STATE OF WISCONSIN

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

DISTRICT IV

Case No. 2019AP1983-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JACOB RICHARD BEYER,

Defendant-Appellant.

ON APPEAL FROM A JUDGMENT OF CONVICTION ENTERED IN DANE COUNTY CIRCUIT COURT, THE HONORABLE WILLIAM E. HANRAHAN, PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

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ISSUES PRESENTED

1. After repeated adverse rulings on a discovery issue, Defendant-Appellant Jacob R. Beyer negotiated ten counts of possession of child pornography down to one. He then stipulated to a set of facts and admitted his guilt at a court trial, expressly to avoid the guilty-plea-waiver rule.

As a matter of public policy, may a defendant circumvent the guilty-plea-waiver rule in this way?

The circuit court did not address this issue.

This Court should answer, "no."

2. If this Court elects to address the issue, did the circuit court err in denying Beyer's discovery request?

The circuit court did not address this issue.

This Court should answer, "no."

3. Did the circuit court err in denying Beyer's motion to suppress?

The circuit court did not address this issue.

This Court should answer, "no."

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State does not request oral argument. It requests publication under Wis. Stat. § (Rule) 809.23(1)(a)1. to establish that criminal defendants may not avoid the guilty-plea-waiver rule by utilizing the procedure at issue in this case. Publication on the discovery issue may be warranted under Wis. Stat. § (Rule) 809.23(1)(a)5.

INTRODUCTION

At a purported court trial, Beyer stipulated to a set of facts and agreed to have the circuit court find him guilty of one count of possession of child pornography. He utilized this

rare procedure to avoid the guilty-plea-waiver rule's applicability to his heavily litigated discovery claim. The court convicted Beyer, imposed the mandatory-minimum sentence, and stayed it pending appeal.

Beyer now revives his discovery claim, contending that the circuit court erred in denying him access to law enforcement's computer and its undercover investigative software. He also challenges the court's denial of his suppression motion.

This Court should affirm. As a preliminary matter, this Court should hold that a defendant may not circumvent the guilty-plea-waiver rule by admitting his guilt and consenting that a judgment of conviction be entered against him at a court "trial." If this Court chooses to overlook the waiver rule in this case, it should hold that the circuit court's discovery ruling did not violate Beyer's constitutional rights. Finally, this Court should hold that Beyer was not entitled to suppression because the search-warrant affidavit states probable cause, and Beyer failed to prove a *Franks/Mann* violation.

STATEMENT OF THE CASE

The charges

In December 2017, the State charged Beyer with ten counts of possession of child pornography. (R. 2:1–5.)

The complaint alleged that on October 28, 2017, Wisconsin Department of Justice Special Agent Jeffrey Lenzner "was conducting an online investigation on peer to peer file sharing networks" looking for people sharing child pornography. (R. 2:5.) He discovered a file that contained a video of an adult male and prepubescent female engaging in sexual contact. (R. 2:5–6.) Utilizing the IP address from the suspect device, Agent Lenzner served the internet-service provider, Charter Communications, Inc. ("Charter"), with an

administrative subpoena to discern the account holder. (R. 2:6.) Roughly three weeks later, Charter informed Agent Lenzner that the account holder was Beyer, who lived in a multi-unit apartment building in Madison. (R. 2:6.)

On December 7, 2017, City of Madison Police Detective Scott Sachtjen executed a search warrant at Beyer's apartment. (R. 2:6.) Beyer confirmed that he lived there alone and ultimately admitted to possessing child pornography. (R. 2:6–8.) A subsequent search of Beyer's computer revealed at least ten images of child pornography, nine of which involved prepubescent females. (R. 2:9–10.)

Pre-trial issues

Discovery. On February 26, 2018, Beyer filed a "Demand for Additional Discovery and Inspection." (R. 16:1.) Relevant here, he stated his desire to "test the computer used by Special Agent Jeffrey Lenzner in conducting his internet undercover operations, with the hardware and software configuration and settings it had on the dates and times the State claims Special Agent Lenzner detected the evidence of child pornography which formed the basis for the" search warrant. (R. 16:3.)

At a motion hearing on September 13, 2018, defense counsel explained that his forensic computer examiner "was waiting for a hash value that he could use to" confirm that the video that served as the basis for the search warrant existed on Beyer's computer. (R. 69:2.) Defense counsel informed the circuit court that counsel had since obtained that information. (R. 69:2–3.) Accordingly, he solely asked for "an order allowing [his] expert to copy [Beyer's] hard drive without the contraband and take it back to his office for analysis." (R. 69:3.) The circuit court granted Beyer's request. (R. 31:1.)

On December 18, 2018, Beyer filed a "Notice of Motion and Motion to View the State's Computer and its Undercover Software." (R. 35:1.) His motion alleged that his expert had

"searched for the SHA-1 hash value that was allegedly associated with the image that was viewed by Agent Lenzner on October 28, 2017, and he was unable to locate that hash value on the defendant's computer." (R. 35:2.) Beyer further claimed that his expert "also searched for the State's undercover computer software infohash (State's term), which differs from the SHA-1 hash value, and was unable to locate that hash value on the defendant's computer, as well." (R. 35:2–3 (footnote omitted).) Finally, Beyer alleged that his expert "searched for the name of the file which was given to him in the warrant, and he was unable to locate that file with that name, as well." (R. 35:3.) Beyer claimed a "right to make sure that the image alleged to have been seen by the agent was actually seen by him." (R. 35:3.) Regarding the legal basis for his motion, Beyer cited his due process right to present a defense and Wis. Stat. § 971.23, governing pre-trial discovery. (R. 38.)

The circuit court held a hearing on Beyer's motion on January 22, 2019. (R. 70:1.) Beyer argued that he could not ascertain the validity of the search warrant unless the court granted his motion. (R. 70:3.) The State countered that Beyer was not entitled to the discovery under Wis. Stat. § 971.23 because it did not intend to introduce the evidence that served as the basis for the search warrant at trial. (R. 70:6–21.) The court agreed with the State and denied Beyer's motion. (R. 70:24–25.) It noted that Beyer could file a suppression motion and cross-examine Agent Lenzner to "find out all the dark secrets about how the [State's] computer operates and the like." (R. 70:24.)

Suppression. Beyer then filed a motion to suppress on three grounds. (R. 41.) First, he contended that the search warrant "lacked probable cause in and of itself." (R. 41:1.) Second, Beyer argued that "the agents relying on the search warrant knew that the search warrant lacked probable cause." (R. 41:1.) Third, he maintained that "the agents

omitted and provided misleading information concerning its undercover investigative software (UIS)." (R. 41:1.) Beyer also made another request to "view the State's computer." (R. 41:12.)

Four witnesses testified at the suppression hearing. Agent Lenzner and Detective Sachtjen testified for the State. Nicholas Schiavo and Juanluis Villegas, two forensic computer examiners, testified for Beyer.

Agent Lenzner stated that he has "over 300 hours of investigative training in internet-crimes-against-children cases, including some forensic training, undercover-chat training, and peer-to-peer training." (R. 71:14.) He defined "peer to peer" as "[f]ile-sharing networks where people share files." (R. 71:14.) One such network is "BitTorrent," which allows people "to share a large amount of files in a short amount of time." (R. 71:14.) Using music as an example, Agent Lenzner explained that a person could "go on the internet, search for the name of [a] Metallica CD, and it would show all the people that are sharing the torrent that have that Metallica CD in it." (R. 71:14.) The searching person's "computer would then connect" to other computers using the BitTorrent network to download the CD, getting "bits and pieces . . . from all the users out there" to expedite the process. (R. 71:14–15.) Once the person completely downloads the Metallica CD, he "start[s] sharing that CD with other users." (R. 71:14.)

