STATE OF WISCONSIN

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

DISTRICT IV

Case No. 2019AP21-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

KEITH M. ABBOTT,

Defendant-Appellant.

ON APPEAL FROM A JUDGMENT OF CONVICTION, ENTERED IN THE ROCK COUNTY CIRCUIT COURT, THE HONRABLE MICHAEL A. HAAKENSON, PRESIDING

BRIEF AND SUPPLEMENT APPENDIX OF PLAINTIFF-RESPONDENT

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ISSUES PRESENTED

1. Whether law enforcement violated Defendant-Appellant Keith M. Abbott's Fourth Amendment rights when they seized his clothing at the hospital after receiving the clothing from hospital staff.

The circuit court answered, "no."

This Court should answer, "no."

2. Whether law enforcement violated Abbott's Fourth Amendment rights when they seized Abbott's sweatshirts after Abbott's wife gave them permission to search the marital home and "take whatever [they] needed," including the sweatshirts.

The circuit court answered, "no."

This Court should answer, "no."

3. Whether law enforcement violated Abbott's rights under *Miranda* when they questioned him after he made comments about his attorney.

The circuit court answered, "no."

This Court should answer, "no."

4. If the circuit court incorrectly decided one or more of the above issues, whether that decision or decisions so affected Abbott's plea as warrant plea withdrawal.

Abbott did not present this issue to the circuit court.

This Court should answer, "no."

INTRODUCTION

On January 1, 2011, Abbott and his girlfriend Kristin Miller went missing. Abbott returned to his home on January 3. Kristin, however, never returned. Instead, on January 31, a citizen discovered her naked body, stabbed multiple times and wrapped in plastic. A wealth of evidence indicated that

during the time Abbott was missing, he killed Kristin, wrapped her body in plastic wrap and blankets from his wood shop, drove down Highway 11 to Iowa, and discarded Kristin's body along the way. The State charged Abbott with first-degree intentional homicide and hiding a corpse. Abbott moved to suppress numerous pieces of evidence and the circuit court denied almost all of Abbott's motions. Abbott later pled pursuant to *Alford*.[1] After sentencing, Abbott appealed his conviction directly, challenging three of the circuit court's suppression decisions and claiming that these erroneous decisions entitle him to plea withdrawal.

In order to withdraw his plea, Abbott must show both that the circuit court's constitutional rulings were erroneous and that the errors affected his plea. Abbott fails on both counts.

In order to withdraw a plea after sentencing, a defendant must show that an error affected his plea. Defendants seeking post-sentencing plea withdrawal must show that a manifest injustice warrants such withdrawal. Showing a manifest injustice requires showing a "serious flaw in the fundamental integrity of the plea," *State v. Thomas*, 2000 WI 13, ¶ 16, 232 Wis. 2d 714, 605 N.W.2d 836 (citation omitted). Therefore, when a defendant seeks post-sentencing plea withdrawal based on an alleged error occurring outside of the plea colloquy, courts consistently require the defendant to show that the error affected his plea. In the case of constitutional violations, courts require the defendant to show that a constitutional violation occurred and that the violation caused him to plead.

Abbott has not shown that a constitutional violation occurred. Police reasonably seized Abbott's clothing from the hospital: the clothing was evidence of a crime in plain view. Likewise, police reasonably seized sweatshirts from Abbott's

[1] *North Carolina v. Alford*, 400 U.S. 25 (1970).

home. Abbott's wife validly consented to the seizure and had authority to do so. Moreover, Abbott's wife gave police permission to search her home, where the sweatshirts were evidence of a crime in plain view. Finally, police did not violate Abbott's Fifth Amendment *Miranda*[2] rights when they interrogated him. At the start of the interrogation, police read Abbott his *Miranda* rights and Abbott indicated that he understood, then Abbott voluntarily answered questions before unequivocally invoking his right to counsel at the end of the interrogation.

Even if Abbott successfully showed that one or more constitutional violations occurred, Abbott fails to show that any alleged violation caused him to plead. The record belies Abbott's contention that the disputed evidence represented a substantial portion of the State's case. Abbott's disputed statements were duplicative of other witnesses' statements, the State had significant other physical and circumstantial evidence against Abbott, and Abbott made incriminating statements to others, including that he may have killed Kristin. Moreover, Abbott presented no defense other than a claim that he did not remember the timeframe of the murder. Finally, Abbott received a substantial benefit by pleading: the chance to be released from prison in his lifetime.

Abbott contends that if he shows that a constitutional violation occurred, then the State bears the burden to prove harmlessness. As an initial matter, it is Abbott who bears the burden of showing a manifest injustice warranting plea withdrawal. But even if Abbott were correct that the State must prove harmlessness, given the strength of the State's case even without the disputed evidence, the weakness of Abbott's defense, and the benefit Abbott received by pleading, it is clear beyond a reasonable doubt that Abbott would still have pled had he succeeded even in all three suppression

[2] *Miranda v. Arizona*, 384 U.S. 436 (1966).

motions. Finally, if this Court disagrees, it should remand to the circuit court for additional fact-finding, as the record indicates but does not definitively show both that the State may have had more evidence against Abbott and that Abbott may have received additional benefits by pleading.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State does not request oral argument. The briefs adequately address the issues presented.

The State does not request publication if this Court agrees with the circuit court's suppression rulings. However, if this Court disagrees with any of the circuit court's rulings, then the State requests publication to clarify the standard for showing either causation or harmlessness in plea-withdrawal requests brought under Wis. Stat. § 971.31(10).

STATEMENT OF THE CASE

I. Factual Background

From January 1 to January 3, 2011, Abbott and Kristin Miller were missing. At the time, Abbott was married but in a romantic relationship with Kristin. (R.213:4, 14, 28, 33.) On the morning of January 1, Abbott left the home that he shared with his wife in his pickup truck. (R.2:1–2; 213:9.) That evening, Abbott and Kristin were scheduled to pick up Kristin's child from Abbott's stepson, but never arrived. (R.2:2.) Family members began searching for them, but without success. (R.2:2; 213:125–26.)

On January 3, Abbott returned home having an apparent mental breakdown and said that he believed he had killed Kristin. Early in the morning, Abbott's daughter awoke Abbott's wife, Ermelinda Cruz, explaining that Abbott had returned home. (R.2:2.) Ermelinda located Abbott in the living room and found him "uncontrollably shaking." (R.2:2; 213:12.)

Abbott then told Ermelinda that he had been having an affair with Kristin and that he thought he had killed her. (R.213:14.)

Ermelinda called for emergency aid and, after police responded, a rescue squad took Abbott to the hospital. Given Abbott's mental condition, Ermelinda called emergency services. (R.213:5.) Police Officers Kovacs and Gelden responded and found Abbott sitting on the living-room floor, rocking back and forth, and unresponsive to their inquiries. (R.210:4, 10–11; 213:21–23, 48–49.) Officer Kovacs therefore requested medical personnel, who responded and removed two sweatshirts from Abbott, placing them on the living-room floor. (R.210:6, 12, 27; 213:8, 23.) Medical personnel took Abbott to the hospital, and Officer Kovacs followed and checked in with the staff. (R.210:6, 15–16; 213:50–51.) Officer Kovacs left shortly thereafter, telling staff to contact him if they needed anything. (R.210:6, 15–16; 213:50–51.)

While examining Abbott, hospital staff became suspicious of foul play and so contacted police, who responded and gathered information. Shortly after leaving the hospital, Officer Kovacs "received a voicemail message from" Nurse Darios, a registered nurse and "ER staff member," requesting that he return to the emergency room. (R.210:6–7, 16–17; 213:52, 68–69.) Nurse Darios "indicated she observed what she believed to be some suspicious injuries" to Abbott, including a bite mark on Abbott's wrist, and "some suspicious spots" on Abbott's clothing that she believed to be blood. (R.213:52–53.) Officer Kovacs therefore returned to the hospital and verified this information. (R.213:51–52.)

While at the hospital, Officer Kovacs also spoke with Abbott's relatives and other law-enforcement officers, receiving more information about a possible crime. Officer Kovacs spoke with Abbott's brother and nephew, who were at the hospital. (R.213:53–54, 67–68.) Abbott's brother explained that Abbott had said that he "may have done something bad." (R.213:55.) Abbott's nephew told Officer Kovacs that he had

gone to Abbott's wood shop while Abbott was missing and saw Kristin's vehicle there but could not find Kristin. (R.213:55.) Throughout the day, other law-enforcement officers visited the hospital and Officer Kovacs learned that Kristin "could not be located" and became concerned that "she might be injured." (R.213:58–59.)

