STATE OF WISCONSIN

C O U R T O F A P P E A L S

DISTRICT II

Case Nos. 2018AP000826-CR
2018AP000827-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

SIMON E. JENINGA,

Defendant-Appellant.

On Appeal from Judgments of Conviction and
an Order Denying Postconviction Relief,
Entered in the Walworth County Circuit Court,
the Honorable David M. Reddy Presiding

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

COLLEEN MARION
Assistant State Public Defender
State Bar No. 1089028

Office of the State Public Defender
Post Office Box 7862
Madison, WI 53707-7862
(608) 267-5176
marionc@opd.wi.gov

Attorney for Defendant-Appellant

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ISSUE PRESENTED

> Whether trial-level counsel rendered ineffective assistance of counsel by not filing a motion to suppress evidence obtained pursuant to a search warrant that was: (1) facially deficient, (2) unconstitutionally overbroad, and (3) contained intentional or reckless omissions and misrepresentations of material fact.

Mr. Jeninga's postconviction motion was denied in the circuit court.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Oral argument is not requested, but would be welcomed if the Court so orders. Publication is likely not warranted. The issues involve application of well-established law to the facts.

STATEMENT OF THE CASE AND FACTS

Police obtained a search warrant to search Mr. Jeninga's personal cell phone and all of the data stored therein. *See* ***Riley v. California***, 134 S.Ct. 2473, 2490 (2014) (a person's cell phone carries "a cache of sensitive personal information" amounting to "a digital record of nearly every aspect of their lives").

The warrant issued after nine-year-old M.Y.V. said that Mr. Jeninga, her mom's husband, shook her on his clothed lap and she could feel his "squirrel's tail" through his

pants. (R1-2:1-2).[1] Detective Thomas Bushey interviewed Mr. Jeninga at the City of Elkhorn Police Department. In discovery, trial counsel was provided with an audiovisual recording of the interview. (R1-36).

Throughout the interview, Mr. Jeninga adamantly denied that anything inappropriate occurred with M.Y.V. He acknowledged bouncing her on his lap, but maintained that it was not done in an inappropriate manner. (R1-36 at 4:11:20[2]) ("she's sat on my lap before," "she's bounced around.").

After interviewing Mr. Jeninga, the detective left the room. (R1-36:4:41:09). While the detective was gone, Mr. Jeninga began using his cell phone. When the detective came back (R1-36: 5:06:02), he asked Mr. Jeninga what he was doing on his phone. Mr. Jeninga replied that he was texting his mother and trying to get a hold of his wife (M.Y.V.'s mother, Nicole).

The detective told Mr. Jeninga he had decided to refer charges and Mr. Jeninga was now under arrest and would be handcuffed. (R1-36:5:07:02). He told Mr. Jeninga he was taking Mr. Jeninga's phone and asked for the phone's password. Mr. Jeninga said there was no password. The detective asked for permission to search the phone. Mr. Jeninga declined, and asked the detective why he needed to look at the phone. The detective responded that he did not know who Mr. Jeninga had been texting and "maybe you've been telling somebody something." (R1-36:5:07:30).

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[1] This is a consolidated appeal. Record citations to Appeal No. 2018AP00086 will be to "R1" and citations to Appeal No. 2018AP00087 will be to "R2."

[2] Portions of this record item will be identified by timestamp.

Mr. Jeninga offered to show the detective "everything I just said" and handed the detective his phone. (R1-36:5:07:34). The detective said, "so I can analyze your phone? Do I have your permission to look through everything?" Mr. Jeninga did not say yes, but instead directed the detective to the contents of his text messages. The detective said "alright," and kept possession of the phone. The detective signaled to another officer to put Mr. Jeninga in handcuffs, and Mr. Jeninga was taken away to jail.

The detective subsequently drafted a two-page application and affidavit for a search warrant for the cell phone and all of its data. (R1-7, R1-8). The warrant affidavit alleged the following in support of a warrant:

- M.Y.V. said Mr. Jeninga shook her on his lap five times. She could feel his "squirrel's tail," it felt hard, and she did not like the feeling. She circled the pelvic area on a drawing of a boy.

- M.Y.V.'s mother, Nicole, told police that she confronted Mr. Jeninga and he said he was just being playful and silly.

- Detective Bushey questioned Mr. Jeninga about M.Y.V.'s statements.

- Mr. Jeninga "denied that he would put M.Y.V. on his lap."

- Mr. Jeninga was texting on his cell phone in the interview room.

- When asked who he was texting, Mr. Jeninga said "Nicole."

- Detective Bushey asked for permission to look at the phone and "go through it."
- Mr. Jeninga "stated no."
- "Your affiant knows through his training and experience that people who sexually assault children will sometimes comment on it through their texts, sometimes take pictures of the victims on their phones while they are sexually assaulting them, and sometimes download child porn on their phones."

(R1-8:1-2; App. 101-02).

The affidavit omitted the fact that Mr. Jeninga offered to let the detective view his text messages and handed the detective his phone for this purpose. The affidavit incorrectly asserted that Mr. Jeninga denied bouncing M.Y.V. on his lap when Mr. Jeninga in fact acknowledged doing so but maintained it was in an appropriate manner. In addition, the affidavit incorrectly asserted that Mr. Jeninga said he was texting with his wife, Nicole, when in fact, he said he was texting with his mother, and "trying" to get a hold of his wife, Nicole. The detective asked, "is your wife [Nicole] answering?" and Mr. Jeninga said "no." (R1-36:5:06:15).

A subsequent forensic analysis of the phone revealed evidence of child pornography in the cell phone's internet browser history. The State charged Mr. Jeninga with repeated sexual assault of a child in Case No. 16-CF-62 (R1-2)[3] and

[3] The State mischarged Mr. Jeninga with a violation of Wis. Stat. § 948.025(1)(a). Under that section, a person is guilty of a Class A felony only if there are at least 3 violations of Wis. Stat. § 948.02(1)(am). Section 948.02(1)(am) requires proof that the person had sexual

possession of child pornography in Case No. 16-CF-162. (R2- 1).