Agent Lenzner explained that the Department of Justice utilizes several programs to search for people sharing child pornography on the internet. (R. 71:15.) In this case, he used a program called Torrential Downpour. (R. 71:15.) He participated in a 20-hour training to learn how to use the program, and he now trains other law enforcement officers on how to use it. (R. 71:16.)

The Torrential Downpour program "identifies people that are on the BitTorrent network that are sharing info hashes containing child pornography." (R. 71:16.) Agent Lenzner explained that an "info hash is a batch of files that is created through the BitTorrent network." (R. 71:16.) He clarified that an info hash "could contain one file" or "thousands of files." (R. 71:16.) The info hash has "a specific number" that allows law enforcement "to determine what is in there." (R. 71:16.) Agent Lenzner elaborated: "the info hash will give us usually the file names, some metadata about that file, how many files are in there, and our computers specifically look for info hashes that are known child pornography." (R. 71:16–17.)

Agent Lenzner testified that around October 28, 2017, he received an alert from the Torrential Downpour program that someone in the Madison area was sharing child pornography. (R. 71:17.) He then downloaded the subject file, which contained a "10 minute, 33 second video of an adult male attempting to vaginally and annually penetrate a prepubescent child." (R. 71:18–19.) After viewing the video, Agent Lenzner sent an administrative subpoena to Charter to determine the internet subscriber during the relevant time period. (R. 71:18–20.) Charter responded that it was Beyer and provided his address. (R. 71:20.) Armed with this information, Agent Lenzner contacted Detective Sachtjen. (R. 71:22.)

Detective Sachtjen testified that he applied for and executed the search warrant in this case. (R. 71:4.) He indicated that Agent Lenzner's investigation yielded the information that served as the basis for the warrant. (R. 71:5–6.) At the time of the warrant application, Detective Sachtjen swore "that the information provided by Agent Jeffrey Lenzner . . . was truthful and reliable." (R. 71:6.)

After Detective Sachtjen executed the search warrant, Agent Lenzner's office searched the devices confiscated from

Beyer's apartment. (R. 71:22.) Agent Lenzner then learned that, at the time of this examination, none of Beyer's devices contained the video that served as the basis for the warrant. (R. 71:22.) Based on his training and experience, Agent Lenzner believed that Beyer "probably deleted" the video before police executed the warrant. (R. 71:23.) Agent Lenzner noted that the warrant was executed more than thirty days after he detected the child pornography. (R. 71:23.) He explained: "the time from [when] we get the download to the time we do the warrant, between that time frame, the sooner we do it, the more [likely] we're going to find that file." (R. 71:23.) He continued: "but if we're doing search warrants 30 days, 60 days, 90 days down the road . . . then it's more likely we're not going find it." (R. 71:23.) Agent Lenzner specified that some people delete the file after viewing its contents, while some "save it somewhere else." (R. 71:24.)

The circuit court interjected: "I thought in the affidavit for the search warrant you both attested to the fact that [suspects] don't delete these things, that they keep them, and that's why you had reason to believe that there would be this image and others on his computer." (R. 71:24.) Agent Lenzner responded that there are various types of offenders. (R. 71:24.) Most commonly, police deal with "collectors." (R. 71:24.) However, some offenders view the child pornography "right away and delete it." (R. 71:24.) Agent Lenzner explained: "we never know what kind of offender we're going to have at the time of the warrant." (R. 71:24–25.) When asked why the affidavit did not state that some offenders delete the child pornography right away, Agent Lenzner reiterated the "high likelihood" that an offender is a collector. (R. 71:25.)

On cross-examination, Agent Lenzner agreed that the search warrant in this case was "pretty boilerplate." (R. 71:26.) He testified that at the time he spotted the child pornography on Beyer's computer, he did not know (1) whether Beyer was a collector, (2) whether Beyer had viewed

the video, or (3) how the video got on Beyer's computer. (R. 71:27–28.) Agent Lenzner also said that he did not know "the specific person or . . . specific device" that was sharing the child pornography, only the IP address for the router involved. (R. 71:31.) He agreed that it was possible that someone who did not reside at Beyer's residence was accessing the internet through the subject router. (R. 71:31.) Agent Lenzner also confirmed that there are two ways to prove that he detected the video that served as the basis for the search warrant: (1) by taking his own word, and (2) by examining his computer system. (R. 71:32.)

Finally, at the suppression hearing, Agent Lenzner acknowledged that any computer program is subject to malware. (R. 71:33.) However, he said that he had never seen a case where a suspect claimed to possess child pornography because of malware. (R. 71:34.) Nor was Agent Lenzner aware of a time when malware infected the Department of Justice's investigative software in this context. (R. 71:35–36.)

Nicholas Schiavo testified that there were two explanations why the video that served as the basis for the search warrant was not on any of Beyer's devices: "either it never was there, or there was some user intervention by somebody to delete the file and it was subsequently overwritten by new files." (R. 71:39.) When asked what he could to do to verify Agent Lenzner's testimony that he viewed the child pornography in question, Schiavo responded, "Look at their system and see the number of connections, when and what was downloaded, perhaps what was in the shared folder." (R. 71:40.)

Schiavo dedicated the remainder of his testimony to speculating benign reasons why child pornography was associated with Beyer's IP address. (R. 71:40–62.) He suggested that Beyer could have unwittingly downloaded it. (R. 71:40–41, 58.) Schiavo also indicated that another person could have used Beyer's router to download the child

pornography. (R. 71:44.) Finally, he testified that uTorrent—the program that Beyer was using to file share—had a "flaw" that could be "exploited by any user with a web browser." (R. 71:33, 45.) He suggested the possibility that law enforcement exploited Beyer's computer. (R. 71:48.) More specifically, Schiavo thought it was possible that Agent Lenzner planted the evidence on Beyer's computer. (R. 71:50.) In the end, however, he acknowledged the possibility that Beyer simply deleted the child pornography after viewing it. (R. 71:51–52.)

Finally, Juanluis Villegas testified that he has participated in over one hundred child pornography investigations. (R. 71:62–63.) He said that he "[v]ery rarely" sees the State charge the suspect with the child pornography that serves as the basis for the search warrant. (R. 71:63–64.) Regarding the "one or two [instances that were] charged," the child pornography remained on the suspect's computer following the execution of the search warrant. (R. 71:64.) Defense counsel then asked, "How about on those other hundred times that you didn't see it charged? What's the percentage of time that those images that they claim they saw to get the search warrant were actually still on the computer?" (R. 71:64.) Villegas answered 50 percent. (R. 71:64–65.)

The circuit court denied Beyer's suppression motion. (R. 48.) It determined that the search warrant stated probable cause. (R. 71:79–83.) The court also concluded that "Detective Sachtjen had a right to rely upon the information provided by the special agent," reasoning that Agent Lenzner "truthfully asserted that he's relied upon this type of evidentiary trail in the past and found it to be accurate and reliable." (R. 71:83.) And while the court expressed a preference for a search-warrant affidavit that was "more individually tailored" and contained a "more candid assessment[ ] of the reliability of this method of a search," it ultimately found no police "misconduct whatsoever." (R. 71:82–83.) The court did not

expressly address Beyer's renewed request to "view the State's computer." (R. 41:12; 71:79–83.)

Reconsideration. Beyer then filed a motion to reconsider. (R. 49.) Again, he asked the circuit court "to inspect the Governmental Torrential Downpour software." (R. 49.) The court again denied Beyer's request. (R. 52.)