At the hospital, staff gave Officer Kovacs a bag containing Abbott's blood-stained clothing, which later tested positive for the presence of Kristin's blood. At the hospital, staff kept Abbott's clothing in a "patient belongings bag," a "clear plastic bag similar to a bigger shopping bag with a handle on it." (R.210:24; 213:60–61.) After Officer Kovacs arrived, hospital staff gave him the bag containing Abbott's clothing. (R.213:80.) Officer Kovacs separated the items from the bag and "secured them" in his squad car. (R.210:7–10; 213:61.) Later testing confirmed that Kristin's blood was on both of Abbott's shoes and socks. (R.210:35.)

After gathering information from the hospital, Officer Kovacs directed Officer Gelden to return to Abbott's home, where Officer Gelden discovered additional evidence. Officer Kovacs informed Officer Gelden that Abbott's girlfriend was missing and that hospital staff found blood on Abbott's socks. (R.213:23–24, 30–31.) Officer Kovacs therefore asked Officer Gelden to return to Abbott's home. (R.213:23–24.) Officer Gelden did so and saw parked in front of the residence a "black Chevy pickup truck" registered to Abbott. (R.213:24.) Officer Gelden noticed "what appeared to . . . be blood on the tailgate of the truck." (R.213:24–25.) He therefore called the police chief, who directed him to wait for a tow truck. (R.213:27.) While Officer Gelden waited, Ermelinda exited the home and waved for Officer Gelden "to come and speak with her." (R.213:6–7, 27.)

Officer Gelden then spoke with Ermelinda, who volunteered information and permission to search the house and take certain items. Ermelinda told Officer Gelden that

Abbott had been having an affair with Kristin (R.213:14, 28, 33), that Kristin had been blackmailing Abbott for money (R.213:15, 28, 34), and that Abbott told her he thought he had killed Kristin (R.213:14). Ermelinda also informed Officer Gelden that she and Abbott were contemplating divorce and that Abbott was living in the basement. (R.213:16, 34–36.) Ermelinda gave Officer Gelden permission to take Abbott's truck, telling him "to take whatever [h]e needed." (R.213:7–8, 28–29.) Officer Gelden asked about the sweatshirts that Abbott had been wearing, which medical personnel had removed. (R.213:7–8, 29, 39.) Ermelinda gave Officer Gelden permission to take the sweatshirts, pointing to the living-room floor where they were laying. (R.213:7–8, 29, 39.) Officer Gelden collected Abbott's sweatshirts and a tow truck took Abbott's truck to the police department. (R.213:29–30.)

Subsequent searches and testing of the truck and clothing yielded more evidence. Police found a blood-stained blanket in the bed of Abbott's truck and receipts from locations in Iowa during the time that Abbott was missing. (R.2:2–3.) Police sent the sweatshirts, blanket, and swabs from the truck for testing, and all items from the truck and one sweatshirt tested positive for the presence of Kristin's blood. (R.118:1–3; 210:35.)

Police continued searching for Kristin, eventually discovering her body on January 31, 2011. Police received location data for Abbott's cell phone, which indicated that Abbott was near Highway 11 in Burlington on January 1. (R.2:3; 213:42.) Highway 11 runs from Racine to Iowa, where receipts from Abbott's truck indicated that Abbott had also been during that time. (R.2:3.) Then, on January 31, a citizen walking his property near Highway 11 in Rock County discovered Kristin's body, naked and wrapped in two types of plastic wrap, one of which was covered in a film of sawdust. (R.2:3; 210:36–37.) The Medical Examiner determined

Kristin's cause of death to be stab wounds to the torso. (R.2:2; 210:39.)

Police arrested Abbott at his wood shop on February 1 and searched the premises, discovering more evidence. (R.2:3.) Police discovered "plastic wrap consistent with both types of plastic found wrapped around [Kristin's] body." (R.2:3.) The police also noted that the shop "was filled with very fine sawdust and moving blankets that matched the blanket found in the rear bed of Abbott's truck." (R.2:3.) Finally, law enforcement utilized a substance in the bathroom, which indicated the presence of blood. (R.2:3.)

After Abbott's arrest, officers conducted a custodial interview of Abbott, at the beginning of which officers read Abbott his *Miranda* rights and Abbott indicated that he understood. On February 1, Detective Knaus and Sheriff Schmaling interviewed Abbott, the entirety of which was video recorded. (R.213:82–85; 226, Ex.4–6.) At the beginning of the interview, Detective Knaus informed Abbott that he had "the right to remain silent" and asked Abbott if he understood; Abbott responded "yeah." (R.226, Ex.4, 1:45:15–:25.)[3] Detective Knaus told Abbott that he had the "right to consult with a lawyer before questioning and to have a lawyer present . . . during questioning," and asked Abbott if he understood; Abbott responded "yeah, I got a lawyer." (R.226, Ex.4, 1:45:25–:35.) Detective Knaus informed Abbott that a lawyer would be appointed for him if he could not afford one, and Abbott indicated that he understood. (R.226, Ex.4, 1:45:35–:50.) Finally, Detective Knaus informed Abbott that if Abbott decided to answer questions without a lawyer present, he had the right to, "at any time," "stop the questioning and remain silent" or "ask for and have a lawyer." (R.226, Ex.4, 1:45:45–1:46:10.) Detective Knaus asked Abbott

[3] Citations to the video exhibits correlate to the time stamps on the videos.

if he understood, and Abbott responded "yeah, I have one." (R.226, Ex.4, 1:45:45–1:46:10.) Later, Detective Knaus reminded Abbott about his rights and asked Abbott again if he understood; Abbott responded "yeah." (R.226, Ex.4, 1:53:25–:40.) After some time, Detective Knaus asked Abbott if Abbott would like him to read the rights again, and Abbott responded "no." (R.226, Ex.4, 2:00:20–:35.) Then, Detective Knaus and Sheriff Schmaling asked Abbott again if he understood his rights and Abbott responded, "I do." (R.226, Ex.4, 2:00:20–:35.)

Abbott made several comments about his attorney without ever indicating whether he wanted his attorney to be present. After first reading Abbott his *Miranda* rights, Detective Knaus explained that he wanted to ask Abbott some questions and Abbott responded that his lawyer, "Michael Phegley," was "helping." (R.226, Ex.4, 1:46:05–:25.) Detective Knaus asked if it would be "okay [to] talk . . . without Michael" and Abbott responded that Michael would want to be present. (R.226, Ex.4, 1:46:25–:35.) When the officers again asked if it would be okay to talk without Michael present, Abbott responded "he said to have him here." (R.226, Ex.4, 1:47:55–1:48:20.) Detective Knaus explained that Abbott must make that decision, and Abbott responded, "I don't want to get in trouble with Michael." (R.226, Ex.4, 1:48:40–:45.) When Detective Knaus again informed Abbott that he must make the decision, Abbott replied "I don't know, ask Michael, ask Michael if it's okay, I don't know, I don't want to get in trouble." (R.226, Ex.4, 1:49:00–:15.) Sheriff Schmaling also told Abbott that he must make the decision and Abbott simply responded that he did not want to get in trouble with Michael. (R.226, Ex.4, 1:49:30–1:50:10–:20.) As the officers reminded Abbott that he must decide, Abbott continued to state he did not know what to do, that he did not want to get in trouble with Michael, and that the officers should ask Michael what to do. (R.226, Ex.4, 1:50:20–2:02:20.) The officers told Abbott

to take some time to think about it, reminded him that it needed to be his decision, and exited the room. (R.226, Ex.4, 2:02:20–2:03:30.)

After a brief recess, the officers continued the interview and Abbott made some statements before eventually saying that he wanted his attorney present. Upon returning, Detective Knaus began discussing with Abbott what law enforcement knew about Abbott's relationship with Kristin. (R.226, Ex.4, 2:06:25–:45.) Detective Knaus asked Abbott when he met Kristin and Abbott responded, "it was a couple years ago." (R.226, Ex.4, 2:08:10–:25.) Later, Detective Knaus asked Abbott how his sexual relationship with Kristin started; Abbott answered that he did not know how, that it just "happened." (R.226, Ex.5, 2:40–3:20.) Detective Knaus explained that money was missing from Abbott's account and asked if Kristin was blackmailing him; Abbott explained that Kristin "wanted money" and had threatened to tell his wife about the affair. (R.226, Ex.5, 5:25–:45, 9:10–11:10.) He explained that he "didn't want to lose [his] business," so he continued to give Kristin money. (R.226, Ex.5, 11:10–:45.) Abbott continuously denied remembering anything that happened between dropping off Kristin's child on the morning of January 1 and riding to the hospital in an ambulance on January 3. (R.226, Ex.5, 15:15–15:35, 33:45–34:15.) Finally, approximately four hours into the interview, Sheriff Schmaling reminded Abbott of his rights and Abbott responded, "I want Mike to be here because I don't want to get in trouble with him." (R.226, Ex.6, 1:34:10–:30.)[4]

[4] During the interview, police also discussed with Abbott some of the evidence that they had obtained, including video evidence of Abbott retrieving money from an ATM and placing gas in his car during the time he was missing (R.226, Ex.5, 46:40–47:10, 52:00–:15, 1:04:35–:45, 1:25:20–:30), and evidence that Kristin failed to pick her son up from his grandmother at 3:00 on January 1 (R.226, Ex.5, 1:25:30–:40; Ex.6, 5:30–:45).

