STATE OF WISCONSIN

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

DISTRICT IV

Case No. 2022AP2060-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JOHN J. DRACHENBERG,

Defendant-Appellant.

ON APPEAL FROM THE JUDGMENT OF CONVICTION ENTERED IN THE CIRCUIT COURT FOR WOOD COUNTY, THE HONORABLE TODD P. WOLF, PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

INTRODUCTION

Under Wis. Stat. § 968.15, "[a] search warrant must be executed and returned not more than 5 days after the date of issuance." Here, a judge issued a search warrant authorizing a search of John Drachenberg's property for evidence of child pornography, and three days later law enforcement seized computers and cell phones from Drachenberg's property. The same day, a detective filed a return to the search warrant listing all items seized. Then, over less than two months, the detective analyzed the devices and discovered child pornography. Drachenberg moved to suppress, arguing that Wis. Stat. § 968.15(1) required that analysis to be completed within five days of the warrant's issuance to be timely "executed." The circuit court disagreed and denied the motion.

ISSUES PRESENTED

The State re-frames the issues:

1. Does the word "executed" in Wis. Stat. § 968.15(1) require complete testing and analysis on lawfully seized items within five days of the warrant's issuance?

The circuit court implicitly answered "no" when it denied Drachenberg's motion.

This Court should answer: No.

2. If Wis. Stat. § 968.15(1) does require all testing and analysis of lawfully seized items to be completed within five days, does a violation of that requirement mandate suppression of the evidence recovered?

The circuit court did not reach this question.

This Court should answer: No.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State does not believe oral argument is necessary. Under Wis. Stat. § (Rule) 809.22(2)(b), the briefs should fully present and meet the issues on appeal and fully develop the theories and legal authorities on each side. Given the lack of authority on this issue, publication is warranted under Wis. Stat. § (Rule) 809.23(1)(a)1. to enunciate and clarify whether "executed" as used in Wis. Stat. § 968.15(1) includes further testing and analysis of lawfully seized items.

STATEMENT OF THE CASE

Detective Parks of the Marshfield Police Department received a tip from the National Center of Missing and Exploited Children (NCMEC). (R. 19:7.) Omegle.com, a website where users can text or video chat, had informed NCMEC that one if its users streamed a video depicting a young girl engaged in sexual activity. (R. 19:7–8.) The NCMEC tip included an internet protocol (IP) address for the user streaming the video and a model number of the webcam used. (R. 19:9–10; 21.) The Wisconsin Department of Justice investigated the IP address and determined that it was associated with Pete Drachenberg[1] and an address of 405 North Cherry Avenue, in Marshfield. (R. 19:11; 22.)

Detective Parks then sought and obtained a search warrant for 405 North Cherry Avenue. (R. 19:13, 21.) Judge Brazeau signed the warrant the same day, on January 29, 2021. (R. 19:21; 23:17.) The signed warrant authorized law enforcement to remove "computers, computer storage media and any other electronic device" from the premises and to analyze them later "in order to examine the contents for

[1] Though not directly stated in the record, the State believes Pete is John Drachenberg's father. (R. 19:29.)

contraband or other evidence." (R. 23:15.) Specifically, **"[t]he Court authorizes those items to be removed from the premises and analyzed at a later time for this purpose.**" (R. 23:15 (emphasis in original).)

Officers executed the warrant on February 1, 2021. (R. 19:21.) In a shed on the property, they found a desktop computer and a webcam consistent with the information from Omegle.com and the NCMEC tip. (R. 19:23.) Prior police contacts with Drachenberg associated him with the shed and indicated that he spends large amounts of time in the shed. (R. 19:23.) At the suppression hearing, Detective Parks testified that two forensic examiners on the scene attempted to conduct a "preview" of the desktop computer found in the shed and belonging to Drachenberg. (R. 19:24.) However, officers found "a very large amount of data on that computer," could not get a preview, and therefore seized the computer. (R. 19:25).

Detective Parks completed and filed with the court a return and an inventory sheet of the items collected the same day. (R. 19:21.) Detective Parks also began "reviewing the digital devices that were seized" on February 1, 2021. (R. 19:26.) Detective Park testified at the suppression hearing that he found numerous files believed to depict child pornography on Drachenberg's computer. (R. 19:29.) The images recovered "totaled approximately 14 terabytes worth of data." (R. 19:27.) Detective Parks completed his review of all the seized devices, not just the one computer with 14 terabytes, by the time he completed his report dated March 29, 2021. (R. 19:28.)

Drachenberg moved to suppress the images found on his computer under several theories.[2] Pertinent here, he

[2] In his motion to suppress to the circuit court, Drachenberg asserted that probable cause had dissipated, that the warrant

argued that officers did not fully execute the warrant within five days because the analysis of the digital devices was not completed until over two months after the warrant was issued. Therefore, he argued, the warrant was void under Wis. Stat. § 968.15. (R. 16.) The circuit court denied the motion. (R. 47; 31.) Drachenberg pleaded guilty to one count of Possession of Child Pornography under Wis. Stat. § 948.12(1m) and was sentenced to thirteen years imprisonment, comprising three years of initial confinement and ten years of extended supervision. (R. 40.)

This appeal follows.

STANDARD OF REVIEW

To resolve this appeal, this Court must interpret Wis. Stat. § 968.15. This Court independently reviews questions of statutory interpretation. *State v. Popenhagen*, 2008 WI 55, ¶ 163, 309 Wis. 2d 601, 749 N.W.2d 611.

As to factual findings from Drachenberg's motion to suppress that affect this Court's reasoning, this Court employs a two-step standard of review when it analyzes a motion to suppress. *State v. Roberson*, 2019 WI 102, ¶ 66, 389 Wis. 2d 190, 935 N.W.2d 813. First, this Court will uphold the circuit court's historical findings of fact unless they are clearly erroneous. *Id*. Second, it independently applies constitutional principles to the facts. *Id*.

