STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2019AP1983-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JACOB RICHARD BEYER,

Defendant-Appellant.

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

BRIEF AND SUPPLEMENTAL APPENDIX OF PLAINTIFF-RESPONDENT

JOSHUA L. KAUL
Attorney General of Wisconsin

KARA LYNN JANSON
Assistant Attorney General
State Bar #1081358

Attorneys for Plaintiff-Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 261-5809
(608) 294-2907 (Fax)
melekl@doj.state.wi.us

TABLE OF CONTENTS

Page

Page

TABLE OF AUTHORITIES

Cases

Page

Page

Page

Page

Statutes

Page

Other Authorities

ISSUES PRESENTED

1. Defendant-Appellant Jacob Richard Beyer pled not guilty to ten counts of possession of child pornography. Thereafter, the circuit court repeatedly ruled against him on a discovery issue. Beyer then negotiated the ten child-pornography charges down to one, stipulated to the inculpatory facts supporting each element of the offense, and explicitly agreed to a finding of guilt at a "trial" where no witness testified. He advanced this procedure expressly to avoid the guilty-plea-waiver rule's applicability to his discovery claim.

Does the guilty-plea-waiver rule apply in this situation?

The circuit court acquiesced to the above procedure.

The court of appeals certified this issue.

This Court should answer, "yes."

2. Using undercover software on the BitTorrent network, law enforcement detected child pornography on Beyer's computer, leading to the issuance of a search warrant for Beyer's residence. Beyer's discovery request was to access law enforcement's computer and its undercover software to determine whether the agent lied about seeing child pornography on his computer.

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

The circuit court denied Beyer's discovery request.

The court of appeals did not address this issue.

This Court should answer, "no."

3. After the circuit court denied Beyer's discovery motion, Beyer filed a suppression motion challenging the validity of the search warrant.

Did the circuit court err in denying Beyer's suppression motion?

The circuit court denied Beyer's suppression motion.

The court of appeals did not address this issue.

This Court should answer, "no."

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State requests oral argument and publication.

STATEMENT OF THE CASE

BitTorrent is a peer-to-peer file-sharing network

Beyer came to law enforcement's attention through his participation in the BitTorrent network. The BitTorrent network is a public "peer-to-peer" file sharing network in which users who are part of the network (peers) can exchange files with others in the network. (R. 40:8.)

Would-be BitTorrent peers join the network by downloading publicly available network client software programs from the internet. (R. 40:8–9.) When they install a typical BitTorrent network client program, they establish settings that allow them to automatically upload, or share, designated files with other peers and simultaneously download other peers' shared files. (R. 40:9.)

Files shared on BitTorrent are identified by "torrents," which contain data about each shareable file. (R. 40:9.) That data includes the file name; its "hash values," which are unique digital signatures attached to the file; and other information. (R. 40:7, 9.) The torrents help allow BitTorrent

peers to locate desired shared files. (R. 40:9–10.) A BitTorrent peer enters search terms into torrent indexing websites, which work much like a Google search: after the BitTorrent peer enters keywords designed to find desired files, the indexing website produces a list of "matching" torrents. (R. 40:9–10.) The peer can then select a torrent of interest from that list and download the file. (R. 40:10.)

Typically, once a BitTorrent peer has downloaded a file or part of a file, it is saved in the peer's BitTorrent shared file folder. (R. 40:10.) There, it is immediately available to share with other users on the network. (R. 40:9–10.) To maximize download speeds for all peers, the client software programs will download parts of the file from multiple sources, i.e., multiple peers who have the same shared file. (R. 40:9.)

Law enforcement uses BitTorrent to identify possessors of child pornography

Just as the BitTorrent network is available to peers through publicly available software, law enforcement can search the BitTorrent network to locate suspected or known files depicting child pornography. (R. 40:11.)

Law enforcement also uses "Roundup,"[1] a software program specially designed for it to identify peers sharing child pornography through the BitTorrent network. (R. 40:12.) Roundup has several functionalities, as described in the warrant application. (R. 40:12–13.) Pertinent here, Roundup can identify peers, based on their specific IP addresses, who are offering to share suspected child pornography files from their BitTorrent shared folder. (R.

[1] In the warrant application, the affiant refers to two versions of the software: "Roundup Torrential Downpour" and "Roundup Torrential Downpour Receptor." (R. 40:12–13.) The State uses the general name "Roundup" to refer to the software because any distinction is irrelevant on appeal.

40:12.) Roundup does this by comparing the unique hash values of previously identified child pornography files compiled in law enforcement databases against the hash values in the suspect's shared file. (R. 40:12.)

Roundup can also cause peer devices on the network searching for child pornography to identify the investigator's computer as a peer offering to share child pornography. (R. 40:12–13.) When the peer connects with the investigator's computer, the software can attempt a "single source" download of known or suspected child pornography files from that peer's shared BitTorrent folder. (R. 40:13.) This single-source download means that Roundup downloads the files directly from that peer alone. (R. 40:13.)

