STATE OF WISCONSIN

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

DISTRICT I

Case No. 2019AP2296-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

BILLY JOE CANNON,

Defendant-Appellant.

ON APPEAL FROM A JUDGMENT OF CONVICTION AND AN ORDER DENYING POSTCONVICTION RELIEF, ENTERED IN MILWAUKEE COUNTY CIRCUIT COURT, THE HONORABLE STEPHANIE ROTHSTEIN, PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

JOSHUA L. KAUL
Attorney General of Wisconsin

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

Attorneys for Plaintiff-Respondent

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

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ISSUES PRESENTED

1. Was a conspiracy to deliver cocaine in March 2008 the "same offense" for double jeopardy purposes as a conspiracy to deliver cocaine in November 2005?

After a jury in 2011 acquitted Defendant-Appellant Billy Joe Cannon of conspiracy to deliver cocaine on November 10, 2005, the State charged Cannon with a separate conspiracy to deliver cocaine in March 2008. The trial court rejected Cannon's double jeopardy challenge to the new charge and a jury in 2014 found him guilty of the 2008 conspiracy.

This Court should affirm because the conspiracy to deliver cocaine in 2008 was not the same in fact as the conspiracy to deliver cocaine in 2005.

2. Has Cannon proven that his trial attorney was ineffective for not moving to suppress evidence relevant to the firearm charge for alleged technical defects in the supplemental warrant application under Wis. Stat. § 968.29(5), allowing police to use evidence of the firearm transaction they intercepted while lawfully executing the initial wiretap warrant issued under Wis. Stat. § 968.28?

The trial court held that Cannon failed to prove his attorney was ineffective because there was no basis for suppressing any direct or derivative evidence of the firearm transaction intercepted while police were lawfully monitoring his telephone on April 3, 2008, pursuant to the initial warrant authorizing them to monitor his calls for evidence of drug dealing.

This Court should affirm because Cannon failed to prove that there was any violation of Wis. Stat. § 968.29(5) or, if there were technical defects, that there was any basis for suppressing evidence of the firearm transaction.

POSITION ON ORAL ARGUMENT AND PUBLICATION

The State does not request oral argument or publication. Despite the two trials and the voluminous record, the issues are relatively straightforward and involve the application of established principles of law to the facts.

STATEMENT OF THE CASE

The State charged Cannon in case no. 09-CF-1337 with conspiracy to deliver cocaine in an amount greater than 40 grams on November 10, 2005. It also charged him in that case with one count of possession of a firearm by a convicted felon and one count of furnishing a firearm to a convicted felon, both arising out of Cannon's involvement in a firearm transaction on October 16, 2008. (R. 35:1; 36:3; 253:2.) The conspiracy charge was eventually severed from the two firearms charges for trial. (R. 36:3.)

Cannon went to trial on the November 10, 2005, conspiracy charge on January 10–12, 2011. (R. 256; 257; 258.) The jury found him not guilty of that conspiracy. (R. 258:87.) On March 23, 2011, Cannon pled guilty to the second count in case no. 09-CF-1337, possession of a firearm by a convicted felon on October 16, 2008. (R. 222.) In exchange for his plea to that charge, the State agreed to dismiss but read into the record the third count, furnishing a firearm to a convicted felon on that same date. (R. 35:2; 222:2, 7–9.) The trial court accepted the plea and found Cannon guilty of possession of a firearm by a convicted felon on October 16, 2008. (R. 222:13.)

On February 24, 2011, six weeks after Cannon's acquittal of the 2005 conspiracy charge, the State filed new charges against Cannon and eight others. (R. 7; 36:4.) The State charged Cannon with one count of conspiracy to deliver cocaine in an amount greater than 40 grams "between on or about March 4, 2008, and on or about March 24, 2008"

(R. 12:1); one count of conspiracy to possess THC in an amount greater than 10,000 grams "between on or about February 2008 and on or about October 2008" (R. 12:2); and one count of knowingly furnishing a firearm to a convicted felon "on or about Thursday, April 3, 2008," as a party to the crime (R. 12:2).

Cannon was tried by a jury on those three new charges on February 10–14, 2014. (R. 242–48.) Before trial, Cannon filed motions to suppress evidence obtained in telephone wiretaps (R. 24; 25; 31; 98); to dismiss for vindictive prosecution after his conspiracy acquittal (R. 19); and to dismiss the new charges as violative of Cannon's right to be free from double jeopardy (R. 27; 28). The trial court rejected the claim of prosecutorial vindictiveness (R. 229:77–83); the double jeopardy challenges (R. 230:12–24; 237:75); Cannon's challenge to the issuance of a GPS tracking warrant (R. 231:36–47); Cannon's challenge to the admissibility of his confession (R. 237:70–71); and his various challenges to the wiretap evidence as it related to the conspiracy charge (R. 233:8–19; 237:72–75). Cannon did not move to suppress evidence supporting the firearm count as having been obtained in violation of Wis. Stat. § 968.29(5) or on any other ground.

The State proved at trial that Cannon conspired to deliver a kilogram of cocaine beginning around March 4, 2008, ending around March 24, 2008, from Eraclio Varela through Cannon to his customer, Damone Powell, at Cannon's house on Nash Street in Milwaukee. (R. 242:165–173; 243:33–34, 37–53; 244:51–88, 91-109; 245:43, 57–60; 247:52; 248:29–30, 36-38, 41–44, 49–50.) The State also proved that Cannon arranged the transfer of a firearm to a Jimmy Hayes through Hayes's father and Cannon's lifelong friend, Anthony Turnage, and Carl Page, on April 3, 2008. (R. 243:65-72; 245:148-152, 154-161; 246:15-25.) Both Turnage and Page were convicted felons at the time. (R. 245:162-36; 246:25-26.)

Cannon admitted in his statements to police after his arrest on October 19 and 22, 2008, and he again admitted on the witness stand at trial, that he knew that Turnage and Page were both convicted felons when he orchestrated the transfer of the firearm through them to Jimmy Hayes. (R. 246:68-69; 247:27, 35, 50–51.)

The jury found Cannon guilty of all three counts. (R. 132–34; 248:87.) (Cannon does not challenge his conviction of conspiracy to deliver THC).

On April 25, 2019, Cannon filed a motion for a new trial. (R. 178.) The State filed responses in opposition and exhibits in support thereof. (R. 197–204; 214.) The court ordered that all documents be filed under seal. (R. 205–06.) The trial court denied the motion without an evidentiary hearing in a decision and order issued on November 26, 2019. (R. 217, A-App. B.) The court rejected Cannon's challenge to the effectiveness of trial counsel for not moving to suppress evidence of the firearm transaction (R. 217:18–20); his renewed prosecutorial vindictiveness challenge (R. 227:11); and his renewed double jeopardy challenge (R. 217:11–17). Canon now appeals from the judgment and order. (R. 218.)

The State will discuss additional relevant facts in the Argument to follow.

STANDARD OF REVIEW

The issue whether there has been a double jeopardy violation is one of law, reviewable de novo. *State v. Steinhardt*, 2017 WI 62, ¶ 11, 375 Wis. 2d 712, 896 N.W.2d 700.

On review of an ineffective assistance of counsel challenge, this Court is presented with a mixed question of fact and law. The trial court's findings of historical fact and credibility determinations will not be disturbed unless they are clearly erroneous. *See* Wis. Stat. § 805.17(2). The ultimate determinations based upon those findings of fact and

credibility determinations—whether counsel's performance was deficient and prejudicial—are questions of law subject to independent review in this Court. *State v. Trawitzki*, 2001 WI 77, ¶ 19, 244 Wis. 2d 523, 628 N.W.2d 801.