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application did not comply with the oath or affirmation requirement, that the execution of the warrant violated the knock and announce rule, that the warrant was insufficiently particular as to the evidence to be seized, and that the execution of the warrant violated Wis. Stat. § 968.15. (R. 27:6–17.) On appeal, he only maintains the argument about Wis. Stat. § 968.15. (Drachenberg Br. 5 n.1.)

ARGUMENT

I. A warrant authorizing the seizure of digital equipment to be searched and analyzed at a later date is fully executed when the equipment is physically seized.

The contested issue in this case is the meaning of the statutory term "executed." The State's position is that a warrant is "executed" when law enforcement finds the physical items described in the warrant in a search and seizes them for investigative and prosecutorial purposes. Drachenberg contends that a warrant is not "executed" until the seized items are fully tested and analyzed. (Drachenberg's Br. 9–10.) Where, as here, physical items seized within five days of a warrant's issuance are fully tested and analyzed more than five days after its issuance, the definition of "executed" implicates whether the warrant here was "executed in compliance with" Wis. Stat. § 968.15.

No Wisconsin case defines what "executed" means within Wis. Stat. § 968.15(1). However, the factors that should guide this Court in interpreting what "executed" means show that it does not include further testing and analysis. The dictionary definition of "execute" does not require completion. Several other sections of Chapter 968 using the term "execute" in connection with warrants show that "execute" refers to the physical search and seizure of evidence, not the complete analysis of evidence. The legislative history of section 968.15 shows that the Legislature's main concern was the dissipation of probable cause before the execution of the warrant. Every other jurisdiction that has considered this issue has concluded that a warrant is "executed" when the items are seized and removed, not when further testing is done. Our own case law holds that further testing and analysis of seized items do not constitute a separate search and do not require a new warrant

or new probable cause, suggesting that such further testing does not implicate section 968.15. And Drachenberg's reading of "execute" would lead to absurd results.

A. The rules of statutory construction

"[T]he purpose of statutory interpretation is to determine what the statute means so that it may be given its full, proper, and intended effect." *State ex rel. Kalal v. Circuit Court for Dane Cty.*, 2004 WI 58, ¶ 44, 271 Wis. 2d 633, 681 N.W.2d 110. "This Court begins statutory interpretation with the language of [the] statute." *State v. Quintana*, 2008 WI 33, ¶ 13, 308 Wis. 2d 615, 748 N.W.2d 447. When examining the nontechnical words in the phrase, a court may consult a dictionary to give the language "its common, ordinary, and accepted meaning." *Kalal*, 271 Wis. 2d 633, ¶¶ 45, 53.

Because a statute's context is important to its meaning, this Court may consider related statutes when it construes a statute's plain meaning. *State v. Harrison*, 2020 WI 35, ¶ 35, 391 Wis. 2d 161, 942 N.W.2d 310. "[S]tatutory language is interpreted in the context in which it is used; not in isolation but as part of a whole; in relation to the language of surrounding or closely-related statutes; and reasonably, to avoid absurd or unreasonable results." *Kalal*, 271 Wis. 2d 633, ¶ 46.

Additionally, there are two scenarios where a court can look to extrinsic sources to guide interpretation even where the plain meaning is clear: to confirm the plain meaning, and to avoid absurd results. *Teschendorf v. State Farm Ins. Companies*, 2006 WI 89, ¶¶ 13–15, 293 Wis. 2d 123, 717 N.W.2d 258. Going to the legislative history to confirm meaning is done "merely to contribute to an informed explanation that will firm up statutory meaning." *Id.* ¶ 14. Courts consult extrinsic sources to avoid absurd results "to verify that the legislature did not intend these unreasonable or unthinkable results." *Id.* ¶ 15.

To confirm a statute's plain meaning, "[t]he court must ascertain the legislature's intent from the language of the statute in relation to its context, scope, history, and objective intended to be accomplished. A cardinal rule in interpreting statutes is to favor an interpretation that will fulfill the purpose of the statute over an interpretation that defeats the manifest objective of the act." *State v. Davis*, 2001 WI 136, ¶ 13, 248 Wis. 2d 986, 637 N.W.2d 62 (footnote omitted). Examination of legislative intent can assist in that endeavor.

Absurdity results "when the interpretation of [a statute's] plain language leads to 'unreasonable or unthinkable results' and 'open disbelief of what a statute appears to require.'" *City of Kaukauna v. Vill. Of Harrison*, 2015 WI App 73, ¶ 9, 365 Wis. 2d 181, 870 N.W.2d 680 (quoting *Teschendorf*, 293 Wis. 2d 123, ¶ 15). A statute can be absurd when its command is unworkable in practice. *See Duncan v. Asset Recovery Specialists, Inc.,* 2022 WI 1, ¶ 20, 400 Wis. 2d 1, 968 N.W.2d 661 (calling party's proposed interpretation of a statute "unworkable").

Where the plain language interpretation of a statute would lead to an absurd outcome which the Legislature could not have intended, a court may interpret the statute to avoid the absurd result. *Resolution Trust Corp. v. Westgate Partners, Ltd*., 937 F.2d 526, 529 (10th Cir. 1991).

Another time to look to extrinsic sources is when a statute is ambiguous. *Teschendorf*, 293 Wis. 2d 123, ¶ 13. "A statute is ambiguous if it is capable of being interpreted by reasonably well-informed persons to have two or more distinct meanings." *State v. Crowe*, 189 Wis. 2d 72, 76, 525 N.W.2d 291 (Ct. App. 1994). "It is not enough that there is a disagreement about the statutory meaning . . . . 'Statutory interpretation involves the ascertainment of meaning, not a search for ambiguity.'" *Kalal*, 271 Wis. 2d 633, ¶ 47 (citation omitted). If a statute is ambiguous, the court may consult extrinsic sources, such as legislative history. *Id.* ¶ 48.

