STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

Case No. 94-0123-CR

STATE OF WISCONSIN,

Plaintiff-Appellant,

v.

KEVIN GILMORE,

Defendant-Respondent.

Appeal From The Order Entered In The Circuit Court For Milwaukee County, The Honorable John A. Franke, Circuit Judge, Presiding

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CORRECTED BRIEF AND SUPPLEMENTAL APPENDIX OF DEFENDANT-RESPONDENT

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BRIEF OF DEFENDANT-RESPONDENT

ISSUES PRESENTED FOR REVIEW

1. Whether this Court lacks jurisdiction to hear the appeal due to the state's 10 1/2-month delay in filing a notice of appeal after the circuit court's dismissal of the charge against Gilmore.

The circuit court did not address this issue.

2. Whether the state's delay in initiating this appeal violates due process, is fundamentally unfair, and is contrary to the interests of justice.

The circuit court did not address this issue.

3. Whether the state's unilateral public disclosure in a criminal complaint of the contents of wire communications intercepted pursuant to a wiretap violates the strict limits on disclosures set forth in the Wisconsin Electronic Surveillance Control Law and Title III of the Omnibus Crime Control and Safe Streets Act of 1968.

The circuit court held that such disclosure violated Wis. Stat. §968.29.

4. Whether, when the unlawfully disclosed contents of Gilmore's intercepted wire communications and evidence derived therefrom are stricken from the criminal complaint, that complaint states probable cause to believe Gilmore committed the offense charged.

The trial court held, after striking the improper disclosures, that the criminal complaint failed to establish probable cause to believe Gilmore committed the offense charged.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Oral argument probably would help clarify the issues raised on this appeal. Publication also is appropriate to provide notice to Wisconsin prosecutors that unilateral public disclosures of the contents of intercepted wire or oral communications in a criminal complaint are illegal. Hope-

fully, such notice will prevent in the future the type of unlawful disclosure which took place here.

SUPPLEMENTAL STATEMENT OF THE CASE

On September 29, 1992, the state filed a criminal complaint charging Gilmore with conspiracy to deliver cocaine (R2).[1] On November 20, 1992, Gilmore moved to strike contents of intercepted wire communications from the criminal complaint and to dismiss (R10). The parties briefed the issue, along with other issues raised by the defendant (R15:6-8; R16:14-17).

On February 1 and February 15, 1993, the Milwaukee County Circuit Court, Judge John A. Franke presiding, heard argument from the parties concerning Gilmore's motion (R22; R23). The February 1, 1993 hearing addressed the legality of the state's public disclosure of the contents of intercepted wire communications in the criminal complaint. Following argument, Judge Franke concluded that the relevant statutes are clear on their faces and that "there is no authorization

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[1] Throughout this brief, references to the record will take the following form: (R__:__), with the R__ reference denoting record document number and the following :__ reference denoting the page number of the document. Where the referenced material is contained in the Appendix to the state's brief, it will be further identified by Appendix page number as App. __. Where the referenced material is contained in the Supplemental Appendix, it will be further identified by Supplemental Appendix page number as S.App. __.

anywhere in the statute--the Wisconsin or the federal law to disclose this material in a Criminal Complaint, and as a consequence, it may not be disclosed in a Criminal Complaint." (R22:17, 21-22; App. 109, 113-14). Judge Franke then determined that the only reasonable remedy was to strike the unlawful disclosures from the complaint:

> Now, that leads me to the question of what the remedy ought to be. That is, simply because this stuff shouldn't have been disclosed doesn't mean that I have to strike it or should strike it.
>
> I'm not sure there's any clear guidance on this, but I've thought about it. I'm satisfied that the only reasonable remedy is to strike it. That is somewhat analogous to the exclusionary rule, in that to use it now, to consider it now, to talk about it now would essentially put the Court in the position of promoting a violation of the statute.
>
> It would essentially put the Court in the position of using material that should not have been disclosed, and ... even though there's no particular guidance as to what to do, I think the only reasonable course is to find that since this material should not have been disclosed, the Court cannot participate any further in its disclosure, and that it cannot consider it in assessing the probable cause in the sense I never should have read it to begin with, so I am going to grant the motion to strike any material in the Criminal Complaint which discloses the contents of any electronic surveillance.

(R22:22-23; App. 114-15).

At the motions hearing on February 15, 1993, Judge

Franke heard argument concerning whether the redacted complaint[2] stated probable cause and concluded that "the complaint is insufficient as to Defendant Gilmore on Count 1" (R23:33; App. 127; *see also* R23:35; App. 129 ("as to Defendant Gilmore, the complaint is dismissed -- it's Count 1")). Following that order, Judge Franke stated that "Defendant Gilmore is released from any and all pre-trial orders" (R23:36).

The judgment roll bears the following notation regarding the court's actions at the February 15, 1993 hearing:

> Court finds Ct. 1 to be insufficient as to defendant (Gilmore) and dismisses the complaint as to Gilmore.

(R1:14).

The state took no action concerning the dismissal of Gilmore's case until October 26, 1993, over eight months later, at which time the prosecutor sent a letter to Gilmore's former defense counsel requesting him to review the proposed order regarding dismissal that the state intended to submit to Judge Franke. In a letter dated November 3, 1993, Gilmore's counsel objected to the proposed order and requested a hearing on the matter (James M. Shellow Letter to ADA Jane Vinopal,

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[2]No redacted complaint was filed in the trial court as a separate document. The state did submit a redacted version as an attachment to its State's Response (R15).

dated November 3, 1993).[3]

On November 8, 1993, the state submitted its proposed order to Judge Franke, who signed the order on November 23, 1993, without affording Gilmore a hearing on the matter (R19; App. 101). The state filed a notice of appeal from the written order on January 6, 1994 (R20; App. 102).

By motion dated July 1, 1994, Gilmore moved this Court for the entry of an Order dismissing this appeal for lack of jurisdiction. On August 2, 1994, Presiding Judge Ted E. Wedemeyer entered an Order purporting to deny that motion. Because the Internal Operating Procedures of this Court require consideration of such motions by a full panel rather than a single judge, Int. Op. Proc. VI(3)(c) (Wis. App.), Gilmore on August 4, 1994, moved for reconsideration and decision on the motion to dismiss by the full panel of this Court. As of the date of this brief, counsel have received no notification of a ruling on that motion.

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[3] Gilmore has moved this Court for an Order supplementing the appellate record to include his counsel's letters dated November 2 & 3, 1993, objecting to the proposed order, as well as the state's letter in response dated November 8, 1993.

ARGUMENT

I.

THIS APPEAL SHOULD BE DISMISSED DUE TO THE STATE'S UNCONSCIONABLE DELAY IN FILING IT.

