home within the scope of the 4th Amendment."** *See* Kyllo v. United States, 533 U.S. 27,40 (2001)*; see* April A. Otterberg, GPS tracking Technology; The case for revisiting knots and shifting the Supreme Courts Theory of the Public Space Under the Fourt Amendment, 46 B.C. L. REV. 661, 693 (2005) (discussing the Kyllos Courts development of this new test.)

23. Detective Kowaleski used specialized tools to obtain files from a server and subsequently the computer contained within the home of Ronald Baric. (R. 59) (R. 32 6-11)

24. Besides downplaying the fact that two searches occurred before obtaining an IP or applying for a warrant the Affidavit of Detective Kowaleski is completely inconsistent with his testimony under oath that the software deployed was not publically available. (R. 59) (R. 32 6-11)

"Q Earlier today you mentioned the term "my software" when you were referencing how you were plugging in hashtag values to find contraband images or certain key terms. What is the software that you've been using?

A CPS, Child Protective Services - - or Child Protective System. Im sorry

Q Is that something that is produced just for your agency?

A No.

Q Is that something that is publically available?

A No." – (R. 59 8-9)

25. Ronald Baric resided at the time of this Shawano County Case in Outagamie County. (R. 59)

26. The search of Kowaleski a Shawano County Offcier, included the use of specialty software to intrude into the home of Ronald Baric, to gain access to files stored physically on Baric's computer and to copy files from within his home. (R. 59) (R. 32 6-11)

27. At the close of testimony Counsel for the Defendant moved for an opportunity to brief the issues that were developed on the record. The Court denied the request and then moved to opine without allowing argument from eitherside. (R. 59- 16)

28. Factually the Court in denying the Defendants motion found that there is no search. (R 59-17)

29. What Defense wished to brief and what the Court failed to consider was that in order to find the IP address two searches using sense enhancing devices had already taken place.

30. The process looks like this:

1. Without a warrant or applying for one an officer acting beyond his jurisdiction used specially designed, not publically available software and servers (sense enhancing devices) to go online and "look for people on various peer-to-peer networks that are offering to distribute or have available for distribution files with those hash tag values" (R. 59-9; 10-15)

2. These files would be contained on a personal computer and are only identified after the officer has searched online using specialty software and servers to find a file contained on a personal computer. "So is it possible that you would get a report *from your software* for a partial file either *being stored or downloaded on somebodys computer*? A. Correct" (R. 59-12)

3. After the sifting of thousands of personal computers for the presence of a specific file to obtain information pertaining to the crime a second search begins.

4. Now that the Officer has acquired the file from the personal computer they have what they need to begin the second search. After the suspect file is found its hashtags (digital signatures) are cross referenced against a list of known hashtags that the FBI has acquired.

5. After the file is located using specialty software and cross checked against known hashtags the second warrantless search beings.

6. The second warrantless search uses the IP address obtained by stiffing for files subsequently comparing the contents of those files.

"So I am going into the servers for CPS, which the servers for CPS are

going in the servers for emule" - (R. 59-11)

"CPS has its own servers that check the networks, such as Gnutella or ED 2k, eDonkey 2000 Network, which emule typically runs or possibly the K.A.T. network" – (R. 59-11).

Dectective Kolwaski goes on to describe the locations of files on personal computers and how they are accessed, sifted and compared using the CPS software.

"I think to better explain it, when somebody runs emule and they download the program, files are created- - or folders are created by default" (R 59-11)

This sentence is describing how when a personal computer user downloads the emule software (which is used to share legal files as well) the downloaded program automatically creates local files on the Personal Computer that are accessible by search to the emule network.

These files were discovered by officer Kowalski, because CPS has a server and specialty software he used to sift the legal and illegal files stored in these automatically created files (stored locally on personal computers).

7. The software then identifies the file was downloaded by the computer and cross checks it against a control. ***This is a massive monitoring and search that is conducted automatically by the server.*** "CPS has its own servers that check the networks, such as Gnutella or ED 2k, eDonkey 2000 Network, which emule typically runs on K.A.T. Then it will show up on the screen I open that there is a target within my area. So I am going into the servers for CPS, which the servers for CPS are going in the servers for eMule" (R. 59-11) It is important to note that through the servers for the tor client the items stored on a personal computer are accessed and checked.