Extrinsic sources can go beyond the individual statute's legislative history. "Legislation in other states and jurisdictions may help guide the interpretation of a doubtful statute which pertains to the same subject matter, persons, things, or relations." 2B Shambie Singer and Norman Singer, *Sutherland Statutes and Statutory Construction*, § 52:3 at 351 (7th ed. 2022). For example, this Court has previously looked to federal and state interpretations of statutes with the same origins and purpose. *See Fore Way Exp., Inc. v. Bast*, 178 Wis. 2d 693, 702–04, 505 N.W.2d 408 (Ct. App. 1993) (interpreting Wisconsin securities law by reference to federal decision on the Federal Securities Act and the Securities Exchange Act, as well as other jurisdictions that enacted the Uniform Securities Acts); *State v. Green*, 208 Wis. 2d 290, 300, 560 N.W.2d 295 (Ct. App. 1997) (using the federal loan sharking statute to guide interpretation of the similar state statute).

The supreme court has stated that where "no Wisconsin cases are directly on point . . . we may look to other jurisdictions for persuasive authority." *Russ ex rel. Schwartz v. Russ*, 2007 WI 83, ¶ 34 n.9, 302 Wis. 2d 264, 734 N.W.2d 874. This court has done the same. *State v. Harvey*, 2006 WI App 26, ¶ 20, 289 Wis. 2d 222, 710 N.W.2d 482 ("not[ing] that other states have considered this issue and arrived at a definition . . . consistent with our determination").

B. Plain language, statutory context, and legislative history

Section 968.15(1) requires that "[a] search warrant must be executed and returned not more than 5 days after the date of issuance." The only term at issue here is "executed."

The interpretation of the word "executed" begins with the language of the statute. *See Xcel Energy Servs., Inc., v. Labor & Indus. Review Comm'n*, 2013 WI 64, ¶ 30, 349 Wis. 2d 234, 833 N.W.2d 665. The statute does not define

"executed." Wis. Stat. § 968.15. When examining the nontechnical words in the phrase, a court may consult a dictionary to give the language "its common, ordinary, and accepted meaning." *Kalal*, 271 Wis. 2d 633, ¶ 45. Here, the dictionary definition of "execute" does not require completion; the statutory context militates against requiring completed analysis of items seized; and the legislative history of Wis. Stat. § 968.15 demonstrates concern about warrants being executed capriciously and the dissipation of probable cause.

Black's Law Dictionary defines "execute" as: "[t]o perform or complete (a contract or duty)." *Execute*, Black's Law Dictionary (11th ed. 2019). The American Heritage Dictionary defines "execute" in part as: "[t]o put into effect; carry out . . . [t]o perform, do; . . . [t]o perform or carry out what is required by." *Execute*, American Heritage Dictionary (5th ed. 2016).

If the dictionary definitions are not enough to establish a definitive meaning of the statutory term, the court should consider the statutory context, i.e. the neighboring statutes dealing with closely related subjects. *Kalal,* 271 Wis. 2d 633, ¶ 46.

Surrounding sections in Wis. Stat. ch, 968 govern other search warrant procedures. *See* Wis. Stat. §§ 968.12[3], 968.13[4],

[3] Most relevantly, Wisconsin Stat. § 968.12(3)(f) commands "[t]he person who executes the warrant shall enter the exact time of execution on the face of the duplicate original warrant." And Wis. Stat. § 968.12(4) allows warrants "to be conducted anywhere in the state and may be executed pursuant to its terms anywhere in the state."

[4] Wisconsin Stat. § 968.13 describes examples of the property subject to seizure.

968.14[5], 968.16[6], and 968.17[7]. Read together, these sections are directed at the physical search and seizure—and not to further testing or analysis. Their use of the word "execute" only makes sense if the execution is considered the carrying out of the warrant: the intrusion onto protected property, the search for items listed on the warrant, and the seizure of items authorized by the warrant. Wisconsin Stat. § 968.12(3)(f)'s command that the person executing the warrant list the exact time of execution simply does not make sense if execution is considered a lasting, ongoing process. Similarly, Wis. Stat. § 968.14's authorization that officers may use "all necessary force" to execute a warrant strongly suggests that "execute" means the intrusion into a property

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[5] "All necessary force may be used to execute a search warrant or to effect any entry into any building or property or part thereof to execute a search warrant." Wis. Stat. § 968.14.

[6] "The person executing the search warrant may reasonably detain and search any person on the premises at the time to protect himself or herself from attack or to prevent the disposal or concealment of any item particularly described in the search warrant." Wis. Stat. § 968.16.

[7] Wisconsin Stat. § 968.17 provides:

> **(1)** The return of the search warrant shall be made within 48 hours after execution to the clerk designated in the warrant. The return shall be accompanied by a written inventory of any property taken. Upon request, the clerk shall deliver a copy of the inventory to the person from whom or from whose premises the property was taken and to the applicant for the search warrant.
>
> **(2)** An affidavit or complaint made in support of the issuance of the warrant and the transcript of any testimony taken shall be filed with the clerk within 5 days after the date of the execution of any search warrant.

and seizure of listed items, rather than the further testing and analysis. Finally, Wis. Stat. § 968.16's reference to "[t]he person executing the search warrant" only makes sense if execution means the initial entry into a protected area.

In order to confirm this plain meaning, the court may consult legislative history. When Wis. Stat. § 968.15 was enacted, the Judicial Council provided the following explanatory note:

> Current law has no provision on the execution of a search warrant. It is believed that there should be some reasonable period in which a warrant should be executed and returned. Experience teaches that normally search warrants have little effect if they are not promptly served. They should not be held by an officer and served at his whim. Various states have adopted times different than the federal requirement in F.R. Cr. P. 41(d) which has a 10-day limitation. The Council, after consultation with law enforcement authorities, felt 5 days was a reasonable period.

Judicial Council Note, 1969, § 968.15 (*quoted in State v. Sveum*, 2010 WI 92, ¶ 91 n.2, 328 Wis. 2d 369, 787 N.W.2d 317 (Abrahamson, C.J., dissenting)).