The trial court may in its discretion summarily deny a postconviction motion without an evidentiary hearing if the motion fails to allege sufficient facts, presents only conclusory allegations, or the record conclusively shows that the defendant is not entitled to relief. Its decision is reviewed for an erroneous exercise of discretion. *State v. Balliette*, 2011 WI 79, ¶¶ 50, 56–59, 336 Wis. 2d 358, 805 N.W.2d 334; *State v. Bentley*, 201 Wis. 2d 303, 309–11, 548 N.W.2d 50 (1996).

ARGUMENT

I. There was no double jeopardy violation because the conspiracy to deliver cocaine in March 2008 was not the same offense as the alleged conspiracy to deliver cocaine on November 10, 2005.

Cannon maintains that the State violated his right to be free from double jeopardy when it charged him with and tried him for a March 2008 conspiracy to deliver cocaine after he was acquitted of participating in a November 2005 conspiracy to deliver cocaine. Cannon apparently believes that once he was acquitted of the 2005 conspiracy to deliver cocaine, he could never again be prosecuted for conspiracy to deliver cocaine no matter how many years later, how different the circumstances, or how strong the State's proof of the new conspiracy.

Cannon's argument is utterly meritless because the 2005 and 2008 conspiracies were obviously not the same in fact, committed as they were nearly two-and-a-half years apart. Cannon's acquittal of the 2005 conspiracy did not give him a free pass to commit drug conspiracies for the rest of his

life including the one in 2008 that the State proved he committed beyond a reasonable doubt.

A. There is no double jeopardy violation when multiple charges are based on different facts.

The Double Jeopardy Clause proscribes putting a defendant twice in jeopardy "for the same offence." U.S. Const. amend. V. It protects a defendant from, pertinent here, "a second prosecution for the same offense after acquittal." *State v. Schultz*, 2020 WI 24, ¶ 21, 390 Wis. 2d 570, 939 N.W.2d 519 (citation omitted).

A double jeopardy challenge based on a claim that the defendant is being twice prosecuted for the same offense is analyzed under the two-part test adopted by the Court in *Blockburger v. United States*, 284 U.S. 299 (1932). "The *Blockburger* test is used . . . to determine 'sameness' for situations involving successive prosecutions." *State v. Davison*, 2003 WI 89, ¶ 24 n.11, 263 Wis. 2d 145, 666 N.W.2d 1. The first part requires the court to determine whether the two offenses are the same in law and in fact. *State v. Derango*, 2000 WI 89, ¶ 29, 236 Wis. 2d 721, 613 N.W.2d 833. If they are, then the charges are multiplicitous. *Id.* Wisconsin has adopted the *Blockburger* test. *See State v. Vasso*, 218 Wis. 2d 330, 335, 579 N.W.2d 35 (1998) ("Wisconsin Stat. § 939.71 substantially enacts the *Blockburger* test for determining whether the two offenses are the 'same offense' for double jeopardy purposes."); *id*. at 337 (like section 939.71, section 939.66(1) "codifies the *Blockburger* same-elements test").

Under the *Blockburger* test, "two prosecutions are for the 'same offense,' and therefore violate the Double Jeopardy Clause, when the offenses in both prosecutions are 'identical in the law and in fact.'" *Schultz*, 390 Wis. 2d 570, ¶ 22 (citation omitted). Here, the two conspiracy charges are identical in

law, so the dispositive issue is whether they are identical in fact.

"Offenses are not identical in fact when 'a conviction for each offense requires proof of an additional fact that conviction for the other offenses does not.'" *Schultz*, 390 Wis. 2d 570, ¶ 22 (citation omitted). "Offenses are also not identical in fact if they are different in nature or separated in time." *Id. See Steinhardt*, 375 Wis. 2d 712, ¶ 19; *State v. Nommensen*, 2007 WI App 224, ¶ 8, 305 Wis. 2d 695, 741 N.W.2d 481 (same). They are significantly different in nature if each requires a "new volitional departure in the defendant's course of conduct." *State v. Anderson*, 219 Wis. 2d 739, 750, 580 N.W.2d 329 (1998) (citation omitted).

B. Wisconsin law permits separate prosecutions for separate conspiracies even when they are part of the same course of conduct.

"Unlike the federal conspiracy statute, Wis. Stat. § 939.31 permits the charging of multiple offenses." *State v. Jackson*, 2004 WI App 190, ¶ 6, 276 Wis. 2d 697, 688 N.W.2d 688.

In both prosecutions, the State charged Cannon with the inchoate crime of conspiracy under Wis. Stat. § 939.31. The elements are: "(1) an agreement between the defendant and at least one other person to commit *a crime*; (2) intent on the part of the conspirators to commit *the crime*; and (3) an act performed by one of the conspirators in furtherance of the conspiracy." *State v. West*, 214 Wis. 2d 468, 476, 571 N.W.2d 196 (Ct. App. 1997) (emphasis added); *see* Wis. JI–Criminal 570 (2001).

Wisconsin's conspiracy statute incorporates into its elements each underlying criminal offense that is the object of the conspiracy ("the crime"). *Jackson*, 276 Wis. 2d 697, ¶ 8. Here, the object of the 2005 and 2008 conspiracies was the

delivery of more than 40 grams of cocaine in violation of Wis. Stat. § 961.41(1). (R. 12.)

When it enacted section 939.31, the Legislature expressly acknowledged that it was enacting a change from the common law which did not require proof of any specific crime contemplated by the conspiracy. 5 Wis. Legislative Council, *Judiciary Committee Report on the Criminal Code*, § 339.31, Comment at 27 (1953).

As with its elements, the penalty structure for section 939.31 is inextricably tied to the crime or crimes contemplated by the conspiracy. *Jackson*, 276 Wis. 2d 697, ¶ 10. Just as one cannot prove conspiracy under section 939.31 without proving what the intended crime was, one cannot sentence under section 939.31 without proving what the intended crime was. *Id.* ¶¶ 8–10.

It stands to reason that if the objects of the conspiracy are separate crimes at separate times and places, with distinct penalties, the State is free to charge and punish the co-conspirators for every one of those crimes the State can prove they all agreed to commit. If the State fails to prove one conspiracy, it remains free (subject to the statute of limitations) to prosecute the conspirators for their separate agreements to commit other intended crimes.

Cannon asks this Court to ignore the plain language of section 939.31, and to follow case law interpreting the federal conspiracy statute, 18 U.S.C. § 1871, instead. (Cannon's Br. 11–15.) He ignores the materially different language and focus of Wisconsin's statute and the case law interpreting it. Unlike the common law or the federal conspiracy statute, section 939.31 imposes the same penalty as that for the completed crime(s) (except that crimes for which the penalty is life imprisonment are reduced to Class B felonies). *Jackson*, 276 Wis. 2d 697, ¶ 10. The focus of the federal statute, on the other hand, is not on any specific crime but on the agreement

itself to commit "any offense" against the United States or "to defraud the United States." Its penalty of "not more than five years" is completely detached from the penalty for the intended underlying crime or crimes. A.L.I., *Model Penal Code and Commentaries*, Part I, § 5.03, Comment at 395 (1985) (hereinafter *Model Penal Code*); *see also Jackson*, 276 Wis. 2d 697, ¶ 10 (contrasting Wis. Stat. § 939.31 with 18 U.S.C. § 371). This also distinguishes section 939.31 from the conspiracy statute adopted by the *Model Penal Code*, § 5.03. The conspiracy statute in the *Model Penal Code* contains a specific provision that one who conspires to commit more than one crime is guilty of only one conspiracy if the multiple crimes are the objects of the agreement or of a continuous conspiratorial relationship. *Model Penal Code*, § 5.03(3). *See State v. Begin*, 652 A.2d 102, 107 (Me. 1995); *Model Penal Code*, Comment at 438–39. There is no such provision in section 939.31. *See Model Penal Code*, Comment at 439 n.185.