A. This Court Lacks Jurisdiction Over This Appeal.

Judge Franke dismissed the criminal complaint on February 15, 1993, but apparently did not indorse this finding on the complaint as required by Wis. Stat. §968.03(1). The statutory mandate put the state on notice that an appeal of the court's dismissal of the complaint would have to be initiated within 45 days. Wis. Stat. (Rule) 808.04(4). More importantly, a defendant in Gilmore's position should be able to rely on the statutory mandate requiring the court to endorse the complaint. If the court had complied with the mandate, the state's time for appeal would have expired on April 1, 1993. Such time limits are jurisdictional. *Wainwright v. Wainwright*, 176 Wis. 2d 246, 500 N.W.2d 343, 345 (Ct. App. 1993).

Although the general rule is that the statutory time frame for appealing an order or judgment does not begin to run until a written judgment or order has been filed with the clerk of court, *In Interest of M.T.*, 108 Wis. 2d 410, 321 N.W.2d 289, 292 (1982), the Wisconsin Supreme Court has held

that there are circumstances in which the time for appeal begins running on the date the court's order was pronounced orally and entered on the judgment roll. *See State v. Wollmer*, 46 Wis. 2d 334, 174 N.W.2d 491 (1970); *Babbitt v. State*, 23 Wis. 2d 446, 127 N.W.2d 405 (1964).

In *Wollmer*, the court held that the defendant failed to timely appeal his conviction within the one year time for appeal where his notice of appeal was dated July 29, 1969, and the judgment roll reflected that he had been convicted on June 28, 1968. Although no written judgment apparently was filed with the clerk's office, the court held that the date of conviction entered in the judgment roll was determinative of the defendant's appeal period.

In *Dumer v. State*, 64 Wis. 2d 590, 219 N.W.2d 592, 604 (1974), the court explained that an entry on the judgment roll reflecting a conviction was distinguishable from an entry on the judgment roll denying certain other types of motions:

> Although the order may appear in the transcript and be filed with the clerk of courts, such is not an entry of the writing of the order within the meaning of sec. 270.53(2). Here, there was an oral order and no written order was ever entered denying a new trial. It is true, in *State v. Wollmer* ... and *Babbitt v. State* ... , we held a conviction entry in the judgment roll amounts to "entry," for purposes of former sec. 958.13, the predecessor of present sec. 974.03 and the judgment roll in the instant case shows that a motion had been denied, we do not think a notation in the judgment roll is

> sufficient entry of a motion for a new trial. Convictions by the court either upon a jury verdict or upon its own finding of guilty are in a different category than ordinary motions for a new trial. On this basis, the writ of error from the alleged order should be dismissed.

219 N.W.2d 592, 604

Similarly, outright dismissals of the state case are in a different category from, for example, motions for a new trial. Like a conviction, the dismissal of the criminal complaint is a judgment that disposes of the entire matter in litigation and prevents further proceedings. In this case, as in *Wollmer*, the appealing party has delayed the appeal beyond the statutory limits and should be denied the right to appeal. Further, it is clear from the February 15, 1993 hearing, and from the delay in filing a written order, that the circuit court did not anticipate taking any further action with respect to Gilmore's case following the dismissal of the criminal complaint on February 15. *Cf. State v. Goyer*, 155 Wis. 2d 294, 456 N.W.2d 168, 169 (Ct. App. 1990).

B. Because The State's Delay In Filing This Appeal Violates Due Process And Fundamental Fairness, The Appeal Should Be Dismissed.

Even if a written order dismissing the complaint is necessary to confer appellate jurisdiction, that does not mean that an appealing party may delay appeal indefinitely pending

the entry of a written order. *Cf. Wollmer*, 174 N.W.2d at 492. Regardless whether there is a written order, there still must be a meaningful limitation on the state's time for appeal. There is no reasonable basis for permitting the state to enlarge its time for appeal for an unlimited period of time by waiting to submit a written order to the trial court. Such a policy is contrary to the interests of justice and, if allowed here, would violate Gilmore's due process rights.

The state should not be permitted to reinstate criminal proceedings at any time in the manner it is attempting to do here. This Court could not have granted the state an extension of time to file its notice of appeal, Wis. Stat. (Rule) 809.82(2)(b), and it should not sanction the state's unilateral attempt to avoid the strict time limits for filing such an appeal.

Gilmore was entitled to rely upon the statutory requirement that the court endorse its dismissal on the complaint. *See* Wis. Stat. §968.03(1). He also was entitled to rely upon that court's order dismissing the case when it was not appealed within 45 days of the dismissal and the state expressed no intention of obtaining a separate written order for appeal purposes.

Gilmore's appellate rights should not be denied merely because of an oversight by the trial court. *Cf. Matter of Estate of Ristau*, 144 Wis. 2d 421, 424 N.W.2d 203, 205

(1988) (oversight by court clerk should not result in denial of appeal rights). He will be prejudiced seriously if this Court were to reinstate the complaint and allow the prosecution to proceed; defending himself after the state's tardy appeal and the time necessarily consumed by the appellate process would be extremely difficult, given the fading memories and probable difficulty in locating witnesses.[4]

II.

BECAUSE FEDERAL AND WISCONSIN WIRETAP STATUTES BAR EXACTLY THE TYPE OF DISCLOSURES COMMITTED BY THE STATE HERE, THE TRIAL COURT DID NOT ERR IN STRIKING THOSE DISCLOSURES FROM THE CRIMINAL COMPLAINT.

The state intercepted Gilmore's private telephone conversations and then unilaterally disclosed them publicly in a criminal complaint for the whole world to see (*see* R2). It claims that it has a right to do just that, apparently whenever it wants to. After full briefing and argument on the issue, Judge Franke held to the contrary in a thoughtful oral decision (R22:13-22; App. 105-14).

Judge Franke was right and the state is wrong. Not

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[4]This situation thus is analogous to the equitable defense of laches. "For laches to arise there must be unreasonable delay; knowledge of the course of events and acquiescence therein; and prejudice to the party asserting the defense." *Gorski v. Gorski*, 82 Wis. 2d 248, 262 N.W.2d 120, 126 (1978) (citation omitted).

only is the state's disclosure a blatant violation of the Wisconsin Electronic Surveillance Control Law ("WESCL"), Wis. Stat. §§968.27 - 968.37, but it violates Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§2510 *et seq.*, as well.

A. Standard of Review.

Whether WESCL and Title III permit the state's unilateral public disclosure of intercepted wire communications presents a question of statutory interpretation. Statutory construction is a question of law reviewed *de novo*. *State v. Fettig*, 172 Wis. 2d 428, 493 N.W.2d 254, 257 (Ct. App. 1992) (citation omitted).

In construing a statute, first recourse is to the language used. *Id.* The purpose of statutory interpretation is to give effect to the intent of the legislature. *Id.* "Only if the language does not clearly or unambiguously set forth the legislative may [the Court] look beyond the language and resort to judicial construction to ascertain and carry out that intent." *Id.*

B. The Applicable Statutes.

WESCL is modeled after Title III. *State ex rel. Arnold v. County Court of Rock County*, 51 Wis. 2d 434, 187 N.W.2d 354, 359 (1971). Like Title III, WESCL imposes strict

limitations upon the interception of wire and oral communications, as well as upon the use and disclosure of the contents of such intercepted communications. The full text of both statutes is set forth in the Supplemental Appendix (S. App. 1-21).