The clear aim of Wis. Stat. § 968.15 is to prevent warrants from being executed at law enforcement's whim, allowing probable cause to dissipate. To give force to this rationale, this Court held that a defendant may challenge the execution of a search warrant due to the dissipation of probable cause, even if the warrant was executed within five days. *State v. Edwards*, 98 Wis. 2d 367, 376, 297 N.W.2d 12 (1980). The explicit rationale was "to lessen the possibility that the facts upon which probable cause was initially based do not become dissipated." *Id.* at 372 (quoting *United States v. Bedford*, 519 F.2d 650, 655 (3d Cir. 1975)).

A warrant is "executed" when law enforcement performs or carries out the acts it authorizes. Secondary sources confirm that this is how to interpret "execute." 68 Am.

Jur. 2d *Searches and Seizures* § 307 (2023) ("The process of carrying out a search or seizure pursuant to a search warrant is generally referred to as 'executing' the warrant."). That would be when law enforcement interferes with a defendant's right to exclude others from his property, searches property that would otherwise be protected by the Fourth Amendment, and seizes items that a defendant has a possessory interest in. When that is done, law enforcement files a return stating when the warrant was executed and what items were seized. This comports with the dictionary definition of "execute," the statutory context of the other statutes in Chapter 968, and the legislative intent that warrants not be executed capriciously after probable cause has dissipated.

C. Other jurisdictions have held that the time limit for executing a warrant does not include analysis of the lawfully seized items.

Wisconsin is hardly the first state to encounter this issue. Other states, and the Federal Rules of Criminal Procedure have similar statutes regarding the timing of executing a warrant. Dissipating probable cause is generally recognized as the rationale behind these statutes and their time limits. Orin S. Kerr, *Search Warrants in an Era of Digital Evidence*, 75 Miss. L.J. 85, 102–03 (2005) ("The Rules ensure that Officers do not wait until the probable cause becomes stale."); 68 Am. Jur. 2d *Searches and Seizures* § 243 ("The purpose of a state statute requiring a search warrant be executed and returned within 10 days after issuance, is to insure that the circumstances showing probable cause that supported the issuance of the warrant will still exist at the time the warrant is executed.").

As Fourth Amendment expert Wayne LaFave has observed, "computer searches typically involve 'a two-step process': premises are entered and hardware is seized, and later off-site the equipment is searched for particular

data." 2 Wayne LaFave, *Search and Seizure: A Treatise on the Fourth Amendment* § 4.7(a) (5th ed. 2022) (quoting Kerr, 75 Miss. L.J. at 86). He continues that "[t]his gives rise to the question of whether any constitutional or statute/rule requirements regarding the time of search warrant execution apply as well to the second stage, which the courts have answered in the negative." *Id. See also id.* n.20 (cases cited). He emphasizes that "this is a sound conclusion regarding the Fourth Amendment issue, for the 'initial physical search and seizure has already occurred,' and thus probable cause 'can no longer become stale.'" *Id.* (quoting Kerr, 75 Miss. L.J. at 120).

The State has not found any jurisdiction where "executed," within an analogous statute on the timing of the execution of warrants, was held to include subsequent testing and analysis. And Drachenberg does not cite any. To the contrary, numerous other states and federal circuits have addressed this issue squarely and concluded that "executed" does not include further testing and analysis of lawfully seized items. Federal courts consider a warrant "executed" when the item is seized or removed from the premises. *United States v. Cleveland*, 907 F.3d 423, 431 (6th Cir. 2018) ("Execution of the warrant occurred when the cell phone was removed from its location and shipped to the analytics laboratory—an act that occurred prior to the warrant's deadline. It is not relevant for compliance with that deadline that the subsequent extraction occurred after the warrant's execution date." (footnote omitted)); *United States v. Huart*, 735 F.3d 972, 974 n.2 (7th Cir. 2013) ("We do note that, under Federal Rule of Criminal Procedure 41(e)(2)(B), a warrant for electronically stored information is executed when the information is seized or copied—here, when . . . the phone [was seized]. Law enforcement is permitted to decode or otherwise analyze data on a seized device at a later time.").

State courts agree. *See State v. Monger*, 472 P.3d 270, 276 (Or. Ct. App. 2020) ("[I]t would be anomalous to conclude

that a seizure of an electronic device within five days was permissible but that the subsequent search or analysis of the same electronic device that had been stored in an evidence room after weeks had elapsed somehow effected staleness concerns."); *State v. Sanchez*, 476 P.3d 889, 894 (N.M. Ct. App. 2020) ("[A] warrant to search an electronic device is executed when the device is seized or the data from the device is copied on site. In other words, a device must be in the custody of police within ten days after the police obtain a warrant to search that device."); *Ramirez v. State*, 611 S.W.3d 645, 651–52, (Tex. App. 2020) ("[T]he three-day requirement for the execution of a search warrant sets the limit for the actual search for and seizure of the evidence by a peace officer, not the timing for any subsequent forensic analysis that may be conducted on the seized evidence."); *People v. Shinohara*, 872 N.E.2d 498, 518 (Ill. App. Ct. 2007) (declining to apply Illinois' 96 hour time limit for the execution of warrants to forensic analysis of a computer, emphasizing that the statute was enacted "well before the computer age"); *State v. Nadeau*, 1 A.3d 445, 463 (Me. 2010) ("The execution of a search warrant is the act of lawfully searching for and taking possession of property as authorized by the warrant.").

These cases support the interpretation of the plain meaning of "executed" as the intrusion into the listed premises, the search for the listed items, and the seizure and removal of those items from the premises. This Court can consider these persuasive authorities to confirm that meaning. *Harvey*, 289 Wis. 2d 222, ¶ 20 ("not[ing] that other states have considered this issue and arrived at a definition . . . consistent with our determination").