8. The purpose of the next search (before applying for a warrant) is to geo-locate the computer that was being searched under the first warrantless search.

9. The next search is also identified in the June 22nd testimony of Detective Kowalski "When the server from the software I use finds those, it takes the IP address, because in order for peer-to-peer to work, the IP address has to be available, it geo locates that on a map. If it comes back to my area it will show up on my screen as a target." (R. 59-9)

31. All of these actions were done without a warrant by an officer acting outside his jurisdiction. The officer, who conducted the search, was deputized to conduct these searches with limitations. That limitation being that when these searches are conducted that he "generally work with other FBI officers" on a case. (R. 59-10)

32. There is no evidence of other FBI officers involvement in these searches.

33. The wide-ranging, multijurisdictional, warrantless search and tracking of Barics personal information and files stored on a personal computer is similar to Kyllo's use of sense enhancing devices to search within a home without a warrant.

34. The officer's use of specialty software to sift through thousands of files for the purpose of identifying an illegal file, on personal computers and private servers and then conducting the geolocation that person is a search that is entitled to 4th amendment protection.

35. Ordinary citizens, even citizens who are subject to diminished privacy interests because they have been detained, have a legitimate expectation of privacy in the contents of their electronic devices. *See Riley v. California*, U.S., 134 S.Ct. 2473, 189 L.Ed.2d 430 (2014); *State v. Carroll*, 2010 WI 8, ¶ 27, 322 Wis.2d 299, 778 N.W.2d 1. State v. Purtell, 2014 WI 101, ¶ 28, 359 Wis. 2d 212, 232, 851 N.W.2d 417, 427

36. The United States Court of Appeals for the District of Columbia Circuit reversed the conviction because of admission of the evidence obtained by warrantless use of the GPS device which, it said, violated the Fourth Amendment. *United States v. Maynard,* 615 F.3d 544 (2010) United States v. Jones, 565 U.S. 400, 404, 132 S. Ct. 945, 949, 181 L. Ed. 2d 911 (2012)

37. This search would not have been able to take place absent the use of sense enhancing devices. The device deployed is not publically available. There is a privacy interest in the area search (servers and then subsequently files on the local machine) Worse yet, the software and methods deployed by an Officer in Shawano County covered nearly the entire state if not regions entirely outside the state.

38. The use of wide spread sense enhancing devices to conduct many warrantless searches of files on personal computers and servers, outside of the Jurisdiction of the officer and without meeting the restrictions on his deputization as well as conducting the search to geolocate the Defendant resulted in a warrantless search protected by the 4th amendment.

39. "The Court held that the use of "sense-enhancing technology" that is not in use by the public and is able to gather information about activity within the home that, absent the technology, could not be gathered without entering the home, **Constitutes a search of the home within the scope of the 4th Amendment."** *See* Kyllo v. United States, 533 U.S. 27,40 (2001)

The Trial Court Errored in applying Precedent that is not binding and Conflicts with the clear language of binding precedent.

40. In Kyllo V. United States, the U.S. Supreme Court held that the use of an infrared thermal sensor to detect heat being emitted from the defendant's home was an unreasonable search that required a warrant. The sense enhancing device that was used by the officers in Kyllo was capable of detecting both legal and illegal activity within the home, leading the Court to hold that **all activity within the home, no matter how trivial, should be protected from government intrusion absent a warrant.** *Id*

41. The Trial Court in issuing its decision held that there was not a search.

(R. 59 17) In opining there was no search the Court ignores how information would be transferred from the hard drive on Barics computer to the program being executed by the FBI and the law under Kyllo, Riley v. California, U.S., 134 S.Ct. 2473, 189 L.Ed.2d 430 (2014); State v. Carroll, 2010 WI 8, ¶ 27, 322 Wis.2d 299, 778 N.W.2d 1. State v. Purtell, 2014 WI 101, ¶ 28, 359 Wis. 2d 212, 232, 851 N.W.2d 417, 427

42. Is was a mass search conducted for the purpose of identification of the existence of specific files contained within a server and then hard drive, comparing the content of those files and then geo-locating the suspect before applying for a warrant.

