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STATE OF WISCONSIN
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DISTRICT I

Appeal No. 2019 AP 2296-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

BILLY JOE CANNON,

Defendant- Appellant.

BRIEF & APPENDIX OF DEFENDANT-APPELLANT

APPEAL FROM A JUDGMENT OF CONVICTION ENTERED ON APRIL 4, 2014, AND A DECISION AND ORDER ENTERED ON NOVEMBER 26, 2019, IN THE CIRCUIT COURT OF MILWAUKEE COUNTY
The Honorable Stephanie Rothstein, Presiding
Trial Court Case No. 2011 CF 924

Respectfully submitted:

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ISSUES PRESENTED

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The trial court answered: No.

II. WHETHER THE PLAIN MEANING OF SECTION 968.29 REQUIRES THE SAME JUDGE WHO APPROVED THE ORIGINAL WIRETAP ORDER TO APPROVE THE USE OF ANY NON-ENUMERATED OFFENSE INTERCEPTS, AND PROHIBITS ANYONE OTHER THAN AN AUTHORIZED DEPUTY CHIEF JUDGE FROM DOING SO, OR MINIMALLY, SOME OTHER JUDGE THE RECORD ESTABLISHES WAS AUTHORIZED.

The trial court answered: No.

III. WHETHER AN AFFIDAVIT SUBMITTED TO SUPPORT A REQUEST TO USE A WIRETAP INTERCEPT OF A POSSIBLE FIREARM OFFENSE CONSTITUTES PROBABLE CAUSE TO BELIEVE A FIREARM CRIME OCCURRED WHEN ALL IT ALLEGED WAS THAT THE SUBJECT REQUESTED THAT A FELON LEND A FIREARM TO A NON-FELON.

The trial court answered: Yes.

IV. WHETHERTO THE EXTENT SECTION 968.29 AUTHORIZES THE USE OF WIRETAP EVIDENCE OF NON-AUTHORIZED OFFENSES, SUCH OFFENSES MUST STILL BE AN ENUMERATED OFFENSE UNDER SECTION 968.29.

The trial court answered: No.

STATEMENT ON PUBLICATION

The appellant believes the Court's opinion in this case will meet the criteria for publication as it will clarify and develop the law surrounding the scope of the authorized use of wiretap intercepts of non-enumerated offenses that are not authorized by the underlying wiretap order.

STATEMENT ON ORAL ARGUMENT

The appellant does not request oral argument insofar as he believes the briefs will sufficiently explicate the facts and law necessary for this Court to decide the issues presented.

STATEMENT OF THE CASE AND FACTS

A. The Cocaine Conspiracy Investigation.

To fully understand the legal issues relevant to this appeal, one must view them in the larger context of a single, ongoing investigation by a single Joint Task Force, comprised of the Milwaukee Police Department (MPD) and the Wisconsin Department of Justice (DOJ). This was a joint investigation into the actions of the defendant-appellant, Billy Joe Cannon, and many others. Two prominent co-leaders of this Task Force were MPD Detective Dean Newport and DOJ Agent Timothy Gray, both working with the High Intensity Drug Trafficking Area (HIDTA) Program. (R180; R181). The Assistant District Attorney (ADA) assigned to HIDTA was Grant Huebner. The record is not entirely clear as to when the investigation began, but the relevant portion of it, for purposes of this appeal, was the roughly three-year period from November of 2005 to October of 2008.

In addition to Cannon, the investigation also focused on Gerald McGhee who, on November 10, 2005, was arrested following a bust of a cocaine transaction arranged by a Confidential Informant (CI). (R7). The driver of the target vehicle, Lamont Powell, managed to get away, but not McGhee. (*Id.*). Following apprehension, McGhee claimed Cannon had been involved in supplying the cocaine. Police recovered cocaine from the vehicle and seized more cocaine upon executing a search warrant at the residence of Powell, who McGhee said had been driving the vehicle.

Thereafter, the Task Force continued to investigate Cannon, McGhee, Powell, Jimmy Butler and Marc Brown, among others. (R184). Indeed, McGhee was released from custody to continue the drug conspiracy investigation, a primary target of which became Cannon. (R257-64-65).[1] And in March of 2006, the Task Force connected Cannon to Butler, as having schooled Butler on how to deal with people who had been federally indicted. (R184-6). Butler then also became a primary focus of the ongoing cocaine conspiracy investigation.

[1]References to January 2011 transcripts are to Case No. 2009 CF 1337.

It was also learned that in 2006, Cannon had allegedly gone to Miami to find a new cocaine source, and that supposedly there had been transactions ranging from $35,000 to $50,000 between Cannon and Marcus Adams, and that Cannon was also connected to somebody named Floyd. (R185-21). In 2007, the Task Force continued to develop information connecting Cannon with Butler. (*Id.*). That same year, it connected Cannon to Marc Brown. (*Id.*). In 2007, Agent Gray also obtained Cannon's phone records. (R257-76).

As the Joint Task Force's investigation of a drug conspiracy involving Cannon, McGhee, Brown and others continued into 2008, the Task Force installed, on January 13, 2008, a GPS device on Cannon's vehicle. (R184-16). Then, during that same month, the Joint Task Force sought and obtained an order to wiretap the phone of Marc Brown. (R1; R2). The wiretap order authorized surveillance of Brown's phone and went on for several weeks, during which time the Task Force intercepted calls between Brown and Cannon. (R184-31; R185-54-57). One of these calls involved discussions about Butler being arrested. (R185-57). Consequently, some of the calls between Cannon and Brown included discussions about how they would need to get lawyers, who to get, and how much it would cost. (*Id.* at 58). This, in turn, led to physical surveillance of Cannon and Brown meeting at a radio station, presumably to discuss these developments. (R185-40, 45).

Then, in March of 2008, the Task Force parlayed information obtained from the Brown wiretap into an order to wiretap Cannon's phone, to further its ongoing drug conspiracy investigation of Cannon. Persons expected to be intercepted included McGhee, Butler, and Brown, among others. (R6-8-9). The application identified McGhee as an individual who purchases kilogram quantities of cocaine from Cannon. (*Id.*). The application also relied amply on the 2005 incident allegedly involving McGhee and Cannon. (*Id.* at 13-17). And notably, McGhee continued to be a subject of the investigation. (R181; R182). He was caught on surveillance video going to Cannon's home. (R181). Reports also documented a number of telephone contacts between Cannon and McGhee. (R182). All of this was in the Spring of 2008.

The wiretap order for Cannon was extended on two subsequent occasions and during the months of March, April and May, 2008, the Task Force continued to capture numerous phone calls placed to and from Cannon's phone number, more of which involved McGhee. Some of these, the State would later claim, demonstrated Cannon was still involved in a conspiracy to distribute cocaine. Others, the State would also later claim, demonstrated that Cannon, a convicted felon, was involved in a firearm transaction involving Carl Page.[2]

On June 7, 2008, as the investigation of Cannon continued, the Task Force arrested Page, who was in possession of cocaine, and recruited him to cooperate in the investigation of Cannon. To that end, on October 16, 2008, the Task Force, aware of the firearm transaction involving Cannon and Page as a result of the intercepted wiretapped calls, sent Page to Cannon's house for the purpose of conducting another firearm transaction. The contrived controlled transfer was successful. Thus, on October 19, 2008, Task Force members arrested Cannon and while in custody, Cannon provided the police with some incriminating statements. Cannon was released from custody and thus ended the Task Force's three-year investigation of Cannon for conspiracy to distribute cocaine.