Roundup accesses only the BitTorrent files that a peer chooses to share on the network and that other peers would otherwise be able to access. (R. 40:12–13.)

Police found child pornography on Beyer's computer

On October 28, 2017, Department of Justice (DOJ) 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 containing a video of an adult male and prepubescent female having sexual contact. (R. 2:5–6.) Further investigation revealed that the suspect IP address belonged to Beyer, who lived in an 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.) Ultimately, Beyer admitted to possessing child pornography. (R. 2:6–8.) A subsequent search of Beyer's computer revealed at least ten images of child pornography. (R. 2:9–10.)

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

Beyer sought access to the State's investigative computer

Beyer hired a forensic computer examiner to confirm that the video that served as the basis for the search warrant existed on his computer. (R. 69:2–3.) After analyzing Beyer's hard drive, the expert found no evidence of the video. (R. 35:1–3.)

Beyer then filed a "Notice of Motion and Motion to View the State's Computer and its Undercover Software." (R. 35:1.) Beyer claimed a "right to make sure that the [video] alleged to have been seen by the agent was actually seen by him." (R. 35:3.)

The circuit court held a hearing on Beyer's discovery motion. (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.)

The circuit court indicated that Beyer could file a suppression motion challenging the validity of the search warrant. (R. 70:24.) Beyer accordingly moved to suppress, claiming that (1) the search warrant "lacked probable cause in and of itself," (2) "the agents relying on the search warrant knew that the search warrant lacked probable cause," and (3) "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 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 training "in the BitTorrent network." (R. 71:14.)

According to Agent Lenzner, DOJ utilizes several programs to search for people sharing child pornography on the internet, including Roundup. (R. 71:15.) Lenzner participated in a 20-hour Roundup training, and now trains other officers on how to use the program. (R. 71:16.)

Agent Lenzner also stated that around October 28, 2017, he received an alert from Roundup that someone in the Madison area was sharing child pornography. (R. 71:17.) He downloaded the subject file, which contained a "10 minute, 33 second video of an adult male attempting to vaginally and anally penetrate a prepubescent child." (R. 71:18–19.) After viewing the video, Lenzner sent an administrative subpoena to Charter to determine the internet subscriber. (R. 71:18–20.) Charter said it was Beyer and provided his address. (R. 71:20.) Lenzner then contacted Detective Sachtjen. (R. 71:22.)

Detective Sachtjen testified that he applied for and executed the search warrant. (R. 71:4.) He indicated that information from Agent Lenzner's investigation provided the basis for the warrant. (R. 71:5–6.)

After Detective Sachtjen executed the warrant, Agent Lenzner's office searched the devices confiscated from Beyer's apartment. (R. 71:22.) 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, Lenzner believed that

Beyer "probably deleted" the video before police executed the warrant. (R. 71:23.) He noted that the warrant was executed more than 30 days after he detected the child pornography, increasing the likelihood that the file would be missing. (R. 71:23.) He 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.) 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 swiftly delete the child pornography, Lenzner reiterated the "high likelihood" that an offender is a collector. (R. 71:25.)

On cross-examination, Agent Lenzner agreed that the search warrant 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.) Lenzner also said that he did not know "the specific person" that was sharing the child pornography, only the router's IP address. (R. 71:31.) He conceded that someone who did not reside at Beyer's residence could have accessed the internet through the subject router. (R. 71:31.) Lenzner also confirmed that the two ways to prove that he saw the video were to take his word, and to examine his computer system. (R. 71:32.)

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

Defense witness Schiavo gave two explanations for why the video underlying 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 how to verify Agent Lenzner's testimony that he saw the video, Schiavo responded, "Look at their system." (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.) For example, he testified that uTorrent—the program that Beyer used to file share—had a "flaw" that could be "exploited by any user with a web browser." (R. 71:33, 45.) He offered the possibility that law enforcement exploited Beyer's computer. (R. 71:48.) In other words, Schiavo thought that Agent Lenzner might have planted the evidence. (R. 71:50.)

Finally, defense witness Villegas testified that he has participated in over 100 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.)

The circuit court denied Beyer's suppression motion. (R. 48.) It determined that the search warrant stated probable cause. (R. 71:79–83.) It found 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."[2] (R. 71:82–83.)

The parties proposed a "stipulated court trial" to avoid the guilty-plea-waiver rule

After Beyer lost his suppression motion, the circuit court asked whether the matter would go to trial. (R. 71:83.) Defense counsel answered no. (R. 71:83.) The court stated that Beyer had "a pile of appellate issues," to which defense counsel noted that he could preserve "the Fourth Amendment issue" without there being "a fact-finding trial." (R. 71:83–84.) Defense counsel asked the court to set the matter for a plea. (R. 71:84.)