43. The State asserts in its affidavit that "once a set of digital signatures were identified that matched the SHA1 signatures of known child pornography, **this detective could then use a *publicly available software* to request a list of internet network computers that are reported to have the same images for trade or are participating in the trade of known images**".

44. This sentence from the affidavit clearly is the exact opposite of the Officers testimony at the motion hearing and clear articulates two searches. (R. 59)

1. "Once a set of digital signatures were identified that matched SHA1 signatures..." in order to verify the conformity of the file in question there needs to be access to that file as well as the "control file". (R. 32: 6-11)

a. To access the file on a computer in a home is a search that violated the fourth amendment. Or in other words: "By using this type of **SEARCH** this detective could compare the offered SHA1 signatures (of the suspect file) with SHA1 signatures known..." The Appellant argues that if the officer never accessed the subject file present on the defendant's computer this comparison could not have occurred. (R. 32: 6-11)

2. Further after the search is conducted t**o ascertain and compare the files** a second search begins. The terms from the Affidavit

"publically available software" and "request" are of the utmost importance here. Factually, the publically available software was not publically available. (R. 59: 8-9) Factually the purpose of the CPS software is to sift servers and files to verify the existence of a suspected image or file by comparing the suspect file to that of a known image. (R. 59 – 9) Again, in order to compare these files there must be access to the suspect file. (R. 32: 6-11)

b. Factually, the FBI used a CPS server not available to the public (R. 59- 8), to deploy software not available to the public (R. 59 8-9) to search another server and then ultimately searched for, accessed and compared files on many personal computers before a warrant was ever applied for. (R. 59-9) (R. 32: 6-11)

45. Factually, the Court errored by finding that no search occurred, as that ruling is inconsistent with the clear language of Kyllo: The Court held that the use of "sense-enhancing technology" that is not in use by the public and is able to gather information about activity within the home that, absent the technology, could not be gathered without entering the home, **Constitutes a search of the home within the scope of the 4th Amendment.** *See* Kyllo v. United States, 533 U.S. 27,40 (2001)

46. Factually the Court errored in finding that there is privacy interest in an IP address. It is clearly articulated in the affidavit and record the search in question is not that of an IP address but rather a search first for files and then another subsequent search to cross reference known data to that of the suspect computer and subsequent to that a geolocation of the searched files.

47. These are all searches that occur prior to applying for a warrant. A warrant could not have been ascertained to conduct this search as there is no

cause to search Baric absent the information obtained in the prior unlawful searches. All of the searches require in some way access to the suspected file, a file located in the home of Ronald Baric.

The Interrogation of Ronald Baric was the product of Coercion

1. On Thursday, February 19th, 2015, Ronald Baric was at home with his family and guests celebrating his sister's birthday. (R. 20-29)

2. In total 5 agents responded to Barics house. (R. 58-16)

3. On this date Special Agents from the Wisconsin Department of Justice travelled to a residence located at N2787 State Highway 15, Hortonville, Outagamie County, Wisconsin. (R. 20-1)

4. Special Agents Roffers and Racine arrived at the home of Ronald Baric at 7:54 P.M., where they awaited an opportunity to approach the defendant. (R. 20-1)

5. Shortly after arriving Agents Roffers and Racine note that an occupant of the residence that they were actively seeking entry into, was currently taking out the trash. (R. 20-1)

6. Roffers and Racine used this opportunity to gain entry into the home.

"RACINE: Eric said someone is taking the trash out right now." (R. 20-1)

7. Shortly after approaching Chris Schultz a resident of the home, Special Agent Roffers stated his credentials and informed Chris he was looking for a Lee Baric.

"ROFFERS: Oh, that's all right. I wanted to show you my credentials here. I'm a special agent with the Wisconsin Department of Justice. I'm looking for a Lee Baric." (R. 20-2)

.

8. After gaining entry into the home via credentials the Special Agents seek contact with Ronald Baric, the defendant in this case.

"CHRIS: Is Lee home yet?

JOHN: Lee? I think so. Why? Is he in trouble?