II. Procedural History

The State charged Abbott with first-degree intentional homicide, use of a deadly weapon, and hiding a corpse. (R.2.) After several years of competency evaluations (*see* R.9–115), Abbott moved to suppress numerous pieces of evidence (R.126–145). As relevant to this appeal, Abbott claimed that law enforcement violated his Fourth Amendment rights both when they seized his clothing at the hospital and when they seized the sweatshirts from his home (R.126; 127; 130; 131; 150:4–7; 152:2–4, 5–6), and that law enforcement violated his *Miranda* rights when they questioned him on February 1 (R.128; 129; 150:10–11; 152:6–7).

The circuit court held an evidentiary hearing. (R.213.) Abbott's wife, Ermelinda, testified about, among other things, Abbott's being missing and returning home on January 3, her calling emergency services, her later speaking with police about Abbott's relationship with Kristin, and her giving police permission to search the home, to take Abbott's truck, and to take Abbott's sweatshirts. (R.213:4–9, 12–15.) Ermelinda also explained that she had access to the basement, where Abbott had been sleeping, and that the basement was not locked or separated from the house. (R.213:19.) Officers Gelden and Kovacs also testified, including about responding to Abbott's residence on January 3, returning to the hospital and to Abbott's residence after receiving information from hospital staff, and receiving Abbott's clothing from hospital staff and permission from Ermelinda to search the home and take Abbott's sweatshirts. (R.213:21–46 (Officer Gelden), 47–82 (Officer Kovacs).) Detective Knaus also testified regarding the February 1 interview of Abbott. (R.213:82–117.)

The circuit court denied most of Abbott's suppression motions. (R.214; 215; 216; A-App. 104–160.) The circuit court made certain factual findings, including that Ermelinda gave Officer Gelden permission to search their home and "to take

whatever he needed" and that Ermelinda "continued to have access to the basement," where Abbott had been living. (R.214:4–5, 7; A-App. 107–08, 110.) The circuit court also found that "someone working for the hospital" gave Officer Kovacs the "clear plastic" bag containing Abbott's "socks, jeans, shoes and a shirt." (R.214:8; A-App. 111.)

Abbott later pled pursuant to *Alford* to second-degree intentional homicide (R.183; 223:7–21), and the circuit court sentenced Abbott to 35 years' initial confinement followed by 20 years' extended supervision (R.224:40–65).

Abbott did not file a postconviction motion; instead, he appealed his conviction directly to this Court, seeking to withdraw his plea. (R.185.)

STANDARD OF REVIEW

This Court reviews a motion to suppress under "a two-step analysis." *State v. Rindfleisch*, 2014 WI App 121, ¶ 17, 359 Wis. 2d 147, 857 N.W.2d 456 (citation omitted). This Court upholds the circuit court's findings of fact "unless they are against the great weight and clear preponderance of the evidence." *Id.* (citation omitted). This Court "review[s] independently the application of relevant constitutional principles to those facts." *Id.* (citation omitted).

When the applicable legal standard is unclear, the question of which standard applies "presents a question of law that [this Court] review[s] independently." *State v. Rockette*, 2005 WI App 205, ¶ 26, 287 Wis. 2d 257, 704 N.W.2d 382.

ARGUMENT

Abbott is not entitled to withdraw his plea.

In order to show that a suppression issue warrants post-sentencing plea withdrawal, Abbott must show that a constitutional violation occurred and that this violation

caused him to plead. A defendant may not withdraw his plea after sentencing unless he shows that a manifest injustice warrants plea withdrawal. *State v. Cross*, 2010 WI 70, ¶ 42, 326 Wis. 2d 492, 786 N.W.2d 64. A manifest injustice occurs when there is "a serious flaw in the fundamental integrity of the plea." *Thomas*, 232 Wis. 2d 714, ¶ 16 (citation omitted). In order to show that such a flaw stems from a constitutional violation occurring outside of the plea colloquy, the defendant must show that the violation affected the plea. *See State v. Harris*, 2004 WI 64, ¶ 11, 272 Wis. 2d 80, 680 N.W.2d 737. And while the Legislature has permitted defendants to appeal suppression issues even in the wake of a plea, Wis. Stat. § 971.31(10), the Legislature did not abrogate the manifest-injustice framework or the defendant's burden to show causation. *See infra* pp. 27–29. Thus when, as here, a defendant's post-sentencing plea-withdrawal request is based upon an alleged constitutional violation occurring outside the plea colloquy, the defendant must show both that a constitutional violation occurred and that this violation caused him to plead. *See Harris*, 272 Wis. 2d 80, ¶ 11; *infra* pp. 27–30, 33. Abbott fails on both counts.

A. No constitutional violation occurred.

On appeal, Abbott raises three suppression issues. Abbott makes two Fourth-Amendment claims relating to various items of clothing seized by law enforcement. (Abbott's Br. 6–22.) Abbott also raises an issue under *Miranda* regarding statements he made during the February 1 interrogation. (Abbott's Br. 23–31.) In each case, as the circuit court correctly held, no constitutional violation occurred.

1. Officer Kovacs' receipt of Abbott's clothing at the hospital did not violate the Fourth Amendment.

The Fourth Amendment prohibits only unreasonable searches and seizures by the government. The Amendment

protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures," and 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." U.S. Const. amend. IV.[5] "[T]he text of the Fourth Amendment does not specify when a . . . warrant must be obtained." *Kentucky v. King*, 563 U.S. 452, 459 (2011). Instead, "[t]he touchstone of the Fourth Amendment is reasonableness." *State v. Purtell*, 2014 WI 101, ¶ 21, 358 Wis. 2d 212, 851 N.W.2d 417 (quoting *United States v. Knights*, 534 U.S. 112, 118 (2001)). Thus, "certain categories of permissible warrantless searches have long been recognized" because they are reasonable. *Fernandez v. California*, 571 U.S. 292, 298 (2014).

A search implicates the Fourth Amendment only where the individual has a legitimate expectation of privacy in the location or item searched. "[T]he reasonableness of any search is considered in the context of the individual's legitimate expectations of privacy." *Purtell*, 358 Wis. 2d 212, ¶ 21. If an individual has no legitimate expectation of privacy, then the Fourth Amendment is not implicated. *See State v. Thompson*, 222 Wis. 2d 179, 185, 585 N.W.2d 905 (Ct. App. 1998).

When a private party inspects an item, law enforcement may similarly inspect the item without offending the Fourth Amendment. The Fourth Amendment applies "only [to] governmental action; it is wholly inapplicable 'to a search or seizure, even an unreasonable one, effected by a private

[5] Article I, Section 11 of the Wisconsin Constitution contains identical language, Wis. Const. art. I, § 11, and therefore this Court generally interprets the Wisconsin Constitution consistent with the Fourth Amendment. *Milewski v. Town of Dover*, 2017 WI 79, ¶ 27, 377 Wis. 2d 38, 899 N.W.2d 303.

individual.'" *United States v. Jacobsen*, 466 U.S. 109, 113 (1984) (citation omitted). And once a private party has searched an item, the owner's "expectation of privacy" in that item "has . . . been frustrated" such that the owner no longer has a "legitimate expectation of privacy." *Id.* at 117, 119–20. A Government agent may, therefore, "view[ ] what a private party ha[s] freely made available for his inspection" without offending the Fourth Amendment. *Id.* at 119.