B. *Single Jeopardy: State v. Cannon,* Case No. 2009 CF 1337 (Conspiracy to Distribute Cocaine)

So it was that on March 20, 2009, the State filed a criminal complaint charging Cannon with:

[2]As is typical with intercepted communications, the Task Force would claim the conspiratorial conversations about cocaine were conducted using coded language. In McGhee's case, intercepted conversations with Cannon were about "TVs." (R183) (e.g., "male can get 'more TVs,'" "has one that is 'fresh' in the box," McGhee will "bring the box" when he gets off of work, "I got that tre ball," "bring the goods," Cannon "will give him a taste," etc.). Clearly the cocaine conspiracy investigation involving Cannon and McGhee that began in November of 2005 was still ongoing in the Spring of 2008.

Count 1 Conspiracy to Distribute Cocaine;

Count 2 Possession of Firearm by Felon; and

Count 3 Furnish Firearm to Unauthorized Person

State v. Cannon, Milw. Co. Case No. 2009 CF 1337. The complaint was signed by Joint Task Force co-leader Agent Newport and HIDTA ADA Grant Huebner. Taken as a whole, the complaint covered a time period from November 2005 to October 2008. The overt act for the conspiracy charge was an alleged cocaine transaction involving McGhee in November 2005. Counts 2 and 3 were based on the controlled transfer of a firearm in October 2008 involving Page.

It is undisputed that at the time the State filed this 2009 case, the Task Force had all the information it would ever have regarding Cannon's alleged involvement in a conspiracy to distribute cocaine. (R229-14-15). It possessed the information regarding Cannon's alleged involvement in the transactions involving McGhee during the 2005 drug bust which, notably, yielded actual drugs and real physical evidence (found on McGhee, in the vehicle, and in Powell's residence). It also possessed the intercepted wiretap communications from Spring 2008 (though no physical evidence) that police believed demonstrated Cannon continued to remain in the cocaine conspiracy, based on their interpretations of "coded" language used during the wiretapped calls.

Nevertheless, when the State filed the 2009 criminal complaint, it presumed to limit the time period for the cocaine conspiracy to 2005 and for which, as noted before, it had real evidence of drugs. (*See* Complaint, Case No. 2009 CF 1337). It also drew in, however, gun charges alleged to have occurred in October 2008, when it presided over the controlled transfer to Page. The complaint thus covered actions from November 2005 to October 2008. Notably, however, it excluded any charges, evidence or claims pertaining to the intercepted calls that fell squarely within that same time frame - i.e., the Spring of 2008 when all the intercepted wiretap calls occurred - and for which, as already noted, there was no physical evidence. The State also withheld the gun transaction involving Page,

allegedly in April of 2008, as the Task Force believed intercepted calls had demonstrated.

On June 23, 2009, Cannon filed a motion to suppress the statements he had given to the police on October 17, 2008. The gun counts were eventually severed from the drug conspiracy count for purposes of trial. On April 1 and June 10, 2010, the circuit court denied the motion to suppress Cannon's statement and ruled it could be used in its entirety at trial. (R254-48; R255-13-14).

Meanwhile, the Task Force continued to investigate alleged co-conspirator Eraclio Varela. Within a couple of months, however, the ADA was told that proceeding with charges against individuals related to the wiretaps would no longer compromise the ongoing investigation. (R229-41). The State did not, however, file any new charges against Cannon at that time, nor did it seek to amend the criminal complaint in the then-pending case - 2009 CF 1337 - or otherwise disclose the wiretap information. Instead, for the next six months, it was business as usual in the 2009 cocaine conspiracy case as that case neared trial. On January 10, 2011, the jury trial commenced on the cocaine conspiracy charge and lasted three days. At the conclusion of the trial, Cannot was acquitted and found not guilty of a cocaine conspiracy.[3]

C. Double Jeopardy: *State v. Cannon*, Case No. 2011 CF 924 (Conspiracy to Distribute Cocaine)

On February 24, 2011, just a little more than a month after Cannon was acquitted on the charge of *conspiracy to distribute cocaine*, the State charged Cannon with *conspiracy to distribute cocaine*. (R7). This complaint was signed by the other Joint Task Force co-leader, Agent Timothy Gray and, again, by HIDTA ADA Grant Huebner. (*Id.*). Taken as a whole, the complaint covered alleged activity from March to May of 2008, which therefore fell squarely within the same time period covered by the first case (November 2005 to

[3] Cannon later entered a plea to Count 2 - Felon in Possession of a Firearm in exchange for dismissal of Count 3 - Furnishing a Firearm to an Unauthorized Person. (R222).

October 2008). (*Id.*). The charge stemmed, in large part, from that portion of the Task Force investigation involving the wiretap communications. Two other charges stemmed from that same time frame as well: (1) Conspiracy to Distribute THC; and (2) Furnishing a Firearm to an Unauthorized Person.[4]

Cannon filed several motions during the pendency of the second conspiracy case (2011 CF 924), just two of which are germane to this appeal: (1) motion to suppress wiretap evidence filed on September 14, 2012; and (2) motion to dismiss based on double jeopardy violations on filed October 16, 2012. (R24; R25; R27; R28). On December 17, 2012, the circuit court heard testimony regarding the background facts underlying the charging decisions in both cases and the timing thereof. (R229-32-64). The circuit court deferred a decision until the next day, (*id.* at 122-23), at which point it denied the double jeopardy motion. (R230-11-23). It reasoned the two cocaine conspiracy cases were distinct in law, and in fact. (*Id.*).

On March 6, 2013, the circuit court addressed Cannon's motion to suppress wiretap evidence. (R231-3). The court heard testimony from Agent Timothy Gray. (*Id.*). Once again, the court deferred a decision until the next day. (*Id.* at 30). On March 7, 2013, the court denied Cannon's motion to suppress wiretap evidence. (R233-10-17).

On February 10, 2014, a five-day jury trial began on the case *sub judice.* (R242-R248). During the course of that trial, there was liberal use of the wiretap recordings for both the drug and firearm charges. (R244-70-76; R248-52-55). At the end of that trial, the jury found Cannon guilty on all counts. On April 1, 2014, Cannon was given a combined sentenced of 30 years.

[4]Count One charged Cannon, along with Damone Powell and Eraclio Varela with Conspiracy to Deliver Cocaine (PTAC), with dates of violation being 3-4-08 and 3-24-08. Count Three charged Cannon, Page, Turnage with Possession Firearm by Felon – Furnish to Felon (PTAC). The THC charge is not a subject of this appeal.

Argument

I. THE COCAINE CONSPIRACY CONVICTION IN THIS CASE, ARISING FROM THE SAME ONGOING INVESTIGATION BY THE SAME JOINT TASK FORCE DURING THE SAME TIME FRAME, AND INVOLVING CONDUCT THAT ALLEGEDLY OCCURRED PRIOR TO THE FILING OF THE FIRST CONSPIRACY CASE, AND FOR WHICH ANY POSSIBLE JUSTIFICATION FOR NOT INCLUDING IN THE FIRST CASE EVAPORATED SIX MONTHS PRIOR TO THE FIRST CASE GOING TO TRIAL, MUST BE VACATED AS VIOLATIVE OF THE DOUBLE JEOPARDY CLAUSE OF THE UNITED STATES AND WISCONSIN CONSTITUTIONS.

The double jeopardy clause protects against successive prosecutions and multiple punishments for the same offense. *State v. Kalty*, 2006 WI 101, ¶ 16, 294 Wis.2d 62, 716 N.W.2d 886. Protection against multiple punishments includes "unit-of-prosecution challenges in which the state is alleged to have improperly subdivided the same offense into multiple counts of violating the same statute. *Id*. Here, while the state investigation involved one continuous conspiracy to deliver cocaine involving Cannon and numerous other named and confidential persons, the State elected to litigate this single offense piecemeal until a conviction was had. When unable to obtain a conviction for an alleged cocaine conspiracy in the 2009 case and indeed, while the ink was still drying on the verdict form acquitting Cannon, the State filed another cocaine conspiracy charge against Cannon using other information from the same investigation.