ROFFERS: Hi, sir. No, he's not in any trouble. I just need to talk to him. My name is Jed Roffers. I'm a special agent with the Wisconsin Department of Justice." (R. 20-3)

9. In seeking contact with the Defendant the Investigating Agents state: "He is not in any trouble. I just need to talk to him". (R. 20-3)

10. Clearly Mr. Baric's family was concerned about the potential risk of charges being brought against their family member. The special Agent patently misrepresent that Baric is not in any trouble. Had the family been informed properly upon their request that Baric was being pursued for criminal charges they would have likely handled the situation differently.

11. "A defendants statements are voluntary if they are the product of a free and unconstrained will, reflecting deliberateness of choice, as opposed to the result of a conspicuously unequal confrontation in which the pressures brought to bear on the defendant by representatives of the State exceed the defendants ability to resist." *State v. Hoppe,* 2003 WI 43, 261 Wis.2d 294, 661 N.W.2d 407

12. Moments later again Barics family raises concerns over conversing and are deliberately mislead again by the two special agents.

"SUE: I will go get him.

ROFFERS: Okay. Yeah, it's pretty important that we, pretty important that we talk to him.

JOHN: Uh-oh. He's not in any trouble, is he--

ROFFERS: No, but it, it is **required** that I talk to him and try to gather some information-" (R. 20-4)

13. Yet again, clearly concerned, a family member of Barics inquires as to whether or not he was in trouble.

"SUE: He's not in trouble, is he?

ROFFERS: At this point, no. At this point, we are just required to follow up on some information that we received, and we're hoping that Lee might be able to provide enough information to shed some light on some things. So, are you okay, and, and how are you guys related?

SUE: I'm his sister.

ROFFERS: You're his sister. Okay. Are you okay with Sue sitting here and talking with us?

BARIC: Yeah.
SUE: Well, I won't talk. I'll just put my heart back in my chest . . .
ROFFERS: Okay, no problem.
SUE: Oh, my goodness.
ROFFERS: Did my partner, Chad, show you his credentials?" (R. 20-6)

14. Conversations between the two special agents and Baric continue for a brief time. During this period of time each time they have an opportunity to speak to Baric each agent makes an attempt to single Baric out and separate him from his family members for individual questioning. One must note that prior to this occurring Baric already stated Sue and family can be present. The purpose of this tactic is to single out Baric and separate him to increase the amount of influence the FBI agents with impressive credentials have.

"RACINE: Sometimes when we have conversations with people, we do talk about things that are personal in nature, so if you could come closer here--[Simultaneous discussion]" (R. 20-10)

"ROFFERS: Yeah, like Chad was saying, Lee, we might indulge in personal conversations, where it might be more comfortable to talk alone, so we're going to leave that up to you when the time comes. Okay? Do you know what I'm, do you know what I'm kind of talking about?
BARIC: Not really.
ROFFERS: No, okay.
BARIC: Kind of. Not really . . .
ROFFERS: Okay, all right. So you're . . . " (R. 20: 12-13)

15. Again, Scott and Sue ask if they are allowed to stay and help answer questions and are again requested to stay. Questioning continues.

"SUE: Do you mind if Scott stays here to answer those questions that I don't know?
SCOTT: It's up to you guys if you want me--
[Simultaneous discussion]
ROFFERS: Well, it's not up to us. It's kind of, it's kind of up to Lee, really.
SUE: Yeah.
SCOTT: Your call, dude. If I'm here, it's fine. I have no idea what's going on.

ROFFERS: All right, so, right, like I was explaining to Lee, Chad and **I are special agents--**

SCOTT: Don't mind me not looking at you, but if I want to hear--

[Simultaneous discussion]

SCOTT: --my hearing sucks, sorry--

ROFFERS: **With Chad and I being special agents, we're like state investigators**." (R. 20-13,14)

16. Conversations then continue and Roffer eventually states to Baric:

"ROFFERS: U-g-e, Deluge, okay. So that's like, and you might even know more about this stuff than I do, but that's, correct me if I'm wrong, but that's file-sharing where you're on a network with other people who also have the program and you can all possess, whether it's pictures, music, videos, movies and I can try to get some of the stuff you've got and you can try to get some of the stuff I've got, and we're a big network. Is that how I understand that works?" (R. 20-17)

17. In stating "you might even know more about this stuff than I do. Special Agent Ruffers is misleading Baric into thinking he is unknowledgeable on this topic effectively swaying Baric into a false sense of security. At this point Barics been told many times he is not in trouble and informed that the Special Agent isn't knowledgeable on the topic he was inquiring. These are patent misrepresentations that lulled the Defendant into eventually giving coerced consent. Further, here the Agent describes some of the legal content on the Networks that were searched.