Additionally, law enforcement may seize evidence of a crime that is in plain view. "The seizure of property in plain view involves no invasion of privacy and is presumptively reasonable" so long as "there is probable cause to associate the property with criminal activity." *Payton v. New York*, 445 U.S. 573, 587 (1980). Law enforcement's seizure of an object is thus reasonable if the object is in plain view, if the officer has "a prior justification for being in the position from which she discovers the [object] in 'plain view,'" and if the object seized "'in itself or in itself with facts known to the officer at the time of the seizure . . . provide[s] probable cause to believe there is a connection between the [object] and criminal activity.'" *State v. Buchanan*, 2011 WI 49, ¶ 23, 334 Wis. 2d 379, 799 N.W.2d 775 (citations omitted).[6] An object is in "plain view" when it is visible and "obvious at a glance." *See Bies v. State*, 76 Wis. 2d 457, 472–73, 251 N.W.2d 461 (1977). An officer has prior justification for being present in a place when one with authority over the place consents to the officer's presence. *See State v. Wheeler*, 2013 WI App 53, ¶¶ 27–28, 347 Wis. 2d 426, 830 N.W.2d 278; *Thompson*, 222 Wis. 2d at 191–92. And there is probable cause if, considering "the totality of the circumstances, . . . there is a fair probability" that the object

[6] Courts also describe the second requirement as one that law enforcement have "a lawful right of access" to the object, *see, e.g.*, *State v. Wheeler*, 2013 WI App 53, ¶ 27, 347 Wis. 2d 426, 830 N.W.2d 278 (citation omitted); *Collins v. Virginia*, 138 S. Ct. 1663, 1672 (2018).

is connected to a crime. *State v. Sutton*, 2012 WI App 7, ¶ 10, 338 Wis. 2d 338, 808 N.W.2d 411 (citation omitted). Probable cause "a flexible, common-sense measure of . . . plausibility." *Id.* (citation omitted). For example, apparent blood stains on an object can provide probable cause to believe that the object is tied to a crime. *See United States v. Chipps*, 410 F.3d 438, 443 (8th Cir. 2005) (sweatshirt); *State v. Phillips*, 382 P.3d 133, 156 (Haw. 2016) (hammer).

Officer Kovacs reasonably seized Abbott's clothing as evidence of a crime in plain view. Officer Kovacs was lawfully present at the hospital because hospital staff invited Officer Kovacs there. (R.213:52; 214:8); *Thompson*, 222 Wis. 2d at 191–92. Indeed, Abbott admits that Officer Kovacs was "lawfully present in the emergency room." (Abbott's Br. 13.) Hospital staff gave Officer Kovacs the bag containing Abbott's clothing (R.213:80; 214:8), and Officer Kovacs was therefore entitled to inspect the bag, *Jacobsen*, 466 U.S. at 119. Moreover, because the bag was clear (R.213:60–61; 214:8), Abbott's clothing would have been immediately visible, *Bies*, 76 Wis. 2d at 472–73. And Officer Kovacs had probable cause to believe that the clothing was evidence of a crime. Officer Kovacs was aware that Kristin, Abbott's girlfriend, "could not be located." (R.213:58.) Nurse Darios told Officer Kovacs that Abbott had suspicious injuries to his person and spots on his socks that appeared to be blood. (R.213:52–53.) And Abbott's brother told Officer Kovacs that Abbott had stated that he "may have done something bad." (R.213:55.) Given this information, there was a "fair probability" that Abbott's clothing was evidence of a crime. *Sutton*, 338 Wis. 2d 338, ¶ 10; *Chipps*, 410 F.3d at 443.

Abbott's arguments to the contrary are unavailing. As an initial matter, Abbott's claim that the State forfeited a plain-view argument is erroneous. (Abbott's Br. 13–14.) The State argued below that Abbott's clothing "had been in plain view of nurses and officers who were present and noticed the

possible blood on [the] clothes" and that "Officer Kovacs had an obligation to preserve [this] evidence of a crime." (R.151:9–10.) And in any event, as the Respondent here, the State may generally "employ any theory or argument on appeal that will allow [this Court] to affirm the trial court's order, even if not raised previously." *Finch v. Southside Lincoln-Mercury, Inc.*, 2004 WI App 110, ¶ 42, 274 Wis. 2d 719, 685 N.W.2d 154.

On the merits, Abbott contends that his clothing was not in "plain view," arguing without record support that his clothing was "sequestered" and "out of sight." (Abbott's Br. 14.) Even if Abbott were correct that his clothing had been "sequestered," hospital staff gave Officer Kovacs the clear bag containing Abbott's clothing and so the clothing would have been in plain view of Officer Kovacs at that time. (R.213:60–61, 80; 214:8); *Bies*, 76 Wis. 2d at 472–73.

Abbott also contends that Officer Kovacs did not have probable cause to believe that Abbott's clothing was evidence of a crime (Abbott's Br. 14–16), but each contention misses the mark.

First, Abbott claims that because Officer Kovacs did not know what the stains on Abbott's socks were, he did not have reason to believe that they were evidence of a crime. (Abbott's Br. 14.) However, Nurse Darios told Officer Kovacs that she believed the stains to be blood (R.213:52–53), a belief that Officer Kovacs could have credited given Nurse Darios' medical training and experience.

Second, Abbott claims that "blood on clothing in an emergency room, in and of itself, is not enough to establish that the clothing is evidence of a crime." (Abbott's Br. 15.) But here, the bloodstains were not the only circumstance indicating that the clothing was evidence of a crime: Abbott and his girlfriend, Kristin, had been missing for days, Kristin was still missing, Abbott had suspicious injuries to his person, and Abbott was having an apparent mental breakdown and

told his brother that he "may have done something bad." *Supra* p. 16. Moreover, medical technicians had taken Abbott to the emergency room not because of a physical injury that would have explained the blood on his clothing, but because of his mental state. (*See* R.210:12; 213:5, 22–23, 49.) Given all of this information, combined with the bloodstains, "common[ ]sense" would indicate a "fair probability" that Abbott's clothing was evidence of a crime. *Sutton*, 338 Wis. 2d 338, ¶ 10.

Finally, Abbott argues that Officer Kovacs did not have probable cause to believe that Abbott's clothing was evidence of a crime because police did not have probable cause to arrest Abbott before he left the hospital. (Abbott's Br. 16.) But whether police had probable cause to arrest Abbott and whether police had probable cause to believe Abbott's clothing was evidence of a crime are two distinct inquiries. *See State v. Secrist*, 224 Wis. 2d 201, 209, 589 N.W.2d 387 (1999). While police may not have had sufficient information to arrest Abbott on probable cause of committing a crime, given Abbott's suspicious injuries, his and Kristin's disappearance, his apparent mental breakdown, his statements about having done "something bad," and Nurse Darios' estimation that the stains on Abbott's socks were bloodstains, Officer Kovacs had probable cause to believe that Abbott's clothing was evidence of a crime. *Sutton*, 338 Wis. 2d 338, ¶ 10.

2. Officer Gelden's seizure of Abbott's sweatshirts did not violate the Fourth Amendment.

Searches and seizures conducted pursuant to valid consent are reasonable under the Fourth Amendment. "Consent searches" are among those "categories of permissible warrantless searches" because they are reasonable. *Fernandez*, 571 U.S. at 298. A search or seizure conducted pursuant to valid consent "is a constitutionally

permissible and wholly legitimate aspect of effective police activity." *Schneckloth v. Bustamonte*, 412 U.S. 218, 228 (1973).

For an individual's consent to be valid, it must meet certain requirements. First, the individual must actually give consent "by words, gestures, or conduct," which is "a question of historical fact." *State v. Artic*, 2010 WI 83, ¶ 30, 327 Wis. 2d 392, 786 N.W.2d 430. Second, the consent must be voluntary. *Id.* ¶ 32. Consent is voluntary when the consenting party gives it freely, without coercion by or duress from law enforcement. *Id.*

When consent is given by someone other than the defendant, it must meet an additional requirement. When a third party consents to a search or seizure of property, that individual must have actual or apparent authority over the property for their consent to satisfy the Fourth Amendment. *See Illinois v. Rodriguez*, 497 U.S. 177, 181–82 (1990); *State v. Pickens*, 2010 WI App 5, ¶ 39, 323 Wis. 2d 226, 779 N.W.2d 1. An individual has actual authority when she has "common authority over [the property]," and apparent authority when "the information available to the police officers at the time of the search [or seizure] would justify a reasonable belief that the party consenting" had common authority over the property. *Pickens*, 323 Wis. 2d 226, ¶ 39; *see also Rodriguez*, 497 U.S. at 186. Common authority exists "where two persons have equal rights to the use or occupancy of [property]," *State v. Verhagen*, 86 Wis. 2d 262, 267, 272 N.W.2d 105 (Ct. App. 1978), or "joint access [to] or control" over property, *United States v. Matlock*, 415 U.S. 164, 171 & n.7 (1974).