The federal statute does not require proof of a specific intent beyond the general intent to enter into a conspiracy. The Wisconsin statute requires not only proof of a general intent to enter into an agreement, but also a specific intent to commit a specific crime. All conspirators must be in agreement as to the same specific crime. *State v. Smith*, 189 Wis. 2d 496, 498–99, 501–02, 525 N.W.2d 264 (1995).

The State is allowed to charge multiple conspiracies under section 939.31 if it can prove that the conspirators intended to commit multiple crimes. *Jackson*, 276 Wis. 2d 697, ¶¶ 6, 9. Not only must the State prove an agreement among the co-conspirators, it also must prove that they all had the same criminal objectives. *State v. Cavallari*, 214 Wis. 2d 42, 49–50, 52–54, 571 N.W.2d 176 (Ct. App. 1997); *see also State v. Moffett*, 2000 WI 130, ¶¶ 19–21, 239 Wis. 2d 629, 619 N.W.2d 918 (holding that one can be charged with both inchoate conspiracy under Wis. Stat. § 939.31, and party to

the crime of an attempted first-degree intentional homicide under Wis. Stat. § 939.05, even though the intended murder was not carried out).

Cannon relies primarily on *United States v. Castro*, 629 F.2d 456 (7th Cir. 1980), in arguing for the federal approach. (Cannon's Br. 11–13.) *Castro* is inapposite here because it interpreted the materially different federal statute. *See Jackson*, 276 Wis. 2d 697, ¶¶ 6,10.

Underlying Cannon's argument is his apparent belief that there cannot be separate convictions and sentences under the same conspiracy statute once he is either convicted or acquitted of one conspiracy that occurred during an ongoing course of criminal activity that also involved other conspiracies. That is not the law. *See State v. Koller*, 2001 WI App 253, ¶ 31, 248 Wis. 2d 259, 635 N.W.2d 838. Even under the federal statute, a defendant may be charged with multiple conspiracies if there are separate agreements to effectuate distinct purposes. *United States v. Katalinich*, 113 F.3d 1475, 1482 (7th Cir. 1997); *see United States v. Ervasti*, 201 F.3d 1029, 1039 (8th Cir. 2000); *United States v. Fleming*, 19 F.3d 1325, 1330 (10th Cir. 1994); *United States v. Swingler*, 758 F.2d 477, 492 (10th Cir. 1985) (whether there is one or multiple conspiracies under a general conspiracy statute is a question of fact and the relevant inquiry is whether there existed more than one agreement to perform multiple illegal acts).

C. The conspiracy to deliver cocaine in 2008 was not the same offense as the conspiracy to deliver cocaine in 2005.

The pertinent and outcome-determinative constitutional question here is whether the 2005 and 2008 conspiracies were the same *in fact*: Did each offense require proof of a fact that the other did not. *Blockburger*, 284 U.S. at 304. To ask the question is to answer it.

It is important to note here that Cannon no longer argues as he did pretrial that the conspiracy charge under review should be dismissed for prosecutorial vindictiveness. (R. 217:5–11.) The prosecutor indeed had almost unfettered discretion in deciding what charges to bring. *State ex rel. Unnamed Petitioners v. Connors*, 136 Wis. 2d 118, 125, 401 N.W.2d 782, 785 (1987), *overruled on other grounds by State v. Unnamed Defendant*, 150 Wis. 2d 352, 441 N.W.2d 696 (1989); *State v. Karpinski*, 92 Wis. 2d 599, 616, 285 N.W.2d 729 (1979).

That leaves only Cannon's double jeopardy challenge to his prosecution for the 2008 conspiracy after he was acquitted of the 2005 conspiracy. He loses that battle because those conspiracy prosecutions were not based on the same facts. *See Schultz*, 390 Wis. 2d 570, ¶ 32 (this Court examines "the entire record, including evidentiary facts adduced at trial" to determine whether the second prosecution violates double jeopardy).

The evidence adduced at Cannon's first conspiracy trial in February 2011 focused specifically and narrowly on a transaction alleged to have occurred at his rental property on North 47th Street in Milwaukee on November 10, 2005, involving a cocaine supplier named "Hot Rod" Smith and Cannon's alleged customers, Jerald McGhee and Lamont Powell. (R. 256:103–07, 115–26, 13543, 170–72, 175–97; 257:97–98, 103–07, 157–58; 258:23–35, 35–68.) The second conspiracy trial in 2014 focused specifically, and again narrowly, on an entirely separate conspiracy to deliver a kilogram of cocaine beginning around March 4, 2008, and ending around March 24, 2008, from Eraclio Varela through Cannon to his customer, Damone Powell, at Cannon's house on Nash Street in Milwaukee. (R. 242:165–73; 243:33–34, 37–53; 244:51–88, 91–109; 245:43, 57–60; 247:52; 248:29–30, 36–38, 41–44, 49–50.) (Note: Damone and Lamont Powell are two different people).

The 2008 conspiracy required the State to prove an agreement to deliver cocaine at a different time, involving different people, at a different location, with a separate volitional departure, than what the State relied on in unsuccessfully trying to prove the 2005 conspiracy. Because these offenses were not the same in fact, the second conspiracy charge did not violate the Double Jeopardy Clause. *See Schultz*, 390 Wis. 2d 570, ¶ 22.

In Cannon's eyes, however, this was but one continuous drug conspiracy encompassing the years 2005 through 2008. As such, he insists, the State was bound by the Double Jeopardy Clause to charge only one conspiracy no matter how many separate drug conspiracies may have been hatched during that over-arching drug conspiracy. Once he was acquitted of the 2005 conspiracy, the State could not charge any other. Cannon is wrong. The State was free to charge either one continuous conspiracy (if in fact this was only one continuous conspiracy), or to charge every separate, factually-distinct conspiracy that occurred during those years. *State v. Kloss*, 2019 WI App 13, ¶ 30, 386 Wis. 2d 314, 925 N.W.2d 563 (the State is free to charge one continuing offense or a series of individual offenses, but not both); *see id.* ¶ 28 ("So far as we can tell, the State could have charged and proved soliciting/reckless-injury based on the content of one phone call or set of phone calls, and soliciting/endangering-safety based on the content of a different phone call or set of phone calls.") In *State v. Bautista*, 2009 WI App 100, ¶ 15, 320 Wis. 2d 582, 770 N.W.2d 744, this Court "reject[ed] the idea that because the conspiracy charge overlapped one of the cocaine delivery charges, this was all part of the same trafficking conspiracy." The court reasoned that the conspiracy charge and delivery charge were "different in time, space and manner." *Id.* ¶ 14. The State was free to prosecute Cannon for the factually-distinct 2008 conspiracy after his acquittal for the 2005 conspiracy.

D. The State was not collaterally estopped from prosecuting Cannon for the 2008 conspiracy.

Cannon argues in the alternative that, even assuming his prosecution for the 2008 conspiracy satisfied the *Blockburger* analysis, the Double Jeopardy Clause still precluded that prosecution. Cannon relies on the doctrine known as issue preclusion or collateral estoppel to argue that the State was estopped from prosecuting him for the 2008 conspiracy because the same fact issues were resolved in his favor at the 2011 trial when he was acquitted of the 2005 conspiracy. (Cannon's Br. 17–20.) Once again, Cannon misses the mark.

Cannon bears the burden of proving that the doctrine of issue preclusion/collateral estoppel bars his prosecution for the 2008 conspiracy. *State v. Miller*, 2004 WI App 117, ¶ 19, 274 Wis. 2d 471, 683 N.W.2d 485.