The Third Circuit aptly summarized the purposes underlying Title III:

> Title III is a comprehensive statute designed to regulate strictly the interception and disclosure of wire and oral communications. It "has as its dual purpose (1) protecting the privacy of wire and oral communications, and (2) delineating on a uniform basis the circumstances and conditions under which the interception of [such communications] may be authorized." *S. Rep. No.* 1097, 90th Cong., 2d Sess., *reprinted in* [1968] *U.S. Code Cong. & Admin. News*, pp. 2112, 2153. The legislative history of Title III makes it clear, as do the elaborate authorization and disclosure provisions of the statute itself, that "the protection of privacy was an overriding congressional concern" of the act. *Gelbard v. United States*, 408 U.S. 41, 48 ... (1972) (footnote omitted)... .

United States v. Cianfrani, 573 F.2d 835, 855 (3rd Cir. 1978).

The provisions most at issue here are those mandating that the contents of intercepted communications be sealed and barring disclosure or use of such contents except in very limited circumstances. Pursuant to Wis. Stat. §968.30(7)(b), all applications for wiretap orders and all such orders "shall be ordered sealed by the court" and may be disclosed only upon

a showing of "good cause." *See also* 18 U.S.C. §2518(8)(b). Any records or recordings of the contents of any communication intercepted pursuant to such an order likewise must be filed with the court and sealed. Wis. Stat. §968.30(7)(a); *see* 18 U.S.C. §2518(8)(a). Duplicates may be made, however, for use or disclosure as authorized under Wis. Stat. §968.29(1), (2) & (3). *See* Wis. Stat. §968.30(7)(a); *see* 18 U.S.C. §2518(8)(a).

Section 968.29 provides those limited situations in which the contents of an intercepted wire or oral communication lawfully may be used or disclosed:

> **968.29 Authorization for disclosure and use of intercepted wire, electronic or oral communications.** (1) Any investigative or law enforcement officer who, by any means authorized by ss. 968.29 to 968.37 or 18 U.S.C. 2510 to 2520, has obtained knowledge of the contents of any wire, electronic or oral communication, or evidence derived therefrom, may disclose the contents to another investigative or law enforcement officer only to the extent that the disclosure is appropriate to the proper performance of the official duties of the officer making or receiving the disclosure.
>
> (2) Any investigative or law enforcement officer who, by any means authorized by ss. 968.28 to 968.37 or 18 U.S.C. 2510 to 2520, has obtained knowledge of the contents of any wire, electronic or oral communication or evidence derived therefrom may use the contents only to the extent the use is appropriate to the proper performance of the officer's official duties.

> (3)(a) Any person who has received by any means authorized by ss. 968.28 to 968.37 or 18 U.S.C. 2510 to 2520 or by a like statute of any other state, any information concerning a wire, electronic or oral communication or evidence derived therefrom intercepted in accordance with ss. 968.28 to 968.37, may disclose the contents of that communication or that derivative evidence only while giving testimony under oath or affirmation in any proceeding in any court or before any magistrate or grand jury in this state, or in any court of the United States or of any state, or in any federal or state grand jury proceeding.

Wis. Stat. §968.29(1) - (3)(a); *see* 18 U.S.C. §2517(1) - (3).[5] Moreover, disclosure of such communications or derivative evidence at a hearing in open court requires at least 10 days prior notice unless waived by the court. Wis. Stat. §968.30(8); *see* 18 U.S.C. §2518(9). Any aggrieved party is entitled, prior to disclosure of the contents of their intercepted communications in any court proceeding, to move to suppress those contents on the grounds that the interception was not legally authorized. 18 U.S.C. §2518(10)(a); Wis. Stat. §968.30(9)(a).

Disclosure of the results of an illegal or unauthorized wiretap is a felony, as is the intentional disclosure of the contents of oral or wire communications

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[5] Title III and WESCL provide for limited disclosure in other circumstances not relevant to this appeal. *See, e.g.*, 18 U.S.C. §§2511(2)(a)(i), (b) & 2511(3); Wis. Stat. §968.31(2)(a).

intercepted pursuant to even a legal wiretap except as authorized under Wis. Stat. §§968.28 - 968.30. Wis. Stat. §968.31(1)(c) & (e); *see* 18 U.S.C. §2511(1)(c).

C. Neither WESCL Nor Title III Authorizes Public Disclosure in a Criminal Complaint of Intercepted Private Telephone Conversations.

The publicly filed criminal complaint in this action contained numerous references to the contents of intercepted wire communications, along with 27 pages of verbatim transcripts of those communications (R2). As Judge Franke properly held below, this public disclosure of the contents of Gilmore's privileged wire communications was not authorized by §968.29 (R22:14-22; App. 106-14). The state seeks here, as it did in the trial court, to justify its unilateral public disclosure of the intercepted communications under the statutory authorization for "use" under §968.29(2). State's Brief at 8-20. That argument, however, both ignores the statute's plain language and purpose and is unsupported by any authority or legitimate rationale. The clear language of the statute bars disclosures other than those specifically authorized in Wis. Stat. §§968.29(1) & (3). But, even if some additional disclosures may be considered "authorized" under WESCL and Title III, the state's unilateral public disclosure here certainly was not.

1. WESCL and Title III Bar Any Disclosures Not Specifically Authorized.

In construing a statute, the language at issue must be construed in light of the entire section and all related sections. *State v. Barnes*, 127 Wis. 2d 34, 377 N.W.2d 624, 625 (Ct. App. 1985). Section 968.29(1) specifically addresses disclosure and authorizes such disclosure only to fellow law enforcement officers and only when such disclosure "is appropriate to the proper performance of the official duties of the officer making or receiving the disclosure." Wis. Stat. §968.29(1). Using almost identical language, Section 968.29(2) authorizes the "use" of the contents of an intercepted communication. Wis. Stat. §968.29(2). Section 968.29(3) authorizes public disclosure by "[a]ny person," but "only while giving testimony under oath or affirmation" in a court or grand jury proceeding. Wis. Stat. §968.29(3) (emphasis added).

The state's assertion that the term "use" in §968.29(2) incorporates "disclosure," renders §968.29(1) utterly meaningless. Why would Congress and the Wisconsin Legislature go to the trouble of authorizing a particular type of disclosure in §968.29(1) if it already authorized such disclosures in §968.29(2)? *See also* 18 U.S.C. §§2511(1)(c) & (d) (distinguishing between unlawful "use" and unlawful

"disclosure" of wiretap information); Wis. Stat. §§968.31(1)(e) & (d) (same).