Courts have held that certain circumstances imbue a third party with authority to consent to a search or seizure. Residence in a home, and the concomitant access to the home, is sufficient to establish authority to consent to a search of the

home. *See Fernandez*, 571 U.S. at 298, 300–01; *Mears v. State*, 52 Wis. 2d 435, 440–41, 190 N.W.2d 184 (1971). And an individual's access to and ability to use particular items are sufficient to establish authority to consent to a seizure of those items. *See State v. Ramage*, 2010 WI App 77, ¶¶ 6, 12–13, 325 Wis. 2d 483, 784 N.W.2d 746; *United States v. James*, 571 F.3d 707, 714 (7th Cir. 2009).

In addition to consent, an officer's seizure of evidence in plain view is reasonable under the Fourth Amendment. So long as (a) an object is in plain view, (b) the officer has a legal right of access to the object or a prior justification for being in the location where the object is in plain view, and (c) there is probable cause to believe that the object is evidence of a crime, the officer may seize the object. *Buchanan*, 334 Wis. 2d 379, ¶ 23; *Wheeler*, 347 Wis. 2d 426, ¶ 27.

Here, Ermelinda gave valid consent to seize the sweatshirts. As the circuit court found, Ermelinda actually gave consent. (R.213:7–8, 28–29; 214:5); *Artic*, 327 Wis. 2d 392, ¶ 30. And her consent was voluntary because she did so without any coercion by law enforcement. (R.213:7–8, 28–29); *see Artic*, 327 Wis. 2d 392, ¶ 32.

Ermelinda had both actual and apparent authority to consent to the seizure of the sweatshirts. Ermelinda had actual authority because she had access to the sweatshirts kept in her home and could use them if she so desired. (R.213:5, 7–8, 19; 214:5); *Ramage*, 325 Wis. 2d 483, ¶¶ 12–13. Ermelinda also had apparent authority over the sweatshirts. A reasonable officer, knowing that Ermelinda was married to Abbott and that she resided in the home where Abbott kept clothing, including the sweatshirts, would have believed that Ermelinda had common authority over the sweatshirts. (R.213:4–6, 27–28, 36); *Pickens*, 323 Wis. 2d 226, ¶ 39.

Even if Ermelinda did not have authority to consent to the seizure of the sweatshirts, she gave valid consent to Officer Gelden's presence in her home, where Officer Gelden then reasonably seized the sweatshirts in plain view. *Buchanan*, 334 Wis. 2d 379, ¶ 23. Again, Ermelinda actually consented to Officer Gelden's presence in her home and did so voluntarily. (R.213:7–8, 27–29; 214:4); *Artic*, 327 Wis. 2d 392, ¶ 32. As a resident of the home, Ermelinda had authority to consent to its search. (R.213:4–5; 214:4–5); *Fernandez*, 571 U.S. at 298, 300–01; *Mears* 52 Wis. 2d at 440–41. Indeed, Abbott agrees that Ermelinda "unquestionably had authority to consent to a search of the marital home." (Abbott's Br. 22 n.6.) Thus, Officer Gelden had a prior justification for being in the home and a legal right of access to the sweatshirts, which were in plain view on the living-room floor. (R.213:7–8, 29, 39); *see Wheeler*, 347 Wis. 2d 426, ¶ 27. Finally, there was probable cause to believe the sweatshirts were evidence of a crime. Officer Kovacs told Officer Gelden that Abbott's girlfriend was missing and that there was blood on Abbott's socks, Officer Gelden saw Abbott wearing the sweatshirts earlier in the day and saw what he believed to be blood on Abbott's truck, and Ermelinda told Officer Gelden that Abbott said he thought he had killed Kristin. (R.213:14–15, 23–25, 28–31, 34, 39); *Sutton*, 338 Wis. 2d 338, ¶ 10.

Abbott argues that Ermelinda did not have authority to consent to the seizure of the sweatshirts and that Officer Gelden's actions were unreasonable considering his knowledge of Abbott's marital problems (Abbott's Br. 21–22 & n.6), but these arguments are meritless.

First, Abbott argues that "clothing is a personal item" and therefore Ermelinda did not have authority over the sweatshirts. (Abbott's Br. 21–22.) Whether an item is "a personal item" is beside the point. The question is whether the consenting individual had access to and the ability to use

the item. *Ramage*, 325 Wis. 2d 483, ¶¶ 6, 12–14; *Matlock*, 415 U.S. at 171. Here, Ermelinda had that access and ability, and could therefore consent to the seizure of the sweatshirts.[7]

Abbott also argues that because he did not leave "the sweatshirts in his wife's care," he did not "assume[ ] the risk that she might consent [to] their seizure." (Abbott's Br. 22 n.6.) Again, the inquiry is not whether Abbott left the sweatshirts in Ermelinda's care, but whether Ermelinda generally had access to and the ability to use the sweatshirts. *Ramage*, 325 Wis. 2d 483, ¶¶ 6, 12–14; *Matlock*, 415 U.S. at 171.

Finally, Abbott argues that because of the marital problems between himself and Ermelinda, it was unreasonable for Officer Gelden to believe that Ermelinda had authority over the sweatshirts. (Abbott's Br. 21–22.) As an initial matter, Ermelinda had actual authority over the sweatshirts, so Officer Gelden's beliefs are irrelevant. *Supra* p. 20. And even if Ermelinda did not have actual authority, the couple's marital strife does not render unreasonable Officer Gelden's belief that Ermelinda had such authority. Abbott presented no evidence that Ermelinda was denied access to the sweatshirts or to any of the clothing that he wore, including clothing kept in the basement. (*See generally* R.150:7; 152:3–4.) To the contrary, Ermelinda testified that she always maintained access to the basement. (R.213:19.)

Abbott also argues that Officer Gelden did not reasonably seize the sweatshirts under the plain-view doctrine (Abbott's Br. 22 n.6), but Abbott's arguments fail. Abbott argues that because Officer Gelden "specifically asked

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[7] Abbott's non-binding authority regarding spousal consent to seizures of "personal property" does not help him. *See* (Abbott's Br. 20 (citing *United States v. Rodriguez,* 888 F.2d 519, 524–25 (7th Cir. 1989) (remanding for determination of whether wife had authority))); *State v. Evans,* 372 P.2d 365, 372 (Haw. 1962) (pre-*Matlock* case relying on traditional roles of husbands and wives).

for" the sweatshirts and Ermelinda "specifically consented to the[ir] seizure," the plain-view doctrine cannot justify the seizure. (Abbott's Br. 22 n.6.) But these facts do not negate that the sweatshirts were in plain view, that Officer Gelden had a lawful right of access to them, and that there was probable cause to believe the sweatshirts were evidence of a crime. And, contrary to Abbott's claims (Abbott's Br. 22 n.6), the testimony establishes that there was probable cause to believe that the sweatshirts were evidence of a crime, *supra* p. 21.

3. Police did not violate the Fifth Amendment when they obtained Abbott's statements during a custodial interrogation.

Individuals are guaranteed the right to remain silent and to counsel during custodial interrogations, and law enforcement must notify an individual of these rights before beginning the interrogation. Because of the "inherently compelling" nature of custodial interrogations, law enforcement must "apprise[ ]" the individual of his rights and "fully honor[ ]" his exercise thereof, thereby protecting his privilege against compelled self-incrimination. *Miranda v. Arizona*, 384 U.S. 436, 445–59, 467; U.S. Const. amend. V; *State v. Cummings*, 2014 WI 88, ¶ 46, 357 Wis. 2d 1, 850 N.W.2d 915. Thus, any person in custody and under interrogation is entitled to warnings about his rights to remain silent and to counsel, and any statement not preceded by those warnings is inadmissible. *Miranda*, 384 U.S. at 444, 477.

An individual implicitly waives his *Miranda* rights by voluntarily answering questions after being informed of and understanding his rights. Law enforcement need not obtain an express waiver of the *Miranda* rights from an individual before interrogating him. *Berghuis v. Thompkins*, 560 U.S. 370, 384 (2010). Because "[t]he main purpose of *Miranda* is to

ensure that an accused is advised of and understands the right to remain silent and the right to counsel," "if a suspect receives adequate *Miranda* warnings, understands them, and has an opportunity to invoke the rights before giving any answers or admissions" then the "requirements [of *Miranda*] are met." *Berghuis*, 560 U.S. at 383, 387. If an individual then makes an uncoerced statement, he implicitly waives his *Miranda* rights. *Id.* at 384; *accord State v. Hampton*, 2010 WI App 169, ¶ 32, 330 Wis. 2d 531, 793 N.W.2d 901. Moreover, once an individual indicates that he understands his *Miranda* rights, this Court presumes that he so understands, absent "countervailing evidence." *See State v. Mitchell*, 167 Wis. 2d 672, 696, 482 N.W.2d 364; *State v. Beaver*, 181 Wis. 2d 959, 967, 512 N.W.2d 254 (Ct. App. 1994).