Thereafter, the parties negotiated a "Stipulated Set of Facts for Trial to the Court," stating 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) police found child pornography on Beyer's computer upon executing a search warrant, (2) Beyer "admitted to the agents . . . that he used a file sharing network to download many different kinds of pornography," (3) Beyer admitted to possessing adult and child pornography, (4) Beyer admitted that he knowingly possessed "the image of child pornography charged in Count 1 of the Information," (5) "Beyer admitted that he knowingly downloaded the child pornography onto his computer," and (6) "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

[2] Beyer later filed a motion to reconsider, which was denied. (R. 49; 52.)

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 (emphasis added).)

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 nine 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 he was waiving by proceeding in such a fashion. (R. 72:5–7.) Beyer indicated that he understood he was waiving those rights. (R. 72:6–7.) The court found that

Beyer knowingly, intelligently, and voluntarily waived his constitutional rights. (R. 72:7.) After defense counsel agreed that the stipulated facts were proof, beyond a reasonable doubt, of each element of the offense, the court convicted Beyer. (R. 72:7.)

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

The court of appeals certified this case to this Court

On September 24, 2020, the court of appeals certified this case to this Court. This Court accepted the certification on November 18, 2020.

ARGUMENT

I. The guilty-plea-waiver rule should apply to the procedure utilized in this case.

A. Standard of review

Whether the guilty-plea-waiver rule should apply to a set of circumstances presents a question of law this Court decides de novo. *See State v. Riekkoff*, 112 Wis. 2d 119, 124–28, 332 N.W.2d 744 (1983).

B. Under the guilty-plea-waiver rule, a guilty, no contest, or *Alford* plea waives (or forfeits) the right to raise nearly all claims on appeal.

1. How it works and why.

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). Courts call this "the

guilty-plea-waiver rule," although it is more accurately described as a rule of forfeiture. *Kelty*, 294 Wis. 2d 62, ¶ 18 & n.11. "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, 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. "Once the defendant chooses to bypass the orderly procedure for litigating his constitutional claims in order to take the benefits, if any, of a plea of guilty, the State acquires a legitimate expectation of finality in the conviction thereby obtained." *Lefkowitz v. Newsome*, 420 U.S. 283, 289 (1975).

In addition to promoting finality, the guilty-plea-waiver rule 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." *Menna v. New York*, 423 U.S. 61, 62 n.2 (1975). "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. *Henderson*, 411 U.S. at 267.

Both this Court and the court of appeals have 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); *State v. Villegas*, 2018 WI App 9, ¶ 47, 380 Wis. 2d 246, 908 N.W.2d 198. As the court of appeals explained, "[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) (citation omitted).

2. Limited exceptions to the rule.

There are a few limited exceptions to the guilty-plea-waiver rule. Judicially created exceptions exist for ineffective-assistance claims related to the plea, *Villegas*, 380 Wis. 2d 246, ¶ 47, and double-jeopardy multiplicity claims that can be resolved based on the appellate record, *Kelty*, 294 Wis. 2d 62, ¶¶ 19, 34. And, "[a]s a matter of state public policy, the legislature has abandoned the guilty-plea-waiver rule in one situation." *Riekkoff*, 112 Wis. 2d at 124. Wisconsin Stat. § 971.31(10) creates a "narrow exception to the rule of waiver," and "excepts only motions to suppress evidence and motions challenging the admissibility of a defendant's statement." *State v. Nelson*, 108 Wis. 2d 698, 702, 324 N.W.2d 292 (Ct. App. 1982).

Given that the Legislature has recognized a single public policy exception to the guilty-plea-waiver rule, this Court has continuously rejected attempts to evade the rule's applicability to an otherwise waived claim. *See Riekkoff*, 112 Wis. 2d at 126–28.

For example, in *Riekkoff*, this Court held that parties may not contract around the rule—regardless of judicial acquiescence or approval. *Riekkoff*, 112 Wis. 2d at 127–28.

There, 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 disagreed. Citing the canon of *expressio unius est exclusio alterius*, this Court used the single 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 126–27.

The takeaway is that court-and-party-approved workarounds of the rule must fail.

C. Beyer's stipulated trial was the functional equivalent of a guilty plea.

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.)

There is no dispute that had Beyer entered a guilty, no contest, or *Alford* plea, the guilty-plea-waiver rule would have applied to his discovery claim. (R. 72:5.) Expressly to avoid that result, Beyer advanced a "very strange" procedure that is the functional equivalent of a guilty plea. (R. 72:3.) It should not be countenanced.

In exchange for a significant reduction of charges and the State's recommendation for the mandatory-minimum sentence, Beyer not only stipulated to a 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 set of facts.").)

