STATE OF WISCONSIN
SUPREME COURT
Appeal No. 2019 AP 2296-CR

STATE OF WISCONSIN,

Plaintiff-Respondent-Respondent,

v.

BILLY JOE CANNON,

Defendant- Appellant-Petitioner.

PETITION FOR REVIEW AND APPENDIX

PETITION FROM A DECISION OF THE WISCONSIN COURT OF APPEALS, DISTRICT I, DATED MAY 25, 2021

Respectfully Submitted:

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ISSUES PRESENTED

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The circuit court: Answered No.

The court of appeals: Answered No.

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The circuit court: Answered No.

The court of appeals: Answered No.

III. WHETHER "ACTING JUDGES" CAN AUTHORIZE USE OF COMMUNICATIONS ABOUT NON-ENUMERATED OFFENSES CAPTURED DURING A LAWFUL WIRETAP ORDER WHEN SECTION 968.29(5), STATS. UNAMBIGUOUSLY LIMITS SUCH AUTHORITY TO THE JUDGE WHO ISSUED THE ORIGINAL WIRETAP ORDER.

The circuit court answered: Yes.

The court of appeals answered: Yes.

IV. WHETHER AN AUTHORIZATION TO USE INTERCEPTED COMMUNICATIONS ABOUT NON-ENUMERATED OFFENSES CONSTITUTES *CARTE BLANCHE* FOR LAW ENFORCEMENT TO CONTINUE TO CAPTURE AND USE ALL SUBSEQUENT SUCH COMMUNICATIONS WITHOUT SEEKING ANY ADDITIONAL AUTHORIZATIONS FROM THE JUDGE PRESIDING OVER THE WIRETAP ORDER.

The circuit court: Answered Yes.

The court of appeals: Avoided the issue by deeming any error harmless.

V. WHETHER PROBABLE CAUSE IS THE TOUCHSTONE FOR WHETHER A WIRETAP JUDGE SHOULD AUTHORIZE "USE" OF AN INTERCEPTED CONVERSATION ABOUT A SUSPECTED NON-ENUMERATED OFFENSE AND IF SO, WHETHER THE GOOD FAITH EXCEPTION CAN BE APPLIED IN THIS CONTEXT.

The circuit court: tacitly answered Yes and found there was probable cause, but did not address the good faith issue.

The court of appeals: Tacitly answered yes and concluded there was probable cause *and* that, even if not, the good faith exception made *use* of the intercepts permissible.

CRITERIA RELIED UPON FOR REVIEW

I. THIS PETITION PRESENTS REAL AND SIGNIFICANT QUESTIONS OF FEDERAL CONSTITUTIONAL LAW.

This petition presents significant constitutional questions of law heretofore unaddressed in this state. The petitioner was tried and acquitted of conspiracy to distribute cocaine. Less than one month after acquittal, the State charged petitioner with another conspiracy to distribute cocaine, using undisclosed wiretap information it already possessed at the time of the first prosecution, with all information derived from a single, ongoing investigation into his alleged drug dealing.

Consequently, this petition recommends examination of double jeopardy issues when the State subdivides a single conspiracy into discreet conspiracies to serially prosecute a defendant. No Wisconsin case addresses this issue, and the parties and appellate court were all left to rely on Seventh Circuit cases: *U.S. v. Castro*, 629 F.2d 456, 465 (7th Cir. 1980); *U.S. v. Sertich*, 95 F.3d 520 (7th Cir. 1996), *U.S. v. Dortch*, 5 F.3d 1056 (7th Cir. 1993), and *U.S. v. Thornton*, 72 F.2d 764 (7th Cir. 1992). (App. A-6).

This petition presents an additional novel double jeopardy issue never addressed in this state. This issue, as alluded to above, is whether, and assuming *arguendo,* the State believes it has two different conspiracies from the same time frame, it can hold back one, and try them seriatim, thereby subjecting a defendant to the repeated burdens of trial, the rehearsal of prosecutions, and the increased risk of erroneous convictions. Here, even if independent, the conspiracies should

have been charged and joined for trial. At a minimum, the existence of a second alleged conspiracy should have been disclosed so the double jeopardy issues could have been addressed *before* he was prosecuted twice.

II. THIS PETITION PRESENTS NOVEL LEGAL ISSUES, THE RESOLUTION OF WHICH WILL DEVELOP AND CLARIFY THE LAW, WITH STATEWIDE IMPACT.

A. Whether "Acting Judges" Can Authorize Use Of Communications About Non-Enumerated Offenses Captured During A Lawful Wiretap When Section 968.29(5) Unambiguously Limits Such Authority To The Same Judge Who Issued The Original Wiretap Order.

This case also presents a novel question regarding the plain meaning of section 968.29(5), Stats. That section allows law enforcement, when engaged in lawfully intercepting wire communications for *enumerated* offenses, and upon intercepting communications relating to *non-enumerated* offenses, to use the contents and evidence derived therefrom, but only if they are "authorized or approved **by the judge who acted on the original application.**" (Emphasis added). Because the plain meaning signifies the legislature meant for the same judge to preside over such matters, resort to extrinsic sources to divine additional meaning of the statutory language was not necessary. Nevertheless, the appellate court resorted to SCR 70.23(2) to expand the meaning of the statute to include an "active judge" for such purposes. And as discussed *infra*,

SCR 70.23(2) does not compel the result the appellate court reached, even if considering it were proper.

B. Whether An Authorization To Use Intercepted Communications About Non-Enumerated Offenses Constitutes *Carte Blanche* For Law Enforcement To Continue Capturing And Using All Subsequent Such Communications Without Seeking Any Additional Authorizations From The Judge Presiding Over The Wiretap Order.

This petition presents an important and novel statutory issue as to the scope of an authorization to use a wiretap intercept about a non-enumerated offense. Specifically, the question presented is whether an initial "use" authorization constitutes *carte blanche* for law enforcement to then continue gathering and using evidence of non-enumerated offenses for the entire term of the wiretap or, instead, whether an authorization to use such evidence must be obtained on each subsequent occasion such evidence is gathered, in accordance with the applicable statutory protocol. Here, there was only a single authorization for an intercepted call of a non-enumerated offense. There were two subsequent intercepts, however, for the non-enumerated offense, and for which no judicial authorization was issued. Nevertheless, the State was permitted to use these two subsequent intercepts to try and convict the petitioner for the non-enumerated offense.

C. Whether Probable Cause Is The Legal Standard For Wiretap Judges To Authorize Use Of Non-Enumerated Offenses, And If So, Whether The Good Faith Exception Applies In This Context.

This petition presents the novel issue of whether "probable cause" (to believe there is a non-enumerated offense) is the touchstone for a court to authorize use of such wiretap intercepts. At the trial court level, the State argued probable cause was not the proper standard to determine whether a petition to use non-enumerated offenses should be granted. On appeal, the State did not repeat that argument, but instead, relied on the good faith exception.

The court of appeals analyzed the issue using the probable cause standard and concluded such existed. As examined below, there is good reason to conclude it did not. In either event, there are no published cases establishing the proper legal standard for granting authorizations of this nature, though it would seem intuitive that probable cause is needed.

Perhaps more interestingly, the appellate court went on to apply the good faith exception to the warrant requirement, relying on *State v. Marquardt*, 2005 WI 157, 286 Wis. 2d 204, 705 N.W.2d 878. It therefore engrafted a doctrine pertaining to search warrants onto a statute pertaining to "use" of wiretap intercepts of non-enumerated offenses. This is, at best, a clumsy use of the good faith exception, for at least two reasons.

First, the *seizure* here is not in question, because it was pursuant to a lawful wiretap order, and the lawfulness of *that* order has never been a subject of the post-conviction

proceedings. Instead, the question here is the subsequent *use* of the intercepts, and to reason the State *used* the intercepts "in good faith" to convict the petitioner is not a ruling that logically flows from *Marquardt.* That this issue was not examined pretrial is the product of the State's failure, consistent with its *Brady* obligation, to turn over the firearm intercept documents.

Second, the good faith exception pertains to the actions of *police*, and that is not the issue here. The issue here pertains to the actions of *the prosecutor*, who used the wiretap intercepts despite the absence of probable cause, an issue he obscured by not turning over the application and order for *use* of the wiretap intercepts of non-enumerated offenses. The irony of the State relying on the good faith exception when it withheld *Brady* material cannot be overstated.

And to the extent police action deserves scrutiny, it cannot be said the police acted in good faith when it deemed the order allowing use of the first wiretap to constitute a blank check to then just gather and purport to use more such wiretap intercepts without any further judicial oversight. Courts have urged caution in applying the good faith exception in the context of electronic eavesdropping. *See., eg., People v. Allard,* 99 N.E.3d 124, 134-135 (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.*; *U.S. v. Lomeli,* 676 F.3d 734 (8th Cir. 2012).

STATEMENT OF THE CASE AND FACTS

A. The Cocaine Conspiracy Investigation.

To understand the legal issues presented by this petition, they must be viewed 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 petitioner, Billy 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 ADA assigned to HIDTA was Grant Huebner. The record is not entirely clear as to when the investigation began, but the relevant portion was from November 2005 to October 2008.

In addition to Cannon, the investigation focused on Gerald McGhee who, on November 10, 2005, was arrested following a bust of a cocaine transaction arranged by a Confidential Informant. (R7). The driver of the target vehicle, Lamont Powell, got away, but not McGhee. (*Id.*). Following apprehension, McGhee claimed Cannon had supplied the cocaine. Police recovered cocaine from the vehicle and, upon executing a search warrant, from 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, the

primary target of which became Cannon. (R257-64-65). And in March 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 focus of the ongoing cocaine conspiracy investigation.

It was also learned that in 2006, Cannon allegedly went to Miami to find a new cocaine source, and supposedly there had been transactions of up to $50,000 between Cannon and Marcus Adams, and 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 also connected Cannon to Brown. (*Id.*). In 2007, Agent Gray 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, in January 2008, a GPS device on Cannon's vehicle. (R184-16). Then, that same month, the Task Force obtained an order to wiretap Brown's phone. (R1; R2). The order authorized surveillance of Brown's phone and continued for several weeks, during which time the Task Force intercepted calls between Brown and Cannon. (R184-31; R185-54-57). One call involved discussions about Butler's arrest. (R185-57). Consequently, some calls between Cannon and Brown covered how they should all get lawyers, who to get, and the cost. (*Id.* at 58). This, in turn, led to physical surveillance of Cannon and Brown meeting at a radio station to discuss these developments. (R185-40-45).

Then, in March 2008, the Task Force parlayed information from the Brown wiretap into an order to wiretap Cannon's phone, furthering its ongoing drug conspiracy investigation of Cannon. Among persons expected to be intercepted were McGhee, Butler, and Brown. (R6-8-9). The application identified McGhee as purchasing kilograms 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 numerous telephone contacts between Cannon and McGhee. (R182).

The wiretap order for Cannon was extended twice and during the months of March, April and May, 2008, the Task Force continued capturing conversations placed to and from Cannon's phone, more of which involved McGhee. Some, the State would later claim, demonstrated Cannon was still conspiring to distribute cocaine. Others, the State would claim, demonstrated that Cannon, a convicted felon, was involved in a firearm transaction involving Carl Page.[2]

[2]As is typical with wiretapped communications, the Task Force intercepted conspiratorial conversations about cocaine conducted using coded language. With McGhee, 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.). The cocaine conspiracy investigation involving Cannon and McGhee that began in November 2005 was still ongoing in March 2008.