There are two important observations about the State's approach to serially prosecuting Cannon vis-a-vis its ongoing investigation. First, at the time the State filed the first case in 2009, it already had *all* the cocaine conspiracy information it would ever have implicating Cannon. It had that information by the middle of October 2008, (R229-56-57), but did not release the wiretap information. Only after Cannon was acquitted in the 2009 case did it release the information when filing the 2011 case just one month later.

The second observation pertains to the excuse offered by the State for dividing the Joint Task Force's single investigation of Cannon into two separate cases, and disclosing the wiretap information only after Cannon was acquitted. The State claimed that when it filed the first conspiracy case against Cannon in 2009, it did not include charges or evidence from the 2008 wiretaps because it was still investigating Varela, and did not want to compromise that investigation. (R229-38).

It is undisputed, however, that by the late summer of 2010 – six months before Cannon's trial in the first case – any justification for not disclosing the wiretap information or charging Cannon had evaporated. This was conceded by the same ADA who signed *both* complaints. (*Id.* at 41). It was then the State learned that proceeding with charges against the wiretapped individuals would no longer compromise any ongoing investigation. (*Id.*). And it was then when the State learned it was free to amend the 2009 complaint to add in the wiretap information it had obtained in 2008, and present that wiretap information during the 2009 trial. Instead, however, it held back and kept that information under wraps, waited for the outcome of the 2009 case, and when such was an acquittal, turned around and filed this case charging Cannon with the exact same offense on which he had just been acquitted.

When first addressing the double jeopardy issue, part of the court's rationale for denying the motion was that the charges in the two cases were legally distinct. The court reached this conclusion even though the underlying substantive crime in both cases was based on section 961.41(1)(cm)4, Stats., which outlaws the distribution of more than 40 grams of cocaine. The court stated:

> As to Count 1, which is the count upon which Mr. Cannon was acquitted, the state charged the defendant with conspiracy to commit delivery of controlled substance, cocaine over 40 grams as party to the crime and cited as the statutes that it relied upon as 961.41 and . . . subsections . . . 961.41(lx) and 939.05 and that case proceeded under a party to the crime theory. Conspiracy was simply the label that was attached to that.

> And as is well-established law, an individual in the State of Wisconsin, we eliminated when they enacted the party to the crime statute the idea that about individual types of involvement in crime. And 939.05 addresses and the Court finds that 939.05 addresses the various ways an individual can allege to be concerned with the commission of the crime.

(R230-11-12). Thus, the court thought it relevant that under section 939.05, conspiracy is just one way to demonstrate party to a crime liability.

The court then turned to how the 2011 case was charged:

> And then we compare and contrast the charges in this matter. . . . ll-CF-0924 charges conspiracy to commit manufacture/delivery of substance, cocaine, over 40 grams as party to the crime but charges in addition to 939.05, it charges the State of Wisconsin's substantive or inchoate crime, if you will, of conspiracy under 939.31 which is a separate and distinct statutory subsection which requires a different factual finding than is required simply under the party to the crime theory alone. Conspiracy under 939.31 provide that whoever, with certain exceptions, whoever with intent that a crime be committed agrees or combines with another for the purpose of committing that crime may, if one or more of the parties to the conspiracy does an act to effect its object be fined or imprisoned and then it goes on to state the penalties. And there's a whole separate body of law surrounding that concept of conspiracy and that appears to be the concept under which the state has chosen to go forward and the legal theory under which the state has chosen to go forward to pursue.

(R230-12-13). The court deemed this "a distinction with a difference." (*Id.* at 14). In other words, because the conspiracy theory in the 2009 case was tied to section 939.05 alone, while

the conspiracy theory in the 2011 case added in section 939.31, the two cases were somehow different in law.

This was an error, as section 961.41(1x), Stats., a basis for charging the 2009 case as a conspiracy, states:

> Conspiracy. Any person who conspires, **as specified in s. 939.31**, to commit a crime under sub. (1)(cm) to (h) or (1m)(cm) to (h) is subject to the applicable penalties under sub. (1)(cm) to (h) or (1m)(cm) to (h).

(Emphasis added). Thus, contrary to the court's reasoning, section 939.31 was implicated equally in both cases, expressly in the 2011 case, and by incorporation, in the 2009 case. The court's original double jeopardy analysis was therefore flawed on this front, as there was no meaningful legal difference between the cocaine conspiracy charges in both cases. This error has now been conceded by both the State, (R197), and the court. (R217).[5]

Accordingly, all that remains is the comparative factual analysis the circuit court undertook and concluded was dispositive, reasoning that the first conspiracy case involved activity in 2005, while the second conspiracy case involved activity in 2008. (R230). Unfortunately, in so doing, it relied on "multiplicity" cases involving the charging of discreet acts, rather than ongoing conspiracy cases. (*Id.* at 20), *citing State v. Eisch*, 96 Wis.2d 25, 291 N.W.2d 800 (1980) (discreet acts of sexual intercourse, each different in kind and defined differently by statute, constituted separately chargeable criminal offenses, even though all acts took place at the same location over a roughly four hour period of time), *and State v. Reveles*, 2009 WI App 27, 316 Wis.2d 412, 763 N.W.2d 559

[5] Review of the jury instructions from the 2009 case reveals PTAC was never part of the State's conspiracy theory. (R258-3-22). A comparative analysis of the instructions from both cases reveal they were functionally identical vis-à-vis the respective, substantive crimes. (*Compare id.* at 15-19 *and* R248-15-18). Nor could Cannon have been convicted under both sections 939.31 and 939.05. *See* section 939.72(2), Stats.

(unpublished) (several acts of sexual assault committed in single course of action not impermissibly multiplicitous).[6]

As Cannon noted during the post-conviction proceedings, the issue should instead have been analyzed using double-jeopardy cases involving conspiracies. (R189), *citing*, *e.g., U. S. v. Castro*, 629 F.2d 456, 465 (7th Cir. 1980). Cannon pointed out that in the conspiracy context, the circuit court's strict application of the factual inquiry under *Blockburger* was inappropriate. As the Seventh Circuit has noted:

> In proving that the first and second alleged conspiracies are one, a defendant traditionally has been required to meet the "same evidence" test, that is, to show that the evidence required to support conviction in one of the prosecutions would have been sufficient to support a finding of guilt in the other prosecution. This test, however, would seldom prevent multiple prosecutions in narcotics conspiracy cases . . . because the Government can shape the overt acts charged in each indictment and thus, under the guise of prosecutorial discretion, advance the proposition of one conspiracy's being capable of proof in several prosecutions requiring different evidence for each conviction.

Castro, at 461. (Citations omitted). This, of course, is precisely what occurred in this case.

To its credit, the circuit court did reexamine the double jeopardy issue during the post-conviction phase and issued a

[6] Multiplicity cases might have been persuasive had Cannon been charged in both cases with stand-alone offenses (e.g., possession of cocaine with intent to deliver). However, where the charge in each case was a conspiracy arising from a single investigation, the rationale used to deny the double jeopardy challenge broke down. In short, it is pivotal the State charged both offenses as a conspiracy. It took a single cocaine conspiracy investigation that began in 2005 and ended in 2008 and then, in 2009, cherry-picked evidence from that investigation to charge Cannon with a cocaine conspiracy, while holding back on other evidence it kept in reserve to be used if Cannon were acquitted. It bears repeating that any justification the State had for this piecemeal approach was gone long before it prosecuted Cannon in the first case.

written decision which was more comprehensive than its pretrial ruling from the bench. Rather than review the prior errors identified by Cannon, however, the court stated:

> The court found, however, that the State had used evidence "which related strictly to a period in time surrounding the November 10th, 2005, events." It further found that the only evidence that arguably related to a time outside of the November 2005 timeframe was the defendant's own statement that he had dealt drugs two or three years before 2008, and that three years would have put it around the November 2005 timeframe. The court determined that the jury's acquittal verdict was not predicated on any evidence that did not deal with November of 2005, and therefore, issue preclusion was not applicable for any activity that occurred after that date. Based on the co-actors involved and the above considerations, the court found that although the offenses were "largely the same in law. . . they are not the same in fact." It concluded that the offenses were separate and distinct and that the charges in 11CF000924 did not violate the Double Jeopardy Clause of the state or federal Constitutions. The court stands by that ruling. Even if (1) the court ignores the multiplicity cases on which it relied in making its findings; (2) assumes the State did not pursue a party to a crime theory in 09CF001337;15 and (3) applies the *Castro* analysis pertaining to conspiracy cases, it reaches the same result.