While the two cases were pending, the State moved to join them for trial. (R1-10). The State argued that the evidence found on Mr. Jeninga's phone was part of the same "common scheme" as the alleged assault and would help the State with its "task of demonstrating that Jeninga's sexual contact with his victim was done with the intent to become sexually aroused or gratified. . ." and that, "[t]he evidence also lends credibility to the victim's version of events." (R1-10:2). The State argued that the phone evidence would be admissible in a separate sexual assault trial as other acts evidence, to show "intent, motive, plan, and absence of mistake or accident pursuant to Wis. Stat. 904.04(2)." (R1-10:3-4). Mr. Jeninga's attorney argued against joinder. (R1-12). After hearing oral arguments (R1-60, R1-62), the court granted the State's joinder motion. (R1-62:25).

Defense counsel did not file a suppression motion.

Subsequently, Mr. Jeninga and the State reached a plea agreement, whereby Mr. Jeninga would plead to an amended charge of second-degree sexual assault of a child in Case No. 16-CF-62, and to one count of child pornography in Case No. 16-CF-162, with the remaining counts dismissed and read in. (R1-66:2-3). In exchange, the State agreed to cap its sentencing recommendation at 10 years of initial confinement and 10 years of extended supervision. The defense would be free to argue for any sentence. (*Id.*).

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intercourse with a person under 13 and caused great bodily harm to that person.

On January 9, 2017, the Walworth County Circuit Court, the Honorable David M. Reddy presiding, accepted Mr. Jeninga's pleas. (R1-66). On March 17, 2017, the court conducted a sentencing hearing, and at its conclusion, imposed 10 years of initial confinement and 10 years of extended supervision on Case No. 16-CF-62 and 3 years of initial confinement and 3 years of extended supervision on Case No. 16-CF-162, concurrent. (R1-67:45). Judgments of conviction were entered accordingly. (R1-33, R2-29). Mr. Jeninga filed timely notices of intent to pursue postconviction relief. (R1-34, R2-30).

On December 13, 2017, Mr. Jeninga filed a Wis. Stat. (Rule) § 809.30(2)(h) postconviction motion alleging that trial counsel rendered ineffective assistance of counsel by failing to file a motion to suppress the phone evidence because the warrant for the phone was facially deficient, unconstitutionally overbroad, and contained intentional or reckless omissions and misrepresentations of material fact. (R1-35, R2-31). The Wis. Stat. (Rule) § 809.30(2)(i) deadline for the circuit court to decide Mr. Jeninga's motion was originally February 12, 2018.

The circuit court ordered briefing on Mr. Jeninga's claim (R1-38) and held a ***Machner***[4] hearing on February 6, 2018. (R1-68; App. 105-26). The parties stipulated to the admission of the warrant application and warrant and DVD of Mr. Jeninga's police interview. (R1-68:14-15 (*see* R1-7, R1-8, R1-36)).

[4] ***State v. Machner***, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979).

Mr. Jeninga called trial-level defense counsel as a witness. Trial counsel testified that she did not file a suppression motion because she did not believe such a motion had merit. (R1-68:7-8; App. 111-12). If she had believed one had merit, she would have filed it. (R1-68:8; App. 112). She did not have a strategic reason for foregoing a suppression motion. She agreed that it was her decision not to file one. (R1-68:8; App. 112).

Counsel testified that she believed she reviewed "portions" of Mr. Jeninga's police interview. (R1-68:5; App. 109). She also reviewed the police reports and discussed the interview with Mr. Jeninga. She reviewed the search warrant and warrant application. (*Id.*). Counsel testified that she has been a defense attorney for many years (R1-68:9; App. 109). She also acknowledged a heavy case load, which included "at least" 200 to 250 cases per year. (R1-68:11; App. 115).

Trial counsel testified that the phone evidence was important to her assessment of the strengths of Mr. Jeninga's defense in the sexual assault case. (R1-68:6; App. 110). Prior to joinder, she believed Mr. Jeninga had a strong case for trial on the charge, due to weaknesses in the alleged victim's story and because of the State's burden to show improper intent. (R1-68:7; App. 111). Trial counsel viewed M.Y.V.'s forensic interview, and observed that it provided strong grounds for cross-examination had there been a trial ("I had also reviewed the child interview that was conducted at the CAC, and I believe that there were - - that the testimony as well as my potential cross of that child victim would have been enough to discredit that child as well."). (R1-68:7; App. 111).

However, once the court joined the two cases for trial, the likelihood of success on the sexual assault charge suffered. (R1-68:6; App 110.). Trial counsel testified that, "I believe that he had a very strong case for trial should that case have been tried separately. But once the Court ruled that joinder was appropriate with the child pornography case and the images that the Court was going to allow to be published to the jury, I believe that changed that case dramatically." (R1-68:7; App. 111). This changed counsel's advice, and Mr. Jeninga's decision, to forego trial in lieu of a plea. (R1-68:6-7; App. 110-11).

The State called Detective Bushey as a witness. He testified that Assistant District Attorney Haley Johnson reviewed the warrant application and notarized it before it was submitted to the court commissioner. (R1-68:18; App. 122). Former court commissioner Zeke Wiedenfeld (current District Attorney for Walworth County) signed the warrant. (*Id.*).

At the close of evidence, the court entered another briefing schedule and set a hearing date of April 11, 2018, for an oral ruling. (R1-68:20; App. 124). Mr. Jeninga filed a post-***Machner*** brief on March 14, 2018. (R1-44). The State filed a response brief on March 28, 2018 (R1-45), and Mr. Jeninga filed a reply brief on April 4, 2018. (R1-46). Mr. Jeninga filed a motion with this Court to extend the Wis. Stat. § 809.30(2)(i) deadline for the circuit court to decide his postconviction motion. This Court granted the extension until April 18, 2018.