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. On October 16, 2008, the Task Force, suspecting a firearm transaction involving Cannon and Page from the intercepted calls, sent Page to Cannon's house to conduct a firearm transaction. A contrived controlled transfer was successful. On October 19, 2008, Task Force members arrested Cannon. While in custody, Cannon provided police with some incriminating statements on both cases. Thus ended the Task Force's three-year investigation of Cannon for conspiracy to distribute cocaine.

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

On March 20, 2009, the State filed a criminal complaint charging Cannon with:

Count 1 Conspiracy to Distribute Cocaine;

Count 2 Possession of Firearm by Felon; and

Count 3 Furnish Firearm to Unauthorized Person

State v. Cannon, Case No. 2009 CF 1337. The complaint was signed by Task Force co-leader Agent Newport and HIDTA ADA 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

involved the controlled transfer of a firearm in October 2008 involving Page.

It is undisputed that when the State filed this 2009 case, the Task Force had all the information it would ever have regarding Cannon's alleged involvement in any cocaine conspiracy. (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 cocaine (found on McGhee, in the vehicle and Powell's residence). It also possessed the intercepted wiretap communications from Spring 2008 (though no cocaine) that police believed demonstrated Cannon continued in the cocaine conspiracy, based on intercepts of "coded" language used during the wiretapped calls.

Nevertheless, when the State filed the 2009 case, 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. It also added gun charges allegedly occurring 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 falling squarely within that same time frame: 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 2008, the Task Force believed intercepted calls demonstrated.

In June 2009, Cannon filed a motion to suppress the statements given to police on October 17, 2008. The gun

counts were eventually severed from the drug conspiracy count for purposes of trial. The circuit court denied the motion to suppress Cannon's statement and ruled it admissible in its entirety. (R254-48; R255-13-14).

Meanwhile, the Task Force continued investigating alleged co-conspirator Eraclio Varela. Within a couple months, however, the ADA was told he could proceed with charges based on the wiretaps. (R229-41). The State did not, however, file any new charges against Cannon, nor amend the criminal complaint in the then-pending 2009 case, or otherwise disclose the wiretap information. Instead, for six months, it was business as usual as the 2009 cocaine conspiracy case neared trial. In January 2011, a jury trial began on the cocaine conspiracy charge. Cannon was acquitted.

C. Double Jeopardy: 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 Task Force co-leader, Agent Gray and, again, by ADA Huebner. (*Id.*). Taken as a whole, this second complaint covered alleged activity from March to May of 2008, squarely within the same time period covered by the first case (November 2005 to October 2008). (*Id.*). The charge stemmed from 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.[1]

Cannon filed several motions during the second conspiracy case. Two are germane here: (1) suppress wiretap evidence; and (2) dismiss the case on double jeopardy violations. (R24; R25; R27; R28). Following hearings, the circuit court denied both motions, reasoning, regarding the latter, that the two cocaine conspiracy cases were distinct in law, and in fact. (R230-11-23; R233-10-17).

On February 10, 2014, a jury trial began on the case *sub judice.* (R242-R248). There was liberal use of the wiretap recordings for both the drug and firearm charges. (R244-70-76; R248-52-55). The jury found Cannon guilty on all counts and he was sentenced to 30 years. On May 25, 2021, the appellate court affirmed Cannon's convictions.[2] (App. A).

[1] The THC conspiracy is not relevant to this petition.

[2] Cannon filed post-conviction motions addressing double jeopardy and wiretap issues, which were denied. (R217).

Argument

I. **THE COCAINE CONSPIRACY CONVICTION IN THIS CASE AROSE FROM THE SAME ONGOING INVESTIGATION BY THE SAME JOINT TASK FORCE DURING THE SAME TIME FRAME THAT GAVE RISE TO THE FIRST COCAINE CONSPIRACY CASE, AND INVOLVED CONDUCT OCCURRING PRIOR TO THE FILING OF THAT FIRST CONSPIRACY CASE, AND ANY PRETENSE FOR NOT INCLUDING THE FACTS OF THIS CASE IN THE FIRST CASE EVAPORATED MONTHS BEFORE THE FIRST CASE WENT TO TRIAL, ALL OF WHICH CONSTITUTED A DOUBLE JEOPARDY VIOLATION.**

A. Double Jeopardy.

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 to an improperly subdivided same offense into multiple counts of violating the same statute. *Id.* Here, while the 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 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 serial prosecution of Cannon. 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, but held it until after Cannon was acquitted in 2011. Second, any pretense offered by the State for dividing the Task Force's single investigation of Cannon into two separate cases, and coming forth with the wiretap information only after Cannon was acquitted, evaporated long before Cannon's first trial. (R229-38-41).

Prosecuting a single conspiracy as separate conspiracies violates a defendant's double jeopardy guarantee, even if some 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. U.S.*, 91 F.2d 614 (4th Cir. 1937). *Short* explained one problem with trying Cannon twice under the guise of construing the 2005 and 2008 evidence as 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 in . . . the *Ferracane* Case [dissent]: 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).

When first addressing the double jeopardy issue, part of the circuit court's rationale for denying the motion was two charges were legally distinct. (R230-11-12). The post-conviction court tacitly conceded this error by undertaking only a factual analysis under *Blockburger*. (R197; R217-15-16). The appellate court did the same, but also conceded that reliance on *Blockburger* is insufficient in the criminal conspiracy context:

> To support his argument that his right to be free from double jeopardy was violated, Cannon argues that a "strict application of the factual inquiry under Blockburger [is] inappropriate" and we should look at the analysis in double jeopardy cases involving conspiracies, such as *United States v. Castro*, 629 F.2d 456 (7th Cir. 1980). We agree with Cannon that *Castro* is instructive in this case, but we conclude that Cannon does not prevail under *Castro*.

(App. A-6). Rather than apply *Castro*, however, the appellate court turned to other *federal* cases. *Id.*, *citing, U.S. v. Sertich*, 95 F.3d 520 (7th Cir. 1996), *U.S. v. Dortch*, 5 F.3d 1056 (7th Cir. 1993), and *U.S. v. Thornton*, 72 F.2d 764 (7th Cir. 1992). The appellate court then reasoned the two conspiracies were factually distinct. (*Id.* at 7-9).

To decide if a conspiracy has been subdivided arbitrarily, courts look to the indictments and the evidence, and consider if 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. *Castro,* at 461. Where several factors are present, the conclusion follows that the alleged illegal combinations are not separate and distinct offenses. *Id.* And the presence of different co-conspirators is not controlling. The law of criminal conspiracy provides that new conspirators may join the criminal agreement after its inception, while others may terminate membership before its completion. *Castro,* at 464. And like this case, the length of the conspiracy in *Castro* was defined by the length of the conspiracy investigation.

In applying these factors, the appellate court first stated there was no overlap in time periods:

> The 2009 charge alleged that a conspiracy took place on November 10, 2005, whereas the 2011 charge alleged that a conspiracy took place from approximately March 4, 2008, to March 24, 2008.

(App. A-7). This analysis ignores, however, the ongoing conspiracy investigation that continued unabated after November 2005 and into Spring 2008. It also artificially frames an ongoing conspiracy as having existed for only a single day: November 10, 2005. It should be noted that the State has never established the beginning or the end of any conspiracy.[3]

[3] In *U.S. v. Cerro,* 775 F.2d 908, 912 (7th Cir. 1985), the government presented as distinct, conspiracies that did not overlap in time. ("Count I . . . April 1980 to December 1980 . . . Count III: Gaulke, March 1977 to the

Second, the appellate court reasoned that each alleged conspiracy involved different co-conspirators:

> The 2009 conspiracy charge allegedly involved cocaine supplier "Hot Rod" Smith and customers Jerald McGhee and Lamont Powell. The 2011 conspiracy charge involved supplier Eraclio Varela and customer Damone Powell.

(App. A-8). The appellate court, however, ignored basic tenets of conspiracy law: alleged co-conspirators may be included in an overall agreement without knowing all the conspiracy's participants, and new conspirators may join the conspiracy after its inception, and others terminate membership before its completion. *Castro*, 629 F.2d at 464. Indeed, as noted above, when Cannon's 2009 supplier left the conspiracy, Varela entered as a new supplier, following Cannon's trip to Miami. Moreover, all of the conspirators need not participate in every aspect of the conspiracy in order to be guilty of a single conspiracy and as long as they knowingly embrace the same criminal objective, they participate in a single conspiracy. *U.S. v. Sababu*, 891 F.2d 1308, 1324 (7th Cir. 1989).[4]

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spring of 1979"). *Cerro* reversed the defendant being sentenced to consecutive sentences for both of these "distinct" conspiracies.

[4] The appellate court also brushes aside the fact McGhee was a crossover participant in both conspiracies the State positioned as separate. To create the illusion of a second and distinct conspiracy, the State simply left McGhee out of the second prosecution. Recall that McGhee was arrested in the first conspiracy when the vehicle he occupied was taken down in the drug bust. McGhee's statement was used in the 2009 complaint and then again in the 2008 application for a wiretap. McGhee never withdrew and

Third, the appellate court reasoned these were separate conspiracies simply because the locations appeared to have changed between 2005 and 2008:

> The 2009 conspiracy charge was alleged to have occurred at Cannon's rental property on North 47th Street in the City of Milwaukee. The 2011 conspiracy charge, however, took place at Cannon's residence on Nash Street in the City of Milwaukee.

(App. A-8-9). Milwaukee, the appellate court reasoned, is large enough for more than one cocaine conspiracy. (*Id.* at 9), *citing Dortch*, at 1062. In *Dortch*, however, the two conspiracies were in different states (Illinois and Missouri) and in the "greater St. Louis area," and not separated by just a few blocks, as here, a fact obscured by omitting the address of the Nash Street residence ("4731") which thus was in close proximity to "47th Street." Nor did it bother to address that *Castro* viewed this factor as favoring a double jeopardy violation, when "both" conspiracies were in "the Chicago area," (*id.* at 463), a metropolitan area infinitely larger than Milwaukee.

Finally, the appellate court presumed no similar *modus operandi*, (App. A-9), when the opposite is apparent from the record. During the entire relevant time period (2005 to 2008),

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remained a target of the investigation into the Spring of 2008, and was captured in the wiretap talking to Cannon about moving "TVs" and "tre balls." To avoid dealing with this commonality, the appellate court characterized it as "minimal overlap." (App. A-8).

Cannon was allegedly engaged in the same activity: buying large amounts of cocaine and then supplying the same to lower-level dealers. In the "first" conspiracy, Cannon allegedly purchased kilograms of cocaine and then supplied the same to lower-level dealers Lamont Powell and McGhee. In the "second" conspiracy, Cannon allegedly purchased kilograms of cocaine and supplied the same to Damone Powell and Ezell. As previously noted, Cannon was also again and still supplying "TVs" and "tre balls" (read, "cocaine" and "three ounces" of cocaine) to McGhee, evidence conveniently excised by the State. In short, Cannon was the Milwaukee "hub" around which the ongoing conspiracy revolved. *Cerro*, *supra*.

The flaw in the appellate court's disposition of the double jeopardy problem is its myopic focus on the existence of two separate overt acts. Its analysis barely went further, when the mere existence of two overt acts did not mean Cannon was involved in two different conspiracies. And it ignored that from 2005 to 2008, some members of the conspiracy present from the outset dropped out, some remained for the entire period of time, and some not there at the outset later joined.