(R217-15-16) (cites omitted). This tacitly conceded that use of multiplicity cases was inappropriate as was the idea that the charges were not identical in law, before putting all of the court's eggs in the "factually distinct" basket.

Rather than address the full *Castro* basis for Cannon's double jeopardy challenge, the circuit court cherry-picked a single statement from *Castro* and stated:

> As stated previously, [i]n claiming double jeopardy based on more than one conspiracy prosecution, a defendant bears the burden of establishing that the prosecutions are for the same offense in law and in fact.

(R217-16), *citing Castro*, 629 F. 2d at 461. It is curious the court relied on this language since *Castro* then noted this test would seldom prevent multiple prosecutions in narcotics conspiracy cases, since Government can shape the overt acts charged in each complaint and, under the guise of prosecutorial discretion, try to prove one conspiracy in several prosecutions, each requiring different evidence for each conviction. *Id.*

Castro went on to note that to determine whether a conspiracy has been subdivided arbitrarily, courts should look to the indictments and the evidence and consider such factors as whether the conspiracies involve the same time period, alleged co-conspirators and places, overt acts, and whether the two conspiracies depend on each other for success. *Id.* Where several of these factors are present, the conclusion follows that the alleged illegal combinations are not separate and distinct offenses. *Id.*

The State has also sought to justify its approach on the grounds that each conspiracy involved different co-defendants, (*see* R229-21-22), but such cannot save it from the double jeopardy challenge. One of the basic tenets of conspiracy law is that an alleged co-conspirator may be included in an overall agreement without knowing all the participants in the conspiracy. *Castro*, 629 F.2d at 464. The law of criminal conspiracy also provides that new conspirators may join the criminal agreement after its inception, and others may terminate their membership before its completion. *Id.* Thus, even were it the case that Powell and Varela (co-conspirators in the 2011 case) joined the conspiracy after its inception (which is not clear) and that McGhee (co-conspirator in the 2009 case) terminated his membership before its completion (which he did not), this would not equate to a separate conspiracy, as the single investigation by a single Joint Task Force into a single conspiracy reveals. Moreover, the prosecutor was able to shape who the co-conspirators were for each case by choosing who to charge. Indeed, even though

McGhee was a common member fully implicated in both alleged conspiracies, the prosecutor left him out of both (out of the first conspiracy, presumably because he cooperated, and out of the second conspiracy, presumably to avoid the double jeopardy problem).[7]

It is settled that the prosecution of a single conspiracy as two separate conspiracies violates a defendant's double jeopardy guarantee. Courts have held that the Double Jeopardy Clause applies even if some of the named co-conspirators are different in the two indictments, *U.S. v. Mallah*, 503 F.2d 971 (2nd Cir. 1974). It also applies even if the two indictments allege different overt acts. *Short v. United States*, 91 F.2d 614 (4th Cir. 1937).

Indeed, *Short* explicated one of the problems with trying Cannon twice under the guise of construing the 2005 evidence and the 2008 evidence as two discreet sets of facts:

> It is true that proof of an overt act is necessary under the statute to a conviction, **but the crime is the conspiracy and not the overt act.** The conspiracy is a partnership in criminal purposes and may have continuation in time. It is constituted by an agreement, but it is the result of the agreement rather than the agreement itself. **The effect of the requirement of an overt act is merely to furnish a locus poenitentiae.** As above stated, only one overt act need be alleged or proven to justify conviction of a continuing conspiracy extending over a period of years in the furtherance of which many overt acts may have been committed; and to hold that a difference in the overt acts charged in the indictment constitutes a difference in the charge of crime would permit the prosecution of the same conspiracy as many times as there are acts done in furtherance of it. This cannot be the law. As was well said by Judge Alschuler in his

[7] In fact, McGhee never withdrew from the conspiracy prior to its termination, as revealed by the fact he remained a target of the investigation into the Spring of 2008, and was captured in the wiretap talking to Cannon about moving "TVs."

> dissenting opinion in the Ferracane Case: While the overt act is an essential element of the statutory offense, the unlawful agreement is, after all, the real gist of the offending, the doing of an overt act marking the limit for repentance, or abandonment of the unlawful undertaking, and to that extent ameliorating the former general rule that the unlawful agreement alone was sufficient. That each separate nod, gesture, or other act done in execution of the same unlawful agreement to commit an offense, may subject the alleged conspirators to several convictions and punishments is . . . untenable.

Short, 91 F.2d at 621–22. (Emphasis added; citations and quotations omitted).

The flaw in the circuit court's disposition of the double jeopardy problem is that it myopically focused on the existence of two separate overt acts. Its analysis went no further, and the mere existence of two overt acts did not mean Cannon was involved in two different conspiracies. From 2005 to 2008, Cannon allegedly engaged in an ongoing conspiracy to distribute cocaine. Some members of the conspiracy present from the outset dropped out, some remained for the entire period of time, and some who were not there from the outset joined later.

Moreover, there *was* factual overlap between the two trials, although the degree and significance of such has been downplayed by the circuit court. In both trials, the statement Cannon gave police when he was arrested in October of 2008 was used. While the use of Cannon's statement in the 2009 trial has been positioned as minor, a more studious examination of its use reveals it was more significant:

> Q And just so we are clear, the primary focus of your investigation what you were talking to the defendant about was **not about this 2005 deal?**
>
> A No, it was not.

(R257-156-57) (emphasis added). Thus, right out of the gate, the jury was advised that when Agent Newport interrogated Cannon in 2008, his primary investigative focus was on events from *after* he first began investigating Cannon in 2005.

Then, after excerpts of the tape recording were played, the following exchange took place:

> Q And you asked the defendant when was the last time that the defendant had . . . dealt in controlled substances with Hot Rod?
>
> A Yes, I did.
>
> Q With Rodney Smith
>
> A Yes.
>
> Q And the defendant indicated the last time that he had dealt with drugs . . . with Hot Rod was when?
>
> A **Two or three years from the date of that interview.**
>
> Q And the date of that interview was October 19th of 2008?
>
> A Yes, it was.
>
> Q So that would mean that the last time that the defendant and Hot Rod had done drugs according to the defendant was in either 2005 **or 2006.**
>
> A. That is correct.

(*Id.* at 156-58) (emphasis added). This time frame, including 2006, was reiterated two additional times during the testimony. (*Id.* at 163, 165). Thus, evidence from Cannon's statement introduced during the trial of the 2009 case was not strictly limited to the 2005 activities. On the contrary, the evidence

presented by the State in the 2009 case projected the conspiracy forward into 2006, just as the ongoing conspiracy investigation did project forward into 2006 and beyond. And in fact, on January 11, 2011, during the first trial, Agent Newport testified that "there was other evidence that supported Mr. Cannon dealing drugs." (*Id.* at 65).[8]

Moreover, the wiretap evidence at the center of the 2011 case infected the 2009 case in another meaningful manner. Recall that the Task Force intercepted calls between Cannon and Page in the Spring of 2008 involving a firearm transaction. This firearm transaction was charged in the 2011 case. However, recall also that this led to the arrest of Page in June of 2008, and then Page being used to make a controlled firearm transfer with Cannon in October of 2008, a transaction charged in the 2009 case, and to which Cannon eventually pled guilty (following acquittal on the cocaine conspiracy charge). Thus, there is more connective tissue between the 2009 and the 2011 cases: evidence obtained in April 2008 and used at trial in the 2011 case was parlayed into evidence obtained in October 2008 and used at trial in the 2009 case.