Drachenberg cites two federal cases as persuasive authority for his proposition that "execution" includes further analysis. (Drachenberg's Br. 10–12.) They do not say what he thinks they do. Instead, they stand for the idea that taking several months to review seized data can be reasonable under

the Fourth Amendment. In *United States v. Jarman*, 847 F.3d 259, 266, (5th Cir. 2017), the court deemed a delay of 23 months reasonable. In *United States v. Metter*, evidence was suppressed because the government delayed over 15 months before even beginning to review seized computers for evidence. *United States v. Metter*, 860 F. Supp. 2d 205, 215 (E.D.N.Y. 2012). But even the *Metter* court recognized that "there is no established upper limit as to when the government must review seized electronic data to determine whether the evidence seized falls within the scope of a warrant." *Id*. at 215. Drachenberg relies on *State v. Plencner*,[8] for the idea that this Court has looked to *Jarman* to conclude that execution includes further testing and analysis. (Drachenberg's Br. 11; A-App. 73–89.) *Plencner* does not assist because it did not address Wis. Stat. § 968.15, and neither *Plencner* nor *Jarman* interpreted the meaning of the statutory term "execute."

D. In the Fourth Amendment context, our courts have held that further testing and analysis of lawfully seized items is an essential part of the seizure and does not require separate justification.

Drachenberg argues that, if, five days after the issuance of a search warrant, police want to conduct further analysis, "the officers can get a new warrant." (Drachenberg's Br. 13.) That reasoning has been expressly rejected.

"[T]he examination of evidence seized pursuant to the warrant requirement or an exception to the warrant requirement is an essential part of the seizure and does not require a judicially authorized warrant." *State v. VanLaarhoven*, 2001 WI App 275, ¶ 16, 248 Wis. 2d 881, 637

[8] *State v. Plencner*, No. 2019AP517-CR, 2020 WL 6302661 (Wis. Ct. App. Oct. 28, 2020) (unpublished).

N.W.2d 411 (chemical analysis of blood obtained by consent is not a separate search and does not need separate constitutional justification).

Further, the supreme court has held that "[l]aw enforcement officers may employ various methods to examine objects lawfully seized in the execution of a warrant." *State v. Petrone*, 161 Wis. 2d 530, 545, 468 N.W.2d 676 (1991), *abrogated on other grounds by State v. Greve*, 2004 WI 69, ¶ 31 & n.7, 272 Wis. 2d 444, 681 N.W.2d 479. In *Petrone*, police developed film they found during the execution of a warrant. *Id.* Petrone argued that developing the film was another search, requiring an additional warrant, but the supreme court disagreed, stating: "[t]he deputies simply used technological aids to assist them in determining whether items within the scope of the warrant were in fact evidence of the crime alleged." *Id.* The court held that "[d]eveloping the film is simply a method of examining a lawfully seized object." *Id.* The court did *not* say that developing film is a method of *executing* a search warrant.

Petrone and *VanLaarhoven* were decided after the enactment of Wis. Stat. § 968.15. Reading these cases together with the statute, further examination of lawfully seized items clearly does not implicate section 968.15(1).

The supreme court has recognized that ongoing, complex searches will last longer than simple searches, and those longer searches can still be reasonable and do not run afoul of Wis. Stat. § 968.15. In *Sveum*, Sveum's ex-girlfriend believed that he was stalking her. *Sveum*, 328 Wis. 2d 369, ¶ 5. Police requested a circuit court order authorizing them to place a GPS device on Sveum's vehicle. *Id.* The court issued the requested order the same day. *Id.* ¶ 7. Police installed a GPS device on Sveum's vehicle the next day. *Id.* ¶ 8. "Because of the limited battery life of the GPS, the officers replaced the GPS twice." *Id.* Police removed the GPS device from Sveum's vehicle for the final time 34 days after they first installed one.

Id. The GPS data showed that Sveum had been stalking his ex-girlfriend. *Id.* ¶ 10. The State charged Sveum with aggravated stalking, and he filed a suppression motion alleging that police obtained the GPS data in violation of the Fourth Amendment. *Id.* ¶ 12.

Sveum moved to suppress, arguing that the 35-day search was unreasonably long and impermissible under Wis. Stat. § 968.15. *Sveum*, 328 Wis. 2d 369, ¶¶ 61, 71. Sveum, like Drachenberg, argued that police needed to obtain successive warrants in order to extend the search. *Id.* ¶ 64. The supreme court disagreed, noting that obtaining evidence of stalking, which requires two or more acts, "could not have been completed in a single day." *Id.* ¶ 67. So, police did not need to obtain additional warrants for each day the GPS monitoring occurred. *Id.*

E. Drachenberg's reading of "executed" would render Wis. Stat. § 968.15(2) absurd.

Drachenberg does not account for how his interpretation of "executed" would affect Wis. Stat. § 968.15(2), which provides that "[a]ny search warrant not executed within the time provided in sub. (1) shall be void and shall be returned to the judge issuing it." It is precisely by looking at sub. (2) that undermines Drachenberg's point. *Kalal*, 271 Wis. 2d 633, ¶ 46 (statutes to be interpreted in context to avoid absurd results). A result can be absurd if it is unworkable in practice. *See Duncan*, 400 Wis. 2d 1, ¶ 20 (calling party's proposed interpretation of a statute "unworkable"). Drachenberg's reading is impractical and unworkable for law enforcement—and judges.

Drachenberg's interpretation of "executed" means that all analysis must be completed within five days after the judge signed the warrant, or else the entire warrant is void. (Drachenberg's Br. 13.) Pennsylvania has explicitly found this interpretation absurd, saying:

> Appellant's proposed construction, by contrast, would lead to absurd results. Under his interpretation, when authorities obtain a warrant to gather a blood or DNA sample, they must also complete forensic analysis of the DNA or blood within the warrant's two-day time limit, or repeatedly seek new warrants every day until the analysis is complete. Along those lines, any time an initial search resulted in the seizure of such evidence, *e.g.*, fingerprints from a weapon, blood from inside a vehicle, bags of suspected narcotics, or DNA samples from a rape kit, the authorities would have to complete the further analysis of the materials within forty-eight hours of the warrant's issuance.

Commonwealth v. Bowens, 265 A.3d 730, 753–54 (Pa. Super. Ct. 2022).