18. In evaluating voluntariness, the court considers and coercive police tactics as well as the defendants personal characteristics. *State v. Hoppe,* 2003 WI 43, ¶¶ 39-40, 261 Wis. 2d 294, 661 N.W. 2d 407.

19. Coercion may consist of psychological tactics that take subtle advantage of the defendant's personal traits. *Id.* ¶32.

20. Continually during questioning with the Defendant the two special agents represent they are not knowledgeable on the topic. This tactic appears to be deployed to take advantage of the personal characteristics of the defendant and lull him into believing he was not in trouble.

21. "The relevant personal characteristics of the defendant include the defendant's age, education and intelligence, physical and emotional condition, and prior experience with law enforcement. The personal characteristics are balanced against the police pressures and tactics which were used to induce the

statements, such as" the length if the questioning, any delay in arraignment, the general conditions under which the statements took place, any excessive physical or psychological pressure brought to bear on the defendant, any inducements, threat, methods or strategies used by the police to compel a response, and whether the defendant was informed of the right to counsel and the right against self-incrimination." *State v. Hoppe,* 2003 WI 43, 261 Wis 2d 294,310,661 N.W.2d 407, 414.

22. At this point Baric has not been told he has the right to Counsel or against self-incrimination. However, he has been told he is not in trouble and that the special agents that don't know much about computers need to talk to him.

23. During this time the Agents attempt to increase their influence on Baric by singling him out away from his family where the *two* special agents can talk with him.

24. Next, Roffers asks for consent to search and upon being informed it's up to him Baric Denied access to search.

"ROFFERS: In the basement, okay. Would I be able to walk down with you and retrieve the laptop that you're talking about?

BARIC: [22:01]

ROFFERS: Are you guys okay with that?

MAN: [22:04] go ahead, yeah. I, yeah, *whatever you guys need to do* . . .

ROFFERS: It would just help clear up some things. Like I said, Chad and I get limited information. These type of stuff end up on our desk all the time. We don't particularly enjoy working this late and barging in and coming and knocking on doors unannounced, but ***it's just something that our boss kind of requires us to do*** and ***we've got to do so many of them a month and we just, you know, after one it's kind of on the next one, so that's kind of how these things work***. So if you're okay with that, we have someone who works for us, like a computer forensic analyst that has the capabilities to just preview a device. They won't ruin your device at all. They can't manipulate it at all. The only thing they can do is kind of take a look at it as far as what's on the device. So, would you be okay with that?

BARIC: Like I [23:03] but, I mean, *if you have to.*

ROFFERS: Okay. It's completely up to you.

BARIC: ***I would rather not, no."*** (R. 20-24)

25. After working to single out baric, stating their credentials multiple times, downplaying their knowledge, misstating their role, informing Baric

they can come in guns a blazing, the Agents are denied consent to search. This is a voluntary denial; it is what Baric intended prior to becoming subdued by the Officers statements and Tactics.

26. After being denied access to search by Baric, the two special agents make a third attempt to single out Baric, this time succeeding.

ROFFERS: Okay, all right, because I—
SUE: Would you take his computer away?
ROFFERS: Well, there's some things, to be honest, that I think might be located on the computer that concern me. And especially with you operating an in-home daycare here, it concerns me a great deal, actually. And there are specific files of interest that I think Lee might know what, exactly what I'm talking about.
BARIC: I have an idea, yeah.
ROFFERS: Okay. What do you think the idea I'm eluding [sic] to is . . .
RACINE: This is when we talked about if you wanted to talk in private--
[Simultaneous discussion]
ROFFERS: Do you want to talk in private--
SUE: Yeah. Scott and I will walk away.
BARIC: Yeah . . .
SUE: Okay. We're leaving. Okay. (R. 20-25)

27. Next, Roffers again reassures Baric he is not in any trouble.

"ROFFERS: Lee, ***let me remind you, you are not in any trouble at all with us right now, okay?*** You are not under arrest. You are not in custody. We're here, you know, knocked on the door. ***Your sister*** let us in. ***We just want to talk to you and try to gather as much information as possible. So . . ." (R. 20-25)***