In addition, the State was also barred under principles of issue preclusion from introducing, in the 2011 case, any evidence that it introduced, or could have introduced, in the 2009 case. This is an issue brought into greater focus by the fact the State had no justification for holding back on the 2011 case evidence when it prosecuted Cannon in the 2009 case. In *Ashe v. Swenson*, 397 U.S. 436, (1970), the Supreme Court established that the doctrine of collateral estoppel, which is an aspect of the Double Jeopardy Clause, applies to multiple prosecutions. When applied, the doctrine precludes further prosecution where an issue of ultimate fact has been resolved in a defendant's favor by a valid and final judgment in a prior proceeding between the identical parties. *Id*. at 443.

As a result, it may afford double jeopardy protection against a second trial in a case where the "same evidence" definition of "same offense" would not. *See Brown v. Ohio*, 432 U.S. 161, 166 n. 6, (1977). Here, evidence from the two

[8] Defense counsel objected to the answer and it was sustained, but only after the cat was already out of the bag. (*Id.*).

cases were "intimately related, so that proof of one strongly implicate[d] the defendant in the other." *State v. Feela*, 101 Wis.2d 249, 263, 304 N.W.2d 152 (Ct. App. 1981). And this is a case where evidence of other crimes such as the 2009 events for which Cannon was acquitted could have been introduced to establish a pattern of behavior. *Id.*

Although first developed in civil litigation, collateral estoppel has been an established rule of federal criminal law for at least the last century. *U.S. v. Oppenheimer*, 242 U.S. 85 (1916). As a general rule, issue preclusion applies when each of the following criteria have been met:

> (1) the issue previously decided is identical with the one presented in the action in question;
>
> (2) the prior action has been finally adjudicated on the merits;
>
> (3) the party against whom the doctrine is invoked was a party or in privity with a party to the prior adjudication; and
>
> (4) the party against whom the doctrine is raised had a full and fair opportunity to litigate the issue in the prior action.

Peffer v. Bennett, 523 F.2d 1323, 1325 (10th Cir. 1975). When determining whether issue preclusion applies, a court must "examine the record of the prior proceeding, taking into account the pleadings, evidence, charge, and other relevant matter," and the inquiry "must be set in a practical frame and viewed with an eye to all the circumstances of the proceedings." *Ashe*, supra, at 444 (footnote omitted), *quoting Sealfon v. U.S.*, 332 U.S. 575, 579 (1948).

Here, the issue previously decided in the 2009 case - whether Cannon was involved in a cocaine conspiracy - is identical to the issue presented in this case. The prior action (the 2009 case) was finally adjudicated on the merits, and resulted in an acquittal. The party against whom Cannon invokes the doctrine - the State - was a party to the prior

adjudication. And the State had a full and fair opportunity to litigate the cocaine conspiracy issue in the prior action.

That full and fair opportunity included the freedom to present the evidence of the 2008 wiretaps. Nothing prevented the State from producing the evidence from the wiretaps, obtained three years earlier, during the trial in the first case. Nor did anything prevent the State, during that trial, from introducing the entirety of the statement Cannon gave police in 2008. Indeed, the admissibility of that statement had been addressed during the proceedings in the first case and the court ruled it was admissible in its totality.

In summary, the State's approach to this case ensured Cannon would be exposed to the very dangers the double jeopardy clause was designed to protect. Under *Blockburger, supra,* the state cannot successively prosecute a defendant for two offenses unless each offense necessarily requires proof of an element the other does not, nor can it relitigate fact issues already been adjudicated to the defendant's benefit in an earlier prosecution. *State v. Kurzawa*, 180 Wis.2d 502, 524, 509 N.W.2d 712 (1994). These protections ensure defendants will not be forced to unfairly "run the gauntlet" a second time for the same offense. *Id.*

Counts One of these two separate complaints were identical. This was a single crime divided into two separate charges in separate prosecutions. That decision guaranteed for Cannon "the very abuses the double jeopardy clause was designed to protect against." *Kurzawa*, 180 Wis.2d at 531 (concurring opinion). In this case, the State, at Cannon's expense, breathed real life into the inequity of such an approach:

> The government could bring a person to trial again and again for that same conduct, violating the principle of finality, subjecting him repeatedly to all the burdens of trial, rehearsing its prosecutions, and increasing the risk of erroneous conviction, all in contravention of the principles behind the protection from successive prosecution.

Id., *quoting U.S. v. Dixon*, 509 U.S. 688 (1993) (J. Souter, dissenting). The cocaine conspiracy conviction and resultant sentence should therefore be vacated.[9]

[9] It should also be noted that the 2009 criminal complaint and the 2008 wiretap applications have nearly identical probable cause determinations. Both use the Gerald McGhee statement from 2005 to Dean Newport. Both rely on the amount of drugs Cannon supposedly was selling to McGhee every month. Both state who the supplier was, but not who supplied him. And neither ever established when Cannon allegedly started dealing with Varela.

II. CANNON'S CONVICTION FOR FURNISHING A FIREARM TO AN UNAUTHORIZED PERSON MUST BE VACATED BECAUSE THE WIRETAP EVIDENCE AND DERIVATIVE EVIDENCE USED TO SECURE THAT CONVICTION WAS UNLAWFULLY OBTAINED.

A. The Plain Meaning Of Section 968.29 Required The Same Judge Who Approved The Original Wiretap Order To Approve Any Non-Enumerated Offense Intercepts, And She Did Not; But Even If An Authorized Deputy Chief Judge Could Do So, Judge Sankovitz Was Not An Authorized Deputy Chief Judge.

Cannon was charged with and convicted of a firearm transaction based on wiretap recordings that allegedly showed him arranging a firearm transaction that involved a felon. The wiretap evidence was used at trial and prejudiced Cannon. This is not a case where the intercepts were merely referenced during the trial, although they were, and often, (*see e.g.*, R243-65-71), which alone would be sufficient to establish the requisite prejudice. Here, the actual audio from the wiretaps were also introduced at trial. (*See*, *e.g.*, R245-146). The audio recordings were played for the jury. Further prejudicing Cannon was derivative evidence in the form of testimony from Page. (R246-12-26).

The original wiretap order was issued by Judge Kitty Brennan, and she authorized intercepts of communications pertaining to drug offenses. (R198). There is no dispute she was the Chief Judge when she did so and therefore statutorily authorized to so act pursuant to section 968.28, Stats. The court order purporting to authorize the additional intercept and use of non-authorized offenses, however, was issued by Judge Richard Sankovitz. (R201-6). The controlling statutory language for the issuance of that type of order can be found in Section 968.29(5), which states, in pertinent part:

> When an investigative or law enforcement officer, while engaged in intercepting wire, electronic or oral communications in the manner authorized, intercepts wire, electronic or oral

> communications relating to offenses other than those specified in the order of authorization or approval, the contents thereof, and evidence derived therefrom, may be disclosed or used as provided in subs. (1) and (2). The contents and any evidence derived therefrom may be used under sub. (3) **when authorized or approved by the judge who acted on the original application** where the judge finds on subsequent application, made as soon as practicable but no later than 48 hours, that the contents were otherwise intercepted in accordance with ss. 968.28 to 968.37 . . . .

Section 968.29(5) (Emphasis added). Likely aware of this limitation, the State drafted the order that would allow use of the non-authorized offenses for the chief judge's signature. Her name, however, was crossed off before it was signed by a different judge (i.e., Judge Sankovitz), who handwrote the word "acting" before the words "Chief Judge." (R201-6).