On April 11, 2018, the court did not make a ruling, as expected. (R1-69). Instead, the court expressed regret that the State had not asked trial counsel more specific questions about the particular case law she reviewed prior to deciding

not to file a motion to suppress. (R1-69:6). The prosecutor did not have many answers for the court because she was the third prosecutor to handle the postconviction claim, and was not very familiar with the cases. (R1-69:3, 27, 30). She did, however, agree that when it comes to deficient performance and a motion to suppress, if there is "some legal basis for it, you file it" and that trial counsel had testified that "if there had been merit, she would have filed it." (R1-69:4-5).

The State asked the court to make a decision on the existing record and to reach the merits of the suppression claim (R1-69:21), but alternatively asked to re-open the evidence and call trial counsel again as a witness. (R1-69:19). Mr. Jeninga objected to re-opening the evidence. (R1-69:31). The court granted the State's request. A hearing was set for May 31, 2018. The court stated it would request another round of briefing after that hearing (R1-69:38), which would result in a total of three rounds of postconviction briefing.

On April 12, 2018, Mr. Jeninga filed a written objection to re-opening the evidence and additional proceedings based on his statutory right to a timely appeal. (R1-47). *See* ***State v. Roehling***, unpublished slip op Appeal No. 2016AP000035-CR, ¶13 (October 3, 2017) (one purpose of the statutory deadline "is to protect convicted defendants from undue delay in the resolution of their postconviction motions."). (App. 128-39).[5]

Mr. Jeninga argued that it would be improper for him to request a second extension of the Wis. Stat. § 809.30(2)(i) deadline for the circuit court to decide the motion, given that he objected to the re-opening of evidence and further delay of his claim, but noted that the State or court could request an

[5] Authored, unpublished opinions issued on or after July 1, 2009, may be cited for their persuasive value. *See* Wis. Stat. § 809.23(3)(b).

extension. (R1:47:1-2). *See* Wis. Stat. § 809.30(2)(i). Mr. Jeninga also agreed to request an extension if ordered by the court. (R1-47:1). Neither the State nor court requested an extension of the court's deadline, and the court did not direct Mr. Jeninga to do so.

On April 25, 2018, Mr. Jeninga's motion was denied by operation Wis. Stat. § 809.30(2)(i) (if no decision is made or extension requested, "the motion is considered to be denied and the clerk of circuit court shall immediately enter an order denying the motion."). (R1-50; App. 127). Mr. Jeninga filed timely notices of appeal. (R1-51, R2-48)

ARGUMENT

Mr. Jeninga Was Denied His Sixth Amendment Right To Effective Representation Of Counsel When Counsel Failed To File A Motion To Suppress Evidence Obtained Pursuant To A Search Warrant That Was Facially Deficient, Unconstitutionally Overbroad, And Contained Intentional Or Reckless Omissions And Misrepresentations Of Material Fact.

A. Introduction and standard of review.

The Fourth Amendment to the United States Constitution and Article I, Section 11 of the Wisconsin Constitution protect against unreasonable searches and seizures. ***State v. Dearborn***, 2010 WI 84, ¶14, 327 Wis. 2d 252, 786 N.W.2d 97. "[A] search based upon an invalid search warrant is per se unreasonable" and thus unlawful. ***State v. Eason***, 2001 WI 98, ¶2, 245 Wis. 2d 206, 629 N.W.2d 625.

The search warrant in this case violated the Fourth Amendment in three ways: (1) it failed to state probable cause, (2) it was unconstitutionally overbroad, and (3) the detective intentionally or recklessly omitted and misstated key facts from the warrant application and affidavit that were critical to the probable cause determination.

Evidence obtained pursuant to an unconstitutional search is fruit of the poisonous tree, and is disqualified from the government's case pursuant to the exclusionary rule. ***Wong Sun v. United States***, 371 U.S. 471, 484-85, 487–88 (1963) (holding that the remedy for a Fourth Amendment violation is to exclude the evidence obtained pursuant to the violation: "we have consistently rejected . . . that a search unlawful at its inception may be validated by what it turns up.").

The United States Supreme Court has recognized unique privacy interests involved with modern cell phones. A person's cell phone constitutes a "digital record of nearly every aspect of their lives—from the mundane to the intimate." ***Riley***, 134 S.Ct. at 2489-90 ("The term 'cell phone' is itself misleading shorthand; many of these devices are in fact minicomputers that also happen to have the capacity to be used as a telephone. They could just as easily be called cameras, video players, rolodexes, calendars, tape recorders, libraries, diaries, albums, televisions, maps, or newspapers."). Indeed, "a cell phone search would typically expose to the government far *more* than the most exhaustive search of a house. . . ." ***Id.*** at 2491. Thus, cell phones are excepted from the search incident to arrest doctrine. ***Id.*** at 2489.

Although in this case, law enforcement did ultimately obtain a warrant, the heightened and specialized privacy interests attendant to modern cell phones are still highly

relevant here because "'the ultimate touchstone of the Fourth Amendment is 'reasonableness.'" ***Id.*** at 2482 (citing ***Brigham City v. Stuart***, 547 U.S. 398, 403 (2006)).

A person's cell phone does not simply contain that person's own private information, but other people's private information as well, commonly including intimate photos, sensitive medical and financial information, and political and religious thoughts and expression. "Privacy is a pillar of freedom. . . . privacy serves more than the individual; it is an integral component of a well-ordered society." ***State v. Subdiaz-Osorio***, 2014 WI 87, ¶¶40, 41, 357 Wis. 2d 41, 849 N.W.2d 748.