Moreover, there *was* factual overlap during the two trials, although the degree and significance of such has thus far been downplayed. In both trials, Cannon's October 2008, statement to police was used. While the use of Cannon's statement in the 2009 trial has been positioned as minor, a closer examination reveals a more significant use:

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, from the start, 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 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 revisited twice more during 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, evidence presented by the State in the 2009 case projected the conspiracy forward into 2006, just as the ongoing conspiracy investigation projected forward into 2006, and beyond. And in fact, during the first trial, Agent Newport testified "there was other evidence that supported Cannon dealing drugs." (*Id.* at 65).

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

The appellate court dismissed this problem, but did not entirely apprehend it:

> Cannon observes that the 2009 conspiracy charge was accompanied by two firearm charges relating to conduct on October 16, 2008. This however is irrelevant. Cannon did not go to trial on the firearm charges. He entered a guilty plea to the possession of a firearm by a convicted felon charge and the furnishing a firearm to a convicted felon charge was dismissed and read in.

(App. A-8, fn. 7). While true, this observation misses the larger point. It further proved the continuing and ongoing investigation from which arose "two" alleged conspiracies that were inextricably intertwined.

B. Issue Preclusion.

The State was also barred under principles of issue preclusion from introducing, in the 2011 case, any evidence it introduced, or could have introduced, in the 2009 case. This issue is brought into greater focus by the fact the State had no justification for holding back the 2011 case evidence when it prosecuted Cannon in the 2009 case. In *Ashe v. Swenson*, 397 U.S. 436, (1970), the Supreme Court ruled the doctrine of collateral estoppel, 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 identical parties. *Id*. at 443.

Issue preclusion affords double jeopardy protection against a second trial where the "same evidence" definition of "same offense" would not. *Brown v. Ohio*, 432 U.S. 161, 166 (1977). Here, evidence from the two 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 in this case 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, issue preclusion has been an established rule of federal criminal law for the last century. *U.S. v. Oppenheimer*, 242 U.S. 85 (1916). Issue preclusion applies when 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). To determine 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*, at 444.

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: an acquittal. The party against whom Cannon invokes the doctrine - the State - was a party to the prior adjudication. The State had a full and fair opportunity to litigate the cocaine conspiracy issue in the prior action, but chose to keep the additional evidence under wraps.

That full and fair opportunity included the freedom to present the 2008 wiretap evidence, obtained three years earlier, during the first trial. Nor did anything prevent the State, during that trial, from introducing the entirety of the statement Cannon gave police in 2008, which addressed both alleged conspiracies. Indeed, the admissibility of that statement had been addressed during the first case and deemed admissible in its entirety. And yet, the State elected to use it piecemeal.

The State's approach ensured Cannon would be exposed to the very dangers the double jeopardy clause was designed to protect. The State cannot successively prosecute defendants for two offenses unless each offense requires proof of an element the other does not, nor relitigate facts already

adjudicated to defendant's benefit in an earlier prosecution. *State v. Kurzawa*, 180 Wis.2d 502, 524, 509 N.W.2d 712 (1994). These protections spare defendants from being forced to unfairly "run the gauntlet" twice for the same offense. *Id*.

By dividing a single crime into two charges in separate prosecutions, Cannon was ensured "the very abuses the double jeopardy clause was designed to protect against." *Kurzawa*, at 531. Here, 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 . . . .

Id. The Double Jeopardy Clause requires the prosecution, except in most limited circumstances, to join at one trial all the charges against a defendant that grow out of a single criminal act, occurrence, episode, or transaction. *Ashe*, at 453–54. (Brennan, concurring).

II. CANNON'S CONVICTION FOR FURNISHING A FIREARM TO AN UNAUTHORIZED PERSON WAS THE PRODUCT OF UNLAWFULLY OBTAINED AND USED WIRETAP EVIDENCE AND DERIVATIVE EVIDENCE.

A. The Plain Meaning Of Section 968.29 Requires The Same Judge Who Approved The Original Wiretap Order To Approve Any Non-Enumerated Offense Intercepts.

Cannon was convicted of a firearm transaction based on wiretap recordings allegedly showing him arranging a firearm transaction involving a felon. The wiretap evidence was used at trial and prejudiced Cannon. The intercepts were not merely referenced at trial, although they were, and often, (*see e.g.*, R243-65-71), which alone would establish the requisite prejudice. Here, the actual wiretap audio was also introduced at trial, and played for the jury. (*See, e.g.*, R245-146). Further prejudicing Cannon was derivative evidence: testimony from Page and Turnage. (App. A-12).

The original wiretap order was issued by Judge Kitty Brennan, authorizing intercepts of communications pertaining to drug offenses. (R198). As Chief Judge, she was statutorily authorized to so act. Section 968.28, Stats. The order purporting to authorize use of non-authorized offenses, however, was issued by Judge Richard Sankovitz. (R201-6). The controlling statutory language for issuing that type of order is found in Section 968.29(5):

> 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 . . . .

(Emphasis added). Likely aware of this limitation, the State drafted an order allowing use of non-authorized offenses for the chief judge's signature. Her name, however, was crossed off before it was signed by Judge Sankovitz, who handwrote the word "acting" before the words "Chief Judge." (R201-6).

The unambiguous statutory language controls: the "same" judge means the "same" judge. *State v. Szarkowitz*, 157 Wis.2d 740, 748, 460 N.W.2d 819 (Ct. App. 1990). In the absence of ambiguity, courts do not look to extrinsic sources, except to confirm a 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.

Nevertheless, the appellate court sanitized the problem by reasoning that per SCR 70.23(2), a chief judge may "assign an active judge" of the district "to substitute for the absenting judge." Resort to extrinsic sources for statutory interpretation, however, is appropriate only when the statute is ambiguous. Section 968.29(5), Stats., is not ambiguous.

Nor does SCR 70.23(2) have the expansive reach the appellate court attributed to it:

> An active judge who is going to be absent from his or her court shall obtain approval of the chief judge of his or her judicial administrative district. The chief judge by order may assign an active judge of the judicial administrative district to substitute for the absenting judge. The chief judge by order may also assign an active judge of the judicial administrative district to relieve congestion, to expedite disposition of litigation or to assist in any branch of circuit court in the judicial administrative district. If no active judge of the district is available for the service, the chief judge shall request the director of state courts to assign a judge from outside the judicial administrative district or a reserve judge. The director of state courts may also make a permanent assignment to a judicial district of a reserve judge who can be assigned by a chief

> judge in the same manner as an active circuit judge under this section.

This provision pertains to a chief judge engaging an active judge to replace an absenting judge, not to a chief judge assigning statutorily prescribed duties to an active judge. The words "active" and "acting" are not synonymous here.

B. While The State Produced An Order For Use Of The First Intercepted Recording, No Orders Authorized Use Of The Subsequent Recordings Used At Cannon's Trial.

The Newport affidavit and consequent order issued by Judge Sankovitz pertain only to the call intercepted on April 3, 2008. That order was signed 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). No orders authorize use of these subsequent calls. Section 968.29, Stats., does not allow, and Judge Sankovitz's order did not grant, *carte blanche* to continue capturing and using intercepts of otherwise unauthorized intercepts with impunity. The solitary 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 CI against Cannon, and later, into a witness against Cannon during the case *sub judice,* on the firearm charge.[5]

[5] 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

Here is where the court of appeals opinion, and its harmless error analysis, is fatally flawed. The appellate court reasoned that any error was harmless because Page and Turnage testified at trial. (App. A-12). This "harmless error" rationale was possible, however, only because the appellate court ignored that Page's and Turner's testimony was derivative of the illegal intercepts. The subsequent calls are not the only thing that should have been barred, but also any testimony about them, and evidence derived from the intercept.

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, And The Good Faith Exception Cannot Apply In This Context.

The purposes for which a court may authorize a wiretap are limited to certain offenses. Section 968.28, Stats. Dealing in controlled substances falls *within* the scope of crimes for which a wiretap may be authorized, while firearms offenses do not. *Id.* Per section 968.29(5), Stats., Agent Newport therefor executed an affidavit to establish probable cause to believe Cannon committed a non-enumerated offense. (R201). The

---

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.

State eventually conceded probable cause is the touchstone for such "use" orders. (*see, e.g.,* 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 more importantly, that Cannon *knew* "Jimmy" or "Page" were felons. Thus, the affidavit did not establish probable cause for the order Judge Sankovitz issued. The appellate court glossed over this problem by reasoning Page was a "known felon." (App. A-11). The absence of evidence suggesting such was "known" *to Cannon* was an inconvenient truth the appellate court chose to ignore.

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 not explain how affiant reached that legal conclusion. Constructive possession requires a defendant to exercise dominion and control over the object in question:

> 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.

U.S. v. Morris, 576 F.3d 661, 666 (7th Cir. 2009).

The 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. 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 is inherent he did not have the requisite dominion or control.

The critical point is nothing in the affidavit - not even a bald allegation - established the requisite knowledge by Cannon that a firearm would be possessed by a felon. Indeed, the claim was the firearm would be furnished to Jimmy Hayes, **but Hayes was not a felon**, so Cannon could not have *known* Hayes was a felon. The appellate court ignores this too. And if Page *was* a felon, and already possessed a firearm, Cannon did nothing to aid that possession. The affidavit was bereft of any claim Cannon knew either individual was a felon, and the most relevant of them was *not* a felon, a fact conveniently omitted from the affidavit, and ignored by the appellate court.

As for the good faith exception to the warrant requirement, the State cited no authority applying that exception in the context of the wiretap statute, (R214-9-10), nor did the appellate court, 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." *Allard, supra; Lomeli, supra*.

Nevertheless, ignoring this as well, the appellate court resolved this issue by concluding probable cause existed *and* by applying that exception:

> In this case, the original wiretap application was approved by the attorney general and the district attorney and then by Chief Judge Brennan. The supplemental application was reviewed and signed by the district attorney and then submitted to Judge Sankovitz for approval. . . . Judge Sankovitz found that there was sufficient information to authorize the use of the firearm transaction evidence. Under these circumstances, the officers who received the authorization . . . could not be expected to question the probable cause determination.

(App. A-13-14). As noted at the outset, the good faith exception does not work in this context because neither a *seizure* nor *police action* are implicated.

Conclusion and Relief Requested

For all the foregoing reasons, Cannon requests this Court grant his petition.

Dated this 23rd day of June, 2021.

/s/ Rex Anderegg
REX R. ANDEREGG
State Bar No. 1016560
Attorney for the Defendant-Appellant-Petitioner

CERTIFICATION

I certify that this petition 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 8,000 words, as counted by Microsoft Word 2016, and accounting for ellipses (12).

Dated this 23rd day of June, 2021.

/s/ Rex Anderegg
REX R. ANDEREGG

CERTIFICATION OF APPENDIX

I hereby certify that I have submitted an electronic copy of this appendix which complies with the requirements of the Interim Rule for Wisconsin's Appellate Electronic Filing Project, Order No. 19-02. I further certify that a copy of this certificate has been served with this appendix filed with the court and served on all parties either by electronic filing or by paper copy. I further certify that the appendix 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 23rd day of June, 2021.

/s/ Rex Anderegg
REX R. ANDEREGG

CERTIFICATE OF COMPLIANCE - RULE 809.19 (12)

I hereby certify that:

I have submitted an electronic copy of this petition for review, excluding the appendix, if any, which complies with the requirements of the Interim Rule for Wisconsin's Appellate Electronic Filing Project, Order No. 19-02.

I further certify that a copy of this certificate has been served with this brief filed with the court and served on all parties either by electronic filing or by paper copy.

Dated this 23rd day of June, 2021.