Once known by the more familiar term "collateral estoppel," the doctrine now called "issue preclusion" restricts the right of parties to relitigate issues that have already been litigated and decided in a previous proceeding.

> The doctrine is intended to prevent parties from revisiting issues "actually litigated in a previous action." *Paige K.B. v. Steven G.B.*, 226 Wis. 2d 210, 219, 594 N.W.2d 370 (1999). The preclusive effect of prior litigation arises where "an issue is actually and necessarily determined by a court of competent jurisdiction." *Id.* (quoting *Montana v. United States*, 440 U.S. 147, 153 (1979)).

Robinson v. City of West Allis, 2000 WI 126, ¶ 39, 239 Wis. 2d 595, 619 N.W.2d 692.

The purpose of the issue preclusion doctrine is to foreclose relitigation of an issue that was already litigated and decided in a prior proceeding. *Lindas v. Cady*, 183 Wis. 2d 547, 558, 515 N.W.2d 458 (1994). It promotes judicial economy

while protecting the rights of litigants to be heard. *N. States Power Co. v. Bugher*, 189 Wis. 2d 541, 549, 525 N.W.2d 723 (1995). It is intended to "guard[ ] against inconsistent decisions on the same set of facts." *Precision Erecting, Inc. v. M & I Marshall & Isley Bank*, 224 Wis. 2d 288, 301–02, 592 N.W.2d 5 (Ct. App. 1998).

1. Issue preclusion is rarely applied in criminal cases.

As a threshold matter, the collateral estoppel/issue preclusion doctrine normally applies only in *civil* cases. This doctrine is based on equitable principles applicable primarily to civil proceedings. *See Michelle T. v. Crozier*, 173 Wis. 2d 681, 687-88, 495 N.W.2d 327 (1993) (in applying this doctrine, the Wisconsin Supreme Court has moved away from a formalistic approach to a more circumstance oriented equity-based approach). This doctrine has little, if any, logical connection to the Double Jeopardy Clause. *But see Vassos*, 218 Wis. 2d at 342–43.

The trial court's determination whether a prosecution is barred by collateral estoppel/issue preclusion is reviewed deferentially for an erroneous exercise of discretion. *Robinson*, 239 Wis. 2d 595, ¶ 39. Cannon does not explain how his constitutional right to be free from double jeopardy can depend only on a trial court's exercise of discretion. The answer is that the doctrine should rarely if ever be applied in a criminal case once the trial court has determined that the *Blockburger* test was satisfied.

The Supreme Court has spoken recently on this very point:

> On its own terms, too, any effort to transplant civil preclusion principles into the Double Jeopardy Clause would quickly meet trouble. While the Clause embodies a kind of "claim preclusion" rule, even this rule bears little in common with its civil counterpart. In civil cases, a claim generally may not be tried if it

> arises out of the same transaction or common nucleus of operative facts as another already tried. Restatement (Second) of Judgments §19 (1982); Moschzisker, Res Judicata, 38 Yale L. J. 299, 325 (1929). But in a criminal case, *Blockburger* precludes a trial on an offense only if a court has previously heard the same offense as measured by its statutory elements. 284 U. S., at 304.

Currier v. Virginia, 138 S. Ct. 2144, 2154 (2018).

The Court further explained that it, "has emphatically refused to import into criminal double jeopardy law the civil law's more generous 'same transaction' or same criminal 'episode' test." *Id*.

"Just last Term this Court warned that issue preclusion principles should have only 'guarded application . . . in criminal cases.' We think that caution remains sound." *Id*. at 2152 (alteration in original) (citation omitted). "The fact is, civil preclusion principles and double jeopardy are different doctrines, with different histories, serving different purposes." *Id*. at 2156. "The *Ashe* collateral estoppel defense is not often available to an accused, for it is difficult to determine, especially in a general verdict of acquittal, how the fact finder in the first trial decided any particular issue." *Vasso*, 218 Wis. 2d at 344. There is no reason to apply those rarely-applied principles to this criminal prosecution.

2. Issue preclusion did not bar Cannon's prosecution for the 2008 conspiracy.

Even assuming that the issue preclusion doctrine applies here, it plainly did not bar Cannon's prosecution for the 2008 conspiracy.

> To say that the second trial is tantamount to a trial of the same offense as the first and thus forbidden by the Double Jeopardy Clause, we must be able to say that "it would have been *irrational* for the jury" in the first

> trial to acquit without finding in the defendant's favor on a fact essential to a conviction in the second.

Currier, 138 S. Ct. at 2150 (citation omitted). In other words, the second prosecution is barred "only if to secure a conviction the prosecution must prevail on an issue the jury necessarily resolved in the defendant's favor in the first trial." *Id.*

It was not irrational for the jury at Cannon's 2011 trial to acquit him of the 2005 cocaine conspiracy without finding in his favor a fact essential to his conviction in the 2014 trial for the 2008 conspiracy. The jury at the 2011 trial found *no facts whatsoever* regarding the 2008 conspiracy because it heard none.

As explained above, the fact issues litigated and decided in the 2014 trial regarding the 2008 drug conspiracy were not litigated in the 2011 trial regarding the 2005 conspiracy. *See Miller*, 274 Wis. 2d 471, ¶¶ 22–23. "[T]he doctrine of issue preclusion is not concerned with why the facts are different in the second litigation and, thus, why there is a different issue of law presented. Rather, the doctrine is aimed at limiting litigation of an issue that has already been litigated." *Id.* ¶ 23.

Cannon failed to prove that the collateral estoppel/issue preclusion doctrine applied to bar his prosecution for the 2008 conspiracy or that the trial court erroneously exercised its discretion when it held that the doctrine did not apply here.

II. Cannon failed to sufficiently allege deficient performance and prejudice to substantiate his claim that the firearm conviction should be overturned because trial counsel was ineffective for not challenging the supplemental warrant that allowed police to use evidence of the firearm transaction they inadvertently intercepted while monitoring Cannon's phone for evidence of his drug dealing.

A. The relevant facts

Pursuant to Wis. Stat. § 968.28, police obtained a warrant to wiretap Cannon's telephone on March 3, 2008, on probable cause to believe that he was engaged in drug dealing. (R. 243:16–18.) Police obtained another warrant on March 11, 2008, and a third warrant on April 1, 2008, for the same purpose. (R. 243:22.) The April 1 warrant authorized police to intercept calls until late May or early June 2008. The warrant applications were all approved by the District Attorney and the Attorney General before they were submitted to the Chief Judge for approval, who then issued them only after finding probable cause to believe that the wiretap would produce evidence of drug dealing. (*Id*.) Cannon concedes the validity and proper execution of those warrants. (Cannon's Br. 21.)

If while executing a wiretap authorized by Wis. Stat. § 968.28, police discover evidence relating to another crime not enumerated in the warrant, they must return to the chief judge and obtain approval pursuant to Wis. Stat. § 968.29(5) to use that evidence in later proceedings. (R. 243:26.)

While lawfully intercepting Cannon's telephone calls authorized by the April 1, 2008 warrant, police intercepted calls on April 3 in which Cannon arranged for the transfer of a firearm to Jimmy Hayes through a known felon, Carl Page. Police obtained judicial authorization to use evidence of the firearm transaction the next day, April 4, 2008, as required by section 968.29(5). Cannon does not dispute the following

finding of fact made by the trial court in its decision denying postconviction relief:

> [T]he court finds the wiretaps were judicially approved within 48 hours as required by sec. 968.29(5), Stats. The Newport affidavit (*also see State's Exhibit D*) indicates that police intercepted a communication on April 3, 2008 at 4:04 p.m. with regard to a possession of a firearm conspiracy. The next day. Judge Sankovitz signed the order permitting the use of the contents of the wiretaps.

