STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT II

Case Nos. 2018AP0826-CR & 2018AP0827-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

SIMON E. JENINGA,

Defendant-Appellant.

ON APPEAL FROM A JUDGMENT OF CONVICTION AND FROM AN ORDER DENYING PLEA WITHDRAWAL, ENTERED IN WALWORTH COUNTY CIRCUIT COURT, THE HONORABLE DAVID M. REDDY, PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

BRAD D. SCHIMEL
Attorney General of Wisconsin

DANIEL J. O'BRIEN
Assistant Attorney General
State Bar #1018324

Attorneys for Plaintiff-Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-9620
(608) 266-9594 (Fax)
obriendj@doj.state.wi.us

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ISSUE PRESENTED

Has Defendant-Appellant Simon E. Jeninga proven by clear and convincing evidence that there was a manifest injustice entitling him to withdraw his guilty plea?

The trial court denied plea withdrawal after it rejected Jeninga's claim that trial counsel was ineffective for not filing a motion to suppress evidence of child pornography obtained by police from Jeninga's cell phone pursuant to a search warrant issued by a court commissioner.

This Court should affirm because Jeninga failed to prove a manifest injustice by clear and convincing evidence.

POSITION ON ORAL ARGUMENT AND PULBICATION

The State does not believe that this case warrants oral argument or publication. It involves the application of established principles of law to the facts presented.

STATEMENT OF THE CASE

Simon E. Jeninga appeals from a judgment of conviction (R. 29)[1], and from an order denying postconviction relief (R. 46), entered in Walworth County Circuit Court, the Honorable David M. Reddy, presiding.

Jeninga was charged in an amended information with repeated sexual assaults of the same child, his nine-year-old stepdaughter, contrary to Wis. Stat. § 948.025(1)(d). (2018AP826-CR, R. 25.) The maximum penalty for that offense is 60 years imprisonment. (*Id.*) Jeninga was also separately charged with ten counts of possession of child

[1] All citations in this consolidated appeal will be to the record in appeal number 2018AP827-CR, unless otherwise indicated.

pornography, each of which carries a maximum penalty of 25 years imprisonment. (R. 1; 8.) His total penalty exposure was, if found guilty on all counts, 310 years imprisonment. The two cases were joined for trial. (R. 63:6.)[2]

Jeninga pled guilty on January 9, 2017, to one count of possession of child pornography, contrary to Wis. Stat. § 948.12(1m), and one count of second-degree sexual assault of a child under the age of sixteen, contrary to Wis. Stat. § 948.02(2). (R. 61:21–29.) Nine other counts of possession of child pornography were dismissed but read into the record for sentencing purposes. The State agreed to cap its sentencing recommendation at ten years of initial confinement followed by ten years of extended supervision, with the defense "free to argue." (R. 61:2–3.) Jeninga understood that his maximum penalty exposure for the two offenses to which he pled guilty was a combined 65 years in prison (40 + 25 years). (R. 61:21–22.)

The trial court accepted the State's recommendation and sentenced Jeninga to ten years of initial confinement followed by ten years of extended supervision on the sexual assault count, and a concurrent term of three years of initial confinement, followed by three years of extended supervision, on the child pornography count. (R. 62:45.)

Jeninga filed a postconviction motion to withdraw his guilty plea on the ground that trial counsel was ineffective for not pursuing a suppression motion. (R. 31.) He argued that trial counsel should have filed a motion to suppress the fruits of the warranted search of Jeninga's cell phone because the motion had a reasonable chance of success. Jeninga believed the motion would have succeeded, resulting

[2] Although defense counsel "strenuously" opposed joinder in the trial court (R. 63:6), Jeninga does not on appeal challenge the trial court's order joining the cases for trial.

in dismissal of the ten child pornography counts, for the following reasons: the warrant application did not set forth probable cause; no reasonable judge would have issued the warrant based on that application; there were material omissions of fact from the warrant application; and the "good faith" exception to the exclusionary rule would not apply because the officers executing the warrant could not reasonably rely on this judicially-issued warrant. (R. 31:4–12.)

Although he did not testify at the postconviction hearing, and did not even submit an affidavit, Jeninga alleged in his motion that he would not have accepted the plea offer, and would have gone to trial on the repeated sexual assaults charge involving his stepdaughter, had the child pornography evidence been suppressed and had those ten charges been dismissed as a result. (R. 31:11.)

Trial counsel, Attorney Michelle Dietrich, a state public defender with 21 years of criminal defense experience (R. 63:8–11), succinctly explained at the February 6, 2018, postconviction hearing why she decided not to file a suppression motion:

> I had actually reviewed the warrant. I had also consulted with other attorneys in my office. I had reviewed case law. I also had looked at [the] probable cause standard, and I did not believe that a motion would be successful. And so I focused on other issues to defend Mr. Jeninga.

(R. 63:7–8.) Attorney Dietrich testified further that, before deciding not to file a suppression motion, she discussed with Jeninga his police interview out of which the warrant application to search his cell phone arose, she reviewed portions of the audio-visual tape of that interview, and she reviewed the police reports relating to that interview. (R. 63:5, 11–12.)

This is what the affidavit in support of the search warrant sworn out by Elkhorn Police Detective Thomas Bushey, and reviewed by Attorney Dietrich, alleged:

> 2. Your affiant is an officer for the Elkhorn Police Department and has been a police officer for 37 years and while so employed, has conducted numerous criminal investigations.
>
> 3. The facts tending to establish the grounds for issuing a search warrant are as follows:
>
> a. On Thursday, 2/18/2016 your affiant was assigned to Elkhorn Case #16-1161. Your affiant participated in an interview with M.Y.V. DOB 01/16/2007. M.Y.V. reported that M.Y.V.'s step father, Simon Jeninga, had been picking M.Y.V. up and putting M.Y.V. on his lap and then he would shake her back and forth across his squirrel's tail. M.Y.V. stated Simon's squirrel's tail would get hard and M.Y.V. did not like that feeling. M.Y.V. circled on a drawing the area on a boy where the squirrel's tail is. M.Y.V. circled the area where a man's penis would be. M.Y.V. reported that Simon has done this to her five times at their apartment in Elkhorn. M.Y.V. reported it happens when M.Y.V.'s mother is gone. M.Y.V. reported when M.Y.V. tries to get off of Simons lap, Simon holds M.Y.V. tighter by the hips until he is done. M.Y.V. reported to your affiant that M.Y.V. told her mother, Nicole Jeninga, about this the night before. Your affiant talked with Nicole Jeninga about this. Nicole Jeninga told your affiant that M.Y.V. did report to her last night that Simon was putting M.Y.V. on his lap and shaking her up and down. Nicole Jeninga reported to your affiant that she confronted Simon about this and Simon stated that he was just being playful and silly. Your affiant interviewed Simon Jeninga on 2/18/16. Jeninga denied that he would put M.Y.V. on his lap. After interviewing Simon Jeninga at the police department, your affiant observed Simon Jeninga texting on his cell phone in the interview room. Your affiant asked Simon Jeninga who he was texting and Simon Jeninga stated Nicole. Your affiant asked Simon Jeninga for permission to look at and go

> through his cell phone. Simon Jeninga stated no. Your affiant seized Simon Jeninga's cell phone and observed it to be a Samsung model SCH-R970. Your affiant later secured this phone in an evidence locker at the Elkhorn Police Department. 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.