/s/ Rex Anderegg
Rex Anderegg

APPENDIX

COURT OF APPEALS OPINION …….App. A

TRIAL COURT DECISION……App. B

JUDGMENT OF CONVICTION……App. C

APPENDIX A

Court of Appeals Opinion

COURT OF APPEALS
DECISION
DATED AND FILED

May 25, 2021

Sheila T. Reiff
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2019AP2296-CR **Cir. Ct. No. 2011CF924**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT I

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

BILLY JOE CANNON,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: STEPHANIE ROTHSTEIN, Judge. *Affirmed*.

Before Brash, P.J., Dugan and Donald, JJ.

¶1 DONALD, J. Billy Joe Cannon appeals from a judgment convicting him of conspiracy to deliver cocaine as a second and subsequent offender, conspiracy to possess with the intent to deliver marijuana as a second and subsequent offender, and furnishing a firearm to an unauthorized person as a party

to a crime. Cannon also appeals an order denying his postconviction motion. Cannon argues that the conspiracy to deliver cocaine charge violates his constitutional rights against double jeopardy and that the wiretap recordings used to convict him of furnishing a firearm to an unauthorized person should have been suppressed. We reject his arguments and affirm.

BACKGROUND

¶2 In 2009, the State charged Cannon with three counts: (1) conspiracy to deliver cocaine in an amount greater than forty grams on November 10, 2005, as a party to a crime; (2) possession of a firearm by a convicted felon on October 16, 2008; and (3) furnishing a firearm to a convicted felon on October 16, 2008, as a party to a crime. The conspiracy charge was severed from the two firearm charges for the purposes of trial.

¶3 In 2011, Cannon went to trial on the conspiracy charge.[1] At trial, the State alleged that Cannon was part of a conspiracy to deliver cocaine on November 10, 2005, involving cocaine supplier "Hot Rod" Smith and Cannon's customers, Jerald McGhee and Lamont Powell, at Cannon's rental property on 47th Street in Milwaukee. The jury found Cannon not guilty. Subsequently, Cannon entered a guilty plea to the possession of a firearm by a convicted felon charge and the furnishing a firearm to a convicted felon charge was dismissed and read in.

¶4 Approximately six weeks after the trial on the conspiracy charge, the State filed new charges against Cannon. The charges were as follows:

[1] The Honorable Michael Guolee presided over Cannon's first trial.

(1) conspiracy to deliver cocaine in an amount greater than forty grams "between on or about March 4, 2008 and on or about March 24, 2008," as a party to a crime; (2) 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," as a party to a crime; and (3) one count of knowingly furnishing a firearm to a convicted felon "on or about Thursday, April 3, 2008," as a party to a crime.[2]

¶5 Pre-trial, Cannon filed a number of motions including a motion to dismiss the new conspiracy charge as a violation of Cannon's right to be free from double jeopardy and a motion to suppress wiretap evidence. The circuit court rejected both challenges.

¶6 In 2014, Cannon went to trial on the new charges.[3] Pertinent to this appeal, at trial, the State argued that beginning on March 4, 2008, and ending around March 24, 2008, at Cannon's house on Nash Street in Milwaukee, Cannon was a member of a conspiracy to deliver cocaine involving cocaine supplier Eraclio Varala[4] and customer Damone Powell.[5] The State also argued that Cannon arranged for the transfer of a firearm to Jimmy Hayes through two convicted felons, Anthony Turnage and Carl Page. A jury found Cannon guilty as charged.

[2] A second and subsequent offender penalty enhancer was later added to counts one and two. The party to a crime designation on counts one and two were stricken at the conclusion of the trial.

[3] The Honorable Stephanie Rothstein presided over Cannon's second trial and decided his postconviction motion.

[4] The record contains different spellings of Eraclio's last name, "Varala." We use the spelling Eraclio provided during the trial.

[5] Damone Powell is a different person from Lamont Powell, who testified at the first trial.

Cannon was sentenced to a total of sixteen years of initial confinement followed by fourteen years of extended supervision.

¶7 Postconviction, Cannon moved for a new trial. The circuit court ordered all postconviction documents to be filed under seal. After briefing, the circuit court denied Cannon's motion without an evidentiary hearing. The circuit court rejected Cannon's renewed double jeopardy challenge to the 2011 conspiracy charge concluding that "the offenses may have been the same, but they were not the same in fact[.]" Additionally, the circuit court rejected Cannon's argument that trial counsel was ineffective for failing to sufficiently argue for suppression of the wiretap recordings of the firearm transaction.

¶8 This appeal follows. Additional relevant facts will be referenced below.

DISCUSSION

I. Double Jeopardy Violation

¶9 Cannon argues that his right to be free from double jeopardy was violated because the 2009 conspiracy charge and the 2011 conspiracy charge were actually a single "continuous conspiracy" to deliver cocaine. In support, Cannon emphasizes that both charges stem from a single investigation, which was completed prior to his first trial. The issue, however, is not whether there was a single investigation, but whether there was a single conspiracy. We conclude that there was not a single conspiracy. Rather, we agree with the State that Cannon was involved in two separate and distinct conspiracies.

¶10 The double jeopardy clause in the United States Constitution states that no person shall "be subject for the same offence to be twice put in

jeopardy[.]" U.S. CONST. amend. V. Likewise, the Wisconsin Constitution provides that "no person for the same offense may be put twice in jeopardy of punishment[.]" WIS. CONST. art. I, § 8. The United States and Wisconsin double jeopardy clauses are identical in scope and purpose. ***State v. Davison***, 2003 WI 89, ¶18, 263 Wis. 2d 145, 666 N.W.2d 1.

¶11 Whether a defendant's constitutional right to be free from double jeopardy has been violated is a question of law that we review *de novo*. ***State v. Harris***, 190 Wis. 2d 718, 722, 528 N.W.2d 7 (Ct. App. 1994).

¶12 To determine whether a double jeopardy violation has occurred, the State argues that we should apply ***Blockburger v. United States***, 284 U.S. 299 (1932). Pursuant to the ***Blockburger*** test, two prosecutions violate the double jeopardy clause when the offenses are "identical in the law and in fact." *See* ***State v. Schultz***, 2020 WI 24, ¶22, 390 Wis. 2d 570, 939 N.W.2d 519 (citation omitted).

¶13 The State here concedes that the 2009 conspiracy charge and the 2011 conspiracy charge are identical in law. We agree with the State's concession and turn to the second part of the ***Blockburger*** test—whether the charges are identical in fact.

¶14 "Offenses are not identical in fact when 'a conviction for each offense requires proof of an additional fact that conviction for the other offense[] does not.'" ***Schultz***, 390 Wis. 2d 570, ¶22 (citation omitted). Offenses also are not identical in fact when "they are different in nature or separated in time." ***Id.***

¶15 To support his argument that his right to be free from double jeopardy was violated, Cannon argues that a "strict application of the factual inquiry under ***Blockburger*** [is] inappropriate" and we should look at the analysis

in double jeopardy cases involving conspiracies, such as ***United States v. Castro***, 629 F.2d 456 (7th Cir. 1980).

¶16 We agree with Cannon that ***Castro*** is instructive in this case, but we conclude that Cannon does not prevail under ***Castro***. In ***Castro***, the Seventh Circuit stated that to determine whether a conspiracy has been subdivided arbitrarily, courts should look to "both 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.*** at 461. Subsequent Seventh Circuit cases have also looked at whether two charges "share similar objectives or modus operandi[,]" and note that when evaluating the factors, a totality of the circumstances test is used. *See e.g.*, ***United States v. Sertich***, 95 F.3d 520, 524 (7th Cir. 1996). Additionally, in a post-trial double jeopardy review, "the defendant alone bears the burden[.]" ***United States v. Dortch***, 5 F.3d 1056, 1060 (7th Cir. 1993).

¶17 In ***United States v. Thornton***, the Seventh Circuit also indicated that,

> [d]eciphering what constitutes prosecution for the *same offense* for purposes of double jeopardy is not an easy task. And, the Supreme Court and this court have recognized that this task becomes even more difficult when we move from single layered crimes such as bank robberies to prosecution for multilayered crimes such as conspiracies which expand over time and place. The reason for the added complexity is that it is difficult to apply double jeopardy's notions of finality to crimes which have no easily discernable boundaries with regard to time, place, persons, and objectives.

Id., 972 F.2d 764, 765 (7th Cir. 1992) (citations omitted).

¶18 In ***Thornton***, the court then stated that,

> [i]n ***Castro*** we held that the double jeopardy clause prohibits the government from arbitrarily subdividing one conspiracy into several and then prosecuting a person multiple times for what essentially constitutes one conspiracy. The rationale underlying this proposition is simple: the double jeopardy clause prohibits multiple prosecutions for the *same offense*, and because the agreement is the *sine qua non* of conspiracy, if the government twice prosecutes an individual under the same statute for what essentially constitutes one agreement, this must constitute prosecution for the same offense in violation of double jeopardy.

Id. at 766 (citation omitted).

¶19 Here, an examination of the totality of the circumstances does not support the existence of a single continuous conspiracy. While the 2009 conspiracy charge and the 2011 conspiracy involved a similar overt act (a cocaine transaction),[6] the remainder of the factors do not support the existence of a single continuous conspiracy.

¶20 First, there is not an overlap in dates between the two conspiracy charges. The 2009 charge alleged that a conspiracy took place on November 10, 2005, whereas the 2011 charge alleged that a conspiracy took place from approximately March 4, 2008, to March 24, 2008. *See* ***Dortch***, 5 F.3d at 1062

[6] At Cannon's second trial, evidence was also elicited that Cannon was involved in selling marijuana. For example, Varala testified that he supplied Cannon with both marijuana and cocaine. However, because Cannon was charged separately for conspiracy to deliver marijuana and because the conspiracy charge at issue here focused on cocaine, we give Cannon the benefit on this factor.

(observing that the court has "found a single conspiracy only when the dates charged in the indictments actually overlapped").[7]

¶21 Second, the charges involved different co-conspirators. The 2009 conspiracy charge allegedly involved cocaine supplier "Hot Rod" Smith and customers Jerald McGhee and Lamont Powell. The 2011 conspiracy charge involved supplier Eraclio Varala and customer Damone Powell. Moreover, at the second trial, Varala testified that he started selling drugs to Cannon in 2008, which supports the existence of a second and separate conspiracy.

¶22 Cannon asserts that "McGhee was a common member fully implicated in both alleged conspiracies," but "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)." Cannon, however, does not present any evidence that McGhee was involved in the transaction with Damone Powell. Further, even if McGhee was implicated in both conspiracies, minimal overlap among defendants is insufficient to establish a single conspiracy. *See* ***id.***

¶23 Third, the location of the charges does not persuade us that a single conspiracy took place. The 2009 conspiracy charge was alleged to have occurred at Cannon's rental property on North 47th Street in the City of Milwaukee. The 2011 conspiracy charge, however, took place at Cannon's residence on Nash

[7] Cannon observes that the 2009 conspiracy charge was accompanied by two firearm charges relating to conduct on October 16, 2008. This however is irrelevant. Cannon did not go to trial on the firearm charges. He entered a guilty plea to the possession of a firearm by a convicted felon charge and the furnishing a firearm to a convicted felon charge was dismissed and read in.

Street in the City of Milwaukee. Although both charges took place in Milwaukee, Milwaukee is large enough for more than one conspiracy to distribute cocaine to exist. *See* ***id.*** at 1062-63 (concluding "[t]he greater St. Louis area is certainly large enough to be home to more than one conspiracy to distribute cocaine").

¶24 Finally, and most significantly, Cannon does not establish that the two conspiracies shared similar modus operandi or depended on each other for success. *See* ***id.*** at 1063 (observing that courts have "paid the most attention … [to] whether the two conspiracies depended on each other for success").

