STATE OF WISCONSIN

IN SUPREME COURT

Case No. 94-0123-CR

STATE OF WISCONSIN,

Plaintiff-Appellant,

v.

KEVIN GILMORE,

Defendant-Respondent-Petitioner.

On Review Of A Decision Of The Court Of Appeals, District I, Reversing The Order Entered In The Circuit Court For Milwaukee County, The Honorable John A. Franke, Circuit Judge, Presiding

---

REPLY BRIEF OF DEFENDANT-RESPONDENT-PETITIONER

ROBERT R. HENAK
SHELLOW, SHELLOW & GLYNN, S.C.
222 East Mason Street
Milwaukee, Wisconsin 53202
(414) 271-8535

Attorney for Defendant-
Respondent-Petitioner

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitution, Rules and Statutes

Other Authorities

STATE OF WISCONSIN

IN SUPREME COURT

Case No. 94-0123-CR

STATE OF WISCONSIN,

Plaintiff-Appellant,

v.

KEVIN GILMORE,

Defendant-Respondent-Petitioner.

REPLY BRIEF OF
DEFENDANT-RESPONDENT-PETITIONER

ARGUMENT

Mr. Gilmore's opening brief anticipated and amply rebutted most of the claims ultimately made by the state before this Court. Accordingly, only a few of the state's errors require any additional response.

I.

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

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

1. WESCL and Title III bar any disclosures not specifically authorized

The state's "plain meaning" argument unfortunately ignores the statutory language at issue in this case. It focuses not on the real question here, what is meant by the term "use" in Wis. Stat. §968.29(2), but on what is being "used" i.e., the contents of wire communications, and the purposes for which they may be "used," i.e., those appropriate to the officer's duties. State's Brief at 11-12. Neither is disputed. The remainder of the state's argument then simply builds upon its own desired conclusion rather than attempting to support it. *See id.*, at 12-14 (arguing that "use" means "disclose" because no statutory language says that it does not).

The meaning of the statutory language, however, depends not on what the state says but on what the legislature said and intended. The plain meaning of the term "use" thus must be read in the context of the entire statute. In that light, as Gilmore fully demonstrated in his opening brief at 11-13, 15-16, the state's desired interpretation both renders

Wis. Stat. §968.29(1) meaningless and ignores this Court's holdings in *State v. Waste Management of Wisconsin, Inc.*, 81 Wis.2d 261 N.W.2d 147, 154-55 (1978), and *State ex rel. Arnold v. County Court of Rock County*, 51 Wis.2d 434, 187 N.W.2d 354, 358-59 (1971), to the effect that evidentiary disclosures of intercepted communications, such as those here, are controlled and limited by the requirements of Wis. Stat. §968.29(3).

The state's attempt to engraft its own desired definition of "use" onto the statutory term also ignores the most common application of that term as implying some exclusivity in the user. Thus, one speaks of "using" a pipe wrench when he or she personally bangs on the plumbing with the wrench, but not when he or she shares the wrench with a neighbor to go pound on his own pipes. *See also Resha v. United States*, 767 F.2d 285, 287 (6th Cir. 1985) (statute ambiguous concerning when, if ever, disclosure is permitted "use" under §2517(2)), *cert. denied*, 475 U.S. 1081 (1986); *Fleming v. United States*, 547 F.2d 872 (5th Cir.), *cert. denied*, 434 U.S. 831 (1977) (same).

2. Even if some disclosures are authorized by Wis. Stat. §968.29(2) and 18 U.S.C. §2517(2), the state's unilateral public disclosures here were not

Reasonable people may differ, as do the courts, concerning whether Title III and WESCL permit law enforcement officers not only to use wiretap information, but also to

disclose it under limited circumstances other than those expressly authorized under 18 U.S.C. §2517(1) & (3) and §968.29(1) & (3). *Compare* Gilmore's Brief at 12-16 *with* State's Brief at 10-25. Yet, no reasonable argument can justify the state's unnecessary, unilateral public disclosures of such information in this case. *See* Gilmore's Brief at 17-24. As the Eighth Circuit has recognized, "disclosure to a limited audience of 'professionally interested strangers' in the context of their official duties is not the equivalent to disclosure to the public." *Certain Interested Individuals v. Pulitzer Publishing*, 895 F.2d 460, 465 (8th Cir.), *cert. denied*, 498 U.S. 880 (1990).

The state attempts to distinguish away the many cases which recognize Title III either to bar outright such public disclosures except under §2517(3), *see* Wis. Stat. §968.29(3), or to require advance judicial authorization. *See* State's Brief at 25-28. Yet, it fails to cite a single case supporting its argument to the contrary. *See id.*

The wholesale public disclosures here were totally unnecessary--the state concedes that the complaint could and should have been filed under seal, State's Brief at 33-34--and thus simply were not "appropriate to the proper performance of the officer's official duties." Wis. Stat. §968.29(2); *see* 18 U.S.C. §2517(2). This is exactly the kind of "unnecessarily widespread dissemination of the contents of interceptions" the

statutes were intended to bar. *United States v. Hall*, 543 F.2d 1229, 1233 (9th Cir. 1976), *cert. denied*, 429 U.S. 1075 (1977).

B. The Trial Court Did Not Err in Depriving the State of the Benefit of Its WESCL and Title III Violations

The state argues that it is entitled to the benefit of its violation of WESCL and Title III. State's Brief at 28-34. Once again, the state is wrong.