The court "trial"

Thereafter, the parties negotiated a "Stipulated Set of Facts for Trial to the Court." (R. 55.) It stated that the parties "hereby stipulate and agree that the Court may make a finding of guilt based upon the following set of facts." (R. 55:1.) Those facts were: (1) that police found child pornography on Beyer's computer upon executing a search warrant at his apartment, (2) that Beyer "admitted to the agents . . . that he used a file sharing network to download many different kinds of pornography," (3) that Beyer admitted to possessing adult and child pornography, (4) that Beyer admitted that he knowingly possessed "the image of child pornography charged in Count 1 of the Information," (5) that "Beyer admitted that he knowingly downloaded the child pornography onto his computer," and (6) that "State agents viewed the images contained on Beyer's computer and determined the images satisfied the definition of child pornography." (R. 55:2.) The stipulation further stated that Beyer "waives his right to a jury trial and agrees to have the Court find him guilty based upon the above stipulated set of facts." (R. 55:2.)

At the so-called court trial, the prosecutor informed the circuit court, "[W]hat we're going to do today is we're going to hold a stipulated court trial. The purpose of this is to-- The defense wishes to maintain an appellate issue on some of the points that have been litigated thus far in the case." (R. 72:2.) He continued, "The defendant is essentially, if you follow through with this, going to be found guilty of Count 1 of that stipulation." (R. 72:2.) The prosecutor explained that he would

move to dismiss the remaining eight charges "and read them in" at sentencing. (R. 72:2.) He also said that he agreed to recommend the mandatory-minimum sentence. (R. 72:3.) Finally, the prosecutor acknowledged the oddity of the proposed procedure: "all being said, this is a very strange procedure we're going to do today." (R. 72:3.)

The circuit court found it odd, too. It stated: "Now, fill me in on this, because is this an exceedingly rare occurrence. What, if any, legal or strategic advantage is there in the court of appeals for proceeding in this fashion as opposed to a plea?" (R. 72:4.) Defense counsel explained: "When someone pleads guilty to a charge, you preserve the right for your suppression motion, but if you recall, there was also a discovery motion in this case, and I'm convinced that if . . . Mr. Beyer pleads guilty, he waives that right to the discovery issue. Remember it was about looking at the State's computer?" (R. 72:5.) He continued, "And I did this with Judge McNamara in *State v. Lovell* . . . to preserve . . . a similar issue for discovery in that case." (R. 72:5.)

The circuit court then explained to Beyer the constitutional rights that he was waiving by proceeding in such a fashion and asked if Beyer understood. (R. 72:5–7.) Beyer indicated that he did. (R. 72:6–7.) The court found that Beyer knowingly, intelligently, and voluntarily waived his constitutional rights. (R. 72:7.) It then convicted Beyer on count one. (R. 72:7.)

The stayed sentence

The circuit court sentenced Beyer to three years' initial confinement and two years' extended supervision. (R. 73:13.) It then granted Beyer's request to stay his sentence pending appeal. (R. 73:14–19.)

ARGUMENT

I. This Court should hold that a defendant may not circumvent the guilty-plea-waiver rule by admitting his guilt and consenting that a judgment of conviction be entered against him at a court "trial."

A. Standard of review.

Whether public policy permits circumvention of the guilty-plea-waiver rule is a question of law that this Court decides de novo. *See State v. Riekkoff*, 112 Wis. 2d 119, 124–28, 332 N.W.2d 744 (1983).

B. The guilty-plea-waiver rule.

Generally, "a guilty, no contest, or *Alford* plea 'waives all nonjurisdictional defects, including constitutional claims.'" *State v. Kelty*, 2006 WI 101, ¶ 18, 294 Wis. 2d 62, 716 N.W.2d 886 (footnote omitted) (citation omitted); *see also Hawkins v. State*, 26 Wis. 2d 443, 448, 132 N.W.2d 545 (1965). Courts call this "the guilty-plea-waiver rule." *Kelty*, 294 Wis. 2d 62, ¶ 18. "Like the general rule of waiver, the guilty-plea-waiver rule is a rule of administration and does not involve the court's power to address the issues raised." *Id.*

The guilty-plea-waiver rule has its genesis in a series of Supreme Court decisions known as the "Brady trilogy." *See Tollett v. Henderson*, 411 U.S. 258, 262–67 (1973). In those cases, discussed in *Tollett*, the defendants' "guilty pleas . . . were found to foreclose direct inquiry into the merits of claimed antecedent constitutional violations." *Id.* at 266. The rationale for the rule is that "a guilty plea represents a break in the chain of events which has preceded it in the criminal process." *Id.* at 267. Because a "plea of guilty and the ensuing conviction comprehend all of the factual and legal elements necessary to sustain a binding, final judgment of guilt and a lawful sentence," *United States v. Broce*, 488 U.S. 563, 569

(1989), the government "acquires a legitimate expectation of finality in the conviction thereby obtained," *Lefkowitz v. Newsome*, 420 U.S. 283, 289 (1975).

So, in reality, the guilty-plea-waiver rule is not about waiver at all. *See Menna v. New York*, 423 U.S. 61, 62 n.2 (1975). Rather, in addition to promoting finality, it rests on notions of relevance: "a counseled plea of guilty is an admission of factual guilt so reliable that, where voluntary and intelligent, it quite validly removes the issue of factual guilt from the case. In most cases, factual guilt is a sufficient basis for the State's imposition of punishment." *Id.* "A guilty plea, therefore, simply renders irrelevant those constitutional violations not logically inconsistent with the valid establishment of factual guilt and which do not stand in the way of conviction if factual guilt is validly established." *Id.* Therefore, "[w]hen a criminal defendant *has solemnly admitted in open court that he is in fact guilty of the offense with which he is charged*, he may not thereafter raise independent" claims of constitutional error that occurred before the entry of the plea. *Tollett*, 411 U.S. at 267 (emphasis added).

Our supreme court has cited the above rationale for the guilty-plea-waiver rule with approval. *See State v. Pohlhammer*, 82 Wis. 2d 1, 3–4, 260 N.W.2d 678 (1978) (per curiam). So has this Court. For example, in *Racine Cty. v. Smith*, this Court explained that "[t]he idea underlying the waiver rule is that a guilty plea itself constitutes both *an admission that the defendant committed past acts and a consent that a judgment of conviction be entered against him without a trial*." *Racine Cty. v. Smith*, 122 Wis. 2d 431, 437, 362 N.W.2d 439 (Ct. App. 1984) (emphasis added) (citing *Brady v. United States*, 397 U.S. 742, 748 (1970)). And in *State v. Villegas*, this Court reiterated that after "*admitting guilt in open court*, a defendant 'may not thereafter raise independent claims relating to the deprivation of constitutional rights'

outside of an attack on the plea itself." *State v. Villegas*, 2018 WI App 9, ¶ 47, 380 Wis. 2d 246, 908 N.W.2d 198 (emphasis added) (citing *Tollett*, 411 U.S. at 267).

Because the guilty-plea-waiver rule "is based upon conduct of the defendant which is probative of guilt," our supreme court has held that parties may not contract around the rule—regardless of judicial acquiescence or approval. *Riekkoff*, 112 Wis. 2d at 127–28. In *Riekkoff*, the defendant pled guilty to burglary after the circuit court denied his motion to admit expert testimony at trial. *Id.* at 121. Under the plea agreement, the parties stipulated that Riekkoff preserved for appellate review the court's evidentiary ruling, notwithstanding the guilty-plea-waiver rule. *Id.* The State also agreed to waive any argument about the applicability of the guilty-plea-waiver rule on appeal. *Id.* The court accepted the defendant's plea and, according to the parties, "concluded that the right of appellate review of the order would be preserved." *Id.* at 122.

On appeal, this Court rejected "the defendant's contention that the parties and the trial court may stipulate to the right of appellate review," and the supreme court affirmed. *Riekkoff*, 112 Wis. 2d at 122, 130. The supreme court framed the issue as whether it was "appropriate public policy" to allow parties "to impose upon [the supreme court] (or the court of appeals) the obligation to abandon the general waiver rule and to" address an issue. *Id.* at 124.