¶25 To support his argument that there was a single conspiracy, Cannon refers to an October 2008 statement he made to the police that the last time he dealt drugs with Hot Rod was in 2005 or 2006. Cannon argues that this statement "projected the conspiracy forward into 2006." This statement, however, does not support the existence of a single conspiracy. Rather, Cannon's statement supports that the first conspiracy ended in 2005 or 2006. Thus, based on the totality of the circumstances, we are not persuaded this was a single continuous conspiracy.

¶26 Lastly, Cannon argues that the State was barred from prosecuting him a second time "under the principles of issue preclusion[.]" "Issue preclusion, formerly known as collateral estoppel, limits the relitigation of issues that have been actually decided in a previous case." ***State v. Miller***, 2004 WI App 117, ¶19, 274 Wis. 2d 471, 683 N.W.2d 485. Cannon bears the burden to establish that issue preclusion applies. ***Id.*** This 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." ***State v. Vassos***, 218 Wis. 2d 330, 344, 579 N.W.2d 35 (1998).

¶27 We conclude that issue preclusion does not apply under the facts of this case. As discussed above, we do not find that there was a single conspiracy, but two separate and distinct conspiracies. At the first trial, the jury acquitted Cannon of the November 10, 2005 conspiracy. The jury did not decide whether Cannon was guilty of the conspiracy beginning on March 4, 2008, and ending around March 24, 2008. *See* ***Currier v. Virginia***, 585 U.S. ___, 138 S. Ct. 2144, 2150 (2018) (stating that a 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"). Thus, we find that Cannon has failed to meet his burden that the State was precluded from charging him with conspiracy to deliver cocaine beginning on March 4, 2008, and ending around March 24, 2008.

II. Suppression of the Wiretap Recordings

¶28 WISCONSIN STAT. § 968.28 (2019-20)[8] allows law enforcement to apply for a court order authorizing the interception of wire, electronic, or oral communications for certain enumerated offenses, including "dealing in controlled substances or controlled substance analogs[.]" If while executing a wiretap, police discover evidence relating to another crime not enumerated in the warrant, pursuant to WIS. STAT. § 968.29(5), they must obtain approval to use that evidence in later proceedings.

¶29 Police obtained a warrant to wiretap Cannon's phone. The warrant, signed by Chief Judge Kitty Brennan, authorized police to intercept calls on the

[8] All references to the Wisconsin Statutes are to the 2019-20 version unless otherwise noted.

grounds that probable cause existed to believe Cannon was engaged in drug dealing. On April 3, 2008, police intercepted calls in which Cannon arranged for the transfer of a firearm through a known felon, Carl Page, to Jimmy Hayes. Pursuant to WIS. STAT. § 968.29(5), police obtained a supplemental warrant from Judge Richard Sankovitz, authorizing the use of evidence of the firearm transaction in later proceedings.

¶30 Cannon makes four arguments as to why the wiretap recordings should have been suppressed. We disagree and address each of his arguments in turn.[9]

¶31 First, Cannon challenges the supplemental warrant authorizing the use of the firearm transaction evidence in later proceedings because it was issued by Acting Chief Judge Richard Sankovitz,[10] not Chief Judge Kitty Brennan, who issued the original warrant.

¶32 WISCONSIN STAT. § 968.29(5) provides that "the contents thereof, and evidence derived therefrom," may be used "when authorized or approved by the judge who acted on the original application …." While the statute refers to the

[9] The State argues that Cannon's wiretap claims were forfeited and should be analyzed under the ineffective assistance of counsel rubric. *See* ***Strickland v. Washington***, 466 U.S. 668 (1984). In his reply brief, Cannon responds that his claims should not be deemed forfeited because his failure to object was due to the State's failure to disclose all the wiretap documentation until the postconviction proceedings in violation of ***Brady v. Maryland***, 373 U.S. 83 (1963). As discussed below, we conclude that Cannon's claims do not have merit. Accordingly, as both the State and Cannon observe, any ineffective assistance of counsel argument would also fail. ***State v. Berggren***, 2009 WI App 82, ¶21, 320 Wis. 2d 209, 769 N.W.2d 110 (holding that counsel cannot be ineffective for not pursuing what would have been a meritless suppression motion).

[10] The supplemental warrant contains hand writing that crossed off "the Honorable Kitty K. Brennan" and inserts the word "Acting" in front of "Chief Judge, First District."

"judge who acted on the original application," Cannon overlooks that the Wisconsin Supreme Court Rules authorize the chief judge to "assign an active judge" of the district "to substitute for the absenting judge." SCR 70.23(2). This rule does not prohibit the chief judge from assigning another judge to take over his or her place. Thus, Cannon's argument that Judge Sankovitz lacked authority to sign the supplemental warrant fails.

¶33 Second, Cannon argues the State failed to produce any order authorizing the use of the calls intercepted on two dates, April 4th or April 5th. Assuming for the sake of argument that the calls on those dates were not authorized, any error was harmless. *See* ***State v. Harris***, 2008 WI 15, ¶85, 307 Wis. 2d 555, 745 N.W.2d 397 (stating that erroneously admitted evidence is subject to the harmless error rule).

¶34 At trial, both Page and Turnage testified regarding the details of the firearm transfer to Hayes. In addition, the jury also heard the April 3, 2008 calls setting up the firearm transaction, and Cannon's statements to the police and at trial admitting that he knew Page and Turnage were convicted felons when he arranged the transfer of the firearm through them to Hayes. Thus, we conclude, beyond a reasonable doubt, that a jury would have found Cannon guilty absent any error. *See* ***State v. Harvey***, 2002 WI 93, ¶48 n.14, 254 Wis. 2d 442, 647 N.W.2d 189 ("[I]n order to conclude that an error 'did not contribute to the verdict' … a court must be able to conclude 'beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error.'" (citation omitted)).

¶35 Third, Cannon argues that the affidavit accompanying the supplemental warrant authorizing the use of the firearm transaction evidence in later proceedings lacked probable cause. However, even if probable cause did not

exist, we agree with the State that suppression is not warranted due to the good faith exception.

¶36 Generally, evidence obtained in violation of the Fourth Amendment is excluded. ***State v. Scull***, 2015 WI 22, ¶20, 361 Wis. 2d 288, 862 N.W.2d 562. However, there are exceptions to the exclusionary rule, such as when police act in good faith or in objectively reasonable reliance on a warrant that is later found to be invalid. *See* ***United States v. Leon***, 468 U.S. 897, 922-23 (1984).

¶37 When a warrant is not supported by probable cause, police act in good faith reliance on the warrant if there is sufficient "indicia" of probable cause. ***State v. Marquardt***, 2005 WI 157, ¶¶24-29, 286 Wis. 2d 204, 705 N.W.2d 878. The standard for "indicia" is less demanding and "requires sufficient signs of probable cause, not probable cause per se." ***Id.***, ¶37. Any competing inferences are to be resolved in favor of the State. ***Id.***, ¶44.

¶38 In this case, the original wiretap application was approved by the attorney general and the district attorney and then by Chief Judge Brennan. The supplemental application was reviewed and signed by the district attorney and then submitted to Judge Sankovitz for approval. The affidavit at issue averred that a person named "Jimmy" asked Cannon for a gun, Cannon was a convicted felon, convicted felon Page agreed to assist Cannon's request for a gun, and that Page had two guns. Judge Sankovitz found that there was sufficient information to authorize the use of the firearm transaction evidence. Under these circumstances, the officers who received the authorization to use the firearm evidence could not be expected to question the probable cause determination. Based on the facts in

the affidavit, we conclude that there was a sufficient indicia of probable cause and that the good faith exception applies.[11]

¶39 Finally, Cannon argues that WIS. STAT. § 968.29(5) does not authorize the interception of any communications regarding firearms. Again, we disagree. As the State asserts, police may use information about other criminal activity that they inadvertently intercept while lawfully conducting an authorized wiretap. *See* ***State v. Gil***, 208 Wis. 2d 531, 544-46, 561 N.W.2d 760 (Ct. App. 1997). Additionally, as stated above, the plain language of § 968.29(5) provides that when an officer intercepts 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" with judicial approval. Accordingly, here, the police, who were conducting a lawfully authorized wiretap, were not barred from intercepting and using the firearm communications.

By the Court.—Judgment and order affirmed.

Not recommended for publication in the official reports.

[11] In Wisconsin, to apply the good faith exception, the State must also show that the process used for obtaining the search warrant included significant investigation and "a review by a police officer trained in, or very knowledgeable of, the legal vagaries of probable cause and reasonable suspicion, or a knowledgeable government attorney." ***State v. Eason***, 2001 WI 98, ¶63, 245 Wis. 2d 206, 629 N.W.2d 625. The State observes in its response brief that in this case there was a "lengthy investigation involving many actors" and both the initial application and supplemental application were reviewed by a government attorney. Cannon does not contest the satisfaction of these requirements in his reply brief, and thus, we deem them conceded. *See* ***United Co-op. v. Frontier FS Co-op.***, 2007 WI App 197, ¶39, 304 Wis. 2d 750, 738 N.W.2d 578 (finding that the failure to refute a proposition in a response brief may be taken as a concession).

APPENDIX B

Circuit Court Decision

STATE OF WISCONSIN CIRCUIT COURT Branch 25 MILWAUKEE COUNTY

FILED
CRIMINAL DIVISION

25 NOV 26 2019 25

JOHN BARRETT
CLERK OF CIRCUIT COURT

STATE OF WISCONSIN,

Plaintiff,

vs.

BILLY JOE CANNON,

Defendant.

Case No. 11CF000924

DECISION AND ORDER
DENYING MOTION FOR POSTCONVICTION RELIEF

On April 25, 2019, the defendant by his attorney filed a motion for postconviction relief seeking a new trial.[1] He was charged with conspiracy to commit manufacture or delivery of a controlled substance (cocaine)(PTAC)[2] and possession of a firearm by a felon (furnishing a firearm to a felon)(PTAC). An amended information charged him with an additional count of conspiracy to commit possession with intent to deliver controlled substance (THC)(PTAC)[3] and added "second or subsequent offense" to both drug offenses. All of the criminal activity alleged occurred between February and October of 2008 during which time the defendant was the subject of an on-going investigation by the HIDTA team (High Intensity Drug Trafficking Area) commencing at the end of 2005.[4] A jury trial was held before this court on February 10-14, 2014, after which he was found guilty as charged. On April 1, 2014, the court sentenced him to

[1] By order of the Court of Appeals dated March 13, 2019, the defendant was permitted to voluntarily dismiss his appeal and file a new motion for postconviction relief on or before April 29, 2019.
[2] The PTAC designation was stricken at the close of trial.
[3] The PTAC designation was stricken at the close of trial.
[4] The defendant was charged in 09CF001337 with conspiracy to commit delivery of controlled substance (cocaine)(PTAC) on or about November 10, 2005 and two counts of possession of a firearm by a felon on October 16, 2008. He pled guilty to one count of possession of a firearm by a felon, and on April 11, 2012, he was sentenced to 4 years in prison (2 years initial confinement, 2 years extended supervision).

22 years on count one (12 years initial confinement, 10 years extended supervision); 11 years on count two (7 years initial confinement, 4 years extended supervision); and 8 years on count three (4 years initial confinement, 4 years extended supervision). Counts one and two were ordered to run concurrent with one another, and count three was ordered to run consecutive to counts one and two. Judge Rosa[5] ordered a briefing schedule to which the parties have responded.[6] The case was returned to this court for a review of the defendant's current claims because this court tried the case and ruled on the essence of the motions presented. For the following reasons, the court denies the defendant's motion for a new trial.