(R. 217:18.)

The intercepted calls on April 3, 2008, led to the charge of furnishing a firearm to a convicted felon. For the first time in his postconviction motion, Cannon challenged the admissibility of evidence relating to the charge of furnishing a firearm to a convicted felon. (R. 178.) One must venture to page 23 n.11 of Cannon's brief to learn that he did not move to suppress the firearm evidence for having been obtained in violation of Wis. Stat. § 968.29(5) before or at trial. Acknowledging this forfeiture of objection, Cannon argues in the alternative that his trial attorney was ineffective for not moving to suppress the firearm evidence.

B. Cannon had to specifically allege both deficient performance and actual prejudice in his postconviction motion.

In light of Cannon's forfeiture of objection, the proper analysis is not on the merits, but on whether Cannon sufficiently alleged in his postconviction motion deficient performance and actual prejudice to substantiate his claim that trial counsel was ineffective for not moving to suppress evidence of the firearm charge. *State v. Pinno*, 2014 WI 74, ¶¶ 81–86, 356 Wis. 2d 106, 850 N.W.2d 207; *Kimmelman v. Morrison,* 477 U.S. 365, 375 (1986).

Cannon would have borne the burden of proving at an evidentiary hearing that the performance of his trial counsel

was both deficient and prejudicial. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *State v. Johnson*, 153 Wis. 2d 121, 127, 449 N.W.2d 845 (1990). To earn an evidentiary hearing on his challenge to the effective assistance of trial counsel, Cannon had to allege in his motion with factual specificity both deficient performance and actual prejudice. *Balliette*, 336 Wis. 2d 358, ¶¶ 40–48. He could not rely on conclusory allegations of deficient performance and prejudice, hoping to supplement them at an evidentiary hearing. *State v. Bentley*, 201 Wis. 2d 303, 313–18, 548 N.W.2d 50 (1996); *Levesque v. State*, 63 Wis. 2d 412, 421–22, 217 N.W.2d 317 (1974). The motion had to allege with factual specificity how and why counsel's performance was both deficient and prejudicial to the defense. *Balliette*, 336 Wis. 2d 358, ¶¶ 40, 59, 67–70.

Regarding deficient performance, the motion had to allege more than that counsel's performance was "imperfect or less than ideal." *Balliette*, 336 Wis. 2d 358, ¶ 22. Cannon had to allege sufficient facts to overcome the strong presumption that trial counsel performed reasonably. *Id.* ¶¶ 25–28, 78. The issue is "whether the attorney's performance was reasonably effective considering all the circumstances." *Id.* ¶ 22. "In sum, the law affords counsel the benefit of the doubt; there is a presumption that counsel is effective unless shown otherwise by the defendant." *Id.* ¶ 27. "Strategic choices are 'virtually unchallengeable.'" *McAfee v. Thurmer*, 589 F.3d 353, 356 (7th Cir. 2009) (quoting *Strickland*, 466 U.S. at 690).

Counsel is not ineffective for deciding against pursuing what would have been a meritless suppression motion. *State v. Berggren*, 2009 WI App 82, ¶ 21, 320 Wis. 2d 209, 769 N.W.2d 110.

Cannon also had to allege prejudice with factual specificity because it would be his burden to affirmatively prove at an evidentiary hearing that he suffered actual prejudice caused by counsel's deficient performance. He could

not speculate. *Balliette*, 336 Wis. 2d 358, ¶¶ 24, 63, 70; *State v. Allen*, 2004 WI 106, ¶ 26, 274 Wis. 2d 568, 682 N.W.2d 433. His motion had to specifically show on its face why there is a reasonable probability the result of the trial would have been different had counsel performed as he now wishes. A reasonable probability is one sufficient to undermine confidence in the outcome. *State v. Trawitzki*, 2001 WI 77, ¶ 40, 244 Wis. 2d 523, 628 N.W.2d 801. "The likelihood of a different outcome 'must be substantial, not just conceivable.'" *Campbell v. Smith*, 770 F.3d 540, 549 (7th Cir. 2014) (citation omitted).

The reviewing court need not address both the deficient performance and prejudice components if Cannon failed to make a sufficient showing as to either one of them. *State v. Mayo*, 2007 WI 78, ¶ 61, 301 Wis. 2d 642, 734 N.W.2d 115.

C. Cannon's motion failed to sufficiently allege deficient performance.

While lawfully intercepting calls relating to drug dealing, police also inadvertently intercepted calls on April 3, 2008, setting up the firearm transaction overseen by Cannon that served as the basis for the charge of furnishing a firearm to a convicted felon.

Cannon complains that trial counsel should have objected to the supplemental warrant on the following grounds: (1) after the initial wiretap warrant was properly issued by Chief Judge Kitty Brennan on probable cause to believe that Cannon was involved in drug dealing, the April 4 supplemental warrant authorizing the use of the intercepted calls regarding the April 3 firearm transaction was invalid because it was not issued by Chief Judge Brennan as required by Wis. Stat. § 968.29(5), but was issued instead by acting chief judge Richard Sankovitz (Cannon's Br. 24); (2) possession of a firearm by a felon was not a statutorily enumerated offense for which the warrant issued under Wis.

Stat. § 968.28 could authorize police to intercept telephone calls regarding the April 3, 2008, firearm transaction (Cannon's Br. 31–33); (3) the supplemental warrant affidavit failed to establish probable cause that Cannon possessed or transferred a firearm to a person he knew to be a convicted felon on April 3, 2008. (Cannon's Br. 26–28, 31). Police did nothing wrong.

1. Police may seek judicial approval to use evidence of crimes not enumerated in the initial wiretap warrant that they inadvertently intercept while executing the warrant.

Police may use information about other criminal activity they inadvertently intercept while lawfully conducting the authorized wiretap for drug dealing activities. *See State v. Gil*, 208 Wis. 2d 531, 544–46, 561 N.W.2d 760 (Ct. App. 1997). There is no requirement that police obtain a separate warrant to seize evidence inadvertently obtained during a wiretap already authorized by a valid warrant so long as the evidence of the new crime was inadvertently discovered while executing the authorized wiretap and the new evidence itself, or coupled with other known information, gave the officer probable cause to believe the new evidence is connected with criminal activity. *Id*. *See generally State v. Guy*, 172 Wis. 2d 86, 101–02, 492 N.W.2d 311 (1992). When this occurs, Wis. Stat. § 968.29(5) comes into play. It requires judicial approval of further use of the inadvertently discovered evidence of a new crime:

> 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 or 18 USC 2510 to 2520 or by a like statute.

Wis. Stat. § 968.29(5).

Pertinent here is section 968.29(3)(a), which allows for anyone who lawfully intercepted information relating to an offense other than the one enumerated in the original warrant to disclose the contents of that communication and any derivative evidence "only while giving testimony under oath or affirmation in any proceeding in any court." That is precisely what occurred here.

Police intercepted Cannon's April 3, 2008, calls setting up the firearm transaction while they were lawfully monitoring Cannon's phone pursuant to the initial warrant, lawfully issued by Chief Judge Brennan pursuant to Wis. Stat. § 968.28, authorizing them to listen for evidence of drug dealing activities. When they heard the firearm discussion while doing so, police sought and obtained authorization the next day from acting chief judge Sankovitz under Wis. Stat. § 968.29(5), to use that additional information in court. As permitted by Wis. Stat. § 968.29(3)(a), police testified under oath at Cannon's 2014 trial about the contents of those intercepted calls regarding the firearm transaction.