"[C]onstruction of a statute that would result in any portion of the statute being superfluous should be avoided wherever possible." *Matter of Sueann A.M.*, 176 Wis. 2d 673, 500 N.W.2d 649, 652 (1993). The only reasonable interpretation of the statute, and the only one which gives meaning to §968.29(1), is that relied upon by Judge Franke. Specifically, disclosures are controlled by §§968.29(1) & (3), while uses not involving disclosure are controlled by §968.29(2). (R22:14-22; App. 106-14). *See Scott v. United States*, 573 F. Supp. 622, 625 (M.D. Tenn. 1983), *rev'd on other grounds sub nom. Resha v. United States*, 767 F.2d 285 (6th Cir. 1985), *cert. denied*, 475 U.S. 1081 (1986). Falling into the latter category are those uses recognized in the legislative history of Title III,[6] none of which require disclosure beyond that authorized in §968.29(1), such as to establish probable cause to search or arrest, *e.g.*, *United States v. Hall*, 543 F.2d 1229, 1232-33 (9th Cir. 1976) (federal agents provided state agents with information gained from wiretap, which information state agents used as basis for approaching and questioning defendant), *cert. denied*, 429 U.S. 1075 (1977); *State v. Lee*,

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[6] *See* S. Rep. 1097, 90th Cong., 2d Sess., *reprinted in* [1968] U.S. Code Cong. & Admin. News p. 2188, cited in State's Brief at 13.

307 A.2d 827, 829 (N.H. 1973)(agents used wiretap evidence to develop probable cause for warrantless arrest), or to develop witnesses by refreshing their recollections with the contents of their own telephone conversations, *see United States v. Ricco*, 566 F.2d 433, 435 (2d Cir. 1977), *cert. denied*, 436 U.S. 926 (1978).[7]

Some of the cases cited by the state permit certain disclosures under the equivalent of §968.29(2) not otherwise authorized under the equivalents of §968.29(1) & (3), such as for voice identification, *United States v. Rabstein*, 554 F.2d 190, 193 (5th Cir. 1977); *Orkin v. State*, 223 S.E.2d 61, 72 (Ga. 1976), or in search warrant affidavits, *see Application of Newsday, Inc.*, 895 F.2d 74, 76-78 (2d Cir.), *cert. denied*, 496 U.S. 931 (1990); *Certain Interested Individuals v. Pulitzer Pub.*, 895 F.2d 460, 463-64 (8th Cir.), *cert. denied*, 498 U.S. 880 (1990); *United States v. Johnson*, 696 F.2d 115,

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[7] Permitting someone to listen to a tape of his or her own telephone conversation is not a "disclosure." To disclose means "to make known or public (something previously held close or secret)." *Webster's New Collegiate Dictionary* (1973) at 325. A person already knows his or her own prior communications, so they are not "secret" in relation to that person. *See also Birdseye v. Driscoll*, 534 A.2d 548, 551-52 (Pa. Commw. 1987) (public affidavit referring to wiretap not an unlawful "disclosure" where existence of wiretap previously was made public by court order, as well as by party to conversation); S. Rep. 1097, 90th Cong., 2d Sess., *reprinted in* [1968] U.S. Code Cong. & Admin. News p. 2181 ("The disclosure of the contents of an intercepted communication that had already become 'public information' or 'common knowledge' would not be prohibited").

118 n.21 (D.C. Cir. 1982); *People v. Mastrodonato*, 75 N.Y.2d 18, 549 N.E.2d 1151, 1153-54 (1989). Such cases, however, fail to resolve, or even mention, the fact that their position effectively writes the equivalent of §968.29(1) out of the statute.[8]

Those cases are not binding upon this Court and may be accepted or rejected based upon the persuasive power of their reasoning. *E.g., Fettig*, 493 N.W.2d at 261. This Court can and should reject such authority, as it "neither expresses any convincing reasons [nor] contains a discussion of the problem." *Widell v. Holy Trinity Catholic Church*, 19 Wis. 2d 648, 121 N.W.2d 249, 254 (1963). Indeed, the only decision Gilmore has found which recognizes and discusses the problem supports him. *See Scott*, 573 F. Supp. at 625.

The only case which the state cites which would be binding here is *State v. Waste Management of Wisconsin, Inc.*, 81 Wis.2d 555, 261 N.W.2d 147, *cert. denied*, 439 U.S. 865 (1978). That case, however, neither suggests that §968.29(2) permits disclosures not authorized under §§968.29(1) or (3), nor held, as asserted by the state, State's Brief at 16-18, that §968.29(3) is inapplicable to non-testimonial use or

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[8]The court in *Application of Newsday* did explain the different statutory language between "use" in §2517(2) and "disclosure" in §2517(3) as based upon the fact subsection (2) is directed to law enforcement officers while subsection (3) applies to anyone. 895 F.2d at 78. The court did not address the effect of its decision on subsection (1), however.

disclosure of interceptions.

Rather, that case only addresses the effect of §968.29(3) on disclosure of one party consent tapes. *See* 261 N.W.2d at 154-55. Although lawful, one party intercept tapes are not "authorized by ss. 968.28 to 968.33." 261 N.W.2d at 154. Accordingly, §968.29(3) bars their admission in court proceedings. *Id.* at 154-55; *see Arnold, supra.*

Waste Management does nothing to limit §968.29's additional restrictions on public disclosure of non-consensual wiretap information, however. Indeed, that decision helps Gilmore here, recognizing as it does that it is not simply testimonial disclosures, but rather the general "use of the contents at evidence" which is controlled by §968.29(3). 261 N.W.2d at 154-55. It is exactly such an evidentiary disclosure which is at issue here and the state plainly failed to comply with the requirements of §968.29(3) which *Waste Management* says must be met.

Judge Franke thus was correct. In light of the plain language of §968.29 and 18 U.S.C. §2517, lawful disclosures are limited to those appropriate disclosures between law enforcement personnel and in-court testimony of witnesses. Any other interpretation would render §968.29(1) and §2517(1) meaningless. *Scott*, 573 F. Supp. at 625.

2. Even if some disclosures are authorized by §968.29(2) and §2517(2), the state's unilateral public disclosures here were not.

Even if this Court could simply write §968.29(1) out of the statute books, as requested by the state, the state's unilateral public disclosures here still were not legally authorized. Even if the statutes could be read to permit some limited, private disclosures of intercepted wire communication beyond those expressly stated, they do not authorize public disclosures, at least in the absence of prior judicial approval. *See, e.g., United States v. Dorfman*, 690 F.2d 1230 (7th Cir. 1982) (distinguishing between public and private disclosures of the contents of intercepted communications and holding that "[t]he only lawful way they can be made public over the defendants' objection is by being admitted into evidence in the criminal trial or in some other public proceeding within the scope of section 2517(3)"); *Cianfrani*, 573 F.2d at 855 & n.7 (distinguishing between "public disclosure," which is authorized only in accordance with §2517(3), and "non-public disclosure" under §2517(1) & (2)).

Even the cases most helpful to the state recognize that "Title III limits disclosure of intercepted communications to '"professionally interested strangers' in the context of their official duties.'" *United States v. Shenberg*, 791 F.

Supp. 292, 293 (S.D. Fla. 1991), quoting *Pulitzer Pub.*, 895 F.2d at 465.