28. Next, special agent Racine joins in:

"RACINE: We know there's more, there's more to the story of why we're here, and we know that you know that. And we don't want, this is not to embarrass you. This is not to single you out. We want to have a private conversation because this is a private matter. ***We're not here to judge you. We want to be fair with you. But we need you to help us do that."(R. 20-26)***

29. At this time the two special agents who have reassured Baric many times he is not in trouble and just needs to cooperate are double teaming the

now singled out Baric as an attempt to overcome his denial of consent. At this time the agents begin mentioning again that he is not in trouble that this is just something they have to do and that he should comply so as not to cause trouble for the people that care about him.

"ROFFERS: And, Lee, Chad and I do this for a living. There's nothing that you're going to tell us that's going to shock us, that's going to make us think you're a monster. We know you're not a monster. ***We know you're a good guy.*** We did a, we did a check on you. ***We know that you're not a criminal, okay. Given some of the information that we did get, we could have applied for a search warrant. We could have went to a judge, applied for a search warrant and came in here, you know, I'm not saying the judge would have gave us the warrant or not,*** **but we could have came here with guns drawn and bust down the door and all that.** ***We didn't want to do that, based off the circumstances***.

RACINE***: These people have been really good to you, and we know that--***

BARIC: Yeah, they have, they have.

RACINE: ***And that's partly why we're [25:39] the way we are.***

BARIC: I understand.

ROFFERS: And if this is a case where a person maybe made a mistake, where the person might feel that they have a problem or some sort of curiosity that maybe evolved into a problem that they feel they need help with, ***we want to be the people to help facilitate whatever assistance that individual needs to get better, but we cannot help facilitate that assistance unless someone's honest and admits maybe they have a problem.*** Do you kind of know what we're getting at—" (R. 20-26)

30. At this point Baric has been told:

a. He is not in trouble (many times) (R. 20: 1-26)

b. The officers could have gotten a warrant (R. 20: 1-26)

c. The officers can come in with guns (R. 20: 1-26)

d. The Agents know everything already (R. 20: 1-26)

e. That the officers don't know much about computers (R. 20: 1-26)

f. That the officers want to help (R. 20: 1-26)

g. That the officers don't want to cause problems with Barics family (R. 20: 1-26)

h. That this is something their boss makes them do, so many a months. (R. 20: 1-26)

31. At this point the Special agents have been informed:

a. The residents had guests over for a birthday party that was ongoing. (R. 20: 1-26)
b. That Baric wanted his family around for questioning. (R. 20: 1-26)
c. That Baric just finished working an 8 hour day. (R. 20: 1-26)
d. That Baric did not wish to consent to a search. (R. 20: 1-26)
e. That Baric denied many times knowing why they were there. (R. 20: 1-26)

32. Baric has not been told anything about his rights to counsel or his right to refuse to answer questions. Baric has not been advised of his rights in anyway, 30 minutes into questioning. (R. 20: 1-26)

33. Again, Roffers indicates to Baric that he wants to help, that he's not in trouble, that honesty will help him. These are misleading tactics deployed to gain consent.

"ROFFERS: That's our concern. That's a big concern for us. And like I said, if this is something that was a curiosity that developed into something, ***we want to get you help if you feel like you need help***. Okay? Do you feel like you need . . ." (R. 20-29)

"ROFFERS: You have? Okay, because ***I'm sure, and I don't want to, I'm sure you're a good guy, yeah. I mean, I know you are not a criminal based off of your history.*** You know, you're living here with a good family. You know, there's kids around, which concerns us if that's [34:14], you know, you admitted that you would never act on it—" (R. 20-32)

"ROFFERS: ***I just want to tell you, Lee, that right now, as far as the honesty goes, respect has always been a two-way street with me, and I've been, Chad and I have been police officers <u>for a while</u>. As long as you continue to show Chad and I respect through honest conversation,*** we'll do the exact same for you, okay. So, the fact that you are being honest about this stuff, we understand it's uncomfortable for you—" (R. 20: 32-33)

"ROFFERS: Okay, so, you know, I mean, we're not here to judge you. We're just here to get to the bottom of it and, ***like I said, be of some assistance if possible***."