(2018AP826-CR, R. 8, A-App. 101–03.)

Detective Bushey's warrant application was reviewed, signed, and notarized by Walworth County Assistant District Attorney Haley J. Johnson before it was submitted to the court commissioner. (R. 63:18–20.) Walworth County Court Commissioner Zeke Wiedenfeld found probable cause to search Jeninga's cell phone based on this affidavit and issued the search warrant on March 8, 2016. (R. 63:18; 2018AP826-CR, R. 7, A-App. 104.)

The trial court held an evidentiary hearing into Jeninga's plea withdrawal motion on February 6, 2018, at which trial counsel and Detective Bushey testified. (R. 63.) The court followed that up with a non-evidentiary hearing on April 11, 2018, at which it was to decide the motion. (R. 64.) Rather than make findings of fact and decide the motion, the trial court "punted" and allowed the motion to be denied by operation of law, pursuant to Wis. Stat. § (Rule) 809.30(2)(i), on April 25, 2018. (R. 46; A-App. 127.)

Jeninga appeals from the judgment and order. (R. 48.)[3]

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[3] The trial court's failure to decide Jeninga's motion, allowing it to be decided by operation of law, is primarily Jeninga's fault. The trial court was concerned that the record was not sufficient to decide the motion after the evidentiary hearing,

SUMMARY OF ARGUMENT

Jeninga failed to prove by clear and convincing evidence that a "manifest injustice" would occur if he was not allowed to back out of the plea agreement that he voluntarily and intelligently entered into on the advice of competent counsel.

There is no "manifest injustice" because Jeninga failed to prove deficient performance and prejudice caused by trial counsel's reasonable decision not to file, before agreeing to the plea deal, a motion to suppress child pornography evidence seized from his cell phone pursuant to a warrant issued by a neutral court commissioner.

1. Jeninga failed to prove deficient performance because a suppression motion would have failed. The detective's warrant application, approved by an assistant district attorney, set forth probable cause to justify the search of Jeninga's cell phone for child pornography evidence. Even if the issue of probable cause was close, the trial judge on review was required to give "great deference" to the court commissioner's probable cause determination and decision to issue the warrant. Even if the court

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and it gave Jeninga the opportunity to supplement the record with more testimony and additional legal authority. The trial court contemplated asking this Court for an extension of time to decide the motion so the record could be supplemented. (R. 64:37–38.)

Although Jeninga bore the burden of proof by clear and convincing evidence, he declined that golden opportunity and declared that he was satisfied with the appellate record as it was, deciding that a speedy appeal was more important than a complete record. (R. 64:19–20, 31–32; 2018AP826-CR, R. 69:31; 47; Jeninga's Br. 9.) The State will now show that, in relying only on this skeletal record, Jeninga has fallen far short of meeting his daunting burden of proving a manifest injustice by clear and convincing evidence.

commissioner was wrong, the fruits of the search remained admissible under the "good faith" exception to the exclusionary rule because police reasonably relied on the court commissioner's decision to issue the warrant. Trial counsel reasonably understood that she was not likely to convince the trial judge that the court commissioner functioned as a mere "rubber stamp" for police.

2. Jeninga failed to prove prejudice. Jeninga did not testify that he would have gone to trial on the repeated sexual assault of a child charge had the child pornography evidence been suppressed, resulting in the dismissal of the ten child pornography charges. As it was, the plea agreement resulted in the dismissal of nine of those ten child pornography charges. The plea agreement also reduced the charge involving his stepdaughter from repeated sexual assaults of the same child (with a 60-year maximum) down to second-degree sexual assault of a child (with a 40-year maximum). Had he rejected the plea offer and gone to trial on the repeated sexual assault charge, Jeninga risked conviction and a 60-year prison sentence if the jury believed his stepdaughter. By accepting the plea offer, Jeninga lowered his total penalty exposure from 310 years to a combined 65 years. The State also agreed to cap its sentence recommendation at ten years of initial confinement followed by ten years of extended supervision, a recommendation the trial court followed. It is not reasonably probable that Jeninga would have rejected this plea offer even had he known there was a chance that the suppression motion would have succeeded had counsel filed it.

STANDARD OF REVIEW

The issue whether Jeninga proved a "manifest injustice" entitling him to withdraw his guilty plea to the reduced charges after sentencing is left to the sound

discretion of the trial court. *State v. Taylor*, 2013 WI 34, ¶ 48, 347 Wis. 2d 30, 829 N.W.2d 482; *State v. Roou*, 2007 WI App 193, ¶ 15, 305 Wis. 2d 164, 738 N.W.2d 173. This Court will not disturb that decision unless the circuit court erroneously exercised its discretion. *State v. Lopez*, 2014 WI 11, ¶ 60, 353 Wis. 2d 1, 843 N.W.2d 390; *State v. Jenkins*, 2007 WI 96, ¶¶ 6, 29–30, 303 Wis. 2d 157, 736 N.W.2d 24; *State v. Canedy*, 161 Wis. 2d 565, 579, 469 N.W.2d 163 (1991).

Even if the trial court failed to exercise its discretion on the record, or did so inadequately, this Court may independently review the record to determine whether there is a reasonable basis to support the trial court's decision. *E.g.*, *State v. Hunt*, 2003 WI 81, ¶¶ 34, 45, 263 Wis. 2d 1, 666 N.W.2d 771. *See generally McCleary v. State*, 49 Wis. 2d 263, 282, 182 N.W.2d 512 (1971).

ARGUMENT

I. Jeninga failed to prove a manifest injustice by clear and convincing evidence because he failed to prove prejudicially deficient performance by trial counsel.

Even though the trial court did not make findings of fact or exercise its discretion on the record, this Court should affirm the order denying plea withdrawal by operation of law because, after independently reviewing the record, this Court will be convinced that Jeninga failed to prove a manifest injustice by clear and convincing evidence when he failed to prove ineffective assistance of counsel. *See, e.g.*, *Hunt*, 263 Wis. 2d 1, ¶¶ 34, 45. There is no reason to reverse the judgment and order because the record conclusively shows that trial counsel performed reasonably.

A. The applicable legal standards

1. The "manifest injustice" standard applicable to post-sentence plea withdrawal motions

In seeking to withdraw his guilty plea after sentencing, Jeninga bore the heavy burden of proving by clear and convincing evidence that there was a "manifest injustice" entitling him to withdraw the plea. *State v. Dillard*, 2014 WI 123, ¶ 36, 358 Wis. 2d 543, 859 N.W.2d 44. Jeninga had to prove there was a serious flaw in the fundamental integrity of his plea, not just disappointment in a lengthier than expected sentence. *Taylor*, 347 Wis. 2d 30, ¶ 49. Jeninga had to provide some reason other than his belated desire to go to trial or his misgivings about the decision to plead guilty. *Jenkins*, 303 Wis. 2d 157, ¶¶ 32, 74.