2. Judge Sankovitz had the authority as acting chief judge to issue the warrant for the firearm evidence.

Chief Judge Brennan had the authority to designate an acting chief judge to fill her shoes in her absence. Supreme Court Rule (SCR) 70.26 provides in pertinent part: "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." The Acting Chief Judge also is authorized "to act for the chief judge in that circuit on any and all administrative duties specifically or generally delegated." SCR 70.265. This includes the authority to issue authorization to law enforcement, pursuant to Wis. Stat. § 968.28, "to intercept communications, including telephone wiretaps." SCR 70.21(21). Judge Sankovitz was acting in Chief Judge Brennan's absence, with her authorization, when he signed the application for a supplemental warrant authorizing the use of the firearm transaction evidence intercepted the day before. Cannon offers no evidence that Chief Judge Brennan did not authorize Judge Sankovitz to act for her.

Cannon's argument that Wis. Stat. § 968.28 prohibited the Chief Judge from delegating her authority to issue wiretap warrants to an acting chief judge ignores the Supreme Court rule and flies in the face of reason and common sense. In Cannon's view, if the Chief Judge is not around to issue the warrant, no one can issue it and the investigation cannot proceed no matter how long the Chief Judge might be incapacitated.

It is not far-fetched to envision a situation where criminal conspirators, upon learning through court insiders or from media accounts that a Chief Judge has been hospitalized with a serious illness or otherwise incapacitated for an extended period of time, would know that they are free to conduct their nefarious business over the telephone without consequence until the Chief Judge returns to the bench to issue a warrant for which probable cause may have existed the day the judge became incapacitated. The most dangerous conspirators might even be motivated to themselves incapacitate the Chief Judge knowing that no other judge, including the acting chief judge, could issue a

wiretap warrant until the Chief Judge returns. That cannot be the law and, thanks to SCR 70.26, it is not the law.

Cannon resorts to semantics when he argues in the alternative that even though Judge Sankovitz was serving as acting chief judge for Chief Judge Brennan, he still could not issue the supplemental warrant because he was not the "deputy" chief judge as provided in SCR 70.26.

Cannon does not account for SCR 70.23(2) which authorizes the chief judge to "assign an active judge" of the district "to substitute for the absenting judge." Nothing in this section expressly prohibits the chief judge from assigning another active judge to take over in his or her own absence. Also, "[t]he 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," giving the special deputy "the same authority as the deputy chief judge." SCR 70.26 It may well be that Judge Sankovitz was serving as the "special deputy chief judge" when he acted for both the chief judge and the deputy chief judge. Cannon offers no evidence to the contrary even though it was Cannon's burden to allege and prove deficient performance.

Even assuming that Judge Sankovitz exceeded his authority because he was "only" an "acting" chief judge but not a "deputy" or "special deputy" chief judge, Cannon failed to sufficiently allege deficient performance because this is a novel legal argument that many reasonably competent defense attorneys would have overlooked. Counsel is not ineffective for failing to conjure up novel arguments. *State v. Maloney*, 2005 WI 74, ¶¶ 28–30, 281 Wis. 2d 595, 698 N.W.2d 583; *State v. McMahon*, 186 Wis. 2d 68, 84, 519 N.W.2d 621 (Ct. App. 1994). Successful ineffective assistance claims "should be limited to situations where the law or duty is clear." *Maloney*, 281 Wis. 2d 595, ¶ 29 (citation omitted); *see Olsen v. State*, 852 N.W.2d 372, ¶¶ 10, 14 (N.D. 2014).

D. Cannon's motion failed to sufficiently allege actual prejudice.

Even assuming in hindsight that counsel ought to have moved to suppress the firearm evidence, Cannon's allegation of prejudice in his postconviction motion was only conclusory and the record conclusively shows that he suffered no prejudice.

1. Cannon's substantial rights were not violated.

Cannon's motion failed to allege how Judge Sankovitz's involvement adversely affected his substantial rights. "No evidence seized under a search warrant shall be suppressed because of technical irregularities not affecting the substantial rights of the defendant." Wis. Stat. § 968.22. "No indictment, information, complaint *or warrant* shall be invalid, nor shall the trial, judgment or other proceedings be affected by reason of any defect or imperfection in matters of form which do not prejudice the defendant." Wis. Stat. § 971.26.

Suppression is inappropriate for a mere statutory violation or technical defect in the search warrant application process. *State v. Sveum*, 2010 WI 92, ¶ 57, 328 Wis. 2d 369, 787 N.W.2d 317. Suppression is inappropriate if the purpose of the wiretap statute was satisfied despite the procedural irregularity. *State v. House*, 2007 WI 79, ¶¶ 42, 50–51, 302 Wis. 2d 1, 734 N.W.2d 140. The purpose of section 968.29(5), to ensure judicial authorization within 48 hours to use evidence of a crime not enumerated in the drug wiretap warrant but obtained during the execution of that warrant, was fully satisfied here the same as if Judge Brennan had reviewed the application. Suppression is not the remedy for this technical defect. (R. 42:23–25.)

Cannon did not allege in his motion, and does not argue here, that the authorization by Judge Sankovitz to use the

intercepted firearm evidence violated his Fourth Amendment right to be free from unreasonable, warrantless searches and seizures, interfered with any of his substantial trial rights, or denied him the right to a fair trial. He does not even argue that Judge Brennan lacked the authority to appoint an acting chief judge in her absence, or that Judge Sankovitz was not properly appointed by her to serve as acting chief judge. He relies only on a technical statutory violation of little or no consequence. That is not enough for suppression. *Sveum*, 328 Wis. 2d 369, ¶ 57. Simply put, if Judge Sankovitz acted beyond his authority, the record conclusively shows that it did not harm Cannon at all.

2. The good faith exception to the exclusionary rule would have barred suppression of the firearm evidence.

The law enforcement officers who sought and obtained the warrant from Judge Sankovitz on April 4, 2008, to use the firearm evidence they intercepted on April 3, reasonably relied in objective good faith on Judge Sankovitz's assurance that he had the authority as acting chief judge to issue the warrant.

Suppression would be wholly improper here because it would do nothing to further the salutary purpose of the exclusionary rule to deter *police* misconduct. *United States v. Leon*, 468 U.S. 897, 913 (1984); *State v. Marquardt*, 2005 WI 157, ¶¶ 24–26, 44–47, 286 Wis. 2d 204, 705 N.W.2d 878; *State v. Eason*, 2001 WI 98, ¶ 63, 245 Wis. 2d 206, 629 N.W.2d 625. "[T]he Fourth Amendment exclusionary rule does not apply to evidence obtained by police officers who acted in objectively reasonable reliance upon a search warrant issued by a neutral magistrate." *Illinois v. Krull*, 480 U.S. 340, 342 (1987). The officers who executed the search "cannot be expected to question the magistrate's probable-cause determination or his judgment that the form of the warrant is technically

sufficient." *Leon*, 468 U.S. at 921. Cannon does not allege that police engaged in any misconduct here, either in how they obtained the firearm evidennce or in how they sought judicial approval to use it the next day.

Cannon points the finger instead at Judge Sankovitz. But he, too, engaged in no misconduct. "Most of the case law in this area addresses search warrants issued upon affidavit by law enforcement, focusing the discussion of the judge or magistrate's role in this process on whether she abdicated her role in the process by serving as a rubber stamp for law enforcement." *State v. Hess*, 2010 WI 82, ¶ 54, 327 Wis. 2d 524, 785 N.W.2d 568. Cannon does not argue that Judge Sankovitz served as a "rubber stamp" for law enforcement. He only makes the technical argument that Judge Brennan improperly delegated to Judge Sankovitz her authority to issue the supplemental warrant.