(R. 20-33)

34. Having reassured Baric that he is there to help, that Baric is not in any trouble, that honesty will help him and singling him out for questioning for some 40 minutes now the multiple Special Agents trained in interrogation, again try to sway Baric into Consenting.

"ROFFERS: Like I mentioned before, Lee, we kind of came here with the intentions of talking to you and ***taking things easy and <u>not barging in with a bunch of cops and going about it that route</u>, so we were kind of hoping for cooperation on your part, and I think, at this point, based off of what we're talking about the reason why you know you're here, you know why we're here, I think you know what you need to do, or what the right thing to do, versus right and wrong. Am I accurate in assuming that?***

BARIC: Yeah.

ROFFERS: What do you think that involves?

BARIC: ***Cooperating as much as I can."***(R. 20-35)

ROFFERS: Okay, because, and that's important, because **we do this a lot**, and ***for the most part, if something like this hits the judicial system, the people that judges and prosecutors are most lenient towards are people who are cooperative, who accept that what they did was, some things that they did were wrong, and that they take responsibility for those things.***

BARIC: [39:56]

ROFFERS: ***So there's that person, and then there's the person who doesn't cooperate, kind of makes things difficult for law enforcement—***

BARIC: Yeah—

ROFFERS: ***--denies things—***

BARIC: I know it's wrong.

ROFFERS: And when evidence is shown against that person, ***it doesn't, it doesn't end up for them,*** from my experience, very well. Kind of know what I'm getting at?

BARIC: Yeah, I mean, I know, like you said, it's wrong. I'm not [40:32] . . .

ROFFERS: Well, I don't know that. I don't know that.

BARIC: ***I'm just scared, I guess.***

ROFFERS: I understand that.

RACINE: ***We'll be with you every step of the way. Like I said, our goal is, we're not here to [40:48] at anybody. We want to be fair with you.***

ROFFERS: I know.

RACINE: But there's certain things that we have to do. Part of this process, as we first brought up [40:59] ***family members*** left here is that we have to corroborate some of the statements you made looking at your [41:09].

[Movement, scraping sounds in recorder]

RACINE: The underlying issue is that this isn't something that you have to do. However—

[Inaudible - loud background noise, talking, TV, etc.]

[Shuffling and scraping sounds in recorder]

RACINE: --I think a very ugly situation from your standpoint, you know, and ***I just look at these good people, we see kids here, so we're trying to make the best***—

[Simultaneous discussion]

BARIC: And I appreciate—

RACINE: --situation, but there is some responsibility that has to--

BARIC: Yeah.

[Simultaneous discussion]

RACINE: ***--you have to take some responsibility. That's part of being a grown-up. People make mistakes. We get that. Other people don't get that. We'll be the messengers, but we're going to take it one step at a time. Okay?***

ROFFERS: Would you mind showing Chad and I your living area, and like walking us down there?

BARIC: Yeah, you know—

ROFFERS: Would that be okay?

BARIC: ***--I think at this point you know and I know. I don't, I want to do what I can to cooperate, I mean, what it takes, like [42:30] I think I***

need help at this point, like . . . I know it's wrong. I just [42:42] I want to do what I can . . .

ROFFERS: Sure. And—

BARIC: [42:49], I guess. Like, I feel like that's where it started.

ROFFERS: Well, it, that takes a, an ***adult and a real man*** to make that decision. It does. And I think, ***if I was in your position, that's what I would do, too***. (R. 20: 35-39)

35. The two special agents then accompany Baric down to his room where they discuss: 1. Barics world or Warcraft character Buttercup, 2. Barics snorkeling trip 3. The types of games the defendant likes and much more. The agents are again using interrogation techniques on a person who typically prefers solitude to relate directly to him and attempt to convince him they are really there to help. The topics of the discussion clearly illustrate the Agents deception and Baric's ability to resist.

36. These tactics in addition to preying on his known weaknesses , repeatedly informing him that he is not in any trouble as well as threating worse things for him and his family if he does not cooperate, individually and cumulatively were enough to convince any reasonable person they did not have a choice. Mr. Baric actually says outload "I am scared". Feeling like there is no choice Baric eventually gives in to the two special agents.