Once an individual has waived his *Miranda* rights, he may later invoke his right to counsel only if he does so unambiguously. In order to invoke his right to counsel under *Miranda*, an individual "must unambiguously request counsel." *Davis v. United States*, 512 U.S. 452, 459 (1994); *State v. Jennings*, 2002 WI 44, ¶ 30, 252 Wis. 2d 228, 647 N.W.2d 142. "[H]e must articulate his desire to have counsel present sufficiently clearly that a reasonable police officer in the circumstances would understand the statement to be a request for an attorney." *Davis*, 512 U.S. at 459; *accord State v. Edler*, 2013 WI 73, ¶ 34, 350 Wis. 2d 1, 833 N.W.2d 564. If the individual "makes a statement concerning the right to counsel 'that is ambiguous or equivocal' or makes no statement, the police are not required to end the interrogation, or [to] ask questions to clarify whether the [individual] wants to invoke his or her *Miranda* rights." *Berghuis*, 560 U.S. at 381 (citation omitted). A statement is "ambiguous or equivocal [if] a reasonable officer in light of the circumstances would have understood only that the suspect *might* be invoking the right to counsel." *Edler*, 350 Wis. 2d 1, ¶ 34 (quoting *Davis*, 512 U.S. at 459).

Courts have held that certain statements are ambiguous and therefore insufficient to invoke the *Miranda* right to counsel. A statement that an individual does not know whether he would like a lawyer present is equivocal. *See State v. Hassel*, 2005 WI App 80, ¶¶ 17–19, 280 Wis. 2d 637, 696 N.W.2d 270 (addressing the concomitant right to remain silent). And an individual's statements about what his attorney would want are ambiguous because they do not indicate the individual's desire. *See State v. Long*, 190 Wis. 2d 386, 397, 526 N.W.2d 826 (Ct. App. 1994). Finally, an individual's request that law enforcement ask his attorney whether he should have counsel present is insufficient to invoke the right to counsel. *See Moran v. Burbine*, 475 U.S. 412, 433 n.4 (1986) ("the privilege against compulsory self-incrimination is . . . a personal one that can only be invoked by the individual whose testimony is being compelled"); *People v. Beltran*, 89 Cal. Rptr. 2d 267, 270 (Cal. Ct. App. 1999) (attorney cannot invoke *Miranda* rights on behalf of client).

Here, Abbott implicitly waived his *Miranda* rights and did not invoke his right to counsel until the end of the interview.

First, Abbott indicated that he understood his *Miranda* rights. Detective Knaus read Abbott the *Miranda* rights and Abbott indicated that he understood. (R.226, Ex.4, 1:45:15–1:46:10); *Mitchell*, 167 Wis. 2d at 696; *Berghuis*, 560 U.S. at 383, 387. And, when Detective Knaus later asked Abbott again if he understood his rights, Abbott repeated that he did. (R.226, Ex.4, 1:53:25–:40.) Finally, when the officers asked a third time whether Abbott understood his rights, Abbott responded, "I do," and declined Detective Knaus' invitation to repeat the warnings. (R.226, Ex.4, 2:00:20–:35.)

Then, when provided an opportunity to invoke his rights, Abbott made only equivocal references to his attorney. After reading the *Miranda* rights, the officers gave Abbott an

opportunity to invoke his rights before questioning him. (R.226, Ex.4, 1:46:05–2:03:30); *Berghuis*, 560 U.S. at 384; *Hampton*, 330 Wis. 2d 531, ¶ 32. Abbott did not do so and instead made only ambiguous statements about whether he wanted his attorney present. Abbott repeatedly made equivocal statements that he did not know what to do. (R.226, Ex.4, 1:49:00–:15, 1:50:20–2:02:20); *Hassel*, 280 Wis. 2d 637, ¶¶ 17–19. Abbott also expressed what his attorney would have wanted, but this too was ambiguous as to whether Abbott wanted counsel present. (R.226, Ex.4, 1:46:25–35, 1:47:55–1:48:20); *Long*, 190 Wis. 2d at 397. And Abbott's requests that the officers ask Abbott's attorney whether he should have counsel present were likewise insufficient to invoke Abbott's right to counsel. (R.226, Ex.4, 1:49:00–:15, 1:50:20–2:02:20); *see Moran*, 475 U.S. at 433 n.4.

Finally, after receiving an opportunity to invoke and failing to do so, Abbott voluntarily spoke with the officers when they began asking him questions about Kristin (R.226, Ex.4, 2:08:10–:25), thereby implicitly waiving his *Miranda* rights. *Berghuis*, 560 U.S. at 384; *Hampton*, 330 Wis. 2d 531, ¶ 32. It was not until the end of the interview that Abbott finally, unequivocally invoked his right to counsel. (R.226, Ex.6, 1:34:10–:30 ("I want [my attorney] to be here").)

Abbott's argument that the officers were required to cease questioning because "Abbott did not have all his faculties" is unavailing. (Abbott's Br. 30–31.) Abbott indicated that he understood his *Miranda* rights (R.226, Ex.4, 1:45:15–1:46:10; 1:53:25–:40; 2:00:20–:35), and this Court presumes that he so understood, *Mitchell*, 167 Wis. 2d at 696. Abbott provided no "countervailing evidence" to undermine his clear statements that he understood his rights. *Id.* While Abbott claims that his mental state was such that he could not understand or invoke his rights, his "responses to the questions" asked during the interview "were relevant and

appropriate to the topic under discussion." *Beaver*, 181 Wis. 2d at 967; (*see, e.g.*, R.226, Ex.4, 2:08:10–:25 (Detective Knaus asks when Abbott met Kristin and Abbott responds "it was a couple of years ago"); Ex.5, 9:10–11:10 (Detective Knaus asks if Kristin was blackmailing Abbott and Abbott responds that she "wanted money" and threatened to tell Abbott's wife about the affair).) This evidence undermines Abbott's claimed inability to understand and invoke his rights. *Beaver*, 181 Wis. 2d at 967.

B. Even if a constitutional violation occurred, it did not affect Abbott's plea.

1. The manifest-injustice framework should apply to Abbott's post-sentencing request for plea withdrawal.

When a defendant seeks to withdraw his plea after sentencing, he bears a heavy burden to show that a manifest injustice warrants plea withdrawal. Once a plea is finalized, "the state's interest in finality of convictions requires a high standard of proof to disturb that plea." *Thomas*, 232 Wis. 2d 714, ¶ 16 (citation omitted). Moreover, after sentencing and entry of judgment, "the presumption of innocence no longer exists." *Id.* Finally, courts place a heavy burden on defendants in order to deter defendants from "testing the waters for possible punishments." *State v. Taylor*, 2013 WI 34, ¶ 48, 347 Wis. 2d 30, 829 N.W.2d 482. Thus, when a defendant seeks to withdraw his plea after sentencing, the defendant must "prove[ ] by clear and convincing evidence that plea withdrawal is necessary to correct a manifest injustice. *Cross*, 326 Wis. 2d 492, ¶ 42. To do so, the defendant must show "a serious flaw in the fundamental integrity of the plea." *Thomas*, 232 Wis. 2d 714, ¶ 16 (citation omitted).

Separate from the manifest-injustice concept, a distinct concept exists known as the guilty-plea-waiver rule, which

prohibits a defendant appealing most issues after entering a plea. The Wisconsin Supreme Court has espoused the "general rule[ ] that a plea of guilty [or no contest], voluntarily and understandingly made, constitutes a waiver of nonjurisdictional defects and defenses, including claims of violation of constitutional rights prior to the plea." *State v. Riekkoff*, 112 Wis. 2d 119, 122–23 332 N.W.2d 744 (1983) (quoting *Hawkins v. State*, 26 Wis. 2d 443, 448, 132 N.W.2d 545 (1965)).[8]

The Legislature has abrogated the guilty-plea-waiver rule in limited circumstances. In 1969, the Legislature created Wis. Stat. § 971.31(10), which "supersedes" the guilty-plea-waiver-rule. *Riekkoff*, 112 Wis. 2d at 124–25; 1969 Wis. Laws, ch. 255, § 63. The statute provides that "[a]n order denying a motion to suppress evidence or a motion challenging the admissibility of a statement of a defendant may be reviewed upon appeal from a final judgment or order notwithstanding the fact that the judgment or order was entered upon a plea of guilty or no contest." Wis. Stat. § 971.31(10); *see also* 1969 Wis. Laws, ch. 255, § 63; 2009 Wis. Act 27, § 3 (amending certain language).