The unambiguous statutory language controls and therefore the "same" judge means the "same" judge. *State v. Szarkowitz*, 157 Wis.2d 740, 748, 460 N.W.2d 819 (Ct. App. 1990) ("where a statute is plain and unambiguous, the plain meaning must be given to the statute"). In the absence of ambiguity, courts do not look to extrinsic sources, except to bolster the plain meaning interpretation. *State ex rel. Kalal v. Circuit Court for Dane County*, 2004 WI 58, ¶¶ 45-48, 271 Wis.2d 633, 681 N.W.2d 110. The plain meaning of section 968.29(5) is that only "the judge who acted on the original application" can authorize disclosure and use of the contents of offenses other than those specified in the order of authorization or approval. That did not happen here.[10]

[10] The State argued the plain meaning of the statute "flies in the face of common sense" and would require the chief judge to "wait idly by in chambers," just in case an additional approval request might come through. (R214-2). Of course, the judge would neither need to be "idle" nor, in today's day and age, "in chambers," but in either event, the State should take up its complaint with the legislature which could have, but did not, use more expansive language. Moreover, the State's "absurd results" argument relied on a "canon of statutory construction" argument, *see e.g., State v. Quintana,* 2008 WI 33, ¶ 90, 308 Wis.2d 615, 748 N.W.2d 447,

The circuit court rejected this position, but did so without any statutory analysis. Instead, the court stated:

> The defendant insists that the statute requires the same judge to sign it, especially in this day and age, and that is that. This day and age might be a different story, but in 2008 when the additional approval was given by Judge Sankovitz, electronic filings and electronic document reviews were not utilized by the courts. The court rejects this claim and finds that the order signed by Judge Sankovitz as "Acting Chief Judge" for Judge Brennan is sufficient under circumstances where the chief judge is not available.

(R217-18).[11]

The circuit court also failed to address the language of SCR 70.26 brought to its attention:

> The chief judge of each judicial administrative district shall appoint a deputy chief judge to serve under the chief judge. The deputy chief judge shall serve at the pleasure of the chief judge. The deputy chief judge shall provide assistance to the chief judge in administrative areas requiring the participation by a judicial officer. The deputy chief judge's duties and authority are delegated by the chief judge and may include acting for the chief judge in his or her absence and representing the chief judge at official functions or in dealings with other

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which is unhelpful here because courts do not employ rules of statutory construction where the plain meaning of the statute is clear. *See, e.g., State Historical Society v. Village of Maple Bluff*, 112 Wis.2d 246, 252, 332 N.W.2d 792 (1983).

[11] Cannon presented this issue as ineffective assistance of counsel for failing to seek suppression of the firearm audio recordings. (R189-8). The circuit court, however, went straight to the merits of the legal issue and deemed the use properly authorized. Alternately, and as discussed more fully below, Cannon also presented the issue as a *Brady* violation, because the order signed by Judge Sankovitz was not turned over to defense counsel until after trial and during the post-conviction proceedings.

> agencies. The chief judge may appoint a special deputy chief judge in the event the chief judge and deputy chief judge are absent or unavailable for 10 working days or less. A special deputy chief judge has the same authority as the deputy chief judge under this rule.

As Cannon pointed out, nowhere does SCR 70.26 refer to an "*acting* chief judge," but instead, specifies a "*deputy* chief judge."

And as Cannon also pointed out, on April 4, 2008, the "deputy chief judge" was not Judge Sankovitz, but instead, Judge Jeffrey Kremers or Judge Mel Flanagan. (R236-2-3). Indeed, there is nothing in the record to suggest that any authority had ever been delegated to Judge Sankovitz. The absence of any proof of such authority in the record is of critical importance where the Judge Sankovitz order did not surface until long after the trial, and the consequent implications of such under *Brady v. Maryland*, 373 U.S. 83 (1963). Given that the *Brady* issue was the reason why the circuit court ordered supplemental briefing on this issue, (R211), the State's silence on the *Brady* problem during the supplemental briefing constituted a concession of the role and effect of *Brady* on this issue.[12]

[12] Not only did the State not provide any authority for an "acting chief judge" to have signed the order in question, it provided *nothing* to suggest Judge Brennan had ever transferred *any* authority to Judge Sankovitz. Moreover, even were it proper to read section 968.29, Stats., in conjunction with SCR 70.26, the former would have to be strictly construed because the investigative mechanism involved threatens the constitutional right to privacy. *State v. House*, 2007 WI 79, ¶ 15, 302 Wis.2d 1, 734 N.W.2d 140. *See also State v. Guarnero*, 2015 WI 72, ¶ 26, 363 Wis.2d 857, 867 N.W.2d 400 ("rule of lenity provides that when doubt exists as to the meaning of a criminal statute, "a court should apply the rule of lenity and interpret the statute in favor of the accused").

B. While The State Belatedly Produced An Order Signed By Judge Sankovitz For Use Of The First Intercepted Recording, There Is Nothing In The Record Authorizing The Use Of Subsequent Recording Also Used During Cannon's Trial.

The Newport affidavit and consequent order issued by Judge Sankovitz pertain only to intercepted calls that occurred on April 3, 2008. The order authorizing use of the April 3rd intercepts was signed by Judge Sankovitz on April 4, 2008. At trial, however, the State also used calls about firearms intercepted on April 4th and April 5th. (R245-103-06, 159-162). The State has never produced any order authorizing the use of any evidence of calls about firearms intercepted on April 4th or April 5th. Section 968.29, Stats. does not allow, and Judge Sankovitz's order did not grant, *carte blanche* to continue recording and using intercepts of otherwise unauthorized intercepts with impunity.

The record reveals the April 4, 2008, calls were in the late afternoon, which the record also establishes was *after* Judge Sankovitz signed the order. (R245-161-63 and R201). Even assuming, *arguendo,* that the Judge Sankovitz order was valid, that order did not constitute a blank check for law enforcement to continue intercepting and using all future intercepts of conversations involving firearms. And yet, not only did the State *use* those conversations during Cannon's trial, it also *used* them derivatively to arrest Page and turn him into a confidential informant against Cannon, and later, into a witness against Cannon during the case *sub judice*, on the firearm charge.[13]

[13] After using the intercepts to arrest Page, police orchestrated a controlled transfer of a gun from Cannon to Page, and then parlayed that into a firearm charge in Cannon's 2009 case, to which Cannon ultimately pled guilty, after being acquitted on the cocaine conspiracy charge. They then used the controlled transfer as a basis for arresting Cannon and then taking his statement which, as previously noted, was used in *both* trials, to varying degrees. Also as noted earlier, this further served to establish the single, ongoing investigation into an alleged cocaine conspiracy, and further enmeshed the 2009 and the 2011 cases.

C. The Affidavit Submitted To Support A Request To Use The Wiretap Intercept Of A Non-Authorized. Non-Enumerated Offense Involving A Firearm Did Not Establish Probable Cause To Believe An Offense Had Occurred.

On April 3, 2008, while monitoring Cannon's phone calls pursuant to the wiretap for enumerated offenses, law enforcement intercepted communications believed to involve a non-enumerated and non-authorized offense regarding a firearm. The purposes for which a court may authorize a wiretap are limited in scope to certain types of offenses. Section 968.28, Stats. At this point, it need only be noted that dealing in controlled substances or controlled substance analogs falls *within* the scope of crimes for which a wiretap may be authorized, while firearms offenses do not. *Id.*

When law enforcement captures conversations about non-authorized offenses while listening for authorized offenses, the captured contents and evidence derived therefrom may be used only when authorized or approved by the judge who acted on the original application. Section 968.29(5), Stats. Accordingly, Agent Newport executed an affidavit in an effort to establish probable cause to believe Cannon had committed a non-enumerated offense. (R201). The State conceded that probable cause is the touchstone for the issuance of wiretap orders. (R214-6), *citing* section 968.30(3), Stats.