The defendant contends that his convictions should be set aside on double jeopardy grounds, an argument that trial counsel raised in pretrial motions. The defendant acknowledges that a double jeopardy argument was previously made by trial counsel, but argues that certain cogent arguments were not presented, all of which requires reconsideration of the issue. In the alternative, he argues that counsel was ineffective for (1) failing to obtain suppression of the wiretap recordings of the firearm transaction on grounds that it wasn't authorized by statute; (2) failing to object to the State's failure to obtain the requisite judicial approval for the wiretaps; and (3) failing to object to the State's failure to obtain approval from the Attorney General on the wiretap application.

Strickland v. Washington, 466 U.S. 668, 694 (1984), sets forth a two-part test for determining whether an attorney's actions constitute ineffective assistance: deficient performance and prejudice to the defendant. Under the second prong, the defendant is required to show "'that there is a reasonable probability, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" ***Id.*** at 694; also ***State v. Johnson***, 153 Wis.2d 121, 128 (1990). A

[5] Judge Rosa was the successor to this court's prior felony drug calendar.
[6] The State filed a motion to seal its response because the complaint was filed under seal, the discovery was provided under protective order, and the search warrants and affidavits were ordered sealed by the Chief Judge.

reasonable probability is a probability sufficient to undermine confidence in the outcome. ***Id.*** A court need not consider whether counsel's performance was deficient if the matter can be resolved on the ground of lack of prejudice. ***State v. Moats***, 156 Wis.2d 74, 101 (1990). "Prejudice occurs where the attorney's error is of such magnitude that there is a reasonable probability that, absent the error, 'the result of the proceeding would have been different.' ***Strickland***, 466 U.S. at 694 . . . . " ***State v. Erickson***, 227 Wis.2d 758, 769 (1999).

The defendant asserts that when the State filed the complaint against him in 09CF001337, other information it had obtained about the defendant from its three-year investigation (and which was used as the basis for the complaint in 11CF000924) could have been used to amend the complaint in 09CF001337 -- instead of first waiting to see if he was convicted in case 09CF001337. It is undisputed that he was charged in case 11CF000924 with another conspiracy to deliver cocaine after he was acquitted in 09CF001337, and to this he remarks, ". . . while the ink was still drying on the verdict form . . . [the State] filed another cocaine conspiracy charge. . . using other information from the same investigation." (*Motion, p. 9*). He maintains that after the Task Force, which was investigating on-going drug activity via wiretaps, was unable to obtain any physical evidence, it decided that charging the individuals involved would no longer compromise its investigation, but the State did not utilize the information the Task Force had gathered until after he was acquitted in 09CF001337. The defendant submits:

> 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 – 2009CF1337 – or otherwise disclose the wiretap information. Instead, for the next six months or so, 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 [in 09CF1337] . . . .

(*Id. at p. 6*).

The defendant maintains that the charge dealing with conspiracy to commit delivery of cocaine in case 11CF000924 falls within the same time period covered by case 09CF001337 (i.e., November 2005 to October 2008), and thus, double jeopardy must apply.

In 11CF000924, the trial counsel filed a motion to dismiss on double jeopardy grounds and also a motion to suppress the wiretap evidence, both of which were denied by the court. He now contends that the court's denial of his motion to dismiss was flawed because "[t]here was no meaningful legal difference between the cocaine conspiracy charges in both cases." (*Id. at 12*). He also faults the court for basing its decision on the dates set forth in each of the complaints – the conspiracy in 09CF001337 allegedly occurred on November 10, 2005, and the conspiracy in case 11CF000924 allegedly occurred during the period March 4, 2008 to March 24, 2008. He argues that the court's analysis was not applicable to conspiracy type cases arising from a single investigation and applied only to multiplicity cases involving multiple acts which were different in kind and which could be charged separately. In support of his position, he cites to ***Short v. United States***, 91 F. 2d 614 (4th Cir. 1937), which stands for the proposition that the State cannot charge multiple overt acts of a conspiracy and call each one of them a conspiracy to charge someone with multiple conspiracies. "[O]nly 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." ***Id.*** at 621-622.

The defendant also relies on issue preclusion law to argue that the issue of whether he was involved in a cocaine conspiracy was decided in 09CF001337 because the same parties were

involved and the issue was the same. "Nothing prevented the State from producing the evidence from the wiretaps, obtained three years earlier, during the trial in the first case." (*Motion, p. 19*). In short, he claims his convictions must be vacated because a single crime was arbitrarily separated into two charges for two separate prosecutions in violation of the double jeopardy clause of the Constitutions of the United States and State of Wisconsin.

The State asserts that it was not collaterally estopped from initiating two prosecutions against the defendant because two separate and distinct conspiracies or agreements were involved. It maintains that it is the particular nature of the agreement which formulates the underlying basis for each conspiracy and that any overlap in proof in the two prosecutions is not the equivalent of a double jeopardy violation, citing to ***United States v. Laguna-Estela***, 394 F. 3d 54, 57 (1st Cir. 2005). In support, the State submits that the conspiracy statute, sec. 939.31, Wis. Stats., allows it to charge multiple offenses because the elements set forth in the statute --

> . . . incorporate each criminal offense that is the criminal object of the conspiracy. This means that when a conspiracy has as its object the commission of multiple crimes, separate charges and convictions for each intended crime are permissible. . . . . Even though both offenses may have arisen from the same agreement, "it is well settled that a single transaction can give rise to distinct offenses . . . [without violating the Double Jeopardy Clause."]

State v. Jackson, 276 Wis. 2d 697, 703 (Ct. App. 2004).[7] Thus, the State argues that the defendant was engaged in two distinct conspiracies (or agreements) to distribute cocaine, three years apart, with different co-conspirators and different factual settings. It claims that the first conspiracy involved an agreement with Hot Rod Smith to deliver a kilogram of cocaine to Lamont Powell and Jereld McGhee in 2005. It further claims that the conspiracy in 2008 involved a new agreement with new people, such as Damone Powell, with Eraclio Varela as the defendant's supplier. The State argues that not only weren't the timeframes the same, but the

[7] ***Jackson*** does not appear to be on the same footing, however, as it involved two different charges, arson and murder.

drugs involved in each trial weren't the same, the defendant's modus operandi wasn't the same, and none of the evidence overlapped in the two trials.

The defendant cites to ***United States v. Castro***, 629 F. 2d 456 (7th Cir. 1980) in support of his argument.[8] The court in ***Castro*** – a case which involved two drug conspiracy cases charged against the defendant, as here -- found that there was only one conspiracy, not two, and that the Double Jeopardy Clause therefore applied to the defendant's second case. It also determined that the doctrine of collateral estoppel barred the State from relitigating the conspiracy issue in the second trial. *See e.g.* ***Ashe v. Swenson***, 397 U.S. 436 (1970). ***Castro*** provides an excellent analysis of the type of factual determination that a court must make in deciding whether double jeopardy applies when a defendant has been twice charged with a conspiracy to distribute drugs. The burden is on the defendant to show that the prosecutions are for the same offense in law and in fact. ***Id.*** at 461.

> 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. [Cite omitted] This test, however, would seldom prevent multiple prosecutions in narcotics conspiracy cases, such as this one, because the Government can shape the overt acts charged in each indictment and thus, under the guise of prosecutional discretion, advance the proposition of one conspiracy's being capable of proof in several prosecutions requiring different evidence for each conviction. To determine whether a conspiracy has been subdivided arbitrarily, resulting in multiple indictments for a single illegal agreement, courts therefore will look to both the indictments and the evidence and consider such factors as whether the conspiracies involve the same time period, alleged co-conspirators and place, overt acts, and whether the two conspiracies depend on each other for success. Where several of these factors are present, the conclusion follows that the alleged illegal combinations are not separate and distinct offenses. ***United States v. Marable*** . . . 578 F. 2d at 154; ***United States v. Mallah***, 503 F. 2d 971 (2d Cir. 1974) . . . .

[8] The ***Castro*** case was not cited or discussed during the pretrial motion hearing before this court in case 11CF000924.

Id. The ***Castro*** court then undertook the task of determining whether the two separate agreements as alleged in each case were really only one. It started by noting that both indictments charged the defendant with conspiracy to distribute heroin. The first involved the distribution of heroin on November 1, 1977 in Aurora, Illinois. The second involved the distribution of heroin on September 29, 1977 in Chicago. Castro and his stepson were the main defendants in both indictments; the undercover agents who negotiated the drug deals were the same in both indictments; and all the overt acts occurred in Puerto Rico or Chicago. The only difference in players was the suppliers who were utilized. There was an overlap in the period of time set forth in each indictment. The first trial involved the time period September 1977 to February 1978, with the conspiracy purportedly starting in the summer of 1977 and ending on November 1, 1977. The second trial involved an alleged conspiracy that began in mid-September 1977 and ended at the end of September 1977. Thus, the conspiracies alleged in each trial overlapped in time.

The court then made a comparison of the overt acts alleged in the indictments as well as the proof presented of those overt acts during each trial. It found that the second indictment was predicated on five overt acts from five separate dates in September 1977. The first indictment was predicated on six overt acts from September, October and November of 1977. It looked at the evidence from each trial, noting that "[a]lthough the Government attempted to prove at the first trial that the conspiracy did not begin until October 1, pre-October 1 conversations were admitted into evidence." (***Id.*** at 463). The court found that this was an important factor which supported the defendant's double jeopardy claim. It also found that the government presented evidence in the second trial of two meetings that occurred in mid-October 1977, whereas its theory during trial was that the conspiracy terminated at the end of September 1977.

> Summarizing the above factors, we find that the alleged conspiracies involved the same objective (to distribute heroin), the same core participants (Carlos and Ramos), the same place of distribution (Chicago area), and the same time period (September 13, 1977 to November 1, 1977), and the same method of operation . . . . Only when the facts adduced at both trials are pieced together, does the existence of one continuous agreement crystalize . . . .

Id. at 463-464.

The question is whether the facts of the two Cannon cases support a finding that one overall conspiracy existed, which would result in a violation of the double jeopardy clause; or whether there were two separate agreements. Based on the arguments made prior to trial, the court found that the double jeopardy clause was not violated.

A review of the record reveals the following.

On December 17, 2012, the court held a hearing on defendant's motion to dismiss commenced and dealt first with the defendant's claim of prosecutorial vindictiveness. The court took note of the dates of the offenses alleged in the criminal complaints, finding that November 10, 2005 was the date which applied to the conspiracy charge relating to the delivery of cocaine in count one of case 09CF001337, and October 16, 2008 was the date related to the firearm transaction (count two in the same case). In case 11CF000924, the relevant dates of the conspiracy were March 4, 2008 to March 24, 2008, and April 3, 2008 for the firearm count. (Tr. . 12/17/12, p. 16). The prosecutor explained the dates:

> [THE STATE:] . . . I have my timeline . . . we have the cocaine delivery from 09-CF-1337, November 10th, 2005 [the cocaine delivery involving Gerald McGhee].[9] I have January 2008 and that's when the first wiretap goes up on the Cannon DTO.[10] March through June 2008, that's when the Cannon and Parker wiretaps are active. October 16, 2008, that's the sale of the .9mm to Carl Page and that's Counts 2 and 3 from 09-CF-1337. October 19th, 2008, that is Cannon's warrant and confession. January 21st, 2009, Eraclio Varela, who's a charged co-actor in the 11-CF-924 case. He's Cannon's supplier. He's charged with conspiracy to

[9] Id. at 38.