When the Legislature abrogated the guilty-plea-waiver rule for certain claims, it did not abrogate the defendant's burden to show a manifest injustice warranting plea withdrawal. While the Legislature may alter or abrogate the common law, *Houle v. Sch. Dist. of Ashland*, 2003 WI App 214, ¶ 13, 267 Wis. 2d 708, 671 N.W.2d 395, "[a] statute does not change the common law unless the legislative purpose to do

[8] Both the manifest-injustice framework and guilty-plea-waiver rule apply to *Alford* pleas. *See State v. Smith*, 202 Wis. 2d 21, 25, 549 N.W.2d 232 (1996); *State v. Kelty*, 2006 WI 101, ¶ 18, 294 Wis. 2d 62, 716 N.W.2d 886.

so is clearly expressed in the language of the statute." *Fuchsgruber v. Custom Accessories, Inc.*, 2001 WI 81, ¶ 25, 244 Wis. 2d 758, 628 N.W.2d 833. Thus, in order "[t]o accomplish a change in the common law, the language of a statute must be clear, unambiguous, and peremptory." *Id.* In 1969, when the Legislature enacted section 971.31(10), the defendant's burden to show a manifest injustice warranting plea withdrawal was part of the common law. *See State v. Reppin*, 35 Wis. 2d 377, 385–86, 151 N.W.2d 9 (1967) (formally adopting the manifest-injustice framework). There is no indication in the text of section 971.31(10) that it was meant to abrogate the manifest-injustice framework or relieve the defendant of his burden. *See* 1969 Wis. Laws, ch. 255, § 63. Thus, when raising a claim under section 971.31(10), a defendant must still show that a manifest injustice warrants plea withdrawal.

If a defendant wishes to show that a constitutional violation occurring outside of the plea colloquy constitutes a manifest injustice, the defendant must show that the violation caused him to plead. Showing a manifest injustice requires showing a "serious flaw in the fundamental integrity of the plea." *Thomas*, 232 Wis. 2d 714, ¶ 16 (citation omitted). An error that does not affect the plea cannot cause a flaw, serious or otherwise, in the fundamental integrity of the plea. Accordingly, courts have consistently held that a defendant must show that a constitutional violation occurring outside of the plea colloquy caused him to plead. *Harris*, 272 Wis. 2d 80, ¶¶ 11–23 (alleged *Brady* violation); *State v. Sturgeon*, 231 Wis. 2d 487, 605 N.W.2d 589 (Ct. App. 1999) (same); *Hatcher v. State*, 83 Wis. 2d 559, 266 N.W.2d 320 (1978) (alleged speedy-trial violation).[9] Thus, when arguing that a

[9] Indeed, prior to the passage of section 971.31(10), the Wisconsin Supreme Court had twice indicated that a defendant must show causation when arguing that a suppression issue

constitutional violation by law enforcement in gathering evidence against a defendant warrants plea withdrawal, the defendant must show not only that a constitutional violation occurred, but also that the violation caused him to plead. *See Harris*, 272 Wis. 2d 80, ¶ 11.[10]

Previously, this Court and the Wisconsin Supreme Court applied conflicting standards to the question of causation when a defendant claimed that a suppression issue warranted plea withdrawal.

First, the Wisconsin Supreme Court wavered as to who bears the burden of showing either causation or harmlessness. Prior to the enactment of section 971.31(10), the Court indicated a requirement that the defendant show that a disputed suppression issue caused him to plead. *Hawkins*, 26 Wis. 2d at 448–50; *State v. Biastock*, 42 Wis. 2d 525, 531–33, 167 N.W.2d 231 (1969). And even after the Legislature enacted section 971.31(10), the Court still referenced causation in cases brought under the statute. *See, e.g.*, *Pontow v. State*, 58 Wis. 2d 135, 137, 205 N.W.2d 775

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must show causation when arguing that a suppression issue warranted plea withdrawal. *Hawkins v. State*, 26 Wis. 2d 443, 448–50, 132 N.W.2d 545 (1965); *State v. Biastock*, 42 Wis. 2d 525, 531–33, 167 N.W.2d 231 (1969). The language of section 971.31(10) does not indicate an intent to alter this requirement, *see* 1969 Wis. Laws, ch. 255, § 63, and so this requirement should have remained part of the common law. *See Fuchsgruber v. Custom Accessories, Inc.*, 2001 WI 81, ¶ 25, 244 Wis. 2d 758, 628 N.W.2d 833.

[10] Courts have also required that the defendant show he was unaware of his claim prior to pleading. *See Harris*, 2004 WI 64, ¶ 11, 272 Wis. 2d 80, 680 N.W.2d 737. However, this requirement is meant to overcome the guilty-plea-waiver rule, *see Ernst v. State*, 43 Wis. 2d 661, 667, 170 N.W.2d 713 (1969), *overruled in part on other grounds by State v. Bangert*, 131 Wis. 2d 246, 389 N.W.2d 12 (1986) (citing *Biastock*, 42 Wis. 2d at 532), a rule that does not apply when the defendant challenges a circuit court's suppression decision pursuant to section 971.31(10).

(1973); *State v. Taylor*, 60 Wis. 2d 506, 510, 210 N.W.2d 873 (1973). Then, without explanation, the Court ceased requiring a causal link between the suppression issue and the plea, going so far as to reject the State's proffered harmlessness analysis. *See Soehle v. State*, 60 Wis. 2d 72, 80, 208 N.W.2d 341 (1973); *State v. Monahan*, 76 Wis. 2d 387, 401, 251 N.W.2d 421 (1977) (rejecting harmlessness analysis).[11] Finally, in *State v. Armstrong*, the Wisconsin Supreme Court limited its holding in *Monahan* and applied a harmless-error analysis to an appeal brought under section 971.31(10), placing the burden on the State to prove harmlessness. 223 Wis. 2d 331, 367–70, 588 N.W.2d 606 (1999), *opinion modified by* 225 Wis. 2d 121, 591 N.W.2d 604 (1999). The Court based its decision on the harmless-error statute, Wis. Stat. § 805.18, without explaining why appeals brought under section 971.31(10) should be exempt from the manifest-injustice framework. *See Armstrong*, 223 Wis. 2d at 367–72.

Second, this Court espoused inconsistent burdens of proof under the *Armstrong* harmlessness analysis. In *Armstrong*, the Court defined the State's burden as showing that "no reasonable possibility" exists that the defendant would not have pled guilty. 223 Wis. 2d at 368–70. The Court clarified that "reasonable possibility" is identical to the

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[11] This Court later addressed a problem created by this scheme. In *State v. Pozo*, the defendant raised under section 971.31(10) a suppression issue regarding evidence of a charge that had been dismissed and therefore could have had "no possible impact on the defendant's plea." 198 Wis. 2d 705, 713–14, 717, 544 N.W.2d 228 (Ct. App. 1995). If there were no need for a causal connection between the suppression issue and the plea, then the defendant should have been permitted to withdraw his plea regardless of whether the suppression issue pertained to a separate, dismissed charge. *See id.* at 715–16. This Court, however, declined to permit such an "absurd result[ ]" to obtain, holding instead that section 971.31(10) does not permit the appeal of suppression issues relating to charges outside of the plea. *Id.* at 715, 717 & n.4.

"reasonable probability" standard from *Strickland v. Washington*, 466 U.S. 668 (1984). *Armstrong*, 233 Wis. 2d at 369, 372 n.40. However, this Court later held that the Wisconsin Supreme Court's decision in *State v. Hale*, 2005 WI 7, 277 Wis. 2d 593, 691 N.W.2d 637, alters the harmlessness analysis under section 971.31(10) such that the State must prove that an erroneous suppression decision was harmless "beyond a reasonable doubt." *Rockette*, 287 Wis. 2d 257, ¶ 26 (citation omitted). However, this Court has subsequently referred to both burdens when assessing harmlessness under section 971.31(10). *See, e.g.*, *State v. Dawson*, No. 2013AP834-CR, 2013 WL 6231295, at *2 (Wis. Ct. App. Dec. 3, 2013) (unpublished).