This stiff burden of proof is imposed on Jeninga, and deference is owed to the trial court's determination that he failed to prove a "manifest injustice," to protect the State's strong interest in preserving the finality of criminal convictions once the plea has been accepted and sentence has been imposed. *Taylor*, 347 Wis. 2d 30, ¶ 48. *See State v. Cain*, 2012 WI 68, ¶¶ 25–26, 342 Wis. 2d 1, 816 N.W.2d 177; *Roou*, 305 Wis. 2d 164, ¶ 15 (same).

This Court's review is not limited to the plea hearing; it encompasses "the entire record, including the sentencing hearing." *Cain*, 342 Wis. 2d 1, ¶ 29. This Court must consider "the totality of the circumstances," including the plea and sentencing hearings, the statements of defense counsel and other portions of the record. *Id.* ¶ 31. "The reviewing court looks at the entirety of the record to determine whether, considered as a whole, the record supports the assertion that manifest injustice will occur if the plea is not withdrawn." *Id.* This broad scope of review is proper because "it would simply not make sense to vacate a

conviction as the result of an error at a plea hearing when later proceedings unambiguously demonstrate that the error did not give rise to a manifest injustice and that the plea was valid." *Id.*

It is of great significance that the plea, as here, satisfied the mandatory procedures set forth at Wis. Stat. § 971.08 as interpreted and applied in *State v. Bangert*, 131 Wis. 2d 246, 262, 389 N.W.2d 12 (1986), for accepting a voluntary and intelligent plea. The antiseptic plea colloquy raises a strong presumption that the plea is binding, and the defendant "bears a heavy burden" to show that some alleged misunderstanding outside the record of the plea colloquy requires this Court to "disregard the solemn answers" he gave during the plea colloquy with the trial court. *Jenkins*, 303 Wis. 2d 157, ¶¶ 60, 62. *See United States v. Collins*, 796 F.3d 829, 834–35 (7th Cir. 2015) (defendant's statements in open court during the colloquy are not mere trifles and are presumed true); *United States v. Abdul*, 75 F.3d 327, 329 (7th Cir. 1996), *cert. denied*, 518 U.S. 1027 (1996) (the defendant "faces a heavy burden" even when he protests his innocence if the record at the plea hearing demonstrates that the plea was voluntarily and intelligently entered); *United States v. Cray*, 47 F.3d 1203, 1208 (D.C. Cir. 1995) ("[A] defendant who fails to show some error under Rule 11 [the federal counterpart to § 971.08] has to shoulder an extremely heavy burden if he is ultimately to prevail.").

One way to establish a manifest injustice is by proving that, as alleged here, the plea was caused by trial counsel's ineffectiveness. *State v. Bentley*, 201 Wis. 2d 303, 311, 548 N.W.2d 50 (1996); *State v. Washington*, 176 Wis. 2d 205, 213–14, 500 N.W.2d 331 (Ct. App. 1993). To prevail on his manifest injustice/ineffective assistance claim, Jeninga had to prove by clear and convincing evidence that: (a) he was in fact denied the effective assistance of trial counsel; (b) counsel's error caused him to plead guilty; and (c) at the time

of his plea, he was unaware of a potential challenge to the plea because of counsel's deficient performance. *State v. Harris*, 2004 WI 64, ¶ 11, 272 Wis. 2d 80, 680 N.W.2d 737.

2. The legal standards related to a plea withdrawal motion based on the alleged ineffective assistance of trial counsel

When it reviews a postconviction motion to withdraw a guilty or no-contest plea based upon the alleged ineffective assistance of trial counsel, the trial court applies the two-pronged test for deficient performance and prejudice established in *Strickland v. Washington*, 466 U.S. 668 (1984). *Bentley*, 201 Wis. 2d at 311–12. Under *Strickland*, the defendant is entitled to relief if he proves that counsel's performance was both deficient and prejudicial. *Strickland*, 466 U.S. at 687; *State v. Allen*, 2004 WI 106, ¶ 26, 274 Wis. 2d 568, 682 N.W.2d 433.

To establish deficient performance, Jeninga had to prove more than that counsel's performance was "imperfect or less than ideal." *State v. Balliette*, 2011 WI 79, ¶ 22, 336 Wis. 2d 358, 805 N.W.2d 334. The issue is "whether the attorney's performance was reasonably effective considering all the circumstances." *Id.* Counsel is strongly presumed to have rendered reasonably competent assistance. *Id.* ¶¶ 25, 27.

There is a "strong societal interest in finality [that] has 'special force with respect to convictions based on guilty pleas.'" *Lee v. United States*, 137 S. Ct. 1958, 1967 (2017) (quoting *United States v. Timmreck*, 441 U.S. 780, 784 (1979)). "Courts should not upset a plea solely because of *post hoc* assertions from a defendant about how he would have pleaded but for his attorney's deficiencies. Judges should instead look to contemporaneous evidence to substantiate a defendant's expressed preferences." *Id.*

To prevail on his claim that trial counsel was ineffective for deciding not to file a suppression motion, Jeninga bore the burden of proving that the suppression motion would have succeeded had it been filed. *See, e.g.*, *State v. Jackson*, 229 Wis. 2d 328, 344, 600 N.W.2d 39 (Ct. App. 1999) (citing *Kimmelman v. Morrison*, 477 U.S. 365, 375 (1986)). This is because *Strickland* does not require trial counsel to file a suppression motion that would have been denied. *E.g.*, *State v. Foster*, 2014 WI 131, ¶¶ 59, 78, 360 Wis. 12, 856 N.W.2d 847; *State v. Maloney*, 2005 WI 74, ¶ 37, 281 Wis. 2d 595, 698 N.W.2d 595; *State v. Berggren*, 2009 WI App 82, ¶ 21, 320 Wis. 2d 209, 769 N.W.2d 110.

Assuming he could prove deficient performance, Jeninga had to also affirmatively prove by clear and convincing evidence that he suffered actual prejudice caused by counsel's deficient performance. He could not speculate. *Balliette*, 336 Wis. 2d 358, ¶¶ 24, 63, 70. "The likelihood of a different outcome 'must be substantial, not just conceivable.' [*Harrington v.*] *Richter*, 131 S. Ct. at 792." *Campbell v. Smith*, 770 F.3d 540, 549 (7th Cir. 2014).

To establish prejudice in the plea withdrawal context, Jeninga had to prove there is a reasonable probability that he would not have pled guilty and would have insisted on going to trial but for counsel's deficient performance. *Lee*, 137 S. Ct. at 1965; *Hill v. Lockhart*, 474 U.S. 52, 59 (1985); *Bentley*, 201 Wis. 2d at 312; *State v. Rockette*, 2005 WI App 205, ¶ 31, 287 Wis. 2d 257, 704 N.W.2d 382.