At the so-called trial, Beyer confirmed his intention to utilize the above procedure. (R. 72:2–7.) The circuit court, in turn, went beyond discerning a valid jury trial waiver. *See State v. Anderson*, 2002 WI 7, ¶ 24, 249 Wis. 2d 586, 638 N.W.2d 301 (listing the requirements for a valid jury trial waiver). Like a plea colloquy, the court informed Beyer that he was waiving his rights to confrontation, to call witnesses, and to remain silent. (R. 72:5–6); *see State v. Hampton*, 2004 WI 107, ¶ 25, 274 Wis. 2d 379, 683 N.W.2d 14 (discussing the constitutional rights that a defendant waives by pleading guilty).

Further, much like a court inquiring into the factual basis for a plea, the court asked defense counsel whether the stipulated facts were proof, beyond a reasonable doubt, of each element of the offense. (R. 72:7); *see State v. Thomas*, 2000 WI 13, ¶ 19, 232 Wis. 2d 714, 605 N.W.2d 836 (noting that, to accept a plea, a judge must decide whether the facts the defendant admits constitute the crime charged). Defense counsel "agree[d] to that," leading the court to "so find." (R. 72:7); *see Thomas*, 232 Wis. 2d 714, ¶ 18 (holding that defense counsel may stipulate to a factual basis). The court continued, "I've reviewed both [the complaint and the stipulated set of facts]. I do so find. Based upon that evidence, I do find the defendant guilty." (R. 72:7.)

To summarize, in consideration for the dismissal of nine charges and the State's recommendation of the mandatory-minimum sentence, Beyer stipulated to the inculpatory facts supporting each element of the remaining offense and expressly agreed to a finding of guilt at a hearing where no witness testified. Having "waiv[ed] a trial and a defense," he simply left the court with "nothing to do but to impose

sentence and enter judgment." *United States v. Cox*, 464 F.2d 937, 941 (6th Cir. 1972) (citation omitted).

If it walks like a plea and talks like a plea, it should be treated like a plea. On similar facts—where the parties' "stipulation was designed to establish guilt beyond a reasonable doubt"—the Illinois Supreme Court held that the so-called stipulated bench trial "was tantamount to a guilty plea." *People v. Smith*, 319 N.E.2d 760, 762–64 (Ill. 1974). The determinative question in Illinois is whether the defense stipulates to the sufficiency of the evidence to convict instead of "present[ing] and preserv[ing] a defense." *People v. Horton*, 570 N.E.2d 320, 325 (Ill. 1991). Similarly, in *United States v. Lawson*, the D.C. Circuit indicated that a stipulated trial is tantamount to a guilty plea "if by stipulation or otherwise a defendant has effectively admitted his guilt and waived trial on all issues." *United States v. Lawson*, 682 F.2d 1012, 1015 (D.C. Cir. 1982).

By contrast, where the defendant does not concede that the stipulated facts are sufficient to establish guilt, courts have held that a stipulated trial is not the functional equivalent of a guilty plea. *See United States v. Schmidt*, 760 F.2d 828, 834 (7th Cir. 1985) (collecting cases). In *Schmidt*, the court held that the defendant's stipulation of facts for use at trial was not tantamount to a guilty plea because the district court decided the case based on the agreed facts. *Id.* ("The stipulations were simple narratives, and largely testimonial. They stated facts to which the government's witnesses would have testified had they been called, with no stipulation as to the truthfulness of the testimony. There were no stipulations as to intent."); *accord Lawson*, 682 F.2d at 1015.

Other cases that draw a distinction between a stipulation of factual guilt and the submission of a case on uncontested evidence include *Adams v. Peterson*, 968 F.2d

835, 836–39 (9th Cir. 1992), *Witherspoon v. United States*, 633 F.2d 1247, 1248–51 (6th Cir. 1980), and *State v. Johnson*, 705 P.2d 773, 775 (Wash. 1985).

The above cases do not address the application of the guilty-plea-waiver rule; rather, they address whether the procedures at issue triggered the need for the admonishments that must attend a guilty plea. But these cases demonstrate that Beyer had a trial in name only.

There are at least five reasons to apply the guilty-plea-waiver rule to the procedure utilized in this case.

First, the procedure undoubtedly implicates the rationale for the rule. By admitting "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), Beyer made his discovery claim irrelevant, *see Menna*, 423 U.S. at 62 n.2. And because Beyer chose "to bypass the orderly procedure for litigating his constitutional claims in order to take the benefits . . . of a plea of guilty, the State acquires a legitimate expectation of finality in the conviction." *Newsome*, 420 U.S. at 289.