Finally, this Court set forth differing sets of factors to consider in the harmlessness analysis. In *State v. Semrau* this Court explained that, to determine whether an erroneous suppression decision was harmless, courts should consider the strength of both the State's and defendant's cases, "the persuasiveness" of the disputed evidence, any reasons expressed by the defendant for why he pled, "the benefits obtained by the defendant in exchange for the plea," and "the thoroughness of the plea colloquy." 2000 WI App 54, ¶¶ 21–22, 233 Wis. 2d 508, 608 N.W.2d 373. Then, in *Rockette*, this Court altered that list, holding that courts should consider "the frequency of the error, the importance of the erroneously admitted evidence, the presence or absence of evidence corroborating or contradicting the erroneously admitted evidence, whether the improperly admitted evidence duplicates untainted evidence, the nature of the defense, and the nature and overall strength of the State's case." 287 Wis. 2d 257, ¶ 26. Because these factors come from caselaw discussing trial errors, this Court did not inquire into the defendant's expressed reasons for pleading, the benefit that the defendant obtained by entering a plea, or the thoroughness of the plea colloquy. *See id.* ¶¶ 26–31. However,

these factors should still be relevant to an inquiry into whether the defendant would have pled absent a particular error.

This conflicting caselaw is inconsistent with recent Wisconsin Supreme Court caselaw applying the manifest-injustice framework, and so the more recent caselaw should control and the manifest-injustice framework should apply. *Armstrong* and its progeny require only that the defendant show that the circuit court erred in deciding a suppression issue. *Armstrong*, 233 Wis. 2d at 367–72; *Semrau*, 233 Wis. 2d 508, ¶¶ 21–22; *Rockette*, 287 Wis. 2d 257, ¶ 26. More recent caselaw, however, requires that the defendant show a manifest injustice warranting plea withdrawal even when there has been an error in the plea colloquy. *Taylor*, 347 Wis. 2d 30, ¶¶ 43–54. Because this caselaw is arguably inconsistent, this Court should follow the Wisconsin Supreme Court's "most recent pronouncement," *see State v. Clark*, 179 Wis. 2d 484, 493, 507 N.W.2d 172 (Ct. App. 1993), and require that defendants seeking post-sentencing plea withdrawal show that a manifest injustice warrants such withdrawal, even when there has been an error.

2. Under either the manifest-injustice framework or a harmlessness analysis, Abbott is not entitled to withdraw his plea.

Under the manifest-injustice framework, a defendant must meet a certain threshold to show that a constitutional violation caused him to plead. To show causation, the defendant must show "a reasonable probability that, but for the [error, he] would have refused to plead and would have insisted on going to trial." *Sturgeon*, 231 Wis. 2d at 503–04. To make this determination, courts look to "(1) the relative strength and weakness of the State's case and the defendant's case; (2) the persuasiveness of the withheld evidence; (3) the reasons, if any, expressed by the defendant for choosing to

plead guilty; (4) the benefits obtained by the defendant in exchange for the plea; and (5) the thoroughness of the plea colloquy." *Id.* at 504.

Here, Abbott fails to show that the circuit court's suppression decisions, either individually or in combination, caused him to plead. Abbott has provided little to no evidence as to any of the relevant factors. He points out only that he pled pursuant to *Alford*, thereby maintaining a claim of innocence, and argues that the evidence subject to the disputed suppression decisions represented "significant pieces" of the State's case. (Abbott's Br. 32). But, as explained below, even if all the evidence that Abbott disputes on appeal had been inadmissible, the State still had a wealth of evidence to support the charge that Abbott murdered Kristin and disposed of her body. Moreover, Abbott's defense was weak, and the benefit he obtained from the plea bargain great. Finally, Abbott offers no argument that each suppression decision caused him to plead, such that if this Court disagrees with only some of the disputed decisions, Abbott should still be permitted to withdraw his plea.

Even if the State must show beyond a reasonable doubt that Abbott would still have pled, the State meets that burden here, even if all of the circuit court's disputed suppression decisions were incorrect.

First, the State's case against Abbott was extremely powerful even without any of the disputed evidence. *Rockette*, 287 Wis. 2d 257, ¶ 26; *Semrau*, 233 Wis. 2d 508, ¶ 22. Abbott's statements during the February 1 interrogation were duplicative. Abbott's wife told law enforcement that Abbott was having an affair with Kristin and that Kristin was blackmailing him. (R.213:14–15, 28, 33–34.) And even without the bloody clothing from the hospital and from Abbott's home, the State still had substantial physical evidence tying Abbott to the murder. Law enforcement found Kristin's blood on Abbott's truck and on blankets in the truck-

bed, and found at Abbott's wood shop the same plastic wrap used to wrap Kristin's body and a film of sawdust similar to that found on the plastic wrapping Kristin's body. (R.2:2–3; 118:1–3; 210:35.) Finally, other evidence pointed to Abbott's having committed the murder. Witnesses explained that Abbott and Kristin were both missing between January 1 and January 3 and told police that they had seen Kristin's car at Abbott's wood shop during that time but could not find Kristin. (*See* R.213:55, 58–59.) Abbott's cell phone data and receipts found in Abbott's truck indicated that he was in the area of Highway 11 during that time—the same area where Kristin's body was found. (R.2:2–3; 213:42.) After going missing for nearly two days, Abbott returned home having a mental breakdown and with suspicious injuries to his person, including a bite-mark to his wrist. (R.2:2; 213:5, 12, 52–53.) Finally, Abbott told his wife that he thought he killed Kristin and told his brother that he "may have done something bad." (R.213:14, 55.)

By contrast, Abbott's defense was weak. *Rockette*, 287 Wis. 2d 257, ¶ 26; *Semrau*, 233 Wis. 2d 508, ¶ 22. Abbott claimed only that he could not remember what happened: he offered no explanation for his activities during the time that he was missing to counter the State's strong, evidence-based contention that he was killing Kristin and disposing of her body. *See* (R.226, Ex.5, 15:15–15:35, 33:45–34:15.)

Finally, Abbott obtained a significant benefit from the plea bargain. *Semrau*, 233 Wis. 2d 508, ¶ 22. In exchange for his plea, Abbott received the opportunity to be released from prison in his lifetime. (R.122 (information); 172 (amended information); Wis. Stat. §§ 939.50, 940.01. The State also dismissed a penalty enhancer and second charge that could have added 15 years to Abbott's sentence. (R.122; 172.)

If this Court holds that the State must prove harmlessness and disagrees that the record shows Abbott's plea decision would have remained the same if some or all of

the disputed evidence had been suppressed, then the State respectfully requests that this Court remand for an evidentiary hearing. The record indicates that the State had more evidence against Abbott. (*See* R.226, Ex.5, 46:40–47:10, 52:00–:15, 1:04:35–:45, 1:25:20–:40; Ex.6, 5:30–:45 (discussing additional evidence).) It also appears that the State, as a result of Abbott's plea here, may have dismissed a separate case against Abbott involving numerous charges of possession of child pornography and carrying a possible punishment of up to 225 years' imprisonment. (R.69 (copy of criminal complaint in Racine County Case No. 2013CF260); 223 (*Alford* plea entered in the present case on Sept. 27, 2017)); Hearing, *State v. Abbott*, No. 2013CF260 (Racine Cty. Cir. Ct., Oct. 16, 2017) (dismissing case without prejudice on State's motion). Because this information is not sufficiently set out in the record, this Court should remand for further fact-finding before permitting Abbott to withdraw his plea. *See, e.g.*, *State v. Anker*, 2014 WI App 107, ¶ 27, 357 Wis. 2d 565, 855 N.W.2d 483.

CONCLUSION

This Court should affirm the decisions of the circuit court and deny Abbott's request to withdraw his plea. If this Court disagrees with any of the circuit court's decisions, this Court should hold that Abbott has failed to show causation, or that the State has shown harmlessness. If this Court holds that the State must show harmlessness and believes that the State cannot meet that burden on this record, then this Court should remand for an evidentiary hearing.

Dated this 18th day of July, 2019.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 10,961words.

Dated this 18th day of July, 2019.

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AMY C. MILLER
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 18th day of July, 2019.

_____
AMY C. MILLER
Assistant Attorney General

SUPPLEMENTAL APPENDIX TO
BRIEF OF PLAINTIFF-RESPONDENT

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APPENDIX CERTIFICATION

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is a supplemental appendix that complies with the content requirements of Wis. Stat. § (Rule) 809.19(2)(a); that is, the record documents contained in the respondent's supplemental appendix fall into one of the categories specified in sub. (2)(a).

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

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AMY C. MILLER
Assistant Attorney General

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I hereby certify that I have submitted an electronic copy of this appendix, which complies with the requirements of Wis. Stat. § (Rule) 809.19(13).

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