Drachenberg's reading would end law enforcement's ability to further investigate the seized items, unless that could be done within five days of the issuance of the warrant. And the consequence of continuing to investigate the seized items beyond those five days would result in a void warrant, requiring suppression of all evidence seized—whether it was the subject of the further analysis or not. Or it would require law enforcement to re-apply for a warrant after every five-day time limit until the examination was complete, unreasonably burdening law enforcement and reviewing magistrates.

The only logical reading of Wis. Stat. § 968.15(2) is that "executed" means the carrying out of the search allowed by the warrant. The authorized intrusion into a defendant's rights must begin, if it is to begin at all, within five days of issuance. The identified property must be found and seized within five days after issuance. If the allowed search or seizure does not begin within five days, then the warrant is void, must be returned, and law enforcement must obtain a new warrant that states probable cause. *See* Wis. Stat. § 968.15(2).

Drachenberg's interpretation would have broader consequences that further demonstrate its absurdity. Under his reading, the State must have lawfully collected DNA evidence tested by the crime lab within five days, and, in a drunk driving case, have seized blood tested within five days. Otherwise, his reasoning goes, any further analysis of the lawfully seized evidence beyond five days means that the warrant is void because it was not fully "executed" within five days of issuance. Case law says this is not the case. *See Maryland v. King,* 569 U.S. 435, 464 (2013) (analysis of lawfully collected DNA does not amount to a significant invasion of privacy under the Fourth Amendment); *VanLaarhoven,* 248 Wis. 2d 881, ¶ 16 (chemical analysis of lawfully seized blood is not a separate search and does not require additional constitutional justification).

F. In this case, the search warrant was executed and returned promptly, within Wis. Stat. § 968.15(1)'s five-day command.

In this case, law enforcement promptly executed the warrant within five days. Judge Brazeau signed the warrant on January 29, 2021. (R. 19:21.) Three days later, on February 1, 2021, Detective Parks and other officers executed the warrant by going to 405 North Cherry Avenue and seized Drachenberg's computer from the shed. (R. 19:21.) Detective Parks returned the warrant with an inventory of the items seized the same day. (R. 19:21).

The warrant presented to Judge Brazeau contemplated, and Judge Brazeau approved of by signing, that law enforcement would remove listed items and subject them to further analysis. (R. 23:15.) The warrant provided explicitly that "**[t]he Court authorizes those items to be removed from the premises and analyzed at a later time for this purpose**." (R. 23:15 (emphasis in original).)

In this case, Detective Parks examined the seized items by "run[ning] software on the computer that looks for images and videos". (R. 19:24.) Or in other words, he used a technological aid to further examine the lawfully seized items and even commenced doing so within five days of the warrant's issuance.

The intrusion into Drachenberg's protected interest began within the time allotted for by Wis. Stat. § 968.15(1). And the return was completed within the same time frame.

* * * * *

The plain meaning of "execute" is to intrude into a protected area, perform a search, and seize items. Other sections within Chapter 968 confirm this, as they only make sense if read similarly. Legislative history and prior decisions of this Court confirm that the intent behind Wis. Stat. § 968.15 is to guard against capricious execution of warrants after probable cause had dissipated. Further testing and analysis of seized items is not a separate search and requires no additional constitutional justification, so it therefore does not implicate the execution of a warrant. No other jurisdictions have concluded that "execution" of a warrant includes further analysis; in fact, many support the reading that "execute" means seizing the item and removing it from the property. Requiring all testing and analysis to be done within five days of issuance would be an absurd result because of the burden it would place on law enforcement and the judiciary. Therefore, this Court should affirm the circuit court.

II. Even if this Court holds that "executed" within section 968.15(1) includes further testing and analysis, suppression is not warranted

Drachenberg assumes without any analysis that suppression is an available remedy and is warranted in this case. (Drachenberg's Br. 13.) The State will show that even if

this Court agrees with Drachenberg that the five-day time limit imposed by Wis. Stat. § 968.15 does include further testing and analysis, that does not end the inquiry. Suppression is not warranted when the police action at issue furthered the statute's objectives, and suppression is not warranted unless a defendant's substantial rights are violated. Suppression is not automatic.

A. Suppression is not warranted because the execution of the warrant furthered section 968.15(1)'s objective of executing search warrants before the dissipation of probable cause.

Suppression is a judicially created remedy generally applicable to police action that violates a defendant's constitutional rights. *United States v. Calandra*, 414 U.S. 338, 348 (1974). However, our supreme court has held that a court may suppress evidence based on a violation of a statute when suppression is necessary to achieve the statute's objectives. *Popenhagen*, 309 Wis. 2d 601, ¶ 62. But the use of suppression as a remedy for statutory violations is infrequent.

Popenhagen illustrates the rare situation when suppression may be appropriate for a statutory violation. The case involved a subpoena for bank records under Wis. Stat. § 968.135. That statute requires a showing of probable cause to a neutral magistrate before the issuance of a subpoena for documents. Wis. Stat. § 968.135. In *Popenhagen*, the district attorney asked the circuit court to issue subpoenas for bank records, but did not use the investigatory subpoena process under Wis. Stat. § 968.135 and made no probable cause showing. *Popenhagen*, 309 Wis. 2d 601, ¶¶ 7, 10.[9]

[9] Instead, the district attorney's subpoena request relied on statutes used to secure the appearance of witnesses along with

The supreme court held that suppression was available because having no remedy for noncompliance with Wis. Stat. § 968.135's probable cause requirement would "emasculate the clear directives of" the statute. *Popenhagen*, 309 Wis. 2d 601, ¶ 54. "[U]nless the documents were suppressed as evidence in the present case, the safeguards established by Wis. Stat. § 968.135 for the issuance of subpoenas would be rendered meaningless." *Id*. ¶ 71. Because the suppression remedy is unusual in the statutory context, the court emphasized that a motion to suppress under a statute must be "germane to the[ ] objectives of" the statute. *Id*. ¶¶ 54, 62.