Trial counsel for Mr. Jeninga did not file a motion to suppress, and by failing to do so, rendered ineffective assistance of counsel. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). Had trial counsel properly filed a motion to suppress, the phone evidence would have been excluded and Mr. Jeninga would not have pleaded to the charges. Mr. Jeninga should be permitted to withdraw his pleas and the phone evidence should be suppressed.

The standard of review on appeal is two-fold. This Court accepts the circuit court's findings of historical fact unless clearly erroneous; however, it reviews the circuit court's application of constitutional principles to those facts de novo. ***State v. Gralinski***, 2007 WI App 233, ¶13, 306 Wis. 2d 101, 743 N.W.2d 448 (standard of review on a suppression motion); ***State v. Harvey***, 139 Wis. 2d 353, 376, 407 N.W.2d 235 (1987) (standard of review on an ineffective assistance of counsel claim).

B. The search warrant for Mr. Jeninga's cell phone failed to state probable cause.

The warrant application to search Mr. Jeninga's cell phone was facially deficient. It did not present sufficient facts to satisfy the probable cause standard. A search based on a warrant that fails to state probable cause is invalid. "Search warrants may issue only upon 'a finding of probable cause by a neutral and detached magistrate.'" ***State v. Ward***, 2000 WI 3, ¶21, 231 Wis. 2d 723, 604 N.W.2d 517 (quoting ***State v. Higginbotham***, 162 Wis. 2d 978, 989, 471 N.W.2d 24 (1991)); Wis. Stat. § 968.12(1).

Probable cause requires "sufficient facts to excite an honest belief in a reasonable mind that the objects sought are linked with the commission of a crime, and that the objects sought will be found in the place to be searched." ***Higginbotham***, 162 Wis. 2d at 989. On review, the warrant-issuing magistrate is owed deference; however, "[d]eference to the magistrate . . . is not boundless." ***United States v. Leon***, 468 U.S. 897, 914 (1984). The probable cause standard is whether there is a "fair probability" that evidence of a crime will be found in a particular place. ***Illinois v. Gates***, 462 U.S. 213, 238 (1983).

Probable cause requires a higher quantum of evidence than mere suspicion; but here, the detective's request for a warrant was based on suspicion and unreasonable speculation from the facts. First, the evidence of child sexual assault was minimal. M.Y.V. said that Mr. Jeninga shook her on his clothed lap, while she was also clothed, and she could feel his "squirrel's tail." Bouncing a child on one's lap is commonly an innocuous display of affection. During his interview, Mr. Jeninga unequivocally and adamantly denied that anything improper occurred. There were no other witnesses to

the alleged impropriety. As defense counsel testified at the ***Machner*** hearing, on these facts, the case was weak for the State and strong for the defense. (R1-68:7).

Furthermore, the only link between the alleged facts and Mr. Jeninga's phone was a single, conclusory sentence: "Your affiant knows through his training and experience that people who sexually assault children will sometimes comment on it through their texts, sometimes take pictures of the victims on their phones while they are sexually assaulting them, and sometimes download child porn on their phones." (R1-8:1-2; App. 102).

These are conclusions, not facts. "Conclusions of the affiant set forth in the affidavit cannot be considered as a basis for the issuance of a search warrant." ***Bast v. State***, 87 Wis. 2d 689, 695, 275 N.W.2d 682 (1979).

"Your affiant knows through his training and experience . . ."

An officer's training and experience may be relevant to a probable cause analysis, but here the detective never explained his training and experience; thus, his asserted "training and experience" was a conclusion, not a fact. While the detective asserted many years of experience, he did specify what kind. A detective with extensive experience in narcotics would not necessarily have relevant training and experience in investigating child sex crimes. A court cannot conclude that a detective possessed relevant training and experience where none is set forth in the affidavit—instead, the court is confined to the four corners of the warrant application. *See* ***State v. Ward***, 2000 WI 3, ¶26, 231 Wis. 2d 723, 604 N.W.2d 517.

A comparison with ***State v. Eason***, 2001 WI 98, 245 Wis. 2d 206, 629 N.W.2d 625, illustrates how deficient the detective's presentation of his "training and experience" was in this case. In ***Eason***, the affiant explained his prior experience with detail, including the number of relevant investigations he had conducted, the specific nature of his relevant training (including the date and location of the training) and content of his relevant training and experience (*i.e.*, what he actually learned). ***Id.***, ¶4. Consider also ***State v. Gralinski***, 2007 WI App 233, 306 Wis. 2d 101, 743 N.W.2d 448, where the affidavit was fifteen pages long and included details about the agent's qualifications and the profile of child pornography users, which allowed the magistrate to draw reasonable inferences from the alleged facts.

". . . that people who sexually assault children will sometimes comment on it through their texts . . ."

There was no evidence that Mr. Jeninga was commenting about sexually assaulting M.Y.V. through his text messages. All the detective had was a hunch based on the fact that Mr. Jeninga used his cell phone while in the interview room. It is important to note that Mr. Jeninga was not under arrest when he arrived at the police station. He drove himself there. The detective thanked him for coming and confirmed that he was not under arrest. (R1-36:4:07).

Mr. Jeninga was not under police custody until the detective came back to the room and told him he was under arrest. As our supreme court recently affirmed, simply because a person is accused of a serious crime does not mean that person is in custody. ***State v. Bartelt***, 2018 WI 16, 379 Wis. 2d 588, 906 N.W.2d 684 (individual not in custody even after confessing to serious crime). While not in custody, Mr. Jeninga was free to use his phone for any purpose—be it

to give his family updates on his whereabouts, communicate with work, contact an attorney, or otherwise. He did nothing wrong or suspicious.

If the fact that Mr. Jeninga used his cell phone in the interview room was enough for probable cause, *anytime* law enforcement interviewed a person about allegations against them, and the person subsequently used their cell phone, police would have probable cause to search their phones.

Furthermore, even if there had been probable cause to search Mr. Jeninga's text messages, the warrant was nonetheless invalid because it was overbroad, as discussed *infra* C.