"Title III's restrictions cannot be avoided by including the intercepted information in search warrant affidavits" or, as in this case, in a criminal complaint. *Shenberg*, 791 F. Supp. at 293. As the Eighth Circuit has recognized, such use "cannot transform the wiretap information into non-wiretap information unprotected by Title III." *Pulitzer Pub.*, 895 F.2d at 465:

> [D]isclosure to a limited audience of "professionally interested strangers" in the context of their official duties is not the equivalent to disclosure to the public. "Title III does not allow public disclosure of all lawfully obtained wiretap evidence just because a few officers are privy to its contents; if it were construed to do so, much of the statute would be superfluous, for example, 18 U.S.C. §§ 2517(1)-(3)." . . . We do not agree that once wiretap information is used in search warrant affidavits, it is no longer subject to Title III's restrictions upon its use and disclosure. We do not think that Title III's restrictions can be so easily avoided.

Id. (citing *Dorfman*, 690 F.2d at 1234-35).

The only cases which suggest that public disclosure of wiretap information may be permissible other than during testimony do not base that suggestion upon a perceived authorization under Title III to make public disclosures. Rather they rely upon a case-by-case judicial determination, prior to the disclosure, as to whether the public's non-

statutory right to know outweighs the individual's right to privacy under Title III and the Fourth Amendment. *See Pulitzer Pub.*, 895 F.2d at 465-67 (balance of interests bars pre-indictment disclosure); *Application of Newsday, supra* (balance of interests permitted disclosure of redacted search warrant application containing wiretap information after guilty plea); *Shenberg*, 791 F. Supp. at 293-94 (balance required search warrant affidavits to remain sealed at least until suppression hearing and admissibility determination by court).[9] *See also Cianfrani*, 573 F.2d at 857 (court should bar public disclosure even of testimony at suppression hearing prior to decision whether interception was lawful).

These cases recognize that the "court must assume

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[9] Of course, some courts have rejected this *ad hoc* approach as insufficient to protect the constitutional privacy right at stake and inappropriate in light of Congress' determination of the proper balance in Title III:

> Congress in Title III struck a balance between these interests that seems reasonable to us. It put no limits on the public disclosure of lawfully obtained wiretap evidence through public testimony in legal proceedings; but neither did it authorize wiretap evidence not made public in this manner to be made public another way without the consent of the people whose phone conversations were intercepted.

Dorfman, 690 F.2d at 1234. The decision which approach is most appropriate is irrelevant here as the state simply disclosed the wiretap information unilaterally, without any prior judicial action.

responsibility for the balancing" of interests. *E.g., United States v. Gerena*, 869 F.2d 82, 86 (2d Cir. 1986). Prior judicial involvement is necessary because, to hold otherwise "makes the government the sole arbiter of what should be disclosed, since once a paper is publicly filed, the damage is done." *Id.* "[I]t would clearly defeat the purpose of protection of the private citizen to allow the issue of what is necessary and essential to be determined solely by the subjective beliefs of the prosecuting attorneys." *Orkin*, 223 S.E.2d at 73.

Even if not otherwise obvious from the statutes, the prohibition of public disclosures beyond those made while testifying is inherent in the limitation on authorized "use" of intercepted communications to that "appropriate to the proper performance of the officer's official duties." Wis. Stat. §968.29(2); *see* 18 U.S.C. §2517(2). As explained by the Ninth Circuit, that phrase in part was "designed to protect the public from unnecessarily widespread dissemination of the contents of interceptions...." *United States v. Hall*, 543 F.2d 1229, 1233 (9th Cir. 1976). Accordingly, it bars exactly the type of unnecessary public disclosure inherent in the public filing of a criminal complaint containing 27 pages of wiretap transcripts, which complaint could and should have been filed under seal, at least pending a determination of the legality of the wiretap. *See, e.g., Shenberg, supra.*

The state fails to identify a single case in which the court found a unilateral government disclosure of intercepted wire or oral communications to the public at large to be authorized under Title III or its equivalent. Rather, the cases cited by the state uniformly involve extremely limited releases of privileged information, either (1) disclosures solely to other law enforcement officers as authorized under 18 U.S.C. §2517(1) or Wis. Stat. §968.29(1), *see Lee, supra;* (2) use of recordings to refresh the recollection of a participant in the communication (and thus not a "disclosure," *see* Note 7, *supra*), *see Ricco, supra;* (3) inclusion of previously unsealed information (which thus is not a "disclosure"), *Birdseye, supra;* (4) limited disclosure to a few civilian witness as necessary for purposes of voice identification, see *Rabstein, supra; Orkin, supra;* (5) inclusion of wiretap information in a sealed affidavit for a search warrant, *see Application of Newsday, supra; Pulitzer Pub., supra;*[10] or (6) inclusion of wiretap information in some other sealed submission to the court, *see Gerena, supra* (trial

[10] Or, alternatively, suggesting that the actual contents of intercepted communications be included in search warrant applications, *Johnson*, 696 F.2d at 118 n.21; *Mastrodonato, supra*, a suggestion not inconsistent with a requirement that such affidavits be sealed to preserve the privacy of the parties to the intercepted communications.

briefs).[11]

United States v. Woods, 544 F.2d 242, 253 (6th Cir. 1976), *cert. denied*, 430 U.S. 969 (1977), also relied upon by the state, State's Brief at 15, did involve public disclosure in a search warrant affidavit, but did not characterize such disclosure as an appropriate "use" under §2517(2). Rather, the court there simply held that dismissal was not a proper sanction for improper public disclosure of search warrant affidavits. 544 F.2d at 253.[12] Indeed, the court noted that

> in view of the congressional intention to protect individual privacy, it would be better practice for the government to request, as a matter of course, that the district court restrict access to documents filed with the court that contain intercepted communications.

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[11] The state's reference to *Fleming v. United States*, 547 F.2d 872 (5th Cir. 1977), *cert. denied*, 434 U.S. 831 (1977), is wholly inaccurate. *Fleming* did not hold, as the state alleges, State's Brief at 14, that F.B.I. disclosure of intercepted wire communications to an I.R.S. revenue (*i.e.*, civil) agent was an authorized "use" under §2517(2). Rather, that court specifically refused to decide that issue, finding that suppression would be an inappropriate remedy in any event. 547 F.2d at 873. At most, the court suggested, without deciding, that the disclosure "may" constitute an appropriate "use." *Id.* at 874-75. *But see Scott*, 573 F. Supp. at 625-26 (holding that FBI agents violated §2517 when they shared wiretap information with IRS revenue agents); *Boettger v. Miklich*, 599 A.2d 713 (Pa. Commw. 1991).

[12] Dismissal was sought in *Woods* as a direct sanction for the government's unlawful disclosures in an unsealed search warrant affidavit, a remedy which the Court understandably deemed unjustified. Unlike the present case, the defendant apparently did not seek the more limited remedy to strike the improper disclosures from the affidavit.

Id.

In short, none of the cases cited by the state remotely supports its position that it has a right unilaterally to disclose the contents of intercepted wire or oral communications to the public at large.