The supreme court found the objectives underlying Wis. Stat. § 968.135 were "allow[ing] the State to acquire and use documents while also ensuring that the State meets statutory requirements that protect persons affected." *Popenhagen*, 309 Wis. 2d 601, ¶ 52. The limits found in Wis. Stat. § 968.135 further this objective: 1) only the attorney general or a district attorney may make a request under the statute; 2) the circuit court must rule on the request before issuance of a subpoena; 3) a subpoena can only issue upon a showing of probable cause; and 4) the statute permits motions to the circuit court, including motions to limit or quash the subpoena. *Id*. ¶ 54. This last element was a key consideration in whether suppression furthered the objectives of Wis. Stat. § 968.135. If the subject of the subpoena has an opportunity to come before the court to prevent or limit the evidence the State may obtain and use, then a defendant's motion to suppress must be allowed because it "is similar in nature." *Id*. ¶ 51.

Suppression was appropriate in *Popenhagen* because the State completely disregarded section 968.135's

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documents in their possession for court proceedings. *State v. Popenhagen*, 2008 WI 55, ¶¶ 8–9, 309 Wis. 2d 601, 749 N.W.2d 611. These statutes do not require a showing of probable cause before issuance. *See* Wis. Stat. §§ 805.07, 885.01.

requirements. The State's failure to submit evidence of probable cause to the court led to the court's failure to make the requisite probable cause findings. *Popenhagen*, 309 Wis. 2d 601, ¶ 98 (Prosser, J., concurring). "[T]his was a subpoena, which at every juncture of the entire process, was defective." *Id.* ¶ 141 (Ziegler, J., concurring in part, dissenting in part). Section 968.135 *requires* a showing of probable cause by the applicant and a finding of probable cause by the circuit court, but neither happened. *Id.* ¶ 7.

As discussed above, *supra* sec. I.B, the aim of Wis. Stat. § 968.15 is to prevent warrants from being delayed in their commencement lest they become stale. The Wisconsin Judicial Council believed that Wis. Stat. § 968.15 provided a reasonable period in which to commence the execution of a warrant, so that warrants would "not be held by an officer and served at his whim." Judicial Council Note, 1969, § 968.15. And when interpreting what makes the execution of a search warrant timely, this Court approved the idea that time limits are proper solely "to lessen the possibility that the facts upon which probable cause was initially based do not become dissipated." *Edwards*, 98 Wis. 2d at 372 (quoting *Bedford*, 519 F.2d at 655).

The Council note and *Edwards* are both concerned with police executing warrants "at leisure." *Id.* Drachenberg does not claim that the affidavit used to obtain the warrant did not state probable cause. Drachenberg no longer maintains his argument that probable cause had dissipated before the warrant was executed. (Drachenberg Br. 5 n.1.) He does not argue that probable cause dissipated before the seized items were analyzed. Indeed, Detective Parks swore in his affidavit to obtain the search warrant that digital evidence of child pornography persists in ways that forensic examination can detect, even long after being deleted. (R. 23:4.) This strongly suggests that probable cause had not and could not dissipate before analyzing the seized computer.

Therefore, this case is entirely unlike *Popenhagen*, where the State's action circumvented the objective of the statute. There, the district attorney completely disregarded the proper statutory section to obtain the evidence he sought. *Popenhagen*, 309 Wis. 2d 601, ¶ 10. In *Popenhagen*, the district attorney used an incorrect procedure and never demonstrated probable cause. *Popenhagen*, 309 Wis. 2d 601, ¶¶ 7–10. As a result, the subpoena was defective *ab initio*. *Id*. ¶ 141 (Ziegler, J., concurring in part, dissenting in part.) Here, the State followed the correct procedure to obtain a valid warrant. (R. 19:21; 23:17.)

The supreme court considered a similar issue in *State ex rel. Arnold v. County Court of Rock County*, on which *Popenhagen* relied. *State ex rel. Arnold v. Cnty. Ct. of Rock Cnty.,* 51 Wis. 2d 434, 443, 187 N.W.2d 354 (1971); *Popenhagen*, 309 Wis. 2d 601, ¶¶ 59–62. In *Arnold*, the sheriff's department, with the consent of the other party to Arnold's phone calls, intercepted and recorded several calls without Arnold's knowledge. *Arnold*, 51 Wis. 2d at 436–37. The supreme court held that this violated the Wisconsin Electronic Surveillance Control law. *Id*. at 439. In order to electronically eavesdrop, police were required to apply to the circuit court for an order authorizing interception, which required a showing of probable cause. *Id*. at 440–41. The supreme court noted that the recordings obtained against Arnold, while "not unlawful," were not "authorized" under the statute, and therefore not admissible into evidence. *Id*. at 442.

The *Arnold* court considered the objective of the electronic surveillance law to be the protection of people's right to privacy. *Id*. at 442. The court found that allowing evidence obtained by one party's consent, rather than by following the application process and a showing of probable cause, would render the electronic surveillance law's protections and safeguards "for naught." *Id*. at 443.

Here, Detective Parks followed the correct procedure to obtain a warrant, and obtained a warrant based upon probable cause. (R. 19:21; 23:17.) This is not a case where the warrant was void *ab initio*. The warrant was valid when issued; it was valid when the police went onto Drachenberg's property and seized his computer; and it was valid when Detective Parks filed a return listing the items seized.

Law enforcement executed and returned the warrant within five days. (R. 19:21.) Within three days, police went onto Drachenberg's property, found his computer, seized it, and removed it for further inspection. (R. 19:21.) This is consistent with the spirit and objective of section 968.15, because this is not a case where law enforcement sat on the warrant and executed it capriciously. Suppression is therefore not warranted.

B. While a statutory violation may lead to suppression, suppression is not warranted unless the violation affected the defendant's substantial rights.