". . . sometimes take pictures of the victims on their phones while they are sexually assaulting them . . ."

There was no evidence that Mr. Jeninga took photos of M.Y.V. while sexually assaulting her, and M.Y.V. was old enough to say if he had. Consider ***State v. Petrone***, 161 Wis. 2d 530, 468 N.W.2d 676 (1991), where a fifteen-year-old girl alleged that the defendant photographed her in the nude, and a warrant issued based on that specific allegation. Here, there was no such allegation.

". . . sometimes download child porn on their phones."

There was no evidence that Mr. Jeninga was involved with child pornography. There were no tips from internet providers or law enforcement. No citizen witness saw Mr. Jeninga with child pornography or heard him discuss child pornography. There was no evidence that Mr. Jeninga visited illicit websites or downloaded anything illegal.

M.Y.V. did not say that Mr. Jeninga showed her pornography or talked about pornography with her.

The detective provided no reasoned link between the alleged misconduct in this case and child pornography. He pointed to no relevant examples of prior experience linking allegations of sexual assault to child pornography. He provided no explanation of relevant studies or literature on point. He gave no examples of trainings or education he received on the topic.

An allegation of child sexual assault alone does not amount to probable cause to search for child pornography. In its pre-***Machner*** response brief, the State asserted there was a "circuit split" on this point, but actually identified only one circuit, the Eighth, that favors its position, ***United States v. Colbert***, 605 F. 3d 573, 578 (8th Cir. 2010). ***Colbert*** is easily distinguished. There, the defendant was seen by a bystander at a park attempting to lure a five year old girl to his apartment. He spoke with the girl for approximately 40 minutes. He referred to movies and videos that he wanted the child to view in his apartment, which led to an inference that he intended to show her child pornography in order to facilitate a sexual assault. A search of his vehicle found handcuffs and items suggesting that the defendant was posing as a police officer, surveilling the area, and looking for "opportune targets." Even there, it was a close call. ***Id.*** at 577. Here, by contrast, there was no evidence that Mr. Jeninga told M.Y.V. about any movies or videos. This was not a case of suspected grooming through showing of pornography.[6]

[6] Not only is ***Colbert*** distinguishable, the weight of federal authority is to the contrary. *See, e.g.*, ***United States v. Cordero-Rosario***, 786 F.3d 64, 69 (1st Cir. 2015); ***Virgin Islands v. John***, 654 F.3d 412, 419 (3d Cir 2011); ***Dougherty v. City of Covina***, 654 F.3d 892, 898 (9th Cir. 2011); ***United States v. Falso***,

In sum, the detective's probable cause assertions in this case were speculative guesswork, and woefully inadequate to satisfy the probable-cause standard. This guesswork was apparent from the phrasing he used: "sometimes," "sometimes," "sometimes."

The word "sometimes" indicates a mere possibility. What is required for a constitutional warrant is a showing that something is not merely possible, but rather, probable. ***State v. Tompkins***, 144 Wis. 2d 116, 125, 423 N.W.2d 823 (1988) (probable cause for a search warrant is "more than a possibility."). The warrant lacked probable cause, and the evidence obtained therefrom must be suppressed.

C. Even if there was probable cause to search Mr. Jeninga's text messages, the warrant was unconstitutionally overbroad because it authorized a search of the entire phone.

Even if this Court finds that there was probable cause to search Mr. Jeninga's text messages (though Mr. Jeninga maintains there was not), the warrant was still unconstitutional because it was impermissibly overbroad. It was not limited to text messages but rather authorized the search of *all* of the phone's digital data.

The Fourth Amendment provides that "no Warrants shall issue, but upon probable cause supported by Oath or affirmation, and *particularly describing* the place to be searched, and the persons or things to be seized" (emphasis added). The particularity requirement "prevents the government from engaging in general exploratory rummaging through a person's papers and effects in search of anything

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544 F.3d 110, 123 (2d Cir. 2008); ***United States v. Hodson***, 543 F.3d 286, 292 (6th Cir. 2008).

that might prove to be incriminating." ***State v. Noll***, 116 Wis. 2d 443, 450, 343 N.W.2d 391 (1984).

In ***State v. Carroll***, 2010 WI 8, ¶28, 322 Wis. 2d 299, 778 N.W.2d 1, the Wisconsin Supreme Court analogized a modern cell phone to a collection of discrete storage containers or pieces of luggage. ***Id.***, ¶27. Probable cause to search one container—a text message gallery—does not reasonably extend to probable cause to search the remaining containers. Here, the illegal images were found through an analysis of Mr. Jeninga's cell phone internet browser, a different container than the text messages. There was no probable cause to search that container.

Evidence obtained pursuant to an overbroad warrant is subject to the exclusionary rule, although items seized pursuant to valid portions of the warrant may be exempted from suppression. ***Noll***, 116 Wis. 2d at 455. Here, the evidence of child pornography was not found in Mr. Jeninga's text messages, but rather, through an analysis of his internet browser.

Thus, even if the portion of the warrant authorizing a search of text messages is valid and can be severed, the evidence must still be suppressed.

D. The search warrant for Mr. Jeninga's cell phone contained intentional or reckless omissions and misrepresentations of material fact.

Even if this Court finds that the warrant affidavit was facially valid, and not overbroad, the evidence must still be suppressed because the detective omitted and misrepresented key facts that were critical to the probable cause determination.

A warrant is invalid if the underlying affidavit intentionally or recklessly omits or misrepresents "material evidentiary facts" that are "critical to a probable cause determination." ***State v. Mann***, 123 Wis. 2d 375, 386-88, 367 N.W.2d 209, 213 (1985) (citing ***Franks v. Delaware***, 438 U.S. 154 (1978)). If an affiant's misrepresentations or omissions are removed from the search warrant application, and as a result, probable cause does not exist, the remedy is suppression of the seized evidence. ***Id.*** at 387.