"ROFFERS: As a formality here, Chad's going to come down here with a piece of paper that [47:05] we can look at your computer. You **have** to read it and sign off on it, okay? So— (R. 20-44)

37. This is another effort by the special agents downplaying and misleading Mr. Baric as to what exactly is going on. It is imperative to note Baric is not adequately informed of any of his rights provided by Miranda by either agent. Rather he is manipulated and convinced into giving his invalid

consent. He is factually told that he has to sign the form, right after being threatened with what happens to people that do not.

"ROFFERS: All right, Lee. Here is the form that I was talking about. Do you want to read it real quick?

BARIC: Yeah.

[Scraping sounds in recorder]

BARIC: And this is giving permission to take it as well?

ROFFERS: We would not take it unless we find something of concern. You would eventually have an option to get your device back, but we can't give it back to you unless we know that certain, well, certain files aren't on there.

BARIC: Yeah, I mean--

ROFFERS: So it might take a period of time, but you would have the option of getting the device back.

BARIC: ***Yeah, I will do whatever."***

(R. 20 -51)

38. After being singled out, reassured, mislead, left uninformed as to his rights, threatened with use of force against him and his family as well as a worse outcome at trial for not consenting and interrogated for nearly 50 minutes Baric eventually gives into the advanced tactics of the multiple Special agents.

39. Baric is a solitary person who is typically isolated and has no prior experience dealing with State Agents investigating. He was unaware of his rights and was intentionally misled as to what his options and rights were and as to what the outcomes of choosing the different options were. There were many unnecessary and unlawful reassurances and threats conveyed that would make any reasonable person who is not informed as to their rights think this is what they <u>had to do</u>. As proven by his own statement, " I will do whatever" changed from his original valid voluntary answer of "I rather not".

40. This final response is the product of the 20 minutes of continued interrogation after the initial question requesting consent that was denied. During the communications it is clear that improper information, promises and threats were portrayed to Baric.

41. Simply put, this is not the product of "free and unconstrained will, reflecting deliberateness of choice". But rather, the result of a conspicuously unequal confrontation in which the pressures brought to bear on the defendant by representative of the State exceeded his ability to resist.

42. In evaluating voluntariness, the court considers and coercive police tactics as well as the defendants personal characteristics. *State v. Hoppe,* 2003 WI 43, ¶¶ 39-40, 261 Wis. 2d 294, 661 N.W. 2d 407.

43. Coercion may consist of psychological tactics that take subtle advantage of the defendants personal traits. *Id.* ¶32.

44. "A defendants statements are voluntary if they are the product of a free and unconstrained will, reflecting deliberateness of choice, as opposed to the result of a conspicuously unequal confrontation in which the pressures brought to bear on the defendant by representatives of the State exceed the defendants ability to resist." *State v. Hoppe,* 2003 WI 43, 261 Wis.2d 294, 661 N.W.2d 407

CONCLUSION

The Denial of the Baric's suppression motions should be reversed and his Judgment of conviction vacated. The conduct of Detective Kowalski amounted to several warrantless searches by way deploying not publically available sense enhancing devices to ascertain contents within the house that would otherwise not be available. Further, the Special Agents that responded to Baric's home failed to properly attain freely given consent.

THEREFORE, the decisions to deny the Appellants January and June 2016 Motions should be overturned and the matter should be remitted to the Circuit Court with the instruction that the Appellants Motions be granted.

Dated this 21st day of April, 2017.

Respectfully Submitted,

JOHN MILLER CARROLL
LAW OFFICE

By: _____

John Miller Carroll
State Bar # 1010478

226 S. State St.
Appleton, WI 54911
(920)734-4878

FORM AND LENGTH CERTIFICATION

I, John M. Carroll, 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 proportional serif font. The length of this brief is 9,916 words.

Dated this 21st day of April, 2017.

_____

John Miller Carroll
State Bar #1010478

ELECTRONIC BRIEF CERTIFICATION

I, John M. Carroll, hereby certify in accordance with Sec. 809.19(12)(f), Stats, that I have filed an electronic copy of a brief, which is identical to this paper copy.

Dated this 21st day of April, 2017.

_____

John Miller Carroll
State Bar #01010478