Jeninga had to present *objective evidence* that there is a reasonable probability he would have gone to trial but for counsel's error. *Koons v. United States*, 639 F.3d 348, 351 (7th Cir. 2011); *Morales v. Boatwright*, 580 F.3d 653, 663 (7th Cir. 2009). Jeninga's unsubstantiated allegation that he would have insisted on going to trial but for counsel's alleged error is insufficient. *Bentley*, 201 Wis. 2d at 313–15; *Bethel v. United States*, 458 F.3d 711, 716–17 (7th Cir. 2006); *United*

States v. Arvanitis, 902 F.2d 489, 494 (7th Cir. 1990). A specific explanation why he would have gone to trial is required. *Santos v. Kolb*, 880 F.2d 941, 943 (7th Cir. 1989). Jeninga had to prove that his lawyer's deficiency was a decisive factor in his decision to plead guilty. *Bethel*, 458 F.3d at 719. In evaluating the impact of counsel's alleged error, the strength of the State's case is a factor. *Eckstein v. Kingston*, 460 F.3d 844, 848 (7th Cir. 2006).

This Court may choose not to address the deficient performance component if it is easier to dispose of the ineffective assistance challenge by holding there was insufficient proof of prejudice, even assuming deficient performance. The reverse is also true. *Strickland*, 466 U.S. at 697; *State v. Moats*, 156 Wis. 2d 74, 101, 457 N.W.2d 299 (1990).

B. Jeninga failed to prove trial counsel was ineffective because: (a) the suppression motion lacked merit; (b) he would not have rejected the favorable plea offer and gone to trial on the repeated sexual assault charge.

Jeninga does not explain what more Attorney Dietrich should have done beyond what she did here: review the search warrant application, review the police interview with her client, consult with her colleagues regarding potential challenges to the warrant, and research the law. Those efforts evince reasonably diligent performance.

The gist of Jeninga's argument seems to be that, even if she believed the suppression motion would not succeed, counsel should have filed one before accepting the plea offer because she had nothing to lose by doing so. "There was no downside." (R. 64:17.) The *Strickland* performance standard is not whether counsel had anything to lose. The standard is not that defense counsel must file every non-frivolous

pretrial motion known to man. The standard is whether competent counsel performed reasonably in deciding not to pursue what she reasonably determined to be a pointless suppression motion. *See Knowles v. Mirzayance*, 556 U.S. 111, 121 (2009) ("This Court has never established anything akin to the Court of Appeals' 'nothing to lose' standard for evaluating *Strickland* claims.").

Jeninga also believes that, just because Attorney Dietrich may in hindsight have been wrong in assessing the potential merit of a suppression motion, she was for that reason ineffective. In the words of postconviction counsel: "I think that being wrong is below an objective standard of reasonableness here." (R. 64:10.) That betrays a fundamental misunderstanding of *Strickland*.

The *Strickland* performance standard is one of reasonableness, not correctness. The prosecutor correctly articulated the *Strickland* standard: "I don't agree that an attorney has to be perfect and has to be right. They have to be reasonable." (R. 64:11.) The trial court agreed. (R. 64:15–16.) Jeninga was not entitled to error-free representation. Trial counsel need not even be very good to be deemed constitutionally adequate. *State v. Wright*, 2003 WI App 252, ¶ 28, 268 Wis. 2d 694, 673 N.W.2d 386; *McAfee v. Thurmer*, 589 F.3d 353, 355–56 (7th Cir. 2009). Ordinarily, a defendant does not prevail unless he proves that counsel's performance sunk to the level of professional malpractice. *Maloney*, 281 Wis. 2d 595, ¶ 23 n.11.

An experienced criminal defense attorney who reviews the evidence, researches the law, and consults with her colleagues in the public defender's office is not engaging in malpractice. Attorney Dietrich performed reasonably even if, with the benefit of hindsight, one is able to show that she was wrong. Here, however, Attorney Dietrich was both reasonable and right.

Trial counsel reasonably determined that the suppression motion would have gone nowhere. In light of the highly deferential standard for review of the court commissioner's "probable cause" determination, coupled with the "good faith" exception to the exclusionary rule applicable when police reasonably rely on a warrant issued by a neutral judge, the motion would have been a pointless exercise.

Jeninga's arguments are, at bottom, nothing but idle 20/20 hindsight second-guessing of reasonable actions by the police, by the court commissioner, and by trial counsel, all of which are entitled to great deference in the courts. While Jeninga has the luxury to second-guess them, this Court cannot do so because those actions were all reasonable.[4]

1. Jeninga failed to prove deficient performance because, given the highly deferential standard for review, there was no basis for counsel to challenge the court commissioner's probable cause determination.

The Walworth County Court Commissioner found probable cause to search Jeninga's cell phone based on the detailed affidavit sworn out by a detective with 37 years of experience who was in the process of investigating the allegations by Jeninga's nine-year-old stepdaughter that he repeatedly sexually assaulted her. (2018AP826-CR, R. 8.) The "probable cause" threshold for issuance of a judicial

[4] One example of Jeninga's hindsight nit-picking is his castigation of trial counsel for reviewing only "portions" of Jeninga's interview with police. (Jeninga's Br. 26.) Although he bore the burden of proving deficient performance, Jeninga did not bother to ask Attorney Dietrich the obvious follow-up question: "Which 'portions' of the interview did you review?" Presumably, she reviewed those portions necessary and sufficient for her to make an intelligent decision whether to file a suppression motion or to accept the plea offer.

warrant is minimal, and the standard for judicial review of the court commissioner's "probable cause" determination is as deferential as it gets. Even if the warrant was defective, the fruits of the search remained admissible because the searching officers reasonably relied in good faith on the judicially-issued warrant. The court commissioner did not serve as a "rubber stamp."

a. The "probable cause" standard for issuance of a search warrant

The probable cause threshold for issuance of a search warrant is low. It was met, if not exceeded, here.

Before issuing a search warrant, the magistrate must be "apprised of '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.'" *State v. Higginbotham*, 162 Wis. 2d 978, 989, 471 N.W.2d 24 (1991) (citation omitted). When considering an application for a search warrant, the issuing magistrate or judge is required, "to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, including the 'veracity' and 'basis of knowledge' of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place." *Illinois v. Gates*, 462 U.S. 213, 238 (1983). *See State v. Schaefer*, 2003 WI App 164, ¶¶ 4–6, 266 Wis. 2d 719, 668 N.W.2d 760.

The quantum of evidence needed to establish probable cause is less than that required for a bindover after a preliminary hearing. *State v. Lindgren*, 2004 WI App 159, ¶ 20, 275 Wis. 2d 851, 687 N.W.2d 60. The probable cause determination is made on a case-by-case basis after reviewing the totality of the circumstances. *Schaefer*, 266 Wis. 2d 719, ¶ 17. The issuing judge may draw reasonable

inferences from the facts asserted in the affidavit. The inferences drawn need not be the only reasonable ones. The issue is whether the inferences drawn by the issuing judge were reasonable. *E.g.*, *State v. Ward*, 2000 WI 3, ¶ 30, 231 Wis. 2d 723, 604 N.W.2d 517; *State v. Jones*, 2002 WI App 196, ¶ 10, 257 Wis. 2d 319, 651 N.W.2d 305.