A misrepresentation or omission is "reckless" if the affiant had "obvious reasons to doubt the veracity" or completeness of the allegations. ***State v. Anderson***, 138 Wis. 2d 451, 462, 406 N.W.2d 398 (1987).

Here, the detective made three intentional or reckless omissions and misrepresentations of material fact.

First, the detective misrepresented the conversation that took place about his request to view Mr. Jeninga's phone. Mr. Jeninga was using his cell phone in the interview room, which led the detective to speculate that he was texting with someone about the sexual assault allegations. In the warrant affidavit, the detective claimed that he asked for permission to look at the phone and "go through it" and Mr. Jeninga "stated no." (R1-8:2; App. 102).

What the magistrate did not know—because the detective omitted it from the warrant affidavit—is that Mr. Jeninga offered to let the detective look at his text messages and even handed over his phone for that purpose. He simply declined to give consent to a carte blanch search of the phone.

Thus, the detective's assertion that Mr. Jeninga gave a blanket refusal to allow the detective to view his phone was

incorrect and misleading. The detective could not have accidentally omitted the fact where he was the very person to whom Mr. Jeninga offered to show his text messages. *See* ***United States v. Martin***, 615 F.2d 318, 329 (5th Cir. 1980) ("when the facts omitted from the affidavit are clearly critical to a finding of probable cause the fact of recklessness may be inferred from proof of the omission itself.").

The omission was not only reckless, it was prejudicial. The detective suggested that Mr. Jeninga had something to hide in his text messages. The fact that Mr. Jeninga gave the detective consent to search the text messages shows otherwise. More importantly, no warrant was necessary to search the text messages because Mr. Jeninga gave consent to search that portion of his phone and freely handed the detective his phone for this purpose. Mr. Jeninga said he was sending messages to two people and did not purport to limit the detective to a single thread of messages.

Second, the detective incorrectly stated that Mr. Jeninga told him he was texting with M.Y.V.'s mother, Nicole. (R1-8:2; App. 102). Actually, he said he was texting with his mother and "trying" to get a hold of Nicole. The detective asked, "is your wife [Nicole] answering?" and Mr. Jeninga said "no." (R1-36:5:06:15). The misleading suggestion that Mr. Jeninga was texting with M.Y.V.'s mother was prejudicial because it made more reasonable an inference that he was discussing the allegations.

Third, the detective incorrectly asserted that Mr. Jeninga "denied that he would put M.Y.V. on his lap." (R1-8:2; App. 102). Not so. Mr. Jeninga told the detective he put her on his lap and bounced her on his lap, but denied that anything improper occurred. (R1-36 at 4:11:20). In its pre-***Machner*** response brief, the State argued that the fact

Mr. Jeninga "denied" lap bouncing but admitted it to his wife showed he had something to hide. (R1-40, fn. 1). This is a fair inference from the facts as set forth in the affidavit. But those facts were untrue. There was no inconsistent statement. This misrepresentation was prejudicial because it gave the warrant application an overall boost by portraying Mr. Jeninga as suspicious and evasive. Again, given that the detective was the person who both interviewed Mr. Jeninga and drafted the affidavit, he had "obvious reasons to doubt the veracity" of this allegation. *See* ***Anderson***, 138 Wis. 2d at 464.

In sum, the warrant-issuing magistrate was deprived of a full and fair opportunity to evaluate probable cause where the detective intentionally or recklessly omitted and misrepresented material facts critical to the probable cause determination. Under ***Franks***/***Mann***, the warrant is invalid, and the phone evidence must be suppressed.

E. The good faith exception does not apply.

Exclusion of evidence may be unwarranted where the State proves that police reliance on a search warrant was objectively reasonable. ***State v. Eason***, 2001 WI 98, ¶32, 245 Wis. 2d 206, 629 N.W.2d 625. The good faith exception does not apply where a detective intentionally or recklessly omits or misrepresents material facts. Police "cannot reasonably rely upon a warrant that was based upon a deliberately or recklessly false affidavit." ***Id.***, ¶36. A deficient warrant application cannot be laundered through a magistrate and thereby insulated from the exclusionary rule.

Even if the court does not find ***Franks***/***Mann*** violation, the exclusionary rule does not apply because the process used in obtaining the warrant did not include a significant investigation. *See* ***Eason***, 245 Wis. 2d 206, ¶63. If the detective was concerned about photographs of M.Y.V., he

could have asked M.Y.V. if Mr. Jeninga took photos of her, or could have investigated whether anyone had seen suspicious photos on Mr. Jeninga's phone. If the detective was concerned about child pornography, he could have interviewed witnesses about Mr. Jeninga's pornography habits, could have investigated Mr. Jeninga's IP address, and could have checked Mr. Jeninga's criminal background for any evidence of prior relevant misconduct. If he was concerned about Mr. Jeninga's text messaging, he could have asked Mr. Jeninga more questions about the texting, could have interviewed Mr. Jeninga's mother and Nicole, and most importantly, could have reviewed the text messages himself, as Mr. Jeninga gave him permission to do.

Finally, police cannot reasonably rely upon a warrant "so facially deficient" that they could not "reasonably presume it to be valid." ***Eason***, 245 Wis. 2d, ¶36. The detective in this case could not reasonably believe the warrant was valid where the supporting affidavit was razor thin and based on speculative guesswork. The only effort the detective made to link the factual allegations to the need for a warrant was a single, conclusory sentence: "Your affiant knows through his training and experience that people who sexually assault children will sometimes comment on it through their texts, sometimes take pictures of the victims on their phones while they are sexually assaulting them, and sometimes download child porn on their phones." (R1-8:2; App. 102).