The supreme court in *Riekkoff* began its analysis by noting that the Legislature "has abandoned the guilty-plea-waiver rule in" just one situation: where a circuit court denies a motion to suppress evidence. *Riekkoff*, 112 Wis. 2d at 124 (citing Wis. Stat. § 971.31(10)). It then discussed its decision in *Foster v. State*, 70 Wis. 2d 12, 233 N.W.2d 411 (1975), which "utilized the exception [in Wis. Stat. § 971.31(10)] to prove the general rule of waiver in the wake of a guilty plea." *Riekkoff*, 112 Wis. 2d at 126. The supreme court in *Riekkoff* interpreted

Foster as articulating the principle that "*the only public policy exception* to the rule of waiver is the legislatively created one in respect to motions to suppress." *Id.* (emphasis added). It stated that "the tenor of the law . . . is that even the express reservation of the right to appeal a prior ruling will not survive a guilty plea in respect to a matter which clearly would be waived absent the reservation." *Riekkoff*, 112 Wis. 2d at 127. That the "prosecutor or the judge or both of them" join in the defendant's reservation is irrelevant. *Id.* at 127–28.

The takeaway here is that (1) the defendant's admission of guilt justifies the guilty-plea-waiver rule by rendering claimed antecedent constitutional violations irrelevant and creating a legitimate expectation of finality in the conviction obtained, and (2) the *only* public policy exception to this rule is the one that the Legislature created in Wis. Stat. § 971.31(10).

C. Just like a guilty plea, Beyer admitted his guilt and consented that a judgment of conviction be entered against him at the court "trial."

For the following reasons, this Court should hold that defendants cannot circumvent the guilty-plea-waiver rule by utilizing the "exceedingly rare" procedure at issue in this case. (R. 72:4.)

Expressly to avoid the guilty-plea-waiver rule's applicability to his discovery claim, Beyer advanced a "very strange" procedure that undoubtedly implicates the rationale for the rule. (R. 72:3.) In exchange for a significant reduction of charges and the State's recommendation for the mandatory-minimum sentence, Beyer not only stipulated to a certain set of facts for use at trial. (R. 55; 72:2–3.) Rather, he *agreed* to have the circuit court adjudge him *guilty* based on

those facts. (R. 55:2 ("Jacob Beyer . . . agrees to have the Court find him guilty based upon the above stipulated facts.").)

At the so-called court trial, Beyer confirmed his intention to utilize the above procedure. (R. 72:2–7.) He reiterated that he was not asking the circuit court to reach its own verdict based on the agreed statement of facts. (R. 72:7.) Instead, Beyer assented that the facts constituted "proof of each element of [the] crime beyond a reasonable doubt." (R. 72:7.) This nuance matters: courts around the country distinguish what happened here—a stipulation of factual guilt—from a conviction on uncontested evidence. For example, in *United States v. Schmidt*, 760 F.2d 828, 834 (7th Cir. 1985) (collecting cases), the court held that the defendant's stipulation of facts for use at trial was not the functional equivalent of a guilty plea because the district court decided the case based on the agreed facts. Moreover, in *Lefkowitz*, the Supreme Court theorized that a plea of "not guilty" and a stipulation of facts for use at trial would bypass the guilty-plea-waiver rule because there would be no admission of guilt. *Lefkowitz*, 420 U.S. at 290 n.7

Thus, whatever legal description most appropriately attaches to the above procedure, one thing is clear: Beyer's admission of factual guilt renders irrelevant his discovery claim. *See Menna*, 423 U.S. at 62 n.2. Further, the State maintains a legitimate expectation of finality in his conviction. *See Lefkowitz*, 420 U.S. at 289. In other words, the "extremely rare" and "very strange" procedure utilized here implicates the rationale for the guilty-plea-waiver rule. (R. 72:3–4.) Clearly, then, there is no substantive difference between Beyer's stipulated court "trial" and a guilty plea—that stipulated trial was the functional equivalent of a guilty plea.

Because the guilty-plea-waiver rule "is based upon conduct of the defendant which is probative of guilt," Beyer should not be allowed to (expressly) game the system,

irrespective of the State's and circuit court's acquiescence to his proposed procedure. *See Reikoff*, 112 Wis. 2d at 127. The supreme court made it clear in *Reikoff* that parties cannot creatively dodge the guilty-plea-waiver rule to impose upon appellate courts "the obligation to abandon the general waiver rule." *Id.* at 124. That is because the Legislature chose a single public policy exception to the rule: motions to suppress evidence. *Id.* at 124–27. A judicially recognized exception in the instant situation—admitting guilt at a court "trial" rather than a plea hearing—would effectively swallow the guilty-plea-waiver rule, not unlike the situation in *Reikoff*. It would also elevate form over substance.

Based on the foregoing, this Court should hold that the procedure utilized in this case cannot be used to get around the guilty-plea-waiver rule. Notably, Beyer was not without options if he wanted this Court to review his discovery claim. He could have filed a petition for leave to appeal the circuit court's non-final order on the issue, as he recognized. (R. 71:84.) Alternatively, he could have gone to trial—at least one where he did not admit his factual guilt. Because he did neither, he should not be able to escape the guilty-plea-waiver rule's reach.

If this Court agrees that a defendant may not circumvent the guilty-plea-waiver rule by admitting his guilt and consenting that a judgment of conviction be entered against him at a court "trial," the question becomes one of remedy. Beyer admitted his guilt in this case based on the misunderstanding that he could appeal his discovery claim. (R. 72:2–7.) So, if this Court views Beyer's stipulation as the functional equivalent of a guilty plea, it was not knowing, intelligent, and voluntary. *See Reikoff*, 112 Wis. 2d at 128.[1] A remand would therefore be necessary to give Beyer the option

[1] The State also recognizes the absence of an adequate *Bangert* colloquy.

of withdrawing his effective guilty plea. *Id.* Even if this Court views Beyer's stipulation simply for what it was, fairness seems to dictate a similar result. Specifically, that he has the choice of withdrawing his admission of guilt based on his misapprehension as to its effect.

Alternatively, this Court may address the merits of Beyer's discovery claim after making it clear that the procedure utilized in this case is not a proper means of avoiding the guilty-plea-waiver rule and may not be used in future cases. *See United States v. Cox*, 464 F.2d 937, 940–46 (6th Cir. 1972) (addressing the merits of the defendants' claim after stating that it would not countenance the procedure at issue in the future); *see also Kelty*, 294 Wis. 2d 62, ¶ 19 (indicating that this Court may overlook the guilty-plea-waiver rule). That is the most efficient approach in this case because Beyer's legal analysis is wrong, and this Court can therefore affirm the circuit court's ruling on the merits.

II. The circuit court did not err in denying Beyer's discovery request to access law enforcement's computer and its undercover investigative software.

A. Standard of review

Whether the circuit court's discovery ruling denied Beyer his constitutional rights is a question of constitutional fact. *See State v. Maday*, 179 Wis. 2d 346, 353, 507 N.W.2d 365 (Ct. App. 1993). This Court upholds the circuit court's findings of historical fact unless they are clearly erroneous. *Id.* It independently reviews the application of constitutional principles to those facts. *Id.*

B. Relevant law.

In contending that the circuit court erred in denying his discovery request, Beyer represents that he has a broad constitutional right to pre-trial discovery. (Beyer's Br. 15.)

The overwhelming amount of authority establishes that there is no general constitutional right to discovery in criminal cases—discovery is a statutory creature distinct from the State's constitutionally mandated duty to disclose exculpatory evidence to ensure a fair trial. Contrary to Beyer's contention (Beyer's Br. 15), neither the constitutional right to present a defense, nor this Court's decision in *Maday,* alters this legal framework.