The state's reference to *State v. Moats*, 156 Wis.2d 74, 457 N.W.2d 299 (1990), *see* State's Brief at 31, 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. The trial court, however, did not suppress the intercepted communications. It merely deprived the state of the benefits of its illegal disclosures by striking them from the complaint and judging the sufficiency of the remaining allegations. This 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). *See also* Wis. Stat. §802.06(6) (authorizing court, on own motion or motion of a party, to strike improper material or allegations from civil

pleadings).[1]

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).

The state's assertion that "a suit for damages is the exclusive remedy for unauthorized disclosures for intercepted communications," State's Brief at 31-32, is not based upon the statutes in question; those statutes contain no such limitation. Rather, the assertion is grounded solely in the state's misreading of overly broad dicta in cases which do not even address the propriety of striking unlawfully disclosed allegations in a criminal complaint. *See United States v. Davis*, 780 F.2d 838, 846 (10th Cir. 1985); *United States v. Cardall*, 773 F.2d 1128, 1134 (10th Cir. 1985); *United States v. Resha*, 767 F.2d 285, 288 (6th Cir. 1985).

Each of these cases addresses the separate question of whether suppression is an appropriate remedy for a *prior*

---

[1] Although not expressly relied upon by the Circuit Court, §802.06(6) would appear fully applicable in criminal cases pursuant to Wis. Stat. §972.11(1).

unlawful disclosure, the fruits of which the government seeks to offer into evidence. *See Davis*, 780 F.2d at 845-46 (defendants sought suppression of evidence obtained due to prior unauthorized disclosure of wiretap information); *Cardall*, 773 F.2d at 1133-34 (defendants sought dismissal or suppression based upon prior unlawful disclosure of wiretap information to grand jury); *Resha*, 767 F.2d at 286 (plaintiffs objected to tax assessed following unlawful disclosure of wiretap information from FBI to IRS). Under the circumstances presented in those cases, the courts no doubt were correct that suppression was not appropriate and that civil remedies were the exclusive remedy.

However, none of those cases involved the circumstances here, where the victim seeks not suppression of the fruits of some prior unlawful disclosure, but simply to deny the state the benefit of a current illegal disclosure by "undoing," to the degree possible, that disclosure. All Mr. Gilmore sought, and all the Circuit Court granted, was an order striking disclosures which never would have occurred in the first place had the state simply complied with the law. This remedy is exactly coextensive with the state's illegality.

Title III, moreover, expressly provides for the remedy the Circuit Court adopted here. 18 U.S.C. §2515 states that

> [w]henever any wire or oral communication

> has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding in or before any court . . . *if the disclosure of that information would be in violation of this chapter.*

(Emphasis added). While this statute does not authorize suppression based upon some prior unlawful disclosure, *e.g.*, *Resha*, *supra*, its express terms bar receipt of evidence by a court where such receipt, as here, itself constitutes an unlawful disclosure. To hold otherwise would involve the court itself with the state's unlawful disclosures. *See Gelbard v. United States*, 408 U.S. 41, 51 (1972).

II.

THE TRIAL COURT PROPERLY DISMISSED THE REDACTED CRIMINAL COMPLAINT FOR FAILURE TO STATE PROBABLE CAUSE

Most of the state's fallback argument addressing the insufficiency of the redacted complaint requires no response. As fully demonstrated in Gilmore's opening brief at 30-33, the Circuit Court addressed the inherent unreliability of the evidence in the complaint, as it is required to do, not the credibility of witnesses.

The state's concession that the statements of Ms. Armon "may not meet the probable cause threshold," State's Brief at 40, is an understatement at best for the reasons already stated. *See* Gilmore's Brief at 33-35.

The state nonetheless seeks corroboration from the

complaint's allegations regarding Officer Thomas' purchase of cocaine from a Vicky Gilmore. *See* State's Brief at 41-42. The complaint, however, fails to give any insight concerning 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 41. Gilmore is not an uncommon name, and at least 56 Gilmores are listed in the Milwaukee phone book. *See Ameritech Milwaukee Metro. White Pages* at 328 (1995-96). 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).

CONCLUSION

For these reasons, as well as for those set forth in

his opening brief, Mr. Gilmore respectfully submits that the Court of Appeals was wrong and the Circuit Court was correct. He therefore asks that this Court reverse the decision of the Court of Appeals and reinstate the order dismissing the complaint against him.

Dated at Milwaukee, Wisconsin, November 27, 1995.

Respectfully submitted,

KEVIN GILMORE,
Defendant-Appellant-Petitioner

SHELLOW, SHELLOW & GLYNN, S.C.

Robert R. Henak
State Bar No. 1016803

P.O. ADDRESS:

222 East Mason Street
Milwaukee, Wisconsin 53202
(414) 271-8535

F:\DATA\WP60\G-I\GILMORE\KG112195.BRZ

RULE 809.19(8)(d) CERTIFICATION

I hereby certify that this reply brief conforms to the rules contained in Rule 809.19(8)(b) and (c) for a reply brief produced with a mono-spaced font. The length of this brief is 10 pages.

Robert R. Henak

Robert R. Henak

F:\DATA\WP60\G-I\GILMORE\KG112295.BRY