No officer acting reasonably would believe this bare bones warrant application to be constitutionally sufficient. A conclusory affidavit robs the magistrate of his or her duty to make an independent probable cause determination and instead reduces magistrates to rubber stamps. ***United States v. Leon***, 468 U.S. 897, 914 (1984) (a magistrate may not "serve merely as a rubber stamp for the police.").

The purpose of the exclusionary rule is two-fold: to deter police misconduct and to ensure judicial integrity. A court must "refuse to give its imprimatur to police misconduct" even if it permits some violations of the law to go unpunished. ***State v. Hess***, 2009 WI 105, ¶24, 320 Wis. 2d 600, 770 N.W.2d 769. The good faith exception does not apply in this case. The phone evidence must be suppressed.

F. Mr. Jeninga was denied his right to effective assistance of counsel.

When an attorney does not file a meritorious motion to suppress the fruits of an unlawful search, a defendant may obtain relief via a claim of ineffective assistance of counsel. A defendant has the right to effective assistance of counsel under the Sixth and Fourteenth Amendments to the United States Constitution, and Article I, Section 7 of the Wisconsin Constitution. ***State v. Smith***, 207 Wis. 2d 258, 273, 558 N.W.2d 379 (1997). To establish ineffective assistance of counsel, a defendant must show deficient performance and prejudice. ***Strickland***, 466 U.S. at 687. Deficient performance is shown where counsel's representation fell below an objective standard of reasonableness. ***Id.*** at 688. To establish prejudice, a defendant must show that there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. ***Id.*** at 694.

Where the allegation of ineffectiveness is defense counsel's failure to litigate a Fourth Amendment claim, the defendant must show that the Fourth Amendment claim is meritorious in order to demonstrate prejudice. ***Kimmelman v. Morrison***, 477 U.S. 365, 375 (1986). In this context, the prejudice analysis is two-fold: first, the court determines whether the suppression motion was meritorious, and second,

the court determines whether there is a reasonable probability that the outcome of the case would have been different absent the excludable evidence. ***Id.*** at 375.

Here, trial counsel performed deficiently by failing to file a motion to suppress. A reasonable exercise of defense duties would have included filing such a motion because the grounds for the motion were readily apparent in the discovery materials. Protecting clients' constitutional rights, filing arguable motions, and preserving meritorious claims are key components of the defense function. *See* American Bar Association, Criminal Justice Standards for the Defense Function, §§ 4-1.2(a), 4-3.7(f), 4-1.5 (4th Ed.).

At the ***Machner*** hearing, Mr. Jeninga's trial counsel testified that she considered filing a motion, but decided it was without merit. Unfortunately, counsel's assessment was incorrect. The motion was not frivolous. *See* ***State v. Parent***, 2006 WI 132, ¶35, 298 Wis. 2d 63, 725 N.W.2d 915 (a finding of no merit is the equivalent to a conclusion that an issue is frivolous).

Counsel confirmed that she did not have a strategic reason for not filing the motion, and would have filed it if she believed it had merit. (R1-68:8; App. 112). To grant relief in this case, the Court need not hold a referendum on counsel's skill or dedication in general. "The object of an ineffectiveness claim is not to grade counsel's performance." ***Strickland***, 466 U.S. at 697. Instead, "the ultimate focus of [an ineffectiveness] inquiry must be on the fundamental fairness of the proceeding." ***Strickland***, 466 U.S. at 696. Even skilled attorneys make mistakes. Indeed, public defenders carry extremely heavy caseloads, which can make occasional mistakes unremarkable. Here, trial counsel testified that she was responsible for at least 200-250 cases per year.

Counsel testified that she "believe[d]" she reviewed "portions" of Mr. Jeninga's police interview (R1-68:5; App. 109), but a partial review of discovery is not sufficient. A review of the entire interview was necessary to evaluate the merits. As counsel recognized, sometimes the police reports and other discovery materials to do not accurately represent what occurred during an interview. (*Id.*). *See* ***Johnson v. United States***, 860 F.Supp.2d 663, 831 (lack of preparation not protected by ***Strickland***'s presumption of reasonableness) (internal citation omitted).

While the law excuses reasonable strategic decisions (***Strickland***, 466 U.S. at 689-90), it does not excuse erroneous legal conclusions. *See, e.g.*, ***Jones v. United States***, 224 F.3d 1251, 1258 (11th Cir. 2000) (counsel failed to argue for suppression on a "clear" ground). It was simply not objectively reasonable to conclude that a suppression motion in this case was without merit, *i.e.*, frivolous. As has been demonstrated, a suppression motion in this case is strong on the merits. And in general, a defendant has "everything to gain and nothing to lose in filing a motion to suppress." ***United States v. Molina***, 934 F.2d 1440, 1447 (9th Cir. 1991).

The warrant application in this case was unusually thin. The detective did not explain any relevant training or experience. The portion that purported to justify a search of the phone was a single sentence. Not only was it a single sentence, it was an entirely conclusory sentence: [y]our affiant knows through his training and experience that people who sexually assault children will sometimes comment on it through their texts, sometimes take pictures of the victims on their phones while they are sexually assaulting them, and sometimes download child porn on their phones." What does the detective know, specifically? Where did he learn it? When

did he learn it? How did he learn it? Why is what he has learned relevant to the case at hand? None of these questions are answered in the affidavit.

The State unconvincingly argues that the issues in this case are matters of unsettled law. (R1-45:3-4). As to issues one and two, the probable cause and particularity requirements, these rules are as old as the constitution itself. The Fourth Amendment states in relevant part, "no Warrants shall issue, but upon probable cause supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." As to issue three, material omissions/misstatements of fact, the seminal case ***Franks v. Delaware***, 438 U.S. 154, was decided in 1978. It has been settled law for four decades.

Counsel's deficient performance prejudiced Mr. Jeninga because had counsel filed the motion, it would have been granted, thus eliminating the evidence of child pornography found on Mr. Jeninga's cell phone. Without this evidence, the State would not have been able to prosecute Mr. Jeninga in Case No. 16-CF-162 (the child pornography charges).