Second, as the court of appeals recognized, the procedure here implicates this Court's holding in *Riekkoff*. (R-App. 102, 107.) Where the guilty-plea-waiver rule would otherwise apply to waive a claim on appeal, parties cannot creatively dodge the rule to impose upon appellate courts "the obligation to abandon the general waiver rule." *Riekkoff*, 112 Wis. 2d at 124. That is because the Legislature chose a single public policy exception to the rule: motions to suppress evidence. *Id.* at 124–27. If the Legislature wanted to sanction a procedure whereby the parties and the circuit court could effectuate a workaround of the rule, it certainly could have done so. *Cf.* Fed. R. Crim. P. 11(a)(2) ("With the consent of the court and the government, a defendant may enter a

conditional plea . . . reserving in writing the right to have an appellate court review an adverse determination of a specified pretrial motion."). But because the Legislature has not so acted, this Court in *Riekkoff* shot down a procedure like that of Fed. R. Crim. P. 11(a)(2). *Riekkoff*, 112 Wis. 2d at 121–27. The same result should follow here, where the circuit court and the parties agreed to conduct a trial in name only to bypass the rule.

Third, a judicially recognized exception in this situation—admitting guilt at a court "trial" rather than a plea hearing—could effectively swallow the guilty-plea-waiver rule. If defendants could have "the best of two worlds," namely being "allowed to plead guilty to reduced charges, while reserving their right to appeal as if they had maintained their innocence through trial," why wouldn't they pursue that option? *Cox*, 464 F.2d at 944. Further, in the interest of efficiency, why wouldn't the court and prosecutor acquiesce to this procedure? *See State v. Nash*, 2020 WI 85, ¶ 53, 394 Wis. 2d 238, 951 N.W.2d 404 (Rebecca Grassl Bradley, J., concurring). Permitting this procedure ensures that "trial by jury" will continue to be "the exception rather than the rule." *Id.*

Fourth, defendants like Beyer have recourse to seek review of non-jurisdictional claims before deciding whether to enter a plea or go to trial. They can file a petition for leave to appeal the circuit court's non-final order under Wis. Stat. § (Rule) 809.50, as defense counsel recognized in this case, (R. 71:83–84).

Fifth, sanctioning the procedure in this case unnecessarily opens a can of worms.

Does double jeopardy attach to the proceeding at which this procedure is employed? Not according to Wis. Stat. § 972.07(1), which provides that jeopardy attaches "[i]n a trial

to the court without a jury when a witness is sworn." Defendants may argue that jeopardy attaches when the circuit court accepts the parties' stipulation, but that sounds a lot like a plea. *See State v. Poveda*, 166 Wis. 2d 19, 25, 479 N.W.2d 175 (Ct. App. 1991) (stating that in a plea situation, jeopardy attaches when the circuit court accepts the plea).

Further, what type of colloquy is required in this situation to ensure that the defendant understands the effects of his decision? Should it be something more than what is required for a valid jury trial waiver, but less than what is mandated for the acceptance of a plea?

Also, what are the collateral effects of this procedure? *See Lee v. State Bd. of Dental Exam'rs*, 29 Wis. 2d 330, 334, 139 N.W.2d 61 (1966) (stating that an express admission of guilt may be used against a defendant in a subsequent civil action).

Should sentencing courts consider the defendants' conduct here as accepting responsibility for their actions, or not?

Finally, will defendants have valid plea-withdrawal claims because their trial counsel never advised them that they could have admitted their guilt to reduced charges at a court "trial" and still preserved their non-jurisdictional claims for appeal?

These are just a few questions that come to mind. Undoubtedly, this Court will identify additional concerns. But there is no need to walk down this rocky road. There is already a procedure in place for defendants who wish to stipulate to the inculpatory facts supporting each element of the offense and expressly agree to a finding of guilt at a hearing where no witness testifies. It's called a guilty plea.

For the above reasons, this Court should hold that the guilty-plea-waiver rule applies to the procedure utilized in this case.

In arguing otherwise, Beyer claims he "simply submitted his case to the trial court for decision on the basis of stipulations of fact," analogizing the facts of this case to those of *Schmidt* and *Adams*. (Beyer's Br. 14.) Not only does his argument disregard the reality of what occurred here, it overlooks the issue that was certified in this case. The issue certified involves a defendant who "explicitly agrees to a finding of guilt at a hearing before the circuit court at which no witness testifies." (R-App. 102.)

Neither *Schmidt* nor *Adams*—nor *Lawson*, *Witherspoon*, *Johnson*, or any other case cited in Beyer's brief (Beyer's Br. 14)—involves a defendant who as part of the parties' stipulation expressly agrees to a finding of guilt. Contrary to Beyer's representation, he did not agree that the stipulated facts "*could* adequately form the factual basis for a finding of guilt," leaving something for the circuit court to decide. (Beyer's Br. 12 (emphasis added).) Rather, he stipulated that the facts *did* establish his guilt, leaving the court with nothing to do but to enter judgment. (R. 55:2; 72:7); *compare Adams*, 968 F.2d at 839 ("Adams never stipulated that he was guilty of the crimes [charged]."). No amount of disregarding the express terms of the parties' written stipulation, or wordsmithing, (Beyer's Br. 12 ("His 'agreement' via counsel that the stipulated facts provided sufficient proof for conviction was merely a straightforward intellectual concession."), changes the hard facts.