The absence of such authority is not surprising. "[T]he strict prohibition in Title III against disclosure of unlawfully obtained wiretap evidence would be undermined by public disclosure of wiretap evidence ... before the judge ruled on the lawfulness of the wiretaps." *Dorfman*, 690 F.2d at 1233; *see Cianfrani*, 573 F.2d at 857. This is why the statutes require notice and an opportunity to challenge the legality of the wiretap before intercepted communications may be disclosed in a court hearing. S. Rep. 1097, 90th Cong., 2d Sess., *reprinted in* [1968] U.S. Code Cong. & Admin. News p. 2195; *see* 18 U.S.C. §§2518(9) & (10)(a); Wis. Stat. §§968.30(8) & (9)(a). *See also Gerena*, 869 F.2d at 88 (government must give notice and opportunity to object, with decision by court, before it includes unsuppressed Title III materials in a publicly filed memorandum or brief).

If the state were correct that its unilateral public disclosure here was proper, nothing in Title III or WESCL would bar the state from simply holding a press conference and disclosing the contents of intercepted communications whenever some prosecutor thought it appropriate. The statutes clearly

bar such disclosure, however. *See Dorfman*, 690 F.2d at 1233.

What was required under Title III and WESCL was for the state to refrain from disclosing the wiretap information except pursuant to §§968.29(1) & (3), *i.e.*, to other officers or in testimony before a judge. *See also* 18 U.S.C. §§2517(1) & (3). Even if some limited additional disclosure is deemed permissible under §2517(2) and §968.29(2), however, the most that could have been found lawful would have been submission of the criminal complaint under seal pending a judicial determination of whether the interests in disclosure outweigh the constitutional privacy interests protected by Title III and WESCL.

At least prior to a determination that the underlying wiretaps were legal, that balance necessarily bars public disclosure. *Pulitzer Pub*, *supra*; *Cianfiani*, *supra*; *Schenberg*, *supra*. The type of wholesale, unilateral public disclosure accomplished by the state here clearly is not authorized. This Court should say so, if for no other reason than to avoid similar unlawful disclosures by the state in the future.

D. Judge Franke Did Not Err in Depriving the State of the Benefit of Its WESCL and Title III Violation.

Judge Franke concluded that the only proper remedy for the state's unlawful disclosure was to strike the disclo-

sures from the criminal complaint because to use those disclosures "would essentially put the Court in the position of promoting a violation of the statute" (R22:22-23; App. 114-15). For the first time on this appeal, the state asserts that it was improper for the court to deny the state the benefit of its violation of WESCL and Title III. State's Brief at 21-24. The state, once again, is wrong.

First, however, this Court should not even reach this issue because the state waived any objection to the particular remedy chosen by Judge Franke. As this Court has held elsewhere, the state has the burden to establish by reference to the record that it objected before the trial court on the same grounds raised on appeal. *State v. Krysheski*, 119 Wis. 2d 84, 349 N.W.2d 729, 731 n.3 (Ct. App. 1984), *overruled on other grounds, State v. McDonald*, 144 Wis.2d 531, 424 N.W.2d 411 (1988). It cannot do so here for the simply reason that it never made such an objection, despite ample opportunity. Neither the state's written response to Gilmore's motion, nor its oral arguments in the trial court object on this ground. Instead, the state's objections in the trial court consisted merely of the allegation that the disclosures were authorized and that the complaint was sufficient even with the disclosures stricken. (R15:6-8; R22:10-13; R23:14-16). "Failure to make a timely objection constitutes a waiver of the objection." *Id.*

(citation omitted).

Even if the state had not waived its objection, it plainly is without merit. Judge Franke's decision to strike the illegal disclosures was the only effective remedy for the state's unlawful conduct.

There has been no finding as of yet that the interceptions themselves were illegal. Accordingly, the state is correct that suppression is unjustified at this time. State's Brief at 22-23 and cases cited therein. Where, as here, the violation is an unlawful disclosure rather than an unlawful interception, the remedy of suppression is overkill. Suppression would ban not simply the current illegal disclosure, but also any future use or disclosure of the same information, even if such future conduct were otherwise authorized by §968.29 and §2517. In short, the remedy of wholesale suppression is not commensurate with the disclosure violation.

The state is incorrect, however, in jumping from that unremarkable position to the conclusion that it is entitled to the benefit of its unlawful disclosure. Judge Franke did not suppress the wiretap information. The state can continue to use or disclose that information non-publicly, as long as it complies with §968.29 and §2517. It may also disclose the information publicly under §968.29(3) and §2517(3), assuming, of course, that it provides the requisite

notice and the interception itself is found to have been legal.

Judge Franke simply addressed the state's particular violation and fashioned an appropriately limited remedy, fully in line with what Congress intended:

> Only by striking at all aspects of the problem can privacy be adequately protected. The prohibition, too, must be enforced with all appropriate sanctions. Criminal penalties have their part to play. But other remedies must be afforded the victim of an unlawful invasion of privacy. Provision must be made for civil recourse for damages. *The perpetrator must be denied the fruits of his unlawful actions in civil and criminal proceedings*. Each of these objectives is sought by the proposed legislation.

S. Rep. No. 1097, *supra*, at 69, quoted in *Gelbard v. United States*, 408 U.S. 41, 50 (1972). Only by striking the state's unlawful disclosures could Judge Franke put an end to that violation and deny the state the fruits of its unlawful conduct. At the same time, that remedy does not go beyond the scope of the illegality. It simply places the parties in the exact same position they would have been in had the state complied with the law by not disclosing the wiretap information in the first place.

As Judge Franke recognized, this limited remedy also is necessary to ensure that the court did not become a partner in the state's illegal conduct (R22:22-23; App. 114-15). In enacting Title III, Congress found that the restrictions on

the use and disclosure were necessary not simply "to prevent the obstruction of interstate commerce" and "to protect effectively the privacy of wire and oral communications," but "to protect the integrity of court and administrative proceedings" as well. Pub. Law 90-351, §801(b); *see also Gelbard*, 408 U.S. at 51. Had Judge Franke not stricken the unlawful disclosures, it would have improperly "entangle[d] the courts in the illegal acts of Government agents." *Id.* The unlawful disclosure would have continued unabated and to the state's ill-gotten benefit.

The state's reference to *State v. Moats*, 156 Wis. 2d 74, 457 N.W.2d 299 (1990), *see* State's Brief at 22, does not help its cause. *Moats* based its ruling on Wis. Stat. §971.31(5)(b), which bars suppression or discovery motions prior to arraignment. *Moats*, 457 N.W.2d at 304. Judge Franke did not, however, suppress the intercepted communications. He merely put an end to their illegal disclosure by striking them from the complaint and judging the sufficiency of the remaining allegations. The Supreme Court has sanctioned exactly this remedy elsewhere. *See State v. Mann*, 123 Wis. 2d 375, 367 N.W.2d 209 (1985) (upon defense motion and proof, court must strike falsehoods from criminal complaint, add exculpatory omissions, and determine sufficiency from remaining allegations).