Under Wisconsin's stricter version of the *Leon* "good faith" exception, the warrant application may be presented to the judge only after a significant police investigation, and only after the warrant application was independently reviewed and approved by a supervisory officer or a law enforcement lawyer such as an assistant district attorney. *Marquardt*, 705 N.W.2d 878, ¶¶ 44–47; *Eason*, 629 N.W.2d 625, ¶ 63. Police act in good faith reliance on a warrant that is not supported by probable cause if there are "indicia" of probable cause. *Id.* ¶¶ 28–31, 37–44. Any competing inferences are to be resolved in favor of the State. *Id.* ¶ 44.

Here, after a lengthy investigation involving many actors, the initial application was approved by the Attorney General and the District Attorney before it was approved by Chief Judge Brennan. Police properly intercepted the calls setting up the firearm transaction while acting within the scope of that warrant. The supplemental application was reviewed and signed by Milwaukee County District Attorney John Chisholm before it was submitted to Acting Chief Judge

Sankovitz for approval. It was supported at least by an indicia of probable cause. It complied with the Fourth Amendment. There was no reason, therefore, for trial counsel to believe that the trial court would have rejected the "good faith" exception and suppressed evidence of the firearm transaction just because Judge Sankovitz may have overstepped his authority.

Lastly, Cannon argues that the good faith exception does not apply to wiretap warrants. (Cannon's Br. 30.) He is wrong. His reliance on *People v. Allard*, 99 N.E.3d 124 (Ill. App. Ct. 2018), is inapt. The *Allard* court applied a state statute that specifically prohibited application of the good faith exception to technical errors in wiretap warrant applications. Even then, the court held that the good faith exception might apply where the police are not guilty of misconduct in the application process. *Id.* 134–35.

There is no such statute restricting the scope of the good faith exception in Wisconsin. Wisconsin Stat. § 968.30(9)(a) merely authorizes an "aggrieved person" to seek suppression of evidence alleged to have been obtained in violation of the wiretap statutes and "[i]f the motion is granted," the intercepted contents of the wiretap and any derivative evidence is to be suppressed. Directly contrary to the statute discussed in *Allard*, Wisconsin's Electronic Surveillance Law requires courts to overlook technical defects in the warrant application process that do not affect the defendant's substantial rights. Wis. Stat. § 968.22; *see* Wis. Stat. § 971.26. Suppression is not called for in Wisconsin when the proven violation is only statutory and technical. *Sveum*, 328 Wis. 2d 369, ¶ 57.

Moreover, because no Wisconsin case or statute has ever held that the good faith exception does not apply to wiretap warrants, with the law being directly to the contrary, *see id.*, counsel was not ineffective for failing to make this novel argument to change the law. *Maloney,* 281 Wis. 2d 595,

¶¶ 28–30; *McMahon,* 186 Wis. 2d at 84. Presumptively competent counsel was not ineffective for deciding against pursuing an utterly meritless suppression motion.

3. Judge Sankovitz reasonably found probable cause.

Cannon argues that trial counsel was ineffective for not moving to suppress the firearm evidence on the ground that the supplemental warrant application failed to establish probable cause to believe that he: (a) as a convicted felon, constructively possessed a firearm; (b) was a party to the possession of a firearm by another felon; or (c) furnished a firearm to a known felon. Without conceding the point, the State will assume only for the sake of argument that it must make a probable cause showing of the discovery of a new crime not enumerated in the initial warrant to obtain judicial authorization to use evidence of that new crime under section 968.29(5). Cannon's challenge is without merit because the standard is only probable cause; it is not proof beyond a reasonable doubt. It is a minimal standard that was easily met here. There was no reason for counsel to object.

Cannon would have borne the burden of proving at a suppression hearing that there was an insufficient showing of probable cause in the application to support its approval. *State v. Schaefer*, 2003 WI App 164, ¶ 5, 266 Wis. 2d 719, 668 N.W.2d 760; *State v. Jones*, 2002 WI App 196, ¶ 11, 257 Wis. 2d 319, 651 N.W.2d 305.

When considering an application for a search warrant, the issuing magistrate or judge is required, "to make a practical, common sense decision whether, given all the circumstances set forth in the affidavit before him, including the 'veracity' and 'basis of knowledge' of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place." *Illinois v. Gates*, 462 U.S. 213, 238 (1983) (citation

omitted); *see, e.g.*, *United States v. Haynes*, 882 F.3d 662, 665 (7th Cir. 2018); *Schaefer*, 266 Wis. 2d 719, ¶¶ 4–6. "Those circumstances need only indicate a reasonable probability that evidence of [a] crime will be found in a particular location; neither an absolute certainty nor even a preponderance of the evidence is necessary." *United States v. Aljabari*, 626 F.3d 940, 944 (7th Cir. 2010).

The probable cause determination is made on a case-by-case basis after reviewing the totality of the circumstances. *Schaefer*, 266 Wis. 2d 719, ¶ 17. The issuing judge may draw reasonable inferences from the facts asserted in the affidavit. The inferences drawn need not be the only reasonable ones. The issue is whether the inferences drawn by the issuing judge were reasonable. *E.g., State v. Ward*, 2000 WI 3, ¶ 30, 231 Wis. 2d 723, 604 N.W.2d 517; *Jones*, 257 Wis. 2d 319, ¶ 10.

This Court on review must give "great deference" to the issuing judge's probable cause determination; the decision must stand unless the defendant proves that the facts were "clearly insufficient" to support the probable cause finding. *State v. Tate*, 2014 WI 89, 357 Wis. 2d 172, 849 N.W.2d 798, ¶ 14; *Marquardt*, 286 Wis. 2d 204, ¶ 23. The decision to issue the warrant must stand if there was a substantial basis for it. *Schaefer*, 266 Wis. 2d 719, ¶ 4. This highly deferential standard of review is in line with the "Fourth Amendment's strong preference for searches conducted pursuant to a warrant." *Id.* (citation omitted); *see Sveum*, 328 Wis. 2d 369, ¶ 26; *Ward*, 231 Wis. 2d 723, ¶¶ 21–24 (same). Even in a close case, the reviewing court must resolve all doubts in favor of the judicial probable cause determination. *State v. Lindgren*, 2004 WI App 159, 275 Wis. 2d 851, ¶ 20, 687 N.W.2d 60.

The affidavit established probable cause to believe that Cannon had at least constructive possession of the firearm transferred at his behest to "Jimmy" (Hayes); Cannon was a convicted felon who knew or should have known the gun he

ordered delivered to Hayes would pass through the hands of at least one convicted felon (Carl Page) before it reached Hayes; making him its constructive joint possessor with Page, or at least a party to the possession of a firearm by the convicted felon, Page. Wis. Stat. §§ 941.29 & 939.05.

The warrant application averred both that Cannon was a convicted felon and that the man he employed to transfer the gun to Hayes (Page) was a convicted felon. It also established at least a fair probability that Cannon had control over the gun he transferred to Hayes even though he did not hold it in his hands because he had sufficient joint control over it with Page to order Page to deliver the gun to "Jimmy." These facts and the reasonable inferences drawn from them were not materially false or made in reckless disregard for the truth. *House*, 302 Wis. 2d 1, ¶¶ 57–59.

The affidavit established probable cause to believe that (a) Cannon, as a convicted felon, constructively possessed a firearm by exercising control over it jointly with someone he knew to be a convicted felon, and (b) this constructive possession enabled him to arrange for its transfer to Hayes. This made him at least a party to possession of a firearm by a convicted felon.

> Possess means the Defendant knowingly had actual physical control of a firearm. . . . An item is also in a person's possession if it is in an area over which the person has control and the person intends to exercise control over the item. It is not required that a person own an item in order to possess it. What is required is that the person exercised control over the item. Possession may be shared by another person. If a person exercises control over an item, that item is in his possession even though another person may also have similar control.