The offense allegedly committed by Cannon, according to the affidavit, was unclear, but appeared to be some species of a violation of section 941.29, Stats., which states "[a] person who possesses a firearm is guilty of a Class G felony if . . . [t]he person has been convicted of a felony in this state." Section 941.29(1m)(a). Against this backdrop, the affidavit averred:

> That a series of phone calls were made and was initiated by the first call that was intercepted on 04/03/2008 at approximately 4:04 p.m. from the cellular phone number of (414) 397-7022; that the caller was a person named "Jimmy" who asked Billy Cannon for a "cannon" [powerful

> firearm]; that Jimmy explained to Cannon that his (Jimmy's] mother's house was shot up by an individual who had just phoned Jimmy stating that it wasn't over yet; that affiant knows Billy Cannon to be a convicted felon and is currently on federal probation supervision for a felony tax evasion charge; That in subsequent phone calls that occurred on both intercepted phones, having the numbers 414-235-6667 and 414-292-8636, it is evidence (sic) from the conversation that Cannon had constructive possession of firearms through his request to multiple convicted felon by the name Carl Page; that Carl Page did verbally agree to assist Cannon is (sic) Cannon's request for gun(s) for Jimmy; that Carl Page provided his home address of 3712 North 17 Street in the City of Milwaukee, Wisconsin and advised Cannon that he has two (2) guns for him.

(R201-4-5). That Cannon was a felon is not disputed, but conspicuously absent from the affidavit was any evidence Cannon ever possessed a gun, or that Jimmy was a convicted felon, or most importantly, that Cannon knew "Jimmy" or "Page" were convicted felons. In other words, the Newport Affidavit did not set forth probable cause for the order Judge Sankovitz purported to issue.

The affidavit tried to compensate for this deficiency, not with facts, but instead, with a legal conclusion, claiming Cannon was in "constructive" possession of a firearm. The affidavit did a poor job of explaining how affiant reached that legal conclusion. In a case with a fact pattern typical of constructive possession cases, the Seventh Circuit examined whether constructive possession of a firearm existed where the defendant had been driving a car (and conducting drug transactions from the driver's window) in which a firearm was found in a storage compartment in the lower portion of the driver's door. *U.S. v. Morris*, 576 F.3d 661, 664-65 (7th Cir. 2009). In examining the constructive possession issue, *Morris* noted:

> Proximity to the item, presence on the property where the item is located, or association with a

> person in actual possession of the item, without more, is not enough to support a finding of constructive possession.

Id. at 666. Instead, the individual must exercise dominion and control over the firearm. *Id*.

It is enough to note that the Newport Affidavit contained nothing to suggest Cannon ever exercised "dominion and control" over any firearm, or that he had "both the power and the intention" to do so. *U.S. v. Griffin*, 684 F.3d 691, 695 (7th Cir. 2012). The affidavit did not aver, because it would not have been true, that Cannon *ordered* Page to give a firearm to Jimmy. On the contrary, it merely alleged Cannon "requested" (the word is used twice) of Page whether he could make a gun available for Jimmy. In other words, Cannon merely "requested" that one individual lend a firearm to another. It was never alleged that Cannon instructed or ordered the person to do so. Rather than address these controlling factual issues, the State got lost in discussing how Agent Newport referenced different "theories of liability." (R214-4).[14]

The critical point is that nothing in the affidavit - not even a bald allegation - established the requisite knowledge by Cannon that a firearm was going to be in the possession of a felon. Indeed, the claim was that the firearm would be furnished to Jimmy Hayes, but there is absolutely nothing in the affidavit to suggest Jimmy was a felon, much less than Cannon *knew* Jimmy was a felon. More important still is that **Jimmy Hayes** - the alleged intended recipient of the firearm - **was *not* a felon**. And if Page was a felon, and already possessed a firearm, Cannon did nothing to aid that possession. In short, the affidavit was bereft of any claim that Cannon knew either of the individuals were felons and the most relevant of them was *not* a felon, a fact conveniently omitted from the affidavit.[15]

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[14] The frailty of the State's position was betrayed by its response in the circuit court, where it endeavored to obfuscate, by wandering into analyses of straw purchases of firearms (section 941.2905, Stats.), *attempted* possessions of a firearm, and the non-determinative nature of firearm *ownership,* all of which had nothing to do with the issue. (R214- 4).

[15] See *State v. Jimmy Hayes*, Milwaukee Co. Case No. 2008 CM 6533 where on November 5, 2008, Hayes was charged with and convicted of

The State conceded the affidavit alleged Cannon did nothing more than *ask* one individual to provide a firearm to another individual, without alleging that Cannon knew either of the individuals were felons. (R214- 5). Later, however, the State cleverly shifted to using words like "directing," "ordering up," "controlling," and "command[ing]" to create the specter of the requisite element wholly missing from the affidavit. (*Id.*). Notably, the State cited no legal authority to support the idea that the facts alleged by the affidavit made out probable cause for constructive possession. based on nothing more than an association with a person in actual possession of the item.

Although the State conceded that probable cause is the touchstone for the issuance of wiretap orders, it went on to argue that courts can authorize the use of any evidence intercepted for any non-enumerated offenses regardless of whether there is probable cause to believe a non-enumerated offense has occurred. (R214-6). The State tried to justify this under the plain view doctrine. The idea that words spoken by a defendant during a wiretap are in plain view is disingenuous. The plain view doctrine is grounded on the idea that a person has no reasonable expectation of privacy in an item that is in plain view. *State v. Guy*, 172 Wis.2d 86, 101, 492 N.W.2d 311 (1992), *citing Horton v. California*, 496 U.S. 128, 133 (1990).

The idea that an individual has no reasonable expectation of privacy in telephone calls that he does not even know are being recorded makes no sense, and illustrates why trying to apply the plain view doctrine in such a scenario is akin to trying to push a square peg into a round hole. That a wiretap has been authorized does not mean the reasonable expectation of privacy has evaporated. It only means that police are authorized to act, the reasonable expectation notwithstanding.

Moreover, the State's "plain view" analysis fails because in its effort to use the doctrine to discount the

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Carrying a Concealed Weapon. A review of CCAP will review that prior to this offense, Hayes (DOB: 7-9-84) had never been convicted of a felony. See *State v. Jimmy Hayes,* Milwaukee Co. Case No. 2008 CM 6533 where on November 5, 2008, Hayes was charged with and convicted of Carrying a Concealed Weapon. A review of CCAP will review that prior to this offense, Hayes (DOB: 7-9-84) had never been convicted of a felony.

importance of probable cause, the State only reaffirms the preeminence of probable cause:

> These elements from *Horton* correspond to the criteria we have previously required for the plain-view doctrine to apply: (1) the evidence must be in plain view; (2) the officer must have a prior justification for being in the position from which she discovers the evidence in "plain view"; and (3) the evidence seized "in itself or in itself with facts known to the officer at the time of the seizure, [must provide] **probable cause to believe there is a connection between the evidence and criminal activity.**

Guy, 172 Wis.2d at 101-02. Thus, for seizure (and use) of the wiretap intercepts to be lawful, there must be probable cause to believe there is a connection between the intercepts and criminal activity. As Cannon has demonstrated, probable cause on this front was lacking.[16]

As for the good faith exception to the warrant requirement, the State did not cite any authority applying the exception in the context of the wiretap statute, (R214-9-10), and for good reason. The good faith exception is not favored in the wiretap context where Congress intended 'to make doubly sure that the statutory authority be used with restraint." *People v. Allard*, 99 N.E.3d 124, 135 (Ill. App. 2018). "The legislature's exclusion of unlawful wiretapping from the good-faith exception reflects the intent to specifically regulate this intrusive investigative technique." *Id.* at 134. *See also U.S. v. Lomeli*, 676 F.3d 734 (8th Cir. 2012).