1. Statutory discovery versus constitutionally mandated disclosure.

"Historically, the right to discovery in criminal cases has been limited to that which is provided by statute." *State v. O'Brien*, 223 Wis. 2d 303, 319, 588 N.W.2d 8 (1999). That is because, despite there being a constitutional right to a fair trial, there "is no general constitutional right to discovery in a criminal case." *Weatherford v. Bursey*, 429 U.S. 545, 559–60 (1977); *accord Britton v. State*, 44 Wis. 2d 109, 118, 170 N.W.2d 785 (1969) ("Discovery has been left to rule-making power and has not been deemed a constitutional issue."). The Supreme Court has stated that "the Due Process clause has little to say regarding the amount of discovery which the parties must be afforded." *Wardius v. Oregon*, 412 U.S. 470, 474 (1973). Indeed, the "Due Process Clause of its own force" does not require states to afford discovery rights to criminal defendants at all. *See id.* at 475.

While "the Constitution does not require the prosecutor to share all useful information with the defendant," *United States v. Ruiz*, 536 U.S. 622, 629 (2002), the Due Process Clause *does* mandate the disclosure of evidence "that is both favorable to the accused and material to guilt or punishment." *Pennsylvania v. Ritchie*, 480 U.S. 39, 57 (1987); *accord Britton*, 44 Wis. 2d at 117–18 (drawing a distinction between discovery and the disclosure of exculpatory evidence on constitutional grounds). This right to *favorable* and *material*

evidence is "a right that the Constitution provides as part of its basic 'fair trial' guarantee." *Ruiz*, 536 U.S. at 628 (citation omitted). It was first recognized in *Brady v. Maryland*, 373 U.S. 83, 87 (1963). Evidence is material in this context "only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *United States v. Bagley*, 473 U.S. 667, 682 (1985).

So, unless the government neglects to disclose evidence that is both favorable to the accused and material to guilt or punishment, both the United States Supreme Court and Wisconsin Supreme Court have no constitutional concern. *See, e.g.*, *Weatherford*, 429 U.S. at 559–60 (finding no constitutional violation where the government withheld the name of a witness who testified unfavorably to the defendant at trial); *Dowd v. City of Richmond*, 137 Wis. 2d 539, 559–60, 405 N.W.2d 66 (1987) (finding no constitutional violation where the government withheld non-exculpatory information from its files); *Britton*, 44 Wis. 2d at 117–19 (finding no constitutional violation where the State declined the defendant's postconviction request to examine its files for useful or helpful information); *State v. Miller*, 35 Wis. 2d 454, 478–79, 151 N.W.2d 157 (1967) (same as *Dowd*).

2. The right to present a defense.

"[T]he right to present a complete defense has *never* been interpreted to include a general right to access (or discover) information in a criminal case." *State v. Lynch*, 2016 WI 66, ¶ 46, 371 Wis. 2d 1, 885 N.W.2d 89 (lead opinion). Like the right to receive exculpatory evidence from the government, the right to present a defense has been recognized as a basic element of a fair trial. *See Crane v. Kentucky*, 476 U.S. 683, 690 (1986). The seven times that the Supreme Court has analyzed the right to present a defense proves this point. *See* Colin Miller, *Dismissed with Prejudice:*

Why Application of the Anti-Jury Impeachment Rule to Allegations of Racial, Religious, or Other Bias Violates the Right to Present a Defense, 61 Baylor L. Rev. 872, 899 (2009). In each case, the Supreme Court examined an evidentiary rule that deprived the defendant of the opportunity to present material and favorable evidence *at trial*. *Id.* 899–916.[2]

That the right to present a defense is a trial-related right with no bearing on a defendant's right to discovery in a criminal case is therefore clear. *See Lynch*, 371 Wis. 2d 1, ¶ 46. The Supreme Court's so-called "access to evidence" cases aimed at safeguarding the right to present a defense are limited to enforcing the government's constitutionally required duty to disclose exculpatory evidence. *See California v. Trombetta*, 467 U.S. 479, 485 (1984). These cases do not impose a general obligation on the part of the government to provide *all useful* information to the defense. *Id.; see also Ruiz*, 536 U.S. at 629.

3. *Maday*'s narrow circumstances.

The Wisconsin Supreme Court has recognized that there is no general constitutional right to discovery in a criminal case, *see Miller*, 35 Wis. 2d at 474, and some members of the court believe that "a defendant is entitled to access information only to the extent outlined in Wis. Stat. § 971.23," *Lynch*, 371 Wis. 2d 1, ¶ 47. Nevertheless, Beyer interprets this Court's decision in *Maday* as affording criminal defendants broad discovery rights in the name of due process. (Beyer's Br. 15.) But he reads this Court's decision far too broadly.

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[2] One of those cases, *Green v. Georgia*, 442 U.S. 95, 97 (1979), involved "the punishment phase of the trial" at issue.

Maday addressed a narrow set of circumstances involving *Jensen* evidence.[3] In anticipation of trial, the State retained five experts to testify that the behaviors of the sexual abuse victims were consistent with the behaviors of sexual abuse victims generally. *Maday*, 179 Wis. 2d at 350. Wanting substantive evidence to rebut the State's *Jensen* evidence, Maday moved the circuit court for an order requiring the victims to submit to psychological examinations by his own experts. *Id*. The court denied Maday's motion. *Id.* at 351. On appeal, noting the importance of a "level playing field" *at trial*, this Court held: "Fundamental fairness requires that Maday be given the opportunity to present relevant evidence to counter [the State's *Jensen* evidence]." *Maday*, 179 Wis. 2d at 357.

This Court's decision in *Maday* speaks more "to the balance of forces between the accused and his accuser," not the "amount of discovery which the parties must be afforded." *Wardius*, 412 U.S. at 474. Nevertheless, this Court made broad statements like "pretrial discovery is a fundamental due process right." *Maday*, 179 Wis. 2d at 354; *contra Weatherford*, 429 U.S. at 559; *Wardius*, 412 U.S. at 474; *Britton*, 44 Wis. 2d at 118; *Miller*, 35 Wis. 2d at 474.[4] This

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[3] Pursuant to *State v. Jensen*, 147 Wis. 2d 240, 257, 432 N.W.2d 913 (1988), which allows expert witness testimony about the consistency of a complainant's behavior with the behavior of victims of the same type of crime.

[4] Notably, the Wisconsin Supreme Court has also made broad statements seemingly in conflict with its own precedent and that of the United States Supreme Court. *Compare State ex rel. Green Bay Newspaper Co. v. Cir. Ct., Branch 1, Brown Cty.*, 113 Wis. 2d 411, 427, 335 N.W.2d 367 (1983) (stating that the defendant has a constitutional right to discover the existence of potential witnesses), *with United States v. Valenzuela-Bernal*, 458 U.S. 858, 872 (1982) (holding that deportation of witnesses did not violate due process absent a showing that their testimony was

Court also said that "fundamental fairness dictates that a defendant be able to obtain access to all relevant evidence necessary to be heard in his or her defense," referencing a "constitutional right of the defendant to a full and fair explication of the evidence." *Maday*, 179 Wis. 2d at 349, 358; *contra United States v. Valenzuela-Bernal*, 458 U.S. 858, 872 (1982); *Ruiz*, 536 U.S. at 629; *Weatherford*, 429 U.S. at 559–60; *Britton*, 44 Wis. 2d at 117–19; *Dowd*, 137 Wis. 2d at 559–60; *Miller*, 35 Wis. 2d at 478–79. At other times, however, this Court spoke in terms of "constitutional rights to a fair trial." *Maday*, 179 Wis. 2d at 361; *see also id.* at 354.