[10] "DTO" was defined as "Drug Trafficking Organization" by ADA Grant Huebner during the motion hearing. (Id. at 33).

> deliver cocaine. And that charge was based in part upon the statements of this defendant as a cooperating witness. On February 5th . . . the case against Varela was dismissed . . . .
>
> Of '09, yes. March 17th, 2009, there was a consent search done on Billy Cannon's residence. March 20th of 2009, he was charged with 09-CF-1337. January 11, 2010, through April 1, 2010, the Motion to Suppress was addressed in 09-CF-1337. September 11th of 2010, Eraclio Varela charged with the identical cocaine conspiracy case. October 2010 -- . . . Damone Powell implicated Mr. Cannon in the cocaine delivery which is the basis for the cocaine count 11-CF-924.
>
> January 10th through 12th, 2011, the defendant was tried only on Count 1 of 09-CF-1337. He was found not guilty. And on that date, Counts 2 and 3 was [sic] set for trial on March 23rd, 2011. I have the filing date based on my review of C-Cap February 24th for the issue of the nine co-defendant case including Eraclio Varela, Cannon, Damone Powell, and others.
>
> And on the day of trial for the 09-CF-1337, Counts 2 and 3, that's March 23rd, 2011, the defendant pled guilty to one of the two gun counts. I also have . . . that on April 4th, 2011, Eraclio Varela was apprehended in Miami, Florida, and extradited to Milwaukee. . . .
>
> . . . Mr. Cannon was not the only person charged n 11-CF-924 . . . There were nine people charged including Eraclio Varela for this conduct . . . .

(Tr. 12/17/12, pp. 18-22).

ADA Grant Huebner was called to testify at the hearing on the defendant's motion to dismiss. He was asked why he only issued two charges against the defendant in 2009, and he responded that the investigation with respect to the "Eraclio Verala DTO"[11] would have compromised another agency's investigation, and so the State only proceeded with the limited charges in 09CF001337. (Id. at 38). When asked what the State's intent was with respect to charging the defendant with the allegations set forth in the complaint in case 11CF000924, he testified as follows:

> [THE STATE:] Prior to the trial against Mr. Cannon for the '05 conduct, what was your intent as to the conduct that was eventually charged in 11-CF-924?

[11] Id. at 33.

ADA HUEBNER: To issue the drug conspiracy case with Mr. Cannon as a part of it.

[THE STATE:] Regardless of the outcome of the trial?

ADA HUEBNER: Regardless of the outcome of the trial. I was working on that criminal complaint for months. . . .

[THE STATE:] So it's your testimony that you were working on these drafts and preparing these complaints prior to the January 10th, 2011, trial date. Is that a fair statement?

ADA HUEBNER: Very fair.

(Id. at 45-46).

[DEFENSE:] When you filed against Mr. Varela and nobody else, okay, the idea was to leverage Mr. Varela into then providing the up-the-ladder suppliers and the local ones that they did? Is that the idea? You said it was a strategy that didn't work. I don't get what the strategy was.

ADA HUEBNER: If Mr. Varela was going to cooperate and he would agree to testify, then we would be able to proceed with the case without having to use telephonic intercepts in the complaint or at prelim. We'd obviously still use them at trial . . . .

If Mr. Eraclio[12] was going to cooperate, that would end up saving a lot of time and was a strategy decision that we would be able to use. That's why I decided to start off with Mr. Eraclio. And unfortunately the first time there was intervention and we were not able to proceed so the case was dismissed. The second time I attempted the same strategy. We weren't able to find him at the time.

[DEFENSE:] But by that point Mr. Cannon had already indicated to you that he was cooperating?

ADA HUEBNER: He was not cooperating.

[DEFENSE:] At no point did you file an individual complaint against Mr. Cannon to try and use this same strategy with him?

ADA HUEBNER: I do not believe, I believe, I would be able to do the same thing with Mr. Cannon. Mr. Cannon based on what we had, I think I would need the telephonic intercepts in order to prove . . . here is what we had. Mr. Cannon dealt with Mr. Eraclio. Mr. Eraclio dealt with further up the line. Mr. Eraclio

[12] ADA Huebner interchanged "Mr. Eraclio" with Mr. Varela several times during his testimony.

> dealt with the other individuals that are named in the complaint. That's why we chose Mr. Eraclio because he was the center point or the focal point of all those various different other defendants or most of them.

(Id. at 63-64).

The defense argued that the prosecution in 11CF000924 was vindictive because the State had all of the wiretap information at the time the 2009 case was pending and could have joined it with that case and not subject the defendant to two separate trials. (Id. at 70). In making its findings, the court first noted that Damone Powell made statements in October of 2010 which implicated the defendant. (Id. at 74). Although the jury trial in 09CF001337 was not held until January of 2011, it indicated that a prosecutor has "'almost limitless discretion to charge or not." (Id. at 78). It further indicated that the dates of the offenses supported a finding that the charges involved "separate and distinct conduct" and that it had heard no argument "that any evidence that is in the complaint in the '11 case insofar as wiretapped cases or charges, that there is an overlap here in an attempt to prove the charges . . . in 11-CF-924." (Id. at 81-82). The court further noted that separate defendants were involved in each case and that a "tactical decision" was made not to charge the defendant, which was "within the prosecution's purview," even though the State could have charged him earlier. (Id. at 82). Accordingly, the court found no prosecutorial vindictiveness.

The argument then moved on to the double jeopardy issue. The ***Blockburger*** case[13] with its elements test was first discussed, with defense indicating that the charges in both of the cases had identical elements because they were both cocaine conspiracy offenses. (Id. at 87). Counsel also argued that it was "one continuous sort of series of events." (Id.)

> [DEFENSE:] And the same background information that was utilized to secure the warrants in this case, the GPS warrants, the search warrants, the wiretaps

[13] ***Blockburger v. United States***, 284 U.S. 299 (1932).

> themselves . . . and all this information was known and in the possession . . . with the prosecutor at the time the 2009 case was litigated.
>
> . . .
>
> Essentially the jury ruled [on] the issue . . . that Mr. Cannon was not part of a cocaine conspiracy, period. He's not part of it. It's been a litigated issue. You can't let the state have another proverbial bite of the apple. . . .
>
> . . .
>
> I think it's very telling . . . what Justice Brennan wrote about his view of double jeopardy and he says that it requires that except in extremely limited circumstances, which I don't think we have here, all the charges against a defendant to grow out of a single act, occurrence, episode, or transactions be prosecuted in one proceeding.
>
> . . .
>
> I understand the state is going to say: Well, these are two different events . . . The '09 [case] simply dealt with a dealing of a kilo in 2005 and they charged that as a conspiracy. . . utilizing the statements of Mr. Cannon, the same statements they now want to again use against him.
>
> And I think that given they are overlapping this investigation, they had their opportunity already to this date, it's precluded. It's not a situation, Your Honor, where they learned new information after the first trial or there was some ongoing criminal conduct after he was acquitted in January of 2011.

(Id. at 88-92).

The State conceded that there was "no new information obtained after the trial of Mr. Cannon on the '05 [transaction]" (Id. at 100), but relied on ***State v. Bautista***, 320 Wis,. 2d 582 (Ct. App. 2009) in support of its position:

> [THE STATE:] And in that case, Your Honor, in that case the facts are even worse for the state because the conspiracy charge that was charged by the state encompasses the same time frame. So we have a conspiracy charge. And then right in the middle of it, we have the single offense that was charged federally.
>
> So if in ***Bautista*** the Court didn't find it was the same offense or same continuous series of acts, then this Court can find that it's not the same or continuous acts. . . .

(Id. at 102-103).

In response, the defense argued that ***Bautista*** only dealt with a delivery charge, not a conspiracy charge.

> [DEFENSE:] . . . ***Bautista*** is distinguishable if they're charging one specific delivery or act which isn't what we have here. We have conspiracy-conspiracy which then makes it by definition a broader or more encompassing charge. In other words, it's going to be to the benefit of the state during the trial to argue a conspiracy charge if they get to bring in a lot of things that maybe in a delivery charge they wouldn't be allowed to. They're allowed to talk about the organization. They're allowed to talk about some of these broader-type ideas rather than did this individual deliver cocaine on this date?
>
> And so when you have ***Bautista***, you have a delivery and then a conspiracy. You didn't have two overlapping conspiracies. . . . We'll concede that [a conspiracy exists]. It's one continuous conspiracy that was investigated by – I guess Special Agent Gray and the Milwaukee Police Department HIDTA . . . .
>
> THE COURT: . . . My question is given the conspiracy charge in 09-CF-1337 surrounded an allegation that it took place on or about November 10th, 2005, can either of you gentlemen . . . advise the Court whether at trial there was any information as to the drug count, not the gun count, but any information put before the jury about the defendant's alleged drug trafficking subsequent to . . . December 2005?
>
> [DEFENSE:] I don't know.
>
> . . .
>
> [THE STATE:] I don't [know.]
>
> . . .
>
> THE COURT: [If] the answer is no, how is this double jeopardy when the second complaint charge has a time period beginning in March two and a half years later?
>
> [DEFENSE:] I don't know if the answer is no. Mr. Cannon seems to indicate "yes" to me. . . . I do know that his statement which was taken in '08 has discussions of a lot more things than just in 2005 and I do know the statement was used at that trial. . . .

(Id. at 104-107).

The court requested information about what evidence the State had presented at Cannon's trial in 09CF001337 with respect to count one and how much of the defendant's statement was admitted, indicating it was "very relevant in our inquiry here." (Id. at 110). The parties agreed to look into the matter, and ADA Huebner was recalled to testify as to what portions of the defendant's statement were used during the trial in 09CF001337. He testified that the defendant's statement was ruled admissible, but both counsels agreed to admit only two portions of it as relevant. The court then questioned ADA Huebner:

> THE COURT: At the trial did the state successfully introduce any evidence about Mr. Cannon engaging in any such behavior after November 10th, 2005, if you recall?
>
> ADA HUEBNER: I don't Your Honor, specifically. The only reason I'm hesitant is as you can see in the transcript that I provided, there is the statement of Mr. Cannon indicating that he had done work or dealt drugs during either two years or three years prior to 2008.[14] That would be the – depending on how you interpret that, that could put it in 2006. But there was no other acts motion filed by the state. This case was limited to what happened in that parking lot in connecting Mr. Cannon to the cocaine that was recovered from that parking lot. This was not a conspiracy case outside of that day and that particular amount of cocaine.
>
> So to the best of my knowledge, the state did not introduce any other acts of Mr. Cannon dealing with any other individuals other than this cocaine coming from Hot Rod and going to the other individuals.

(Id. at 119-120).

The motion hearing continued the next day, at which time trial counsel indicated that he had reviewed the trial transcripts from 09CF001337 to "see how much, if any evidence was presented past the November 2005 cocaine issues." (Tr. 12/18/12, p. 3). He stated that he couldn't find anything, other than the reference to which ADA Huebner had alluded. He apprised the court that the evidence presented was "very pinpointed to the parking lot incident which is what the subject of that was." (Id.) The defense argued it was one main conspiracy,

[14] Case 09CF001337, Tr. 1/11/11, pp. 156-158.

and the State argued it was two "completely separate incidents." (Id. at 10). The court determined that both cases involved conspiracies to commit delivery of cocaine, but distinguished case 09CF001337 as being charged as party to a crime as well, which the court found to be "a distinction with a difference." (Id. at 11-13). Thus, for starters, the court found that the charges in the two cases did not line up. (Id. at 15). The defendant asserts in his current motion that the State did not pursue a party to a crime theory at trial, and therefore, the PTAC designation actually had no applicability to the court's analysis.