In contending that he tried his case to the circuit court, Beyer correctly notes that "stipulations to certain elements of a crime or offense at trial are not entirely uncommon." (Beyer's Br. 13.) But this case involves a horse of a different color. At what trial does the factfinder reach a verdict only

after obtaining the defendant's consent that the facts constituted proof, beyond a reasonable doubt, of each element of the offense? (R. 72:7.)

Further, this Court recently defined a trial as "a fact-finding mission to determine the truth of allegations in a pleading," or "[a] formal judicial examination of evidence and determination of legal claims in an adversary proceeding." *City of Cedarburg v. Hansen*, 2020 WI 11, ¶ 35, 390 Wis. 2d 109, 938 N.W.2d 463 (citation omitted). What fact-finding mission occurs when the defendant admits the truth of the allegations in the pleading? Beyer does not say. (Beyer's Br. 13 n.1.) He tries to shoehorn the facts of this case into the latter definition of a trial, stating that "the trial court conducted a formal examination of the stipulations as evidence in arriving at a judgment of guilt." (Beyer's Br. 13 n.1.) But Beyer neglects to address the second part of that definition, namely that requiring a "determination of legal claims in an adversary proceeding." *Hansen*, 390 Wis. 2d 109, ¶ 35. He offers no explanation on how the facts here meet that part of the definition. (Beyer's Br. 13 n.1.)

Ultimately, Beyer quibbles with the well-established rule that a defendant must go to trial to preserve most non-jurisdictional issues for appeal, citing economic concerns. (Beyer's Br. 13.) He believes that "the procedure employed here is far preferable to the alternative" (Beyer's Br. 13), but the Legislature has not reached that conclusion. It has excepted just one category of claims from the guilty-plea-waiver rule for economic reasons. Again, the Legislature has not sanctioned a court-and-party-approved workaround of the rule. Attempts to do so must therefore fail. *See Riekkoff*, 112 Wis. 2d at 124–27.

Finally, while Beyer has heavily criticized the State for raising this issue on appeal given the parties' stipulation at the circuit court (R-App. 112 n.7; Beyer's Br. 15–16), it is well-

established that the "agreement of the parties on questions of law does not generally bind an appellate court." *State v. Olson*, 127 Wis. 2d 412, 419, 380 N.W.2d 375 (Ct. App. 1985). *Riekkoff* makes this principle particularly clear, as Beyer himself tacitly acknowledges. (Beyer's Br. 15–16); *see Riekkoff*, 112 Wis. 2d at 127–29; *see also Olson*, 127 Wis. 2d at 419 ("No statute creates an exception on the facts before us, and the parties' stipulation therefore is ineffective to prevent consideration of the guilty-plea-waiver rule.").

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 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 Riekkoff*, 112 Wis. 2d at 128.[3] A remand would therefore be necessary to give Beyer the option of withdrawing his effective guilty plea. *Id.*

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 Cox*, 464 F.2d at 940–46 (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). Because the parties

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

have briefed the discovery issue, that is the more efficient approach.

D. This Court should hold that the guilty-plea-waiver rule applies to a stipulated court trial where, although he does not concede guilt, the defendant presents no defense.

As noted in the certification, some courts have determined that a stipulated court trial is tantamount to a guilty plea "even if there is no concession from the defendant that the stipulated facts are sufficient to establish the defendant's guilt." (R-App. 111.) These cases involve defendants who presented no real defense to the charges. (R-App. 111.)

Although in this situation the defendant does not consent to a judgment being entered against him, thereby triggering the rationale for the guilty-plea-waiver rule, it seems that the main reason to utilize this procedure over a guilty plea would be to avoid the rule. *See United States v. Lyons*, 898 F.2d 210, 214 n.5 (1st Cir. 1990) (noting that the use of stipulated trials has diminished since the passage of Fed. R. Crim. P. 11(a)(2), permitting conditional pleas). So, such a procedure would still implicate this Court's decision in *Riekkoff*, at least where the record shows that the parties used it to bypass the rule.

Further, a stipulated court trial where the defendant does not concede guilt but presents no real defense seems to conflict with this Court's definition of a trial. *See Hansen*, 390 Wis. 2d 109, ¶ 35. Notably, the Supreme Court has questioned whether a "truncated" proceeding where the defendant presents no defense to the charges should be considered a trial, referring to it as "the equivalent of a guilty plea." *Brookhart v. Janis*, 384 U.S. 1, 7 (1966); *compare Kemp v. State*, 61 Wis. 2d 125, 129–31, 211 N.W.2d 793 (1973)

(permitting a trial on stipulated facts where the record of the preliminary examination was "thorough and extensive" and the court heard arguments from counsel).