[16]The State was therefore wrong when it argued that the probable cause inquiry should focus on the original wiretap application, (R214-7-8), because the probable cause requirement is built into the plain view doctrine. And even were the State correct, it would only reaffirm the reasons why the legislature has seen fit to require the same judge who issued the original wiretap authorization to be the only judge who can later authorize use of non-enumerated-offense intercepts. And here, again, one can see the fundamental problem with trying to graft the plain view doctrine onto wiretap authorizations/investigations: what might allegedly be justified as being in plain view today does not magically expand to also include what might be in plain view tomorrow, or the day after, or the day after that, etc.

D. To The Extent The Statute Authorizes The Use Of Non-Authorized Offenses, Such Must Still Be An Enumerated Offense.

The purposes for which courts may authorize wiretaps are limited in scope:

> The authorization shall be permitted only if the interception may provide or has provided evidence of the commission of the offense of homicide, felony murder, kidnapping, commercial gambling, bribery, extortion, dealing in controlled substances or controlled substance analogs, a computer crime that is a felony under s. 943.70, sexual exploitation of a child under s. 948.05, trafficking of a child under s. 948.051, child enticement under s. 948.07, use of a computer to facilitate a child sex crime under s. 948.075, or soliciting a child for prostitution under s. 948.08, or any conspiracy to commit any of the foregoing offenses.

Section 968.28, Stats. Conspicuous by its absence is any reference to gun crimes and indeed, Cannon's wiretap order did not authorize interception of any firearm communications.

Nor could the interception of Cannon's firearm communications be justified under some theory that drugs and guns go hand-in-hand. Such a theory would have run square into an insurmountable barrier, both factually and legally. Factually, the firearm transaction was a discreet matter completely divorced from the drug conspiracy. The firearm allegation did not claim Cannon ever actually possessed a firearm, but instead, that he facilitated the provision of such to a felon. Nowhere was it ever alleged that Cannon's involvement with firearms had anything to do with advancing the drug conspiracy.

Even if the State could connect, factually, the firearm and drug charges, that would not bring the firearm wiretaps within the purview of what could lawfully be intercepted. *State v. House*, 2007 WI 79, 302 Wis.2d 1, 734 N.W.2d 140. *House*,

like this case, involved an extended investigation of a drug-trafficking operation focused on Caraballo and Rivera. It further involved a court order authorizing interception of communications from Caraballo's phone, arising from a HIDTA investigation. The affidavit supporting the application described a drug-trafficking enterprise involving at least a dozen individuals and multiple businesses. It described HIDTA's use of CIs, controlled purchases, physical surveillance, a John Doe investigation, garbage searches, and traces on phone numbers associated with Caraballo.

The wiretap application in *House* asserted probable cause the subjects had committed, were committing, and would continue to commit violations of several state and federal drug trafficking statutes. The application also stated the defendants had violated state conspiracy and racketeering statutes, and averred probable cause for violations of federal racketeering and money laundering laws. The court approved a 30-day wiretap, incorporating the language of the application to approve wiretapping for all the crimes set forth therein. The State later filed a complaint charging over 30 people with drug trafficking and drug conspiracy offenses. The complaint did *not* include any charges for money laundering, racketeering, or continuing criminal enterprise. House was charged with two counts of conspiracy to deliver cocaine. The complaint described calls House made to Caraballo requesting cocaine or arranging to receive cocaine from Caraballo. House moved to suppress wiretap evidence arguing, *inter alia,* the wiretap order was unlawful because it authorized wiretaps for crimes not enumerated in section 968.28. The court denied the motion.

The Wisconsin Supreme Court affirmed and, after reviewing the language of section 968.28, Stats., rejected the State's argument that circuit courts may authorize wiretaps for those crimes insofar as they constitute "dealing in controlled substances," which is an enumerated offense under § 968.28. *House* noted that not only would such an interpretation be inconsistent with the plain words of the statute, it would also contradict the legislative intent that § 968.28 be a restrictive statute. *House* at ¶ 13. *House* went on to review the legislative history of the federal wiretap statute (after which Wisconsin's was patterned), noting its limited reach (given serious threats

to constitutionally protected privacy rights) and thus, the need to strictly construe the statute.

House next examined the State's contention that dealing controlled substances could provide a foundation for racketeering or continuing criminal enterprise charges and that money laundering may be an aspect of drug dealing. *House* did not disagree with the State's view of the nature of drug dealing, but noted those offenses could also be based on crimes not enumerated in section 968.28. Thus, *House* reasoned, including them in an order authorizing a wiretap would effectively allow wiretaps for other crimes that would support a racketeering, continuing criminal enterprise, or money laundering charge. *House* affirmed that money laundering, racketeering, and continuing criminal enterprise are not specifically enumerated offenses, and that those offenses are not included within "dealing in controlled substances," an enumerated offense. Thus, an order authorizing a wiretap for gun charges would similarly be deemed unlawful.

House stands for the proposition that the intercepted firearms wiretaps in this case were unlawful, and could not be justified under the theory that drugs and firearms go hand-in-hand. But unlike *House*, where suppression was not an appropriate remedy, suppression was mandated in this case, because intercepted communications regarding non-enumerated offenses (i.e., gun charges) *were* intercepted, non-enumerated offenses *were* charged, and the communications *were* used in prosecuting Cannon. They were introduced at trial, played for the jury, and the referenced liberally during, and as a focal point of, the State's closing argument. (*See*, e.g., R248-52-55) ("Here's how the gun transfer went, as proven by the intercepted phone calls" and then proceeding to describe each of the calls seriatim). In other words, while Wisconsin statutes allow the use of intercepts about non-authorized offenses, such is true only if the offenses are statutorily enumerated offenses. Under no circumstances can non-enumerated offenses referenced during a wiretap be used.

Conclusion and Relief Requested

The double jeopardy violation in this case demands that this Court vacate Cannon's cocaine conspiracy conviction and remand with directions that said charge be dismissed. In the event this Court disagrees with that proposition, this Court should nevertheless vacate the cocaine conspiracy conviction, along with the firearm conviction, and remand for a new trial on both counts, with instructions that with regard to the latter offense, the State is barred from using the firearm wiretap evidence, and any other evidence derivative of such. Cannon is entitled to a new trial on all the charges that led to convictions during the same trial at which this evidence was, but should not have been, admitted. Indeed, one of the co-defendants for the gun charges was also a co-defendant in the THC conspiracy charge (Turnage). Cannon, of course, was a co-defendant with these individuals in all of the charges. Moreover, there is a frequently noted, well-known connection between guns and drugs: "weapons are tools of the trade of drug dealers." *U.S. v. Cooper*, 19 F.3d 1154, 1163 (7th Cir. 1994). Wrongfully admitted evidence of guns thus compromised Cannon's right to a fair trial on the cocaine conspiracy charge.

Dated this 4th day of July, 2020.

/s/ Rex Anderegg
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CERTIFICATION

I certify that this brief conforms to the rules contained in §809.19(8)(b) and (c) for a brief produced using a proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, minimum 11 point for quotes and footnotes, leading of minimum 2 points, maximum of 60 characters per full line of body text. The length of this brief is 11,000 words, as counted by Microsoft Office 365.

Dated this 4th day of July, 2020.

/s/ Rex Anderegg
REX R. ANDEREGG

CERTIFICATION OF APPENDIX

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

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

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, and a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated this 4th day of July, 2020.

/s/ Rex Anderegg
REX R. ANDEREGG

CERTIFICATE OF COMPLIANCE WITH RULE 809.19 (12)

I hereby certify that I have submitted an electronic copy of the respondent's brief-in-chief and appendix, if available, in *State of Wisconsin v. Billy Joe Cannon,* 2019 AP 2296-CR, which complies with the requirements of s. 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 4th day of July, 2020.

/s/ Rex Anderegg
Rex Anderegg