In addition, suppression of the phone evidence would have significantly weakened the State's case against Mr. Jeninga in Case No. 16-CF-62 (the sexual assault charge). As previously discussed, the State moved to join the two cases, and expressly acknowledged that the evidence on Mr. Jeninga's phone would help the State prove that Mr. Jeninga acted with an improper purpose when he bounced M.Y.V. on his lap. Bouncing a child on one's lap is often innocent and innocuous behavior. And Mr. Jeninga denied that there was anything improper about his contact with M.Y.V. As such, the State faced a challenge in proving

that Mr. Jeninga acted with an unlawful purpose. *See* Wis. Stat. § 948.02(1) and (2), 939.34 (sexual contact means intentional touching "done for the purpose of sexual humiliation, degradation, arousal, or gratification"). The phone evidence significantly strengthened the State's case in this regard because it would give the jury a reason to doubt an innocent hypothesis from the facts.

At the ***Machner*** hearing, trial counsel confirmed that joinder of the two cases was a significant factor in her recommendation and Mr. Jeninga's decision to enter pleas in these cases, rather than proceed to trial. (R1-68:6-7; App. 110-11). Counsel recognized the importance of the evidence and testified that she would have filed a suppression motion if she believed it had merit. In sum, there is a reasonable probability that, but for counsel's deficient performance in failing to file a suppression motion, the court would have suppressed the phone evidence. *See* ***Strickland***, 466 U.S. at 694; ***Kimmelman***, 477 U.S. at 375.

G. Mr. Jeninga should be permitted to withdraw his pleas.

Mr. Jeninga's pleas constitute a manifest injustice because they were obtained in violation of his Fourth and Sixth Amendment rights. *See* ***State v. Taylor***, 2013 WI 34, 347 Wis. 2d 30, 829 N.W.2d 482 (a defendant is entitled to withdraw a plea upon showing a manifest injustice); ***State v. Bangert***, 131 Wis. 2d 246, 283, 389 N.W.2d 12 (1986) (denial of a relevant constitutional right constitutes a manifest injustice).

When a defendant enters a plea in a case where a meritorious motion to suppress should have been filed, the defendant is entitled to withdraw the plea if the defendant shows a reasonable probability that he would not have

pleaded as he did had the motion to suppress been granted. *See* ***Harvey***, 139 Wis. 2d at 378.

Had the motion to suppress been granted and the phone evidence suppressed, there is more than a reasonable probability that Mr. Jeninga would not have entered into the joint plea agreement in this case. He would not have pleaded guilty to possession of child pornography if the State had no evidence of child pornography.

Nor would Mr. Jeninga have entered any individual plea in the sexual assault case. As detailed above, the phone evidence significantly strengthened the State's sexual assault charge against Mr. Jeninga. Without it, all the State had was M.Y.V.'s claim that, while she was fully clothed, Mr. Jeninga shook her on his fully clothed lap and she felt something inside his pants. There were no third party witnesses; there was no physical evidence; Mr. Jeninga unambiguously denied that anything improper occurred. Trial counsel viewed M.Y.V.'s forensic interview, and observed that it provided strong grounds for cross-examination had there been a trial. (R1-68:7; App. 111).

Counsel testified that the sexual assault case was in trial posture until the phone evidence was ruled admissible. When asked whether the joinder issue affected Mr. Jeninga's decision on whether to go to trial or take a plea, she said "I believe it did." When asked if it affected her advice on whether to go to trial or take a plea, she answered "it certainly changed my advice, yes." (R1-68:7; App. 111). She believed "that he had a very strong case for trial had that case been tried separately;" however, "once the Court ruled that joinder was appropriate with the child pornography case and the images that the Court was going to allow to be published to

the jury, I believe that that changed that case dramatically." (R1-68:7; App. 111).

Had the child pornography been suppressed, that evidence would not have been used against Mr. Jeninga in the sexual assault trial. In turn, counsel would not have "changed" her advice on taking the case to trial. Mr. Jeninga has shown a "reasonable probability" that he would have taken the sexual assault case to trial had the phone evidence been excluded. *See* ***Kimmelman***, 477 U.S. at 375; ***Hill v. Lockhart***, 474 U.S. 52, 59 (1985). He should be permitted to withdraw his pleas.

CONCLUSION

For the reasons stated above, Mr. Jeninga respectfully asks this Court to reverse the circuit court, and remand with directions to permit Mr. Jeninga to withdraw his pleas and to suppress the evidence found on his cell phone.

Dated this 10th day of July, 2018.

Respectfully submitted,

COLLEEN MARION
Assistant State Public Defender
State Bar No. 1089028

Office of the State Public Defender
Post Office Box 7862
Madison, WI 53707-7862
(608) 267-5176
marionc@opd.wi.gov

Attorney for Defendant-Appellant

CERTIFICATION AS TO FORM/LENGTH

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is: proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line of body text. The length of the brief is 7,871 words.

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of § 809.19(12). I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed on or after this date.

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

Dated this 10th day of July, 2018.

Signed:

COLLEEN MARION
Assistant State Public Defender
State Bar No. 1089028

Office of the State Public Defender
Post Office Box 7862
Madison, WI 53707-7862
(608) 267-5176
marionc@opd.wi.gov

Attorney for Defendant-Appellant

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CERTIFICATION AS TO APPENDIX

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with § 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; (3) a copy of any unpublished opinion cited under s. 809.23(3)(a) or (b); and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

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Dated this 10th day of July, 2018.

Signed:

COLLEEN MARION
Assistant State Public Defender
State Bar No. 1089028

Office of the State Public Defender
Post Office Box 7862
Madison, WI 53707-7862
(608) 267-5176
marionc@opd.wi.gov

Attorney for Defendant-Appellant