Moreover, *Moats* recognized that other statutory

exclusionary rules, such as the rules of evidence, apply fully even before arraignment. 457 N.W.2d at 304. The statutory bar on public disclosures and the Congressionally recognized need to deny the state the benefits of its own illegal conduct is just such a rule. *See also Dunlap v. Superior Court*, 817 P.2d 27, 35 (Ariz. App. 1991) (under Supremacy Clause, U.S. Const. Art. VI, ¶ 2, Title III trumps state bar on suppression hearing prior to preliminary hearing).

Finally, the state is obviously correct that the better course would have been for the state to have filed the criminal complaint under seal in the first place. *See* Section II, C, 2, *supra*. Then the only issue would have been whether this more limited disclosure is unlawful, as the statute indicates. *See* Section II, C, 1, *supra*. At the very least, submitting the complaint under seal would have avoided much of the violation of Gilmore's privacy rights which resulted from the state's actual disclosure to the public at large. Hopefully the state will take its own advice in the future.

What the state might have done, however, is irrelevant here, for the state's argument confuses a possible means of avoiding a disclosure violation in the first place with a remedy for an existing violation. The state did not submit the complaint under seal, but rather filed it and its 27 pages of unlawful disclosures publicly. Given the state's conduct, its proposed "remedy" of simply sealing the complaint

now is nothing more than closing the barn door after the cows are out. It accomplishes nothing. *See, e.g., Dorfman*, 690 F.2d at 1232 (once disclosure takes place "the privacy that the defendants claim to be entitled to under Title III would be gone forever"). At the same time, it leaves the state to benefit from its own wrongdoing. That, in short, is no remedy at all.

III.

JUDGE FRANKE PROPERLY DISMISSED THE REDACTED CRIMINAL COMPLAINT FOR FAILURE TO STATE PROBABLE CAUSE.

The state also claims that Judge Franke erred when, after striking the unlawful disclosures from the criminal complaint, he concluded that the remaining allegations failed to state probable cause against Gilmore. *See* State's Brief at 24-34. Once again, the state is wrong.[13]

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[13] The state also argues that the original, unredacted complaint was legally sufficient. State's Brief, Section II, D, 2 at 34-38. In the process, the state discusses at length the contents of intercepted wire communications and thus commits the same type of unlawful disclosure it committed in the criminal complaint. By separate motion, Gilmore asks this Court to strike and destroy that portion of the state's brief and to direct the state to submit new briefs which comply with WESCL and Title III.

Most annoying, however, is the fact that the unlawful disclosures on this appeal were wholly unnecessary. The sufficiency of the original complaint simply is not at issue on this appeal. Judge Franke did not address that issue, and it was (continued...)

A. Standard of Review.

A criminal complaint "must set forth facts within its four corners that are sufficient, in themselves or together with reasonable inferences to which they give rise, to allow a reasonable person to conclude that a crime was probably committed and the defendant is probably culpable." *State v. Adams*, 152 Wis. 2d 68, 447 N.W.2d 90, 92 (Ct. App. 1989). That document must answer five questions: (1) What is the charge?; (2) Who is charged?; (3) When and where did the alleged offense take place?; (4) Why is this particular person being charged?; and (5) Who says so? or How reliable is the information? *Id.; State ex rel. Evanow v. Seraphim*, 40 Wis. 2d 23, 161 N.W.2d 369, 372 (1968). If it does not, the action must be dismissed. *See State v. White*, 97 Wis. 2d 193, 295 N.W.2d 346, 350 (1980).

Along with the actual facts in the complaint, the court may consider inferences reasonably drawn from the facts alleged. *State ex re. Cornellier v. Black*, 114 Wis. 2d 745, 425 N.W.2d 21, 27 (Ct. App. 1988). A reasonable inference is

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[13](...continued)
not included in the order the state appealed from. (*See* R19; App. 103). Gilmore could have raised the insufficiency of the original complaint as an alternative basis for upholding dismissal, *see State v. Holt*, 128 Wis.2d 110, 382 N.W.2d 679, 686-87 (Ct. App. 1985), in which case the state would have been entitled to respond. But the fact is he did not do so. Section II, D, 2 of the state's brief is wholly irrelevant and Gilmore accordingly need not respond to it.

a rational and logical deduction from established facts rather than a mere guess or conjecture. *See, e.g.*, 2 Sand, et al., *Modern Federal Practice Jury Instructions* ¶6.01 (1989) and cases cited therein. *See also Leary v. United States*, 395 U.S. 6, 36 (1969) (inference is "irrational" unless presumed fact more likely than not given proven fact); *State v. Haugen*, 52 Wis. 2d 791, 191 N.W.2d 12, 15 (1971) (inference of guilt from criminal complaint unreasonable if conclusion of innocence equally reasonable).

Evidence required for probable cause thus must support more than a mere possibility or suspicion. *See, e.g., Cornellier*, 425 N.W.2d at 27. Wisconsin does not permit criminal complaints "on possible cause." Rather, the state is obligated to present sufficient evidence in that document to support a reasonable inference, not hunch, not guess, not possibility, that the defendant charged committed the particular offense alleged.

The exact standard of review on appeal is not entirely clear. While this Court has stated that the sufficiency of a criminal complaint is a matter of law reviewed *de novo* by this Court, *Adams*, 447 N.W.2d at 92, it also has applied a more deferential standard of review to trial court determinations regarding the value of information provided by an informant. *See State v. Wolske*, 143 Wis. 2d 175, 420 N.W.2d 60, 66 (Ct. App.), *rev. denied*, 143 Wis.2d 912, 422

N.W.2d 861 (1988), *cert. denied,* 488 U.S. 1010 (1989). In the latter case, the Court held that "[a] reviewing court must ensure only that the magistrate had a substantial basis for his or her determination." *Id.*, citing *Illinois v. Gates,* 462 U.S. 213, 238-39 (1983). Cases applying the *Gates* standard have also noted the uncertainty concerning the appropriate standard for reviewing a magistrate's determination regarding probable cause. *See United States v. Leake,* 998 F.2d 1359, 1362-63 (6th Cir. 1993). The correct standard of review is irrelevant here, however, as the redacted complaint was insufficient under either standard.

B. Judge Franke Properly Discredited Unreliable Evidence in the Redacted Complaint.

The state complains that Judge Franke made an impermissible credibility determination when he dismissed the redacted criminal complaint. *See* State's Brief at 27-28. Specifically, Judge Franke found that "the statements of a participant in the hours shortly after the execution of a search warrant by themselves blaming somebody else are not enough to establish probable cause" (R23:31; App. 125). Because Ms. Armon's conclusory allegations, the only allegations which tied Gilmore to the charged conspiracy, were unreliable and uncorroborated, Judge Franke held that the complaint failed to state probable cause against Gilmore

(R23:33; App. 127).