Wis. JI–Criminal 1343 (2016).

Possession includes both actual and constructive possession. *State v. Peete*, 185 Wis. 2d 4, 14–16, 517 N.W.2d

149 (1994). "Constructive possession consists of circumstances that are sufficient to support an inference that the person exercised control over, or intended to possess, the item in question." Wis. JI–Criminal 920, Comment 2 (2000); *see State v. Allbaugh*, 148 Wis. 2d 807, 813–14, 436 N.W.2d 898 (Ct. App. 1989).

The issuing judge could reasonably ask: If Cannon did not exercise actual control over the firearm, even jointly with Page, then why did Hayes call him for one, and why did Page follow his order to deliver the gun to Hayes? Why didn't "Jimmy" call Page directly? And, how could Cannon assure Hayes that he could and would arrange for the firearm to be delivered to him unless Cannon exercised actual control over it? The answer is obviously that Cannon had sufficient control over the gun to transfer it, even if he held that control jointly with Page. If Cannon had control over a bag of cocaine possessed by Page, and he ordered Page to deliver the cocaine to a third party, he certainly could be charged with being a coconspirator or a party to the crime with Page to possess the cocaine with the intent to deliver it even if the deal was thwarted by police before the cocaine could be delivered to their customer. *See State v. Hecht*, 116 Wis. 2d 605, 617–28, 342 N.W.2d 721 (1984). The analysis does not change just because the item over which he and Page exercised joint control and delivered to a third party was a firearm. This evidence created a reasonable inference of Cannon's constructive possession of the firearm, his involvement as a party to its possession with someone he knew to be a convicted felon, Page, and his knowingly conspiring to furnish the firearm to Hayes through Page.

4. The good faith exception would have applied to an erroneous judicial probable cause determination as well.

Judge Sankovitz found from the evidence set forth in the warrant application and reasonable inferences therefrom that there was sufficient information presented for him to authorize the future use of the firearm transaction evidence. For the same reasons that police reasonably relied in objective good faith on his authority as acting chief judge to issue the warrant, they reasonably relied in objective good faith on his probable cause determination. The officers who received his authorization to use the evidence "cannot be expected to question the magistrate's probable-cause determination or his judgment that the form of the warrant is technically sufficient." *Leon*, 468 U.S. at 921.

E. The use of post-April 3 telephone calls at trial was harmless error.

Cannon complains that the State referred at trial to telephone calls regarding the firearm transaction that were made on April 4 and 5 even though Judge Sankovitz approved the use of only the April 3 telephone call. (Cannon's Br. 25.) Even if this was error, it was plainly harmless.

Absent the April 4 and 5 phone calls, the State would have introduced the April 3 phone calls during which the firearm transaction was set up. The State would have introduced the testimony of Page and Turnage recounting all of the phone calls and confirming the firearm transfer to Hayes orchestrated by Cannon and completed through them. The State would have introduced Cannon's confession and trial testimony admitting that he, a convicted felon, directed two known convicted felons, Turnage and Page, to transfer a firearm to Hayes on April 3. Beyond a reasonable doubt, the jury's guilty verdict would have been the same had the phone

calls on April 4 and 5 been suppressed. *State v. Harvey*, 2002 WI 93, ¶ 44, 254 Wis. 2d 442, 647 N.W.2d 189.

F. In the alternative, police had the authority to intercept the firearm evidence under the earlier wiretap warrant because it was evidence directly related to Cannon's drug dealing activities.

Finally, even assuming that Judge Sankovitz lacked the authority to issue the supplemental warrant, or that probable cause did not exist to support its issuance, and assuming further that the good faith exception does not apply, evidence of the April 3 firearm transfer would remain admissible under the umbrella of the warrant issued on April 1, 2008, pursuant to Wis. Stat. § 968.28, authorizing police to intercept Cannon's calls on probable cause to believe that Cannon was "dealing in controlled substances" or was engaged in a "conspiracy" to do so. Wis. Stat. § 968.28.

Cannon does not argue that police improperly intercepted his April 3 calls orchestrating the firearm transfer while executing that warrant. It is reasonable to infer that large-scale drug dealers such as Cannon will also be involved in the possession, use and transfer of firearms as part and parcel of their nefarious trade. It would indeed be unreasonable to believe that large scale drug dealers would *not* routinely possess, use or transfer firearms. *See, e.g.*, *State v. Richardson*, 156 Wis. 2d 128, 144, 456 N.W.2d 830 (1990) ("Several cases have found that drug dealers and weapons go hand in hand."). Cannon indeed concedes that firearms are "tools of the trade." (Cannon's Br. 34.) *Cf. House*, 302 Wis. 2d 1, ¶¶ 27–34 (a warrant issued under section 968.28 authorizing a wiretap for non-enumerated offenses of racketeering, money laundering and continuing criminal enterprise was improper; those offenses were too broadly applicable to other non-drug crimes to fit within the

enumerated authorization to search for evidence of "dealing in controlled substances").

When they applied for the initial warrant, police did not need to enumerate firearms possession or to request specific permission to obtain evidence relating to it because firearms possession is a necessary component of the enumerated and broad "dealing in controlled substances" and "conspiracy" to do so. Unlike racketeering, money laundering and conducting a criminal enterprise, which could encompass almost any criminal activity, *House*, 302 Wis. 2d 1, ¶¶ 29–31, firearms are "tools of the trade" (Cannon's Br. 34), much the same as digital scales and cutting agents are tools of the drug trade. The firearm evidence was, therefore, lawfully obtained under the umbrella of the April 1 wiretap warrant authorizing police to intercept Cannon's telephone calls related to "dealing in controlled substances" and "conspiracy" to do so.

Even if firearms possession is not within the scope of the enumerated "dealing in controlled substances" and "conspiracy," suppression is not appropriate because interception of the April 3 calls regarding the firearm transfer did "not undermine the statutory purpose of privacy protection." *House*, 302 Wis. 2d 1, ¶ 56. The firearm calls were properly intercepted on April 3 while police were lawfully executing the warrant issued on April 1 authorizing them to monitor Cannon's telephone for evidence of drug dealing. The initial warrant was lawfully issued and executed in conformity with the Fourth Amendment, with the procedural requirements of Wis. Stat. §§ 968.28 and 968.30(4), and with the probable cause requirement of Wis. Stat. § 968.30(3), namely, probable cause to believe that Cannon was using his telephone to orchestrate drug deals.

Simply put, there was no additional invasion of Cannon's privacy beyond what was lawfully authorized when police intercepted the calls setting up the firearm transfer. Suppression is, therefore, improper because "the statuary

objectives of protecting privacy and restricting wiretaps to situations clearly calling for their use have been fulfilled despite the violation of § 968.28." *House*, 302 Wis. 2d 1, ¶ 35. The same holds true for the alleged violation of section 968.29(5).

In the final analysis, Cannon did not sufficiently allege in his postconviction motion how and why trial counsel was ineffective for deciding against pursuing what would have been a meritless suppression motion. *Berggren*, 320 Wis. 2d 209, ¶ 21. The trial court properly denied his motion without an evidentiary hearing.

CONCLUSION

This Court should affirm.

Dated this 24th day of September 2020.

Respectfully submitted,

JOSHUA L. KAUL
Attorney General of Wisconsin

Daniel J. O'Brien

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

Attorneys for Plaintiff-Respondent

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

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 10,495 words.

Dated this 24th day of September, 2020.

Daniel J. O'Brien

DANIEL J. O'BRIEN
Assistant Attorney General

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

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

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

Dated this 24th day of September, 2020.

Daniel J. O'Brien

DANIEL J. O'BRIEN
Assistant Attorney General