Regardless of the constitutional basis for this Court's decision in *Maday*, two things are clear. First, it mattered that the defendant's claim centered on information that he wanted to present *at trial*. *Maday*, 179 Wis. 2d at 353–62; *accord State v. Migliorino*, 170 Wis. 2d 576, 584–95, 489 N.W.2d 678 (Ct. App. 1992). This is wholly consistent with the principle that "[d]ue process guarantees the accused a *fair trial* . . . ." *State v. Disch*, 119 Wis. 2d 461, 477, 351 N.W.2d 492 (1984) (emphasis added). Second, this Court has since stressed that its decision in *Maday* "is strictly limited to situations in which the prosecution retains experts in anticipation of trial in order to present *Jensen* evidence." *State v. David J.K.*, 190 Wis. 2d 726, 735, 528 N.W.2d 434 (Ct. App. 1994). So, defense attempts to broaden the scope of *Maday* have failed. *See id.*

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material and favorable to the defense), *and Britton v. State*, 44 Wis. 2d 109, 118, 170 N.W.2d 785 (1969) (stating that discovery has not been deemed a constitutional issue). The supreme court in *Green Bay Newspaper Co.* neither overruled past precedent nor indicated that the Wisconsin Constitution affords greater protection in this context than does the United States Constitution. *See Green Bay Newspaper Co.*, 113 Wis. 2d at 427.

C. The circuit court's order denying discovery did not violate Beyer's constitutional rights.[5]

Because there is no general constitutional right to discovery in a criminal case, and because the State did not violate its constitutionally mandated duty to disclose exculpatory evidence, the circuit court did not err in denying Beyer's discovery request to access law enforcement's computer and its undercover investigative software.

As noted, Beyer repeatedly sought access to law enforcement's computer and its undercover investigative software because he was hoping to find a basis to challenge the validity of the search warrant in this case. (R. 52:1; 70:3.) He believes that due process requires as much (R. 38), but Supreme Court precedent establishes that he has "no constitutional right to conduct his own search of the State's files to argue relevance." *Ritchie*, 480 U.S. at 59. Wisconsin law similarly prohibits criminal defendants from examining the State's files for helpful information. *See Britton*, 44 Wis. 2d at 117–19. And even if Beyer could establish that the information that he seeks is useful to his defense, that would not change the analysis. *See Ruiz*, 536 U.S. at 629; *Weatherford*, 429 U.S. at 559–60; *Dowd*, 137 Wis. 2d at 559–60; *Miller*, 35 Wis. 2d at 478–79.

Why? Because Beyer is *not* seeking exculpatory material—the only area of constitutionally guaranteed access to evidence. *See Trombetta*, 467 U.S. at 485. And he is *not* seeking evidence for use at trial. That Beyer seeks non-exculpatory information for use at a pre-trial proceeding

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[5] On appeal, Beyer abandons his claim that he was entitled to the discovery at issue under Wis. Stat. § 971.23. *See A. O. Smith Corp. v. Allstate Ins. Cos.*, 222 Wis. 2d 475, 491–92, 588 N.W.2d 285 (Ct. App. 1998).

makes his self-admittedly novel legal argument even weaker: not only does his position find no support in Supreme Court precedent, it does not fit within the special circumstances in which this Court has sanctioned access to information in the name of due process. *See Maday*, 179 Wis. 2d at 353–62; *Migliorino*, 170 Wis. 2d at 584–95. So, even if the Wisconsin Constitution affords greater protection in this context than does the United States Constitution (it does not), there still is no precedent showing that Beyer is entitled to relief. And more broadly, Beyer's position conflicts with the purpose of pretrial discovery in Wisconsin: "assur[ing] fairness at a criminal trial." *State v. Schaefer*, 2008 WI 25, ¶ 23, 308 Wis. 2d 279, 746 N.W.2d 457.

There simply being no precedent supporting Beyer's discovery request, the circuit court did not err in denying him relief.

Beyer's contrary position is meritless. As a preliminary matter, he acknowledges that no Wisconsin law supports his argument. (Beyer's Br. 16.) While he roots his argument in the Due Process Clause of the United States Constitution (Beyer's Br. 15), he does not address Supreme Court precedent contradicting his claim. For example, he fails to acknowledge that, despite there being a constitutional right to a fair trial, there is no general constitutional right to discovery in a criminal case. (Beyer's Br. 15–23.) Although Beyer references "constitutionally guaranteed access to evidence" (Beyer's Br. 15), he does not mention that such access has been limited to exculpatory evidence, which "protect[s] the *innocent* from erroneous conviction and ensur[es] the integrity of our criminal justice system." *Trombetta*, 467 U.S. at 485 (emphasis added). Notably, Beyer also cites his constitutional right to present a defense but does not discuss any of the seven cases in which the Supreme Court actually applied the right. (Beyer's Br. 15–23.) The import: he overlooks that each case addressed an evidentiary rule that

deprived the defendant of the opportunity to present material and favorable evidence *at trial*. *See* Miller, 61 Baylor L. Rev. at 899–916.

Instead of analyzing any controlling authority, Beyer supports his argument with a non-binding, unpublished, and uncitable decision from this Court, along with three non-binding federal decisions. (Beyer's Br. 18–23.) As to the former, the State does not believe that the rules of appellate procedure allow it to address the case here. *See* Wis. Stat. § (Rule) 809.23(3)(b). And the latter have nothing to do with constitutional rights.

Rather, each of the federal cases addresses Federal Rule of Criminal Procedure 16 (Rule 16), under which "a criminal defendant has a right to inspect all documents, data, or tangible items within the government's 'possession, custody, or control' that are 'material to preparing the defense.'" *United States v. Budziak*, 697 F.3d 1105, 1111 (9th Cir. 2012) (citing Fed. R. Crim. P. 16(a)(1)(E)); *see also United States v. Gonzales*, No. CR-17-01311-001-PHX-DGC, 2019 WL 669813, at *2 (D. Ariz. Feb. 19, 2019); *United States v. Owen*, No. 18-CR-157, 2019 WL 6896144, at *3 (E.D. Wis. Dec. 18, 2019). Since Beyer neither seeks discovery under Rule 16 nor a Wisconsin statutory equivalent, it is unclear why he thinks these cases are instructive. (Beyer's Br. 18.) They are inapposite.

What is clear, however, is that by relying on the looser "materiality" framework of the federal cases (Beyer's Br. 18–23), Beyer seeks not only to apply inapposite law but to circumvent Supreme Court precedent as well. To compel discovery under Rule 16, a defendant simply needs to make a threshold showing that evidence "is helpful to the development of a possible defense." *Budziak*, 697 F.3d at 1111. But the Constitution does not require discovery of "helpful" evidence. *See Ruiz*, 536 U.S. at 629. Rather, it compels the government to disclose evidence that is both

favorable to the accused and *material* to guilt or punishment—a standard that is indisputably higher than Rule 16's. *Gonzales*, 2019 WL 669813, *7.

Regardless, the State can beat Beyer at his own game. Even if Beyer simply needed to make a threshold showing that the information he sought was helpful to his defense, he failed to do so. As best as the State can tell, Beyer's position has always been that discovery is necessary to determine whether Agent Lenzner either (1) lied about viewing the video that served as the basis for the search warrant, or (2) misrepresented the reliability of the undercover investigative software at issue. (R. 35:3; 38:2–3; 70:5–6.) But Agent Lenzner testified to the contrary at the evidentiary hearing, (R. 71:17–19, 33–36), and the circuit court found him credible, (R. 71:82–83). The court specified that it found no "misconduct whatsoever." (R. 71:83.) Beyer does not challenge the court's credibility determination as clearly erroneous (Beyer's Br. 17–18), as he must to escape it. *See Maday*, 179 Wis. 2d at 353. Therefore, Beyer has not even met the relaxed standard that he advocates for.[6]

For the above reasons, this Court should affirm.

III. The circuit court did not err in denying Beyer's motion to suppress.

A. Standards of review

This Court reviews "a warrant-issuing magistrate's determination of whether the affidavit in support of the order was sufficient to show probable cause with 'great deference.'"