Finally, if no witness testifies during such a proceeding, it raises the same double-jeopardy concerns noted above.

For the foregoing reasons, this Court should hold that the guilty-plea-waiver rule applies to a stipulated court trial where the defendant does not concede his guilt but presents no real defense to the charges.

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

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. 16.) Overwhelming case 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. 16), neither the constitutional right to present a

defense, nor the court of appeals' 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).

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). "Evidence that is favorable to the accused encompasses both exculpatory and impeachment evidence." *State v. Harris*, 2004 WI 64, ¶ 12, 272 Wis. 2d 80, 680 N.W.2d 737 (footnotes omitted). Evidence is material "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). 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).

Unless the government neglects to disclose favorable and material evidence, both the Supreme Court and this 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 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.* at 899–916.

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. *See id.*

3. *Maday*'s narrow circumstances.

This 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 *Maday* as affording criminal defendants broad discovery rights in the name of due process. (Beyer's Br. 16.) But he reads *Maday* far too broadly.

Maday addressed a narrow set of circumstances involving *Jensen* evidence.[4] Before 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

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

victims to submit to psychological examinations by his experts. *Id*. The court denied Maday's motion. *Id.* at 351. On appeal, noting the importance of a "level playing field" *at trial*, the 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.

Maday speaks more "to the balance of forces between the accused and his accuser" at trial, not the "amount of discovery which the parties must be afforded." *Wardius*, 412 U.S. at 474. Nevertheless, the court of appeals 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.[5] At other times, however, the court spoke in terms of "constitutional rights to a fair trial." *Maday*, 179 Wis. 2d at 361.

Regardless of the constitutional basis for the 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. Second, the court of appeals 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

---

[5] This Court has also made broad statements seemingly in conflict with its own precedent and that of the 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 the defendant has a constitutional right to discover the existence of potential witnesses), *with Britton v. State,* 44 Wis. 2d 109, 118, 170 N.W.2d 785 (1969) (stating that discovery has not been deemed a constitutional issue), *and United States v. Valenzuela-Bernal*, 458 U.S. 858, 872 (1982) (holding that the deportation of witnesses did not violate due process absent a showing that their testimony was material and favorable to the defense).

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.*

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

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

Beyer sought access to law enforcement's computer because he was hoping to find a basis to challenge the validity of the search warrant. (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. Even if Beyer could establish that the information he seeks is useful to his defense, that would not change the analysis. *See Ruiz*, 536 U.S. at 629.

Why? Because Beyer is not seeking exculpatory material—the only area of constitutionally guaranteed access to evidence. *See Trombetta*, 467 U.S. at 485. He is not even seeking evidence for use at trial. That Beyer seeks non-exculpatory information for use at a pre-trial proceeding makes his 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 where the court of appeals has sanctioned access to information in the name of due process. *See Maday*, 179 Wis. 2d at 353–62. So, even if the Wisconsin Constitution affords greater protection in this

context than does the federal Constitution (it does not), there still is no precedent showing that Beyer is entitled to relief. 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 being no precedent supporting Beyer's discovery request, the circuit court did not err in denying him relief.

Beyer's contrary position is meritless. While he roots his argument in the federal Due Process Clause (Beyer's Br. 16), he does not address Supreme Court precedent contradicting his claim. For example, he fails to acknowledge that there is no general constitutional right to discovery in a criminal case. (Beyer's Br. 16–22.) Although Beyer references "constitutionally guaranteed access to evidence" (Beyer's Br. 17), he does not mention that such access has been limited to exculpatory evidence, *see Trombetta*, 467 U.S. at 485. Beyer also cites his constitutional right to present a defense but does not discuss any of the seven cases where the Supreme Court applied that right. (Beyer's Br. 16–22.) 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, *supra*. at 899–916.

Beyer supports his argument with a non-binding, unpublished, and uncitable decision from the court of appeals, along with three non-binding federal decisions. (Beyer's Br. 17–22.) As to the former, the rules of appellate procedure do not allow the parties 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 Fed. R. Crim. P. 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, these cases are inapposite.

By relying on the looser "materiality" framework of the federal cases (Beyer's Br. 17–22), 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. Apparently, 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 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. 18–19), 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.'" *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, 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 United States and Wisconsin Constitutions 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

---

[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. 17.)

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). There must also be "probable cause to believe that evidence is located in a particular place." *State v. Ward*, 2000 WI 3, ¶ 26, 231 Wis. 2d 723, 604 N.W.2d 517.