1. Suppression is not a remedy absent a violation of substantial rights.

Section 968.22 provides that: "[n]o evidence seized under a search warrant shall be suppressed because of technical irregularities not affecting the substantial rights of the defendant." Wis. Stat. § 968.22. Case law demonstrates that "substantial rights" is linked to prejudice. *See Popenhagen*, 309 Wis. 2d 601, ¶¶ 120–25 (Prosser, J., concurring).

For instance, substantial rights are violated when police fail to sign and swear to the truth of an affidavit in support of a search warrant. *State v. Tye,* 2001 WI 124, ¶ 19, 248 Wis. 2d 530, 636 N.W.2d 473. Our supreme court held that an oath is a matter of substance and required by the

Fourth Amendment. *Id*. The oath or affirmation reminds the officer and the magistrate of the solemnity of the process, and it protects the target by creating liability for perjury or false swearing. *Id*. "An oath preserves the integrity of the search warrant process and thus protects the constitutionally guaranteed fundamental right of people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures." *Id.*

By contrast, the 48-hour time period for returning warrants after execution under Wis. Stat. § 968.17 was "ministerial [in] nature and . . . there [wa]s nothing in the record that the rights of the defendant were in any way prejudiced." *State v. Meier,* 60 Wis.2d 452, 459–60, 210 N.W.2d 685 (1973). Similarly, the failure to file a transcript of search warrant testimony within five days after the execution of a search warrant as required by section 968.17(2) was deemed a technical irregularity under section 968.22, and the supreme court found that there was no prejudice to the defendant. *State v. Elam*, 68 Wis. 2d 614, 620, 229 N.W.2d 664 (1975).

An incorrect address on the face of a warrant—where the warrant was executed upon the correct address—was also found to be a technical irregularity that "did not affect any substantial right of" the defendant. *State v. Nicholson,* 174 Wis. 2d 542, 549, 497 N.W.2d 791 (Ct. App. 1993). Nor are substantial rights violated when the face of a warrant incorrectly identified the defendant's car, but the affidavit correctly described the color, make, model, style, and license plate three times. *State v. Rogers*, 2008 WI App 176, ¶ 15, 315 Wis. 2d 60, 762 N.W.2d 795.

Finally, inadvertent failure to record an application for a warrant done by telephone did not prejudice the defendant because the search warrant was based in probable cause and the circuit court promptly took steps to re-create the

application. *State v. Raflik*, 2001 WI 129, ¶ 57, 248 Wis. 2d 593, 636 N.W.2d 690.

The supreme court has previously held that "substantial rights were [not] violated by . . . officers' failure to execute and return [a] warrant within 5 days after the date of issuance" when the execution of the warrant was done reasonably. *Sveum*, 328 Wis. 2d 369, ¶ 71. The court reasoned that "the officers' use of the GPS device for 35 days was reasonable and, *therefore*, the lack of a return to the circuit court in five days did not violate Sveums substantial rights." *Id.* (emphasis added). It was reasonable because Sveum's stalking was ongoing and a search to obtain evidence of stalking "could not have been completed in a single day." *Id.* ¶ 67. The court held that when failure to comply with sections 968.15 and 968.17 does not prejudice a defendant's substantial rights, the effect of the error is cabined by section 968.22, which does not permit suppression. *Id.* ¶ 72.

2. On the record before the Court, Drachenberg cannot show prejudice to his substantial rights.

There are no constitutional defects with the warrant,[10] and Drachenberg cannot show that it was executed unreasonably, so he cannot show any prejudice to a substantial right. Indeed, since he did not address this issue in his brief, he has forfeited the issue on appeal. *See A.O. Smith Corp. v. Allstate Ins. Cos.*, 222 Wis. 2d 475, 491, 588 N.W.2d 285 (Ct. App. 1998) ("[A]n issue raised in the [circuit] court, but not raised on appeal, is deemed abandoned.").

The affidavit for the warrant states probable cause, was validly attested to, and was notarized. (R. 19:15–17, 18–20.) That makes this entirely unlike *Tye*, where the lack of oath or

[10] Drachenberg has waived his constitutional challenges. (Drachenberg Br. 5 n.1.)

attestation was fatal to the warrant. *Tye*, 248 Wis. 2d 530, ¶ 19.

If section 968.15(1) does require further testing and analysis to be completed within the statute's five-day time frame, a violation of that section makes this case closer to *Sveum*, which endorsed searches that take longer than five days, but which are still performed reasonably, considering the "complex, ongoing nature" of the underlying crime. *Sveum*, 328 Wis. 2d 369, ¶¶ 64–67.

Police acted reasonably, and probable cause had not dissipated before police finished analyzing the seized computer. Detective Parks obtained a warrant. (R. 19:21.) Officers carried out that warrant less than five days later. (R. 19:21.) Multiple phones and computers were seized. (R. 19:28-29.) The computer from Drachenberg's shed contained 14 terabytes of data, an amount "extensively more than any personal desktop computer that [Detective Parks] ha[d] come across." (R. 19:26–27.) He finished analyzing the computer within two months, when he filed his report on March 29, 2021. (R. 19:28.)

Detective Parks acted reasonably in executing the search warrant and analyzing seized items. He acted pursuant to a warrant, which by its own terms allowed him to analyze the seized items later. He promptly completed his analysis within two months.

Like in *Sveum*, because police acted reasonably, Drachenberg's substantial rights were not prejudiced, and suppression is not warranted.

CONCLUSION

This Court should affirm Drachenberg's judgment of conviction.

Dated this 30th day of March 2023.

Respectfully submitted,

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FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § (Rule) 809.19(8)(b), (bm) and (c) for a brief produced with a proportional serif font. The length of this brief is 8,200 words.

Dated this 30th day of March 2023.

Electronically signed by:

John D. Flynn
JOHN D. FLYNN

CERTIFICATE OF EFILE/SERVICE

I certify that in compliance with Wis. Stat. § 801.18(6), I electronically filed this document with the clerk of court using the Wisconsin Court of Appeals Electronic Filing System, which will accomplish electronic notice and service for all participants who are registered users.

Dated this 30th day of March 2023.

Electronically signed by:

John D. Flynn
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