[6] For this reason, and because Schiavo testified to nothing more than possibilities at the evidentiary hearing, (R. 71:39–52), Beyer cannot meet the more heightened materiality standard he discusses in another part of his brief. (Beyer's Br. 16.)

State v. Tate, 2014 WI 89, ¶ 14, 357 Wis. 2d 172, 849 N.W.2d 798 (citation omitted).

This Court reviews do novo whether Beyer was entitled to a *Franks/Mann* hearing. *State v. Manuel*, 213 Wis. 2d 308, 315, 570 N.W.2d 601 (Ct. App. 1997). If he was entitled to a hearing, the question is whether he proved a violation by a preponderance of the evidence. *Id.* at 313.

B. Relevant law

1. Probable cause and the warrant requirement.

The Fourth Amendment to the United States Constitution and Article I, Section 11 of the Wisconsin Constitution protect people from unreasonable searches and establish the requirements for the issuance of a search warrant. *Tate*, 357 Wis. 2d 172, ¶ 27.

One requirement for the issuance of a search warrant is that "the person seeking a warrant demonstrate upon oath or affirmation sufficient facts to support probable cause to believe that 'the evidence sought will aid in a particular apprehension or conviction for a particular offense.'" *Tate*, 357 Wis. 2d 172, ¶ 30 (citation omitted).

"Probable cause is 'more than a possibility, but not a probability, that the conclusion is more likely than not.'" *State v. Sloan*, 2007 WI App 146, ¶ 23, 303 Wis. 2d 438, 736 N.W.2d 189 (citation omitted). Courts determine whether probable cause exists based on the totality of the circumstances. *State v. Ward*, 2000 WI 3, ¶ 26, 231 Wis. 2d 723, 604 N.W.2d 517. "[A] probable cause determination must be based upon what a reasonable magistrate can infer from the information presented by the police." *Id.* The key question is "whether objectively viewed, the record before the warrant-issuing judge provided '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 they will be found in the place to be searched.'" *Id.* ¶ 27 (citation omitted).

"Probable cause [for a search warrant] is not a technical, legalistic concept[,] but a flexible, common-sense measure of the plausibility of particular conclusions about human behavior." *State v. Petrone*, 161 Wis. 2d 530, 547–48, 468 N.W.2d 676 (1991), *overruled on other grounds*, *State v. Greve*, 2004 WI 69, 272 Wis. 2d 444, 681 N.W.2d 479. And a "*reasonable inference* support[ing] the probable cause determination" suffices—it does not matter that a competing inference of lawful conduct exists. *State v. Dunn*, 121 Wis. 2d 389, 398, 359 N.W.2d 151 (1984) (emphasis added); *see also State v. Jones*, 2002 WI App 196, ¶ 10, 257 Wis. 2d 319, 651 N.W.2d 305 ("The test is not whether the inference drawn is the only reasonable inference. The test is whether the inference drawn is a reasonable one." (citation omitted).).

Moreover, probable cause is not an unvarying standard but changes depending on the particular stage of the proceedings and the nature of the interest at stake. The further along in the proceedings, the higher the standard for probable cause. *Cty. of Jefferson v. Renz*, 231 Wis. 2d 293, 308–09, 603 N.W.2d 541 (1999). For example, the quantum of evidence necessary to support a determination of probable cause for a search warrant is less than that required for bindover following a preliminary examination. *Sloan*, 303 Wis. 2d 438, ¶ 23.

The person challenging the warrant bears the burden of demonstrating that the evidence before the warrant-issuing judge was insufficient. *State v. DeSmidt*, 155 Wis. 2d 119, 132, 454 N.W.2d 780 (1990).

2. The *Franks/Mann* standard

Generally, this Court presumes the validity of an affidavit supporting a search warrant. *See State v. Anderson*,

138 Wis. 2d 451, 463, 406 N.W.2d 398 (1987). That presumption is hard to overcome.

In *Franks v. Delaware*, 438 U.S. 154, 155–56 (1978), the Supreme Court held that a trial court is required to conduct a warrant hearing when a "defendant makes a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included . . . in the warrant affidavit, and if the allegedly false statement [was] necessary to a finding of probable cause." If the defendant receives a hearing, he must prove his claimed violation by a preponderance of the evidence. *Id.*

In *State v. Mann*, 123 Wis. 2d 375, 367 N.W.2d 209 (1985), the Wisconsin Supreme Court extended the *Franks* rule "to include omissions from a warrant affidavit if the omissions are the equivalent of deliberate falsehoods or reckless disregard for the truth." *Jones*, 257 Wis. 2d 319, ¶ 25, (citation omitted). "For an omitted fact to be the equivalent of 'a deliberate falsehood or a reckless disregard for the truth,' it must be an undisputed fact that is critical to an impartial judge's fair determination of probable cause." *Mann*, 123 Wis. 2d at 388 (footnote omitted). 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 that the *Franks* rule governs. *Id.* at 389; *Manuel*, 213 Wis. 2d at 316. A defendant is not entitled to a *Mann* hearing unless he shows that the omitted facts, if included, would prevent a probable cause finding. *Mann*, 123 Wis. 2d at 388.

C. The search-warrant affidavit states probable cause that Beyer knowingly possessed child pornography, and Beyer did not prove a *Franks/Mann* violation.

1. Detective Sachtjen's affidavit states probable cause.

To prove that Beyer knowingly possessed child pornography, the State needed to show that: (1) Beyer "knowingly possessed" a recording, (2) the recording showed a child engaged in sexually explicit conduct, (3) Beyer "knew or reasonably should have known" that the recording depicted a child engaged in sexually explicit conduct, and (4) Beyer "knew or reasonably should have known" that the child was under 18 years old. Wis. JI–Criminal 2146A (2013). Regarding the first element, the State must establish that Beyer "knowingly had actual physical control of the recording" or that it was "in an area over which [Beyer] ha[d] control and [Beyer] intend[ed] to exercise control over the recording." *Id.*

The question then becomes whether, under a lens of great deference, Detective Sachtjen's search-warrant affidavit states "sufficient facts to excite an honest belief in a reasonable mind that the objects sought are linked with the commission of [possession of child pornography], and that the objects sought will be found in the placed to be searched." *Ward*, 231 Wis. 2d 723, ¶ 27 (citation omitted). The answer is yes.

Detective Sachtjen's affidavit states that Agent Lenzner found child pornography in a publicly shared file named "Sarah Footjob" from an IP address assigned to Beyer. (R. 40:6, 8, 15, 22–25.) These facts, coupled with the information about the peer-to-peer network and law enforcement's experience therewith (R. 40:7–15), create a reasonable inference that Beyer knowingly possessed child

pornography. *See* Wis. JI–Criminal 2146A; *State v. Gralinski*, 2007 WI App 233, ¶ 24, 306 Wis. 2d 101, 743 N.W.2d 448 (holding that purchase of membership to websites containing child pornography supported inference of knowing possession); *United States v. Raymonda*, 780 F.3d 105, 115–16 (2d Cir. 2015) (discussing circumstances suggesting willful and deliberate access to child pornography).

Further, according to the search-warrant affidavit, police corroborated that Beyer lived at the physical address associated with his IP address. (R. 40:16.) The affidavit also provides information regarding the capabilities of computers and the proclivities of those persons interested in child pornography. For example, it states that "data related to the possession of a file can be recovered for an extended period of time after 'deletion'" of the file, "even months or years later." (R. 40:16.) And according to "historic law enforcement experience," individuals "who have an interest in child pornography . . . tend to retain any images or videos they obtain that depict such activity" such that "it can reasonably be expected that similar evidence of that sexual interest in children . . . will be found" in their possession. (R. 40:17.) These facts reveal "a fair probability" that police would find contraband or evidence of a crime in Beyer's residence, computers, or digital storage devices. *See Gralinski*, 306 Wis. 2d 101, ¶ 31; *see also Raymonda*, 780 F.3d at 115–16 (noting that a single incident of possession or receipt of child pornography—where a reasonable inference exists that the suspect willfully or deliberately accessed the material to satisfy a preexisting predilection—supports the reasonable inference that the suspect is a collector); *United States v. Seiver*, 692 F.3d 774, 777 (7th Cir. 2012) (discussing the significance of the fact that computer files, when deleted, are normally recoverable).