Courts determine whether probable cause exists based on the totality of the circumstances. *Ward*, 231 Wis. 2d 723, ¶ 26. "[A] probable cause determination must be based upon what a reasonable magistrate can infer from the information presented by the police." *Id.* The 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 is not a technical, legalistic concept but a flexible, common-sense measure of the plausibility of particular conclusions about human behavior." *State v. Kerr*, 181 Wis. 2d 372, 379, 511 N.W.2d 586 (1994) (citation omitted). 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).

"The person challenging the warrant bears the burden of demonstrating that the evidence before the warrant-issuing judge was clearly 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), this 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." *State v. Jones*, 2002 WI App 196, ¶ 25, 257 Wis. 2d 319, 651 N.W.2d 305 (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).

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 (2020). 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, the search-warrant affidavit contains information "sufficient for a reasonable person to logically infer that evidence would be found" at Beyer's home. *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; *Raymonda*, 780 F.3d at 115–16; *United States v. Seiver*, 692 F.3d 774, 777 (7th Cir. 2012) (discussing 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. 23.) For example, he complains that "[t]here are no search terms noted in the warrant application which would suggest that Beyer was actively seeking to download child pornography onto his device." (Beyer's Br. 23.)

None of Beyer's complaints here matter. 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. 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.

The remainder of Beyer's position amounts to criticism that Agent Lenzner did not pin him with *more* child pornography before initiating the search-warrant process. (Beyer's Br. 24–25.) Beyer believes that absent additional evidence, he cannot be viewed as a collector of child pornography. (Beyer's Br. 24–25.) It follows, he reasons, 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 Lenzner's initial detection. (Beyer's Br. 24–25.)

This argument is a distraction given the information in the search-warrant affidavit regarding a computer's ability to retain a file even after its deletion. (R. 40:16.) This fact alone 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.

Regardless, Beyer's 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 are no facts supporting a reasonable belief that he is a collector is false: he did not simply need to "click the mouse" to obtain child pornography, and he made the child pornography available to others. (Beyer's Br. 24.)

For the above reasons, this Court should hold that the search-warrant affidavit states probable cause. If this Court disagrees with the State's position, a remand is appropriate for consideration of the good faith exception to the exclusionary rule because the circuit court did not address it.

See State v. Anker, 2014 WI App 107, ¶¶ 26–27, 357 Wis. 2d 565, 855 N.W.2d 483.

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. 27–28.) 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. 28.)

Assuming that Beyer was entitled to a *Franks/Mann* hearing, he has not proved his claims.[7]

Beyer did not establish 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. 27.) 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

[7] That Beyer's current position relies on testimony adduced at the suppression hearing suggests that he did not make the substantial preliminary showing necessary to obtain a *Franks/Mann* hearing. (Beyer's Br. 27); *See State v. Anderson*, 138 Wis. 2d 451, 462, 406 N.W.2d 398 (1987).

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. 28.) And Beyer neither proved that the search-warrant affidavit lacks probable cause without these so-called misrepresentations, nor does he offer anything other than conclusory statements in this regard on appeal. (Beyer's Br. 27–28.)

Finally, Beyer has not proved a critical omission from the search-warrant affidavit. (Beyer's Br. 28.) He appears to argue that the affidavit should have incorporated Agent Lenzner's testimony that a lag in executing the search warrant decreases the likelihood that police will find the suspect file. (Beyer's Br. 27.) This information was not "critical for a fair decision" on probable cause because there was still a "fair probability" that the evidence would exist "despite the passage of [a] significant period[ ] of time." (R. 40:17); *Mann*, 123 Wis. 2d at 388. Further, Beyer offers only conclusory allegations that the inclusion of this omitted information would have prevented a finding of probable cause. (Beyer's Br. 28); *see Mann*, 123 Wis. 2d at 389.

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 22nd day of January 2021.

Respectfully submitted,

JOSHUA L. KAUL
Attorney General of Wisconsin

KARA LYNN JANSON
Assistant Attorney General
State Bar #1081358

Attorneys for Plaintiff-Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 261-5809
(608) 294-2907 (Fax)
melekl@doj.state.wi.us

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 10,988 words.

Dated this 22nd day of January 2021.

KARA LYNN JANSON
Assistant Attorney General

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 22nd day of January 2021.

KARA LYNN JANSON
Assistant Attorney General

Supplemental Appendix
State of Wisconsin v. Jacob Richard Beyer
Case No. 2019AP1983-CR

SUPPLEMENTAL 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.

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.

Dated this 22nd day of January 2021.

KARA LYNN JANSON
Assistant Attorney General

CERTIFICATE OF COMPLIANCE
WITH WIS. STAT. § 809.19(13)

I hereby certify that:

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

I further certify that:

This electronic appendix is identical in content to the printed form of the appendix filed as of this date.

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

Dated this 22nd day of January 2021.

KARA LYNN JANSON
Assistant Attorney General