Jeninga would bear the burden of proving at a suppression hearing that there was an insufficient showing of probable cause in the application to support issuance of the warrant. *Schaefer*, 266 Wis. 2d 719, ¶ 5; *Jones*, 257 Wis. 2d 319, ¶ 11.

b. The standard for review of the judicial "probable cause" determination

Reviewing courts are to give "great deference" to the issuing judge's probable cause determination; it must stand unless the defendant proves that the facts were "clearly insufficient" to support the probable cause finding. *State v. Tate,* 2014 WI 89, ¶ 14, 357 Wis. 2d 172, 849 N.W.2d 798; *State v. Marquardt*, 2005 WI 157, ¶ 23, 286 Wis. 2d 204, 705 N.W.2d 878 (citing *Higginbotham*, 162 Wis. 2d at 989). *See United States v. Scott*, __ F.3d __, No. 17-1666, 2018 WL 4042630, at *1 (7th Cir. Aug. 24, 2018) (same).

The decision to issue the warrant must stand if there was a substantial basis for it. *Schaefer*, 266 Wis. 2d 719, ¶ 4. This highly deferential standard of review is in line with the "Fourth Amendment's strong preference for searches conducted pursuant to a warrant." *Id.* (citation omitted). *See State v. Sveum,* 2010 WI 923, ¶ 26, 328 Wis. 2d 369, 787 N.W.2d 317; *Ward*, 231 Wis. 2d 723, ¶¶ 21–24; *Lindgren*, 275 Wis. 2d 851, ¶¶ 15–16, 19–20 (same).

Even in a close case, the reviewing court must resolve all doubts in favor of the judicial probable cause determination. *Lindgren*, 275 Wis. 2d 851, ¶ 20. Also,

because warrant applications "are normally drafted by nonlawyers in the midst and haste of a criminal investigation. . . . [t]echnical requirements of elaborate specificity . . . have no proper place in this area." *Higginbotham,* 162 Wis. 2d at 991–92. *See Ward*, 231 Wis. 2d 723, ¶ 32.[5]

c. Given the "great deference" a reviewing court must give the court commissioner's probable cause determination, trial counsel reasonably decided that the suppression motion would have failed.

(1) Jeninga failed to prove the warrant was not supported by probable cause.

"With the benefit of 'great deference,' this warrant is valid." *Scott*, 2018 WL 4042630, at *1. There plainly was probable cause to search Jeninga's cell phone. Or, at the very least, a reasonable judge or court commissioner could so find based on the direct evidence presented in the application, and on the reasonable inferences one could draw from it. There was a "fair probability" that evidence relating to sexual activity with the victim, and with children in general, would be found on Jeninga's smart phone. *Gates*, 462 U.S. at 238.[6]

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[5] Jeninga completely ignores this outcome-determinative "great deference" standard for review of the court commissioner's decision in his brief, no doubt hoping that this Court will do the same.

[6] Jeninga does not challenge the legality of the *seizure* of his cell phone upon his arrest for sexual assault. He challenges only the search of its contents. (R. 64:33.)

Attorney Dietrich would have had to convince the trial court that the court commissioner's decision was not entitled to "great deference" because *no reasonable judge* would have determined from the facts alleged that: (1) Jeninga had repeatedly sexually assaulted his stepdaughter by bouncing her on his lap on multiple occasions to the point of obvious erection, refusing to let her go until "he was done," for purposes of his own sexual arousal or gratification (2018AP826-CR, R. 8); (2) when confronted by his wife, Jeninga admitted to bouncing the nine-year-old child on his lap repeatedly and without his wife's knowledge, but claimed he was just being "playful and silly" (*id.*); (3) at the end of the police interview about the allegations that he repeatedly sexually assaulted his stepdaughter, Jeninga sent out a text message on his cell phone after the detective left the room (*id.*); (4) while Jeninga offered to let the detective read the text message he had just sent out (supposedly to his mother or his wife), he refused to consent to a search of anything else stored on his phone (*id.*); (5) the experienced detective—37 years—knew that pedophiles often store images of child pornography on their cell phones, and often send images and messages relating to sexual activity with children (*id.*).[7]

[7] Jeninga acknowledges that 37 years of law enforcement experience is relevant to the probable cause analysis, but he argues that Detective Bushey could have spent some of his 37 years "in narcotics." (Jeninga's Br. 14.) Bushey was acting as a child sexual assault investigator in this case so, presumably, some of his extensive experience involved child sexual assault investigations. The court commissioner could rely on the detective's "experience and special knowledge" to support issuance of the warrant. *State v. Multaler*, 2002 WI 35, ¶ 43, 252 Wis. 2d 54, 643 N.W.2d 437 (citing *State v. Harris*, 256 Wis. 93, 100, 39 N.W.2d 912 (1949)). Jeninga's implication that Detective Bushey had *no* training and experience in child sexual assault investigations over that 37-year span is patently unreasonable.

Jeninga blithely insists that it was not reasonable for the court commissioner to infer that one suspected of repeatedly sexually assaulting a nine-year-old child might: (a) be a pedophile; and (b) as such, might keep pornographic images of that child or other children on his cell phone; or (c) might have sent text messages or accessed websites relating to child pornography. Jeninga fails to explain why *no* police investigator or reviewing judge could reasonably draw those inferences. Apparently, in Jeninga's eyes, it is unreasonable for anyone to believe there is a "fair probability" that a suspected pedophile might have evidence of sexual activity with children on his phone.

Jeninga's inference is the unreasonable one. The eminently reasonable inference is that a suspected pedophile would store images and messages relating to child pornography on his smart phone. As the prosecutor succinctly put it: "[It] doesn't take a whole lot of years of experience to make the conclusion that [child] sexual assault and child pornography are so closely interrelated." (R. 64:24.) This is "a practical, common-sense" inference. *Gates*, 462 U.S. at 238.[8] There is no Wisconsin authority to

[8] *See, e.g.*, *United States v. Colbert*, 605 F.3d 573, 578 (8th Cir. 2010), *cert. denied*, 131 S. Ct. 1469 (2011) ("There is an intuitive relationship between acts such as child molestation or enticement and possession of child pornography. . . . Computers and internet connections have been characterized elsewhere as tools of the trade for those who sexually prey on children."). *See United States v. Scott,* __ F.3d __, No. 17-1666, 2018 WL 4042630, at *2 (7th Cir. Aug. 24, 2018) (favorably citing *Colbert*). *See also United States v. Lebovitz*, 401 F.3d 1263, 1271 (11th Cir. 2005) (referencing "the well-documented link between the possession of child pornography and the sexual abuse of children," and observing: "Law enforcement investigations have verified that pedophiles almost always collect child pornography or child erotica." (quoting S. Rep. No. 104–358, at 12–13 (1996))); *United States v. Byrd*, 31 F.3d 1329, 1339 (5th Cir. 1994) ("[C]ommon sense would indicate that a person who is sexually interested in

the contrary. As the trial court correctly observed: "[T]his is not an area of the law that has been explicitly addressed by a Wisconsin court." (R. 64:26.) Therefore, contrary to Jeninga's position, it was proper for the court commissioner to authorize the search of Jeninga's cell phone, including his text messages and internet browser, for evidence of child sexual activity based on the allegations that he repeatedly sexually assaulted a child. (*See* Jeninga's Br. 19.)