Based on the foregoing, Beyer cannot show that the warrant-issuing judge clearly lacked probable cause. The first

half of Beyer's argument boils down to a disagreement with the well-established principle that reasonable inferences suffice to support the probable cause determination. (Beyer's Br. 25–26.) For example, he complains that Detective Sachtjen's affidavit does not list the specific search term that Beyer used to access child pornography on the file-sharing network. (Beyer's Br. 25.) He protests that the affidavit "offers nothing to indicate that [he] ever viewed the file or the duration of time that he may have viewed it." (Beyer's Br. 25.) And Beyer thinks that there needs to be information about "what, if anything, he did with" the file for there to be probable cause, too. (Beyer's Br. 25.)

But none of the above matters. What matters is law enforcement's direct detection of child pornography in a file named "Sarah Footjob" on a device tied to Beyer, and the reasonable inferences that flow from those facts based on additional information in the search-warrant affidavit. *Cf. Gralinski*, 306 Wis. 2d 101, ¶¶ 20, 30–31 (finding that the search-warrant affidavit stated probable cause even though there was no direct detection of child pornography on a device tied to Gralinksi). For example, the affidavit explained that an individual must obtain special software to participate in a file-sharing network that is often used to facilitate the possession of child pornography. (R. 40:7–11.) It also described how the file-sharing network works—an individual conducts text-based searches for files of interest. (R. 40:8.) Considering these additional facts, it is patently reasonable to infer that Beyer's conduct satisfied all the elements of possession of child pornography. Beyer does not seriously contend otherwise. (Beyer's Br. 25–26.)

The remainder of Beyer's argument here amounts to criticism that Agent Lenzner did not pin him with *more* child pornography before initiating the search-warrant process. (Beyer's Br. 26–28.) He believes that absent additional evidence, he cannot be viewed as a collector of child

pornography. (Beyer's Br. 26–28.) It follows, reasons Beyer, that the tendencies of child-pornography collectors should not factor into whether there was probable cause to believe that evidence of a crime would be found at his house some 40 days after Agent Lenzner's initial detection. (Beyer's Br. 26–27.) This argument fails because, as discussed above, the facts in the search-warrant affidavit support a reasonable inference that Beyer willfully and deliberately accessed child pornography. *See Raymonda*, 780 F.3d at 114–16. Beyer's claim that there is "no attestation with respect to some of the factors ostensible [sic] relevant to establishing" a reasonable belief that he is a collector is false: Beyer did not simply need to "click the mouse" to obtain child pornography, and he made the child pornography available to others. (Beyer's Br. 26–27.)

But perhaps more importantly, Beyer's challenge here completely ignores the information in the search-warrant affidavit regarding a computer's ability to retain a file even after a user deletes it. (R. 40:16; Beyer's Br. 25–28.) This fact in and of itself supports probable cause to believe that evidence of a crime would be found at Beyer's residence. *See Seiver*, 692 F.3d at 775–77.

For the above reasons, this Court should hold that the search-warrant affidavit states probable cause.

Because the search-warrant affidavit states probable cause, this Court need not address Beyer's anticipatory argument that the good-faith exception to the exclusionary rule should not apply. (Beyer's Br. 28–30.) However, if this Court disagrees with the State's position, a remand is appropriate. In cases where this Court disagrees with the circuit court and determines that a Fourth Amendment violation has occurred, it has remanded the matter to the circuit court to determine whether an exception to the exclusionary rule applies. *See, e.g., State v. Anker*, 2014 WI App 107, ¶ 27, 357 Wis. 2d 565, 855 N.W.2d 483 (remanding the case to the circuit court to conduct an evidentiary hearing

to determine whether independent source or inevitable discovery applied); *State v. Marquardt*, 2001 WI App 219, ¶¶ 23, 53, 247 Wis. 2d 765, 635 N.W.2d 188 (remanding the case for a hearing to determine whether the good faith exception applied).

2. Beyer did not prove a *Franks/Mann* violation.

The State fails to understand the exact basis for Beyer's *Franks/Mann* challenge because it has changed over time. (R. 41:9–12; Beyer's Br. 30–33.) However, he now appears to narrow it to "misrepresentations about the expected tendencies of offenders," a "misrepresentation that there was reason to believe that Beyer fell into a certain category [sic] offender," and an "omission of critical information about the preeminence of temporal considerations in determining the likelihood of recovering detected contraband." (Beyer's Br. 32.)

Given that Beyer's current position relies on testimony adduced at the evidentiary hearing (Beyer's Br. 30–31), it is obvious that he was not entitled to a hearing in the first place. To receive a hearing on the so-called misrepresentations noted above, Beyer needed to "first make a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit and that the allegedly false statement is necessary to the finding of probable cause." *Anderson*, 138 Wis. 2d at 462. Moreover, he was required to support his allegations of falsity or reckless disregard for the truth with an offer of proof. *Id.* He did none of those things with respect to his current challenge. (R. 41:9–12.) Similarly, Beyer did not make the substantial preliminary showing necessary to receive a hearing on his so-called critical-omission claim. (R. 41:9–12); *Mann*, 123 Wis. 2d

at 388. Therefore, this Court should deny Beyer's claim on this basis.

But Beyer loses on the merits, anyway.[7] He did not prove by a preponderance of the evidence that the search-warrant affidavit contained false statements that were "made either intentionally, or with a reckless disregard for the truth." *Anderson*, 138 Wis. 2d at 463. Contrary to Beyer's unsupported contention, Agent Lenzner did not admit at the evidentiary hearing that "a significant percentage of offenders were actually not collectors." (Beyer's Br. 30.) Rather, consistent with the information in the search-warrant affidavit, he testified about the "high likelihood" that an offender is a collector. (R. 71:25.) So, there is no false statement whatsoever in this regard, let alone one made intentionally or with reckless disregard for the truth. Moreover, given the "high likelihood" that an offender *is* a collector, Beyer did not prove a "misrepresentation that there was reason to believe that [he] fell into a certain category [sic] offender." (Beyer's Br. 32.) And Beyer neither proved that the search-warrant affidavit lacked probable cause without these so-called misrepresentations, nor does he offer anything other than conclusory statements in this regard on appeal. (Beyer's Br. 30–33.)

Finally, Beyer has not proved a critical omission concerning the "preeminence of temporal considerations in determining the likelihood of recovering detected contraband." (Beyer's Br. 32.) He did not establish that such information was "critical for a fair decision" on probable cause, nor does he develop an argument to this effect on appeal. *See Mann*, 123 Wis. 2d at 388; (Beyer's Br. 30–33.) Similarly, Beyer did not prove that inclusion of the omitted information would have prevented a finding of probable

[7] Noteworthy here is the circuit court's finding of no police "misconduct whatsoever." (R. 71:83.)

cause, nor does he develop an argument in this regard on appeal. *See Mann*, 123 Wis. 2d at 389; (Beyer's Br. 30–33.)

For the above reasons, the circuit court did not err in denying Beyer's *Franks/Mann* challenge.

CONCLUSION

This Court should affirm Beyer's judgment of conviction.

Dated this 24th day of April 2020.

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 10,779 words.

Dated this 24th day of April 2020.

KARA LYNN JANSON
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CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § 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. § 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 24th day of April 2020.

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