The state's argument ignores settled Wisconsin and federal law *requiring* courts to determine whether information in a criminal complaint is reliable when assessing sufficiency. While a criminal complaint may be based upon hearsay, *see* Wis. Stat. §968.01, "there must be something in the complaint, considered in its entirety and given a common sense reading, which shows why the information on which belief is based should be believed." *Ruff v. State*, 65 Wis. 2d 713, 223 N.W.2d 446, 449 (1974) (fn. omitted). Reliability is one of the five questions a valid complaint must answer. *See Adams*, 447 N.W.2d at 92. The required determination of reliability must take into account the entirety of the circumstances, including the informant's demonstrated veracity and basis for knowledge. *Wolske*, 420 N.W.2d at 66, citing *Gates*, 462 U.S. at 238-39.

While a citizen informant who is a victim or mere witness to a crime and aids the police without expectation of gain normally may be deemed reliable, *e.g.*, *State v. Paszek*, 50 Wis. 2d 619, 184 N.W.2d 836, 843 (1971), the same cannot be said of an alleged co-participant. As the Supreme Court observed in *Paszek*:

> Information supplied to officers by the traditional police informer is not given in the spirit of a concerned citizen, but often is given in exchange for some concession, payment, or simply out of re-

> venge against the subject. The nature of these persons and the information which they supply convey a certain impression of unreliability, and it is proper to demand that some evidence of their credibility and reliability be shown.

Paszek, 184 N.W.2d at 842.

The Ninth Circuit, for instance, has taken judicial notice that "[t]he use of informants to investigate and prosecute persons engaged in clandestine activity is fraught with peril." *United States v. Bernal-Obeso*, 989 F.2d 331, 333 (9th Cir. 1993). By definition, the court said, such

> [c]riminal informants are cut from untrustworthy cloth and must be managed and carefully watched by the government and the courts to prevent them from falsely accusing the innocent, from manufacturing evidence against those under suspicion of crime, and from lying under oath in the courtroom.

Id. The court further noted that "[o]ur judicial history is speckled with cases where informants falsely pointed the finger of guilt at suspects and defendants, creating a risk of sending innocent persons to prison." *Id.* at 334.

There are limited circumstances in which the word of an alleged accomplice may be deemed reliable, such as where the accomplice admits her own criminal culpability without promise of benefit while also implicating the defendant. *See Ruff*, 223 N.W.2d at 449-50. The Court must keep in mind, however, that "[t]he fact that a person is making a broadly self-inculpatory confession does not make more credible the

confession's non-self-inculpatory parts. One of the most effective ways to lie is to mix falsehood with truth, especially truth that seems particularly persuasive because of its self-inculpatory nature." *Williamson v. United States*, ___ U.S. ___, 114 S.Ct. 2431, 2435 (1994). Accordingly, the statement of an alleged co-participant is "presumptively unreliable as to the passages detailing the defendants' conduct or culpability...." *Lee v. Illinois*, 476 U.S. 530, 545 (1986).

The mere inculpatory allegation of an alleged co-participant thus is not sufficient for probable cause. There must be facts as well to show "why credence should be placed in [the informant's] assertion." *State ex rel. Cullen v. Ceci*, 45 Wis. 2d 432, 173 N.W.2d 175, 181 (1970). The fact that Judge Franke required such a showing in this case thus was not error. *See Paszek*, 184 N.W.2d at 842.

C. The Redacted Complaint Failed to State Probable Cause.

The state concedes, as it must, that it's case against Gilmore rests upon Armon's statement to the police on July 12, 1991. *See* State's Brief at 30. In marked contrast to Armon's detailed allegations against the other defendants (*see* R2:10, 30 (¶s 19 & 30)), her claims about Gilmore were aptly described by Judge Franke as "cryptic" (R23:28; App.

122). She merely identified a photograph of Gilmore as a person known to her as "KG" and stated in conclusory form that "KG" was "one of Steve's workers" and that "him and Steve transact business together." She also believed that "KG" lived on First Street. (R2:11 (¶23)).

Judge Franke properly held that these allegations were unreliable (R23:33; App. 127). *See* Section III, B, *supra*. Indeed, Armon's attempts to blame others "are exactly the [type of statements] which people are most likely to make even when they are false; and mere proximity to other, self-incriminatory, statements does not increase the plausibility of the self-exculpatory statements," *Williamson*, 114 S.Ct. at 2435; *see Lee v. Illinois*, 476 U.S. at 545, and exactly the type of statements for which corroboration is required. There must be something showing why Armon nevertheless should be believed. *See Ceci, supra; Ruff, supra*. This is especially true given that Armon falsely accused Gilmore in her same July 12, 1991 statement of responsibility for drugs seized pursuant to a search warrant, which drugs in fact belonged to someone else (R2:11 (¶ 23); *see* R23:32; App. 126).

The only corroboration suggested by the state concerns Officer Thomas' purchase of cocaine from a Vicky Gilmore. *See* State's Brief at 30-32. From the complaint, however, there is no indication who Vicky Gilmore is or what her relationship may be to Kevin Gilmore.

The identity of surnames does not, as the state suggests, permit a reasonable inference that the two are related. State's Brief at 31. Gilmore is not an uncommon name, and at least 48 Gilmores are listed in the Milwaukee phone book. *See Ameritech Milwaukee Metro. White Pages* at 293 (1993-94). Without that nexus, the fact that Vicky Gilmore sold cocaine is irrelevant.

Divining corroboration from this transaction would require not the drawing of reasonable inferences, but the piling of inference upon inference. The Court would have to infer first that the "KG" referred to was Kevin Gilmore, and then would have to infer that Gilmore therefore was related somehow to Vicky Gilmore, and then would have to infer that the relationship was related to drugs, and then would have to infer that this particular drug relationship was part of the charged conspiracy. Such piling of inference upon inference is not reasonable, but pure speculation. *Home Savings Bank v. Gertenbach*, 270 Wis. 386, 71 N.W.2d 347, 356 (1955).

Finally, Armon's detailed allegations concerning the involvement of others in the conspiracy renders her cryptic allegations against Gilmore, if anything, even more suspect. The detail with which one is able to support one's allegations is highly relevant to the issue of probable cause. *E.g.*, *Gates*, 462 U.S. at 245 (noting "range of details" in informant's statement). Yet, while Armon amply detailed her

allegations against others, she could not, or at least did not, do so with regard to her claims against Gilmore.

Given the totality of the circumstances presented in the redacted criminal complaint, Judge Franke thus plainly was correct in holding that the complaint failed to state probable cause against Gilmore.

CONCLUSION

Because the state's delay in appealing Judge Franke's order deprived this Court of jurisdiction and denied Gilmore due process and fundamental fairness, the Court should dismiss this appeal. If the Court reaches the merits, however, Judge Franke plainly was correct in denying the state the benefit of its unlawful conduct and dismissing the redacted criminal complaint for failure to state probable cause. In either event, Judge Franke's order should stand.

Dated at Milwaukee, Wisconsin, August 16, 1994.

Respectfully submitted,

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RULE 809.19(8)(d) CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Rule 809.19(8)(b) and (c) for a brief and appendix produced with a mono-spaced font. The length of this brief is 45 pages.

Robert R. Henak

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