The trial court was required by law to give "great deference" to the court commissioner's determination that the warrant application established probable cause. Based on the detailed evidence of repeated child sexual assaults set forth therein, and on the reasonable inferences that the court commissioner drew from it, there was a "fair probability" that evidence of sexual activity with the victim or other children would be found on Jeninga's cell phone. *Gates*, 462 U.S. at 238. There was, therefore, no reason for trial counsel to second-guess the court commissioner's

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children is likely to also be inclined, i.e., predisposed, to order and receive child pornography."); *State v. Johnson*, 372 S.W.3d 549, 555 (Mo. Ct. App. 2012). *See also Osborne v. Ohio*, 495 U.S. 103, 111 (1990) ("evidence suggests that pedophiles use child pornography to seduce other children into sexual activity"); *Probable Cause to Protect Children: The Connection Between Child Molestation and Child Pornography*, 36 B.C.J.L. & Soc. Just. 287, 310–11 (2016) (referencing the "sufficient empirical support for a connection between child molestation and child pornography," as support for the inference that "probable cause to search for evidence of child molestation should provide probable cause to search for evidence of child pornography"). At best, the legal propriety of drawing this inference is unsettled. *See State v. Maloney*, 2005 WI 74, ¶ 28, 281 Wis. 2d 595, 698 N.W.2d 583 ("Counsel is not required to object and argue a point of law that is unsettled." (citation omitted)).

reasonable decision by filing a suppression motion, even assuming counsel had "nothing to lose."[9]

(2) Jeninga failed to prove a *Franks v. Delaware* violation.

Jeninga complains that the detective made material omissions or misstatements of fact in the warrant application in violation of *Franks v. Delaware*, 438 U.S. 154 (1978). (Jeninga's Br. 20–22.)

To obtain a *Franks* hearing, Jeninga bore the burden of making a substantial preliminary showing that the detective who filed the affidavit in support of the search warrant application included false information intentionally, or with reckless disregard for the truth, and that this false information was necessary to the probable cause determination. *Franks*, 438 U.S. at 155–56, 171. If he then proved at the hearing that false information was included in the affidavit intentionally or with reckless disregard for the truth, and if after setting aside that materially false information there was no longer probable cause, the search warrant would be voided and any fruits thereof excluded from evidence to the same extent as if probable cause was lacking in the first place. *Id.* at 155–56. *See State v. Anderson*, 138 Wis. 2d 451, 464, 406 N.W.2d 398 (1987);

[9] In his zeal to back out of his voluntary and intelligent plea, Jeninga goes so far as to accuse the court commissioner of being a "rubber stamp" for the police. (Jeninga's Br. 23.) Apparently, Jeninga believes that any judge or court commissioner who relies on a child's credible account of repeated sexual assaults to authorize the search of the suspected pedophile/perpetrator's cell phone for evidence of sexual activity with that child or other children is a "rubber stamp." That is absurd. The child's credible account here, alone, arguably provided probable cause.

State v. Bruckner, 151 Wis. 2d 833, 863–64, 447 N.W.2d 376 (Ct. App. 1989). The affidavit is, however, presumed valid. *Franks*, 438 U.S. at 171. Proof of mere negligence or innocent mistake on the affiant's part is insufficient to overcome that presumption. *Id. See Anderson,* 138 Wis. 2d at 463.

The *Franks* rule has been extended in Wisconsin to material misstatements of fact as part of the probable cause for issuing a criminal complaint. *State v. Manuel*, 213 Wis. 2d 308, 313, 570 N.W.2d 601 (Ct. App. 1997) (citing *State v. Marshall*, 92 Wis. 2d 101, 284 N.W.2d 592 (1979)). *See State v. Mann*, 123 Wis. 2d 375, 385, 367 N.W.2d 209 (1985). Jeninga did not challenge the substantially similar criminal complaint (R. 1), on *Franks* grounds.

In *State v. Mann*, the Wisconsin Supreme Court extended the *Franks* rule beyond affirmative misstatements of fact to include material *omissions* of fact from the search warrant affidavit or from the complaint. *Mann*, 123 Wis. 2d at 385–86. *See Manuel*, 213 Wis. 2d at 313–14. A material omission of fact is considered to be the same as a deliberate falsehood or a falsehood made with reckless disregard for the truth, when it is an undisputed fact critical to a fair determination of probable cause. *Mann*, 123 Wis. 2d at 388. *See Jones*, 257 Wis. 2d 319, ¶ 25.

On the other hand, mere credibility determinations, the weighing of evidence, or the drawing of one of several inferences from a given fact, are not the sort of material omissions or misstatements of fact governed by the *Franks* rule. *Mann*, 123 Wis. 2d at 389; *Manuel*, 213 Wis. 2d at 316. Rather, the omitted information "must be a critical, undisputed fact capable of only one meaning." *Mann*, 123 Wis. 2d at 389.

There were no misstatements or omissions "material" to the probable cause determination here. All of the *material*

statements in the application were true: Jeninga's stepdaughter told her mother and then told police that Jeninga sexually assaulted her by bouncing her up and down on his lap on five separate occasions when his wife was gone. He refused to let the child squirm free until he achieved an erection and, it can also be inferred, ejaculated ("until he was done"). (R. 8.) Jeninga admitted to his wife when confronted by her the day before the interview that he repeatedly bounced the nine-year-old on his lap, but he denied it was for his sexual arousal or gratification; he was just being "playful and silly." (*Id*.). Jeninga's wife relayed this account to police the next day. During the police interview, Jeninga "acknowledged bouncing her on his lap, but maintained that it was not done in an inappropriate manner." (Jeninga's Br. 2.) As soon as the interview ended, Jeninga pulled out his smart phone and started sending a text message to someone. "While the detective was gone, Mr. Jeninga began using his cell phone." (*Id*.) After being told he was under arrest, Jeninga refused to let the detective look at anything on his phone other than the text message he had just sent out. "The detective asked for permission to search the phone. Mr. Jeninga declined, and asked the detective why he needed to look at the phone." (*Id*.) When the detective asked for permission "to look through everything" on his phone, "Mr. Jeninga did not say yes, but instead directed the detective to the contents of his text messages." (*Id*. at 3.) The detective knew from his 37 years of experience that pedophiles often keep messages and images on their smart phones relating to sexual activity with children, including their victims. These facts and inferences set forth in the application were all true and material.

Jeninga complains that the detective misrepresented the fact that he said "no" when the detective asked for permission to go through his phone. (Jeninga's Br. 20.) That statement is, however, essentially true. When specifically

asked, Jeninga refused to let the detective look at anything on his cell phone other than the text message the officer caught him sending out from the interview room, thereby forcing the detective to get a search warrant for everything else. Jeninga was willing to let the detective read only what he knew to be an innocent text message to his mother or to his wife, but he refused to let the detective see anything else (i.e., inculpatory evidence) on his phone.

Jeninga next complains that the affidavit incorrectly states he was sending a text message to his wife (and the child's mother), Nicole, when he actually claimed to be sending a text message to his own mother asking her to get in touch with his wife, Nicole. "Actually, he said he was texting with his mother and 'trying' to get a hold of Nicole." (Jeninga's Br. 21.) Why this minor discrepancy was material to the probable cause determination is anyone's guess. It was obviously inadvertent and means nothing.

Jeninga's last complaint is that the affidavit erroneously stated he, "denied that he would put [the child] on his lap." (Jeninga's Br. 21.) That statement also is not material to the probable cause determination.

The affidavit accurately states that Jeninga, when confronted by the child's mother, admitted to her that he at times would bounce the child on his lap, but denied to her that it was for any sexual purpose. He apparently repeated that denial to police during the interview. Jeninga's admission to his wife and to police that he repeatedly bounced the nine-year-old on his lap without her mother's knowledge, but he was just being "playful and silly," strongly corroborates the child's account of having been bounced on five separate occasions by Jeninga on his lap and rubbed on his "squirrel's tail" while her mother was gone, this made her uncomfortable, and he would not let the child loose until he "was done." This was not, after all, the typical situation of a parent bouncing a fussy infant or toddler on his lap in

playful "trit-trot-to-Boston" fashion; this was a nine-year-old who said she did not want to be bounced on her stepfather's lap and rubbed against his "squirrel's tail." In either case, Jeninga denied any wrongdoing both to his wife and to police. Whether he denied the act (bouncing the child on his lap) or the intent (to become sexually aroused while doing so) is not significant. Any discrepancy does little to diminish the probable cause provided by the child's detailed and credible account of repeated sexual assaults by Jeninga.

The issue whether the detective made an honest mistake or acted in bad faith was not an undisputed fact capable of only one meaning. *Mann,* 123 Wis. 2d at 389. The trial judge would have been free to draw the reasonable inference that there was no bad faith on the detective's part even if there were reasonable competing inferences. *Ward*, 231 Wis. 2d 723, ¶ 28; *Jones*, 257 Wis. 2d 319, ¶ 10. Jeninga has failed to overcome the presumption that the warrant was valid. *Franks*, 438 U.S. at 171.

Jeninga's claim that the warrant application was "razor thin and based on speculative guesswork" (Jeninga's Br. 23), simply ignores the victim's detailed account of the repeated sexual assaults on which the warrant primarily rests, as corroborated by her consistent report to her mother the day before, and partially by Jeninga's admission to police that he occasionally bounced the nine-year-old on his lap, but he was just being "playful and silly." It ignores the reasonable inference that a suspected pedophile will have evidence of sexual activity with children on his smart phone.

Given the "great deference" owed by the trial court to the court commissioner's decision to issue the warrant, there was no likelihood of success had counsel decided to challenge the court commissioner's decision with a suppression motion before accepting the plea offer.

2. Jeninga failed to prove deficient performance because, even if the warrant was not supported by probable cause, the evidence remained admissible under the "good faith" exception to the exclusionary rule.

If, in hindsight, the warrant was proven to have been defective, suppression would not have been justified if the officers executing the warrant reasonably relied in objective good faith on the neutral and detached court commissioner's decision to issue it. *United States v. Leon*, 468 U.S. 897, 913 (1984); *Marquardt*, 286 Wis. 2d 204, ¶¶ 24–26, 44–47; *State v. Eason*, 2001 WI 98, ¶ 63, 245 Wis. 2d 206, 629 N.W.2d 625.

"Most of the case law in this area addresses search warrants issued upon affidavit by law enforcement, focusing the discussion of the judge or magistrate's role in this process on whether she abdicated her role in the process by serving as a rubber stamp for law enforcement." *State v. Hess*, 2010 WI 82, ¶ 54, 327 Wis. 2d 524, 785 N.W.2d 568. "Case law on the good-faith exception generally proceeds from a warrant that was valid when issued, but later determined to be lacking in probable cause. *See, e.g.*, *Leon*, 468 U.S. at 903; *Eason*, 245 Wis. 2d 206, ¶ 55, 629 N.W.2d 625." *Id*. ¶ 61.

If there were "sufficient indicia of probable cause" in the warrant application, even if in hindsight it lacked probable cause, police could reasonably rely on the judicially-issued warrant. *Marquardt*, 286 Wis. 2d 204, ¶¶ 30, 34. Any competing inferences are to be resolved in favor of the State. *Id*. ¶ 44.

The officers who executed the search, "cannot be expected to question the magistrate's probable-cause determination or his judgment that the form of the warrant

is technically sufficient." *Leon*, 468 U.S. at 921. The evidence is not suppressed if the warrant application was presented to the judge after a significant police investigation, and after the application was independently reviewed and approved by a supervisory officer or a law enforcement lawyer such as an assistant district attorney. *Marquardt*, 286 Wis. 2d 204, ¶¶ 44–47; *Eason*, 245 Wis. 2d 206, ¶ 63.

Any reasonably competent defense attorney would have concluded that the "good faith" exception to the exclusionary rule applies here because the searching officers reasonably relied in objective good faith on the warrant, issued as it was by a neutral and detached court commissioner who was not serving as a "rubber stamp" for police.

Detective Bushey submitted the warrant application only after a significant, still ongoing at the time, police investigation into the allegations that Jeninga repeatedly sexually assaulted his nine-year-old stepdaughter. *Eason*, 245 Wis. 2d 206, ¶¶ 63, 74. That investigation included the reports by Jeninga's stepdaughter and her mother to police of repeated sexual assaults by Jeninga. Police interviewed both the child and her mother. Police then interviewed Jeninga. During the interview, Jeninga admitted that he repeatedly bounced the nine-year-old on his lap, but denied doing so for his own sexual arousal or gratification. This ongoing police investigation into the child's recent accusations was supplemented with the knowledge, gained from the detective's 37 years of experience, that pedophiles often keep messages and images relating to sexual activity with children on their smart phones. As alleged in the application, Detective Bushey caught Jeninga sending a text message from his phone at the end of the interview. When asked, Jeninga refused to let the detective look at anything on his phone other than the text message he had just sent.

In essence, Jeninga told the detective to "get a warrant" if he wanted to see anything else on his phone.

Before the search warrant application was submitted to the court commissioner, police had an assistant district attorney review and approve it, satisfying *Eason*'s requirement that the application be reviewed by a government attorney or a police officer trained in and knowledgeable of the probable cause requirement. *Eason*, 245 Wis. 2d 206, ¶ 63.

A competent and experienced defense attorney, such as Attorney Dietrich, could reasonably conclude that she would be unable to convince the trial court that the "good faith" exception does not apply because this is that rare case where the court commissioner acted as a mere "rubber stamp." There was no basis for trial counsel to second-guess the court commissioner's decision to issue the search warrant, or the good faith reliance by police on that warrant. There was no reason for counsel to believe that the trial court would reject the "good faith" exception and rule the evidence inadmissible. *See United States v. Edwards*, 813 F.3d 953, 969–73 (10th Cir. 2015); *United States v. Needham*, 718 F.3d 1190, 1194–95 (9th Cir. 2013) (applying the good faith exception in cases where a warrant was not supported by probable cause to search for child pornography evidence).

Given the low "probable cause" threshold for a judge or court commissioner to issue a search warrant, the "great deference" the trial court must give to that determination, and the "good faith" exception to the exclusionary rule even when it is shown in hindsight that the minimal probable cause standard was not met, trial counsel reasonably decided against filing a meritless suppression motion. Counsel reasonably determined that any challenge to the warrant would have failed because it lacked arguable merit

and, in the State's view, it would have been "frivolous" in light of this record.[10]

3. Jeninga failed to prove prejudice.

Jeninga did not present any objective evidence that he would have rejected the plea offer and gone to trial for repeatedly sexually assaulting his stepdaughter had he known that a successful suppression motion might have resulted in the dismissal of the ten child pornography charges. Jeninga did not offer an affidavit to that effect in support of his plea withdrawal motion. Jeninga did not testify to that effect under oath at the postconviction hearing.

Jeninga asserts that he did not have to testify at the postconviction hearing that he would have gone to trial on the repeated sexual assault charge had the suppression motion succeeded in getting the ten child pornography charges dropped because it should be obvious that he would have chosen a trial over the plea bargain. (R. 31:11; Jeninga's Br. 29–30.) It is not obvious. In all reasonable probability, Jeninga would have stayed with the plea agreement rather than risk a credibility trial that, if he were

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[10] Jeninga confuses the issue by criticizing trial counsel for concluding that the suppression motion would have been "frivolous." (Jeninga's Br. 25, 26.) Counsel drew no such conclusion. She reasonably determined, after reviewing the warrant application and the law, and after discussing the matter with her colleagues that, though the motion may have had arguable merit (i.e., was not "frivolous"), it was not likely to be granted by the trial court. "Still, arguable merit is not synonymous with actual merit. 'Arguable merit' means an issue is not 'wholly frivolous.' Therefore, it is possible that counsel could miss an issue of arguable merit without prejudicing the defendant, if the issue would ultimately have failed." *State ex rel. Panama v. Hepp*, 2008 WI App 146, ¶ 16, 314 Wis. 2d 112, 758 N.W.2d 806.

found guilty, would have exposed him to 60 years in prison without a favorable ten-year sentence recommendation by the State.

Jeninga has not shown that he would have rejected the plea offer that reduced the repeated sexual assault charge to second-degree sexual assault, and resulted in the dismissal of nine of the ten child pornography charges. A successful suppression motion would have, after all, resulted in the dismissal of all ten of the child pornography charges, or just one more than the plea bargain provided for.

By virtue of the negotiated plea agreement, Jeninga reduced his overall penalty exposure from 310 to 65 years. The State agreed to cap its sentence recommendation at only ten years of initial confinement followed by ten years of extended supervision. Counsel for Jeninga was "free to argue" for whatever sentence she desired. By virtue of the plea agreement, Jeninga avoided a trial where he would have had to convince the jury that his stepdaughter lied when she reported the assaults to her mother at age nine, she was lying again at trial or, at least, she mistook his intentions on the five occasions that he admittedly bounced her on his lap while her mother was away, and she only imagined the "squirrel's tail." If the jury chose to believe his stepdaughter, Jeninga faced up to 60 years in prison and the State would not cap its sentence recommendation at ten years, a recommendation that the trial court followed.

Jeninga also failed to prove prejudice because, even if a successful suppression motion would have resulted in the dismissal of all ten possession-of-child-pornography charges, the pornographic images seized from his cell phone would remain admissible as "other acts" evidence in the repeated-sexual-assaults-of-a-child trial. The images of child pornography would be relevant and probative of Jeninga's motive and intent to become sexually aroused and gratified on the repeated occasions when he bounced his stepdaughter

on his lap to the point of erection. The evidence would be offered for proper purposes, would be relevant, and its high probative value would not be substantially outweighed by the danger of unfair prejudice, especially if a limiting instruction is given. Wis. Stat. § 904.04(2)(a). *See generally State v. Sullivan*, 216 Wis. 2d 768, 772–73, 576 N.W.2d 30 (1998). *See also State v. Payano*, 2009 WI 86, ¶ 65, 320 Wis. 2d 348, 768 N.W.2d 832 (other-acts evidence admissible to prove defendant's motive for his conduct).

Those images would also be relevant and admissible to impeach Jeninga's credibility if he were to testify and deny under oath to having any sexual interest in his stepdaughter or in other children. *See State v. Franklin*, 228 Wis. 2d 408, 415–16, 596 N.W.2d 855 (Ct. App. 1999) (permitting impeachment of a testifying defendant with previously-suppressed but uncoerced contrary statements obtained by police in violation of *Miranda*).[11]

Evidence of Jeninga's possession of child pornography would also be relevant and admissible at his sentencing for repeated sexual assaults of his stepdaughter, assuming a guilty verdict, making it likely that he would receive a sentence for repeated acts of sexual assault against his stepdaughter in excess of the ten years recommended by the State and imposed by the trial court here. *State v. Rush*, 147 Wis. 2d 225, 229–31, 432 N.W.2d 688 (Ct. App. 1988).

Attorney Dietrich reasonably advised her client to take the favorable plea offer rather than pursue a pointless suppression motion, and Jeninga wisely followed that advice. Jeninga failed to prove a manifest injustice by clear and

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[11] At the non-evidentiary postconviction hearing, the trial court raised the issue whether the pornographic images would be admissible in the sexual assault trial, but it was not then resolved. (R. 64:32–33.) It will have to be taken up if this Court allows Jeninga to withdraw his plea.

convincing evidence. "The substantial burden to show ineffective assistance of counsel, the burden the claimant must meet to avoid the plea, has not been met in this case." *Premo v. Moore*, 562 U.S. 115, 132 (2011).[12]

CONCLUSION

This Court should affirm the judgment of conviction and the order denying postconviction relief.

Dated this 25th day of September, 2018.

Respectfully submitted,

BRAD D. SCHIMEL
Attorney General of Wisconsin

DANIEL J. O'BRIEN
Assistant Attorney General
State Bar #1018324

Attorneys for Plaintiff-Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-9620
(608) 266-9594 (Fax)
obriendj@doj.state.wi.us

[12] Jeninga presumably understands that, if allowed to withdraw his plea, the State will on remand prosecute him on all of the original charges, with their collective 310 years of prison exposure. There likely also will not be a similar favorable sentence recommendation by the State if he is convicted of any or all of those offenses.

CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 9,770 words.

Dated this 25th day of September, 2018.

_____
DANIEL J. O'BRIEN
Assistant Attorney General

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (RULE) 809.19(12)

I hereby certify that I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § (Rule) 809.19(12). I further certify that this electronic brief is identical in content and format to the printed form of the brief filed as of this date.

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

Dated this 25th day of September, 2018.

_____
DANIEL J. O'BRIEN
Assistant Attorney General