The court found, however, that the State had used evidence "which related strictly to a period in time surrounding the November 10th, 2005, events." (Id. at 17). 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. (Id. at 18). 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. (Id. at 18-19). 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." (Id. at 20). 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. (Id. at 23).

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. As stated previously,

> In 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.

Castro, 629 F. 2d at 461.

Here, both cases charged the defendant with conspiracy with Hot Rod Smith to deliver cocaine to Jereld McGhee and Lamont Powell, but 09CF001337 was limited to the period November 2005 with evidence related solely to that period, except for some nebulous reference to Cannon being involved in some drug activity perhaps two to three years prior, which could have feasibly dealt with the same period of time in 2005. Case 11CF000924 dealt with a conspiracy with Eraclio Varela and Damone Powell to distribute cocaine throughout the month of March 2008 and had nothing to do with the activity alleged in 09CF001337. There was no overlap of timeframe or evidence during the trials for the conspiracy counts. Although the defendant argues that the timeframe in the second case "fell squarely within the same time period covered by the first case (i.e., November 2005 to October 2008)" (*Motion, p. 7*), the conspiracy to deliver cocaine charge was confined solely to November of 2005. There was certainly the potential for overlap of evidence – other evidence which could have been used by the State at trial in the 2009, but the question raised by the Fifth Amendment is whether the defendant was placed twice in jeopardy for the same offense. *See* ***Brown v. Ohio***, 432 U.S. 161 (1977). The answer is no. As a matter of law, the offenses may have been the same, but they were not the same in fact, which renders the conspiracy charges separate and distinct as the court originally found.

[15] Defendant's motion, p. 12, citing to case 09CF001337, Tr. 1/12/11, pp. 3-22.

In ***Castro***, the evidence in the first trial revealed "that the conspiracy set forth in the second indictment occurred entirely within the time frame of the conspiracy which the Government attempted to prove in the first trial." (***Castro*** at 462.) That was not the case here. There was no overlap of timeframe in the State's proof at trial. In addition, the ***Castro*** court found that not only the timeframe, but the evidence presented at both trials overlapped, which supported a finding of one general ongoing conspiracy. That was not the case here either. There was no evidence overlap by the State in proving each case against the defendant. The two conspiracies did not depend on one another for success as noted in ***Castro***.

There is also some question as to whether the same core participants existed in each case. According to the testimony of ADA Huebner during the motion hearing cited to previously, Eraclio Verala was the original intended focal point for the State's subsequent prosecution and "the focal point of all those various different other defendants." (Tr. 12/17/12, p. 64). As the State points out, "Damone Powell's statements about how he was 'approached by the Defendant to sell cocaine and marijuana' in 2008 reveals the Defendant was negotiating a new agreement." (*State's Brief, p. 22*). This, in conjunction with the significant passage of time between the November 2005 transaction and the subsequent 2008 contacts involving totally different people supports a finding that not one, but two, separate agreements or conspiracies existed.

Accordingly, the court denies the defendant's motion for reconsideration on double jeopardy grounds and finds that the State was not estopped from pursuing another conspiracy case against the defendant predicated on different facts, even though those facts may have emanated from the same overall investigation. To the extent that the defendant argues that trial counsel was ineffective for failing to raise any of the above arguments, it finds that counsel would not have been successful in doing so and, therefore, he cannot be deemed ineffective.

Next, the defendant maintains that trial counsel was ineffective for failing to sufficiently argue suppression of the wiretap recordings of the firearm transaction because sec. 968.28, Wis. Stats., on three separate grounds. First, he argues that when approval for wiretap communications relating to offenses other than those specified in the original order of authorization is sought, approval must be made by the same judge who approved the original application pursuant to sec. 968.29(5), Stats.,[16] and in this case, he claims that did not happen. Judge Kitty Brennan signed the original approval, and Judge Sankovitz signed the approval for purposes of obtaining evidence related to offenses other than those specified in the court's original order.

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. In addition, the 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.

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[16] Sec. 968.29(5) provides the following:

> 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 . . . .

(Emphasis added by defendant).

Second, the defendant argues in his original motion that sec. 968.28 does not permit authorization for a wiretap to obtain information with regard to the sale or furnishing of firearms, claiming that the Wisconsin Supreme Court[17] has demonstrated the restrictive nature of sec. 968.28, Stats.[18] and that the court cannot read gun offenses into the statute in order to justify a wiretap when they are not among the types of offenses that are included in sec. 968.28, Stats. Consequently, he submits that he was prejudiced because the inadmissible wiretap recordings were played for the jury. The defendant further asserts that the affidavit by Officer Newport[19] in support of the firearms wiretap evidence did not set forth probable cause for Judge Sankovitz to approve the use of the additional wiretap evidence because there was no evidence that Cannon ever possessed a gun.

The court disagrees with the defendant's position with respect to firearms and also finds that probable cause existed to allow the wiretaps to be preserved as evidence at a future trial. Although the defendant's argument is very well articulated, the court adopts the State's analysis as its decision with respect to these issues. *(State's second response brief dated October 21, 2019, pp. 3-10).*

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[17] ***State v. House***, 302 Wis. 2d 1 (2007).

[18] Sec. 968.28 provides the following:

> The attorney general together with the district attorney of any county may approve a request of an investigative or law enforcement officer to apply to the chief judge of the judicial administrative district for the county where the interception is to take place for an order authorizing or approving the interception of wire, electronic or oral communications. . . . 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.

[19] The defendant was not aware of the Officer Newport affidavit and other items at the time he filed his motion, and consequently, he raised additional issues after viewing them. The court then sought further response from the State with an opportunity for the defendant to reply to the State's argument.

In sum, counsel was not ineffective for failing to move for and try to obtain suppression of the wiretap recordings related to the firearm transaction for the reasons set forth above. The requisite steps were taken to obtain approval for the intercepts pertaining to the firearm transaction, those intercepts were allowable under the statute, and probable cause existed in the Newport affidavit to support the wiretap order.

For the above reasons, the defendant's motion for reconsideration and for a new trial is denied.

THEREFORE, IT IS HEREBY ORDERED that the defendant's motion for reconsideration and a new trial is **DENIED.**

Stephanie G. Rothstein
Circuit Court Judge

Dated: 11/26/19

CIRCUIT COURT MILWAUKEE CO. WISCONSIN SEAL

APPENDIX C

Judgment of Conviction

STATE OF WISCONSIN **CIRCUIT COURT BRANCH 25** **MILWAUKEE COUNTY**

State of Wisconsin vs. Billy Joe Cannon

Date of Birth: 03-01-1965

Judgment of Conviction

Amended

Sentence to Wisconsin State Prisons and Extended Supervision

Case No. 2011CF000924

FILED
04-04-2014
John Barrett
Clerk of Circuit Court

The defendant was found guilty of the following crime(s):

Ct.	Description	Violation	Plea	Severity	Date(s) Committed	Trial To	Date(s) Convicted
1	[939.31 Conspiracy to Commit] [961.48(1)(a) 2nd/Sub. Drug Offense-Class C/D Felony] Manuf/Deliver Cocaine (>40g)	961.41(1)(cm)4	Not Guilty	Felony C	03-04-2008 to March 24, 2008	Jury	02-14-2014
2	[939.31 Conspiracy] [961.48(1)(a) 2nd/Sub. Drug Offense-Class C/D Felony] Possess w/ Intent-THC (>10,000 g)	961.41(1m)(h)5	Not Guilty	Felony E	02-01-2008 between February 2008 and October 2008	Jury	02-14-2014
3	[939.05 Party to a Crime] Furnishing a Firearm to an Unauthorized Person	941.29(4)	Not Guilty	Felony G	04-03-2008	Jury	02-14-2014

IT IS ADJUDGED that the defendant is guilty as convicted and sentenced as follows:

Ct.	Sent. Date	Sentence	Length	Agency	Comments
1	04-01-2014	State Prison w/ Ext. Supervision	22 YR		
2	04-01-2014	State Prison w/ Ext. Supervision	11 YR		
3	04-01-2014	State Prison w/ Ext. Supervision	8 YR		

Total Bifurcated Sentence Time

	Confinement Period				Extended Supervision			Total Length of Sentence		
Ct.	Years	Months	Days	Comments	Years	Months	Days	Years	Months	Days
1	12	0	0		10	0	0	22	0	0
2	7	0	0		4	0	0	11	0	0
3	4	0	0		4	0	0	8	0	0

Ct.	Sent. Date	Sentence	Length	Agency	Comments
1	04-01-2014	Restitution			$751.00 to District Attorney's ofice as set forth in the Order signed by the Court.
1	04-01-2014	Costs			Provide DNA sample. AS TO EACH COUNT, COUNTS ONE, TWO AND THREE: Pay DNA surcharge, and all mandatory costs, fees and surcharges. AS TO RESTITUTION/ALL FINANCIAL OBLIGATIONS: to be paid through collection by DOC from 25% of funds under Sec. 973.05(4)(b) and as a condition of Extended Supervision. Failure to pay will result in a civil judgment.
1	04-01-2014	Firearms/Weapons Restrict			Pursuant to Wisconsin Statutes section 973.176, the Court advised the defendant of the following restrictions: firearm possession; voting.

State of Wisconsin vs. Billy Joe Cannon

Date of Birth: 03-01-1965

Judgment of Conviction

Amended

Sentence to Wisconsin State Prisons and Extended Supervision

Case No. 2011CF000924

FILED
04-04-2014
John Barrett
Clerk of Circuit Court

Ct.	Sent. Date	Sentence	Length	Agency	Comments
2	04-01-2014	Costs			
3	04-01-2014	Costs			

Sentence Concurrent With/Consecutive Information:

Ct.	Sentence	Type	Concurrent with/Consecutive To Comments
1	State prison	Concurrent	Concurrent with count two. **4/3/2014 Credit of 55 days on counts one and two.
2	State prison	Concurrent	Concurrent with count one.
3	State prison	Consecutive	Consecutive to counts one and two.

Conditions of Extended Supervision:

Ct.	Condition	Agency/Program	Comments
1	Prohibitions		Maintain absolute sobriety. No illegal drugs. Not to be present at any place where illegal drugs are purchased, used, stored, packaged or distributed. No contact with the coactors in this matter: LaBronte Laron Coney, Kenneth Lawrence Ezell, Barry Lymel Green, Carl Page, Paul Parker, Damone Marice Powell, Anthony Fitzerald Turnage, and Eraclio Varela. No contact with any of the witnesses in this matter.

Conditions of Sentence or Probation

Obligations: (Total amounts only)

Fine	Court Costs	Attorney Fees	☐ Joint and Several Restitution	Other	Mandatory Victim/Wit. Surcharge	5% Rest. Surcharge	DNA Anal. Surcharge
	60.00		751.00	83.10	85.00	59.46	750.00

Pursuant to §973.01(3g) and (3m) Wisconsin Statutes, the court determines the following:

The Defendant is ☐ is not ☒ eligible for the Challenge Incarceration Program.

The Defendant is ☐ is not ☒ eligible for the Substance Abuse Program.

IT IS ADJUDGED that **55** days sentence credit are due pursuant to §973.155, Wisconsin Statutes

IT IS ORDERED that the Sheriff shall deliver the defendant into the custody of the Department.

BY THE COURT:

Distribution:

Stephanie Rothstein-25, Judge
Karl P. Hayes, District Attorney
William Francis Sulton, Defense Attorney

Electronically signed by John Barrett
Circuit Court Judge/Clerk/Deputy Clerk